

ISSUES

1. Whether the claimant is entitled to temporary total disability (TTD) benefits from March 13, 2014, through April 9, 2014?
2. Whether the claimant is entitled to TTD benefits from May 1, 2014, through June 17, 2014?
3. Whether the claimant's injuries include her back and other body parts as mentioned in the opinion of Dr. Timothy Hall, the division sponsored independent medical examiner (DIME)?
4. Whether the issue of the claimant's back being related to this claim was previously litigated and resolved in the claimant's favor?

The ALJ resolved issues 1, 2, and 3 above favorably for the claimant and thus does not render a decision on issue 4 as it is now moot.

FINDINGS OF FACT

1. On March 13, 2014 Dr. Richard Nanes, the claimant's authorized treating physician (ATP) for her work related left knee injury, declared the claimant to be unable to work beginning that date, due to her left knee total knee replacement being quite painful, as well as requiring diagnostic tests to determine the nature of her back pain. Specifically, Dr. Nanes observed that the claimant was "only able to flex her left knee to 90° and extension is mildly limited and these movements are very painful for the patient."
2. Dr. Nanes erroneously attributed her back pain at the time to the work injury based upon a misreading of a prior Summary Order issued by this ALJ.
3. Nonetheless, the ALJ finds that the Division independent medical examination (DIME) opinion of Dr. Hall asserts that the back symptomatology is related to the claimant's underlying work related total knee replacement as a result of her altered gait. The ALJ finds that Dr. Hall's opinion on this issue is credible and

persuasive and the ALJ finds that the claimant's back symptoms are related to the claimant's work injury of March 13, 2005.

4. On April 8, 2014 Dr. Nanes returned the claimant to modified duty effective April 10, 2014.

5. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including March 13, 2014 through and including April 9, 2014 as a direct result of her work related injury of March 13, 2005.

6. On May 1, 2014 the claimant's work related left total knee replacement became unstable while the claimant was at home causing her to fall.

7. This is consistent with the claimant's history of having problems with her knee giving out on her a number of times previously. The knee instability had already been documented previously by the surgeon Shawn Nakamura, M.D., on August 26, 2013, observing: "I definitely think she has flexion instability."; "I also think she tore her PCL..."; and, "She does have slight instability in extension, particularly medial. Positive instability in flexion. Positive anterior and posterior instability in flexion. When she ambulates, when the knee gets into flexion, she feels like she is going to fall." Dr. Nanes also found a lot of play in the knee as of October 23, 2012.

8. The claimant sought treatment on May 1, 2014 at the Emergency Department that same day at the St. Thomas More Hospital. The claimant was referred back to Dr. Nanes.

9. The claimant was seen by Dr. Nanes later that same day. Dr. Nanes took the claimant off of work from and including May 1, 2014 and the claimant was continued off work up to and including June 17, 2014, which was the day prior to the claimant having work related revision surgery on the left knee, and on which day the respondent began paying the claimant TTD benefits as a result of that surgery.

10. Dr. William Ciccone, the respondent's IME doctor, agreed that there was documented knee instability before the claimant's May 1, 2014 fall and that the instability would not have resolved on its own before the June 18, 2014 surgery by Dr. Nakamura.

11. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including May 1, 2014 through and including June 17, 2014 as a direct result of her work related injury of March 13, 2005.

12. Dr. William Ciccone opined that an altered gait from a knee injury could cause back pain. He stated that it would be expected to get worse over time as was determined by Dr. Hall in his report.

13. The ALJ finds that the claimant's back has been injured, along with her head, shoulders, neck, and upper extremities, as a result of the fall that occurred in October of 2012. This was specifically part of the opinion by the DIME physician. The ALJ finds the opinions of Dr. Hall with respect to the relatedness of the back, head, shoulders, neck, and upper extremities, to be credible and persuasive. In addition, as a result of the claimant's latest fall, on May 1, 2014, the claimant suffered further injury to her back. Most likely the back pain stems from a combination of these events. Either way, the ALJ finds that the claimant has established that it is more likely than not that the claimant's current back issues, as well as her head, shoulders, neck, and upper extremities issues, are causally related to her industrial injury of March 13, 2005.

14. The ALJ finds that the claimant has established that it is more likely than not that the claimant's current medical issues with her back, head, neck, and shoulders are related to her industrial injury of March 13, 2005 and that the respondent is responsible for the payment of medical treatment related to these issues.

15. The respondent, at the time of the hearing, had not received a bill for the ED services received by the claimant on May 1, 2014 and thus, understandably, had not paid it by the time of the hearing. The ALJ finds that the respondent is responsible for the payment of the May 1, 2014 ED visit as it was causally related to the claimant's industrial injury.

16. The ALJ finds that the respondent has paid for the claimant's MRI of March 26, 2014.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§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.

2. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

4. 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. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

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

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). This includes establishing entitlement to medical treatment. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, supra. The term "disability"

connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to TTD benefits from and including March 13, 2014 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

9. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, *supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

10. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013.

11. The claimant seeks medical benefits in the way of payment for the March 26, 2014 low back MRI and the claimant's May 1, 2014 visit to St. Thomas More Hospital. As found, the respondent paid for the MRI, making that issue moot. It is noted that it has generally been held that payment of medical services is not in itself an

admission of liability. *Ashburn v. La Plata School District*, W.C. No. 3-062-779 (May 4, 2007).

12. Payment for the May 1, 2014 hospital visit pivots on whether the fall that morning occurred due to the claimant's left knee buckling as a result of her industrial injury. As found above, the claimant has established by a preponderance of the evidence that the ED visit was as a result of the industrial injury. The ALJ concludes that the respondent is therefore liable for payment of the ED bill.

13. The claimant seeks treatment for her shoulders, neck, headaches, left thumb, and right hand.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that her current issues involving her back, head, shoulders, neck, and upper extremities are related to her industrial injury and that the respondent is responsible for payment of medical care to cure or relive the claimant from the effects of these issues.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant TTD benefits from and including March 13, 2104 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.
2. The respondent shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of her conditions to her back, head, shoulders, neck, and upper extremities as found herein.
3. The respondent shall pay for the claimant's emergency department visit to St. Thomas More Hospital on May 1, 2014.
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein, and not closed by operation of law, 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>.

DAE: April 2, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

This matter is remanded to the Administrative Law Judge by the ICAO Final Order dated February 2, 2015. The ICAO remanded this matter to the Judge for further findings whether Claimant established by a preponderance of the evidence that her scheduled impairment should be converted to whole person. Specifically, the matter is remanded to the Judge for determination whether Claimant established by a preponderance of the evidence that the situs of her functional impairment is off the schedule and thus she is entitled to an order converting her scheduled impairment rating to a whole person.

FINDINGS OF FACT

1. The Judge incorporates by reference Findings of Fact paragraphs 1 through 24 of the August 21, 2014, "Corrected Order: Findings of Fact, Conclusions of Law and Order."
2. The Judge makes these further findings based on Claimant's credible testimony. Claimant testified that she cannot walk straight because of her limp. Claimant testified that she has been limping since a work related surgery in April 2010. Claimant explained that her limp was caused by the fact that she cannot place her full weight on her left foot because it hurts on both the front and back of the left foot. Claimant further testified that she experiences burning pain in her thigh and stabbing pain in the left side of her upper thigh and buttock. Claimant testified that she experiences pain in her kneecap and ankle. Claimant testified that she uses a cane whenever her pain increases and her balance is off. Use of the cane by Claimant occurs in both the winter and summer months. Claimant further testified that her pain increases when the weather is windy or very cold. Claimant testified that her pain never goes away.
3. Claimant further testified credibly that her left leg is colder than the right leg and that the color of the left foot changes. Though no treating physician ever observed a change in color of the left leg or foot, Claimant had admitted into evidence a photograph of her legs on a date after she was placed at MMI. The photograph depicts Claimant's left and right legs looking downward from a standing position reflecting the pigment of the left leg to be different and darker than the pigment of the right leg. Claimant testified that she has no sensation in four toes on the left foot and she experiences ankle swelling.
4. Claimant takes a number of different medications for pain and depression. Claimant cannot kneel, crawl, crouch or climb stairs as a result of the pain in her

left lower extremity, low back, buttock and left groin areas. Claimant has limitations on the amount of time she can walk, sit, and stand because of the pain she experiences in the left lower extremity, low back, buttock and left groin areas.

5. The evidence established that Claimant proved by a preponderance of the evidence that the situs of her functional impairment extends beyond the left lower extremity into the low back, buttock and left groin areas.
6. The situs of Claimant's functional impairment is not on the schedule of disabilities and should be converted to a whole person impairment. Dr. Fall, the DIME, determined that Claimant's impairment rating was 11% scheduled and 4% whole person. This rating was rendered by Dr. Fall on April 26, 2013, when she performed the DIME examination and prepared a report. Dr. Cebrian credibly opined regarding Claimant's work injury, her course of treatment and impairment rating in an April 24, 2014, report. He credibly opined that Dr. Fall erred in rating Claimant's left knee because there is no left knee diagnosis and no objective pathology. Dr. Cebrian credibly opined that Claimant's original injury was to her left knee when she slipped and fell on it in a parking lot. However, Dr. Cebrian credibly opined that Claimant had a contusion of the left knee as a result of the December 2009 work injury which long ago resolved.
7. Dr. Fall assigned 7% scheduled impairment for Claimant's left ankle injury. It is found that Claimant has a 7% scheduled impairment of the left ankle, which converts to a 3% whole person impairment, using Table 46 of the *AMA Guides*.

CONCLUSIONS OF LAW

On remand, the following conclusions of law are entered:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at 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*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-

43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Claimant contends that she is entitled to a whole person impairment rating for her left lower extremity because her functional impairment extends beyond the left lower extremity into the left groin, buttock and low back. Respondents contend that Claimant did not prove entitlement to a whole person impairment rating for the left lower extremity.

4. The term "injury" refers to the part of the body that has sustained the ultimate loss. *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996). In the context of Section 8-42-107(1), the term "injury" refers to the part or parts of the body that have been functionally impaired or disabled as a result of the injury. *Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAO August 6, 1998), citing *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366 (Colo. App. 1996). Section 8-42-107(1)(a), C.R.S. (2003), limits medical impairment benefits to those provided in subsection (2) where the claimant's injury is one enumerated on the schedule. The schedule of specific injuries includes, in Section 8-42-107(2), the loss of the leg; however, impairment of the buttock and low back is not listed in the schedule of disabilities. *Maree v. Jefferson County Sheriff's Department*, *supra*. Although Section 8-42-107(2) does not describe a buttock or low back injury, our courts have construed that the dispositive issue is whether the claimant sustained a functional impairment to the portion of the body that is listed on the schedule of disabilities. *See Strauch v. PSL Swedish Healthcare*, *supra*. Thus, the ALJ is constrained 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. *Id.* Pain and discomfort which limit the claimant's use of a portion of his body may be considered functional impairment. *Beck v. Mile Hi Express, Inc.*, W.C. No. 4-283-483 (ICAO February 11, 1997).

5. The Judge finds and concludes that Claimant established by a preponderance of the evidence that situs of her functional impairment extends from the left lower extremity into the low back, left groin and buttock where Claimant suffers functional impairment restricting her from kneeling, crawling, crouching, climbing stairs, walking sitting and standing. Claimant proved that she experiences pain in the left lower extremity, low back and left groin, which causes her to limp and limits her functioning. Since the situs of Claimant's functional impairment does not appear on the schedule of disabilities, Claimant is entitled to a whole person impairment rating.

6. The evidence presented at hearing further established that Claimant is entitled to a 3% whole person impairment of her left ankle injury. This rating is arrived at based on the opinions of Drs. Fall and Cebrian. Claimant is not entitled to a rating for loss of range of motion in Claimant's left knee because, as Dr. Cebrian points out, there is no left knee diagnosis and no objective pathology. The Judge adopts Dr. Fall's 7%

scheduled rating for Claimant's left ankle injury, which converts to a 3% whole person impairment.

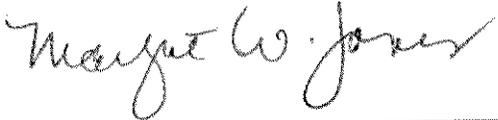
ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant workers' compensation benefits based on a 3% whole person impairment.
2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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: __April 3, 2015__

DIGITAL SIGNATURE:


Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

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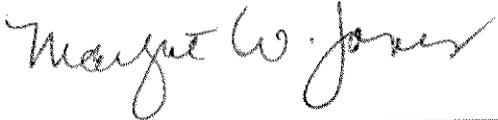
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2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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: __April 3, 2015__

DIGITAL SIGNATURE:


Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issue on remand is whether or not the respondent-insurer is entitled to recoup an overpayment that was specifically included in negotiations between the respondent-insurer, the claimant, and the third-party insurer in the settlement of the third-party claim.

FINDINGS OF FACT

1. In 2010, the claimant sustained admitted, compensable injuries to her neck, shoulders, and elbows when she was rear-ended in an automobile accident while she was en route from a client's home to the respondent-employer's office. In addition to medical benefits, the respondent-insurer paid the claimant temporary total disability (TTD) benefits for the period during which she could not work as a result of her compensable injuries.

2. The claimant started working for a different employer sometime in 2011 or 2012 but admits that she continued receiving TTD benefits. The benefits continued because the claimant failed to provide the respondent-employer with a completed return to work questionnaire.

3. Because the respondent-employer could not fully document the claimant's return to work, the division of workers' compensation would not release the respondent-insurer from paying the claimant TTD benefits. The respondent-insurer therefore claimed an overpayment of \$8,451.08 on its final admission of liability (FAL).

4. In addition to receiving workers' compensation benefits, the claimant also pursued an action against the driver who rear-ended her. The other driver's insurer offered to settle with the claimant for the policy limit of \$50,000.

5. Because it had a statutory subrogation right to compensation it had paid to the claimant, the respondent-insurer participated in the settlement negotiations with the other driver's insurer and the attorney representing the claimant in the automobile action. At the time of the settlement negotiations, the respondent-insurer's lien totaled \$44,739.39, which represented the total amount of worker's compensation benefits the

respondent-insurer had paid to the claimant to that date. The three parties agreed to divide the settlement proceeds as follows: \$18,000 payable to the respondent-insurer; \$13,000 payable to the claimant; and, the remainder (\$19,000) payable to the claimant's automobile accident attorney.

6. The letter memorializing the parties' agreement makes no mention of the overpayment. The letter states: "This letter is to confirm that [the respondent-insurer] has accepted your offer of \$18,000.00 for full and final settlement of its third party subrogation lien in the above-matter." The letter went on to invite the claimant to "contact [the respondent-insurer's subrogation counsel] immediately in the event this correspondence does not accurately reflect the terms of our agreement or should you have additional questions/concerns."

7. Several months after the distribution of the settlement funds, the respondent-insurer claimed reimbursement of the overpayment. The respondent-insurer maintained that because the overpayment was not addressed in the settlement negotiations, it was excluded from the settlement proceeds.

8. The ALJ finds that the overpayment was considered and/or negotiated as a part of the resolution between the claimant and the respondent-insurer over division of the negligent third-party's settlement proceeds. Thus, any overpayment made to the claimant is not recoverable separately from the claimant, as the respondent-insurer received the settlement proceeds from the third-party insurer that specifically included the consideration of the overpayment. The respondent-insurer fully received the benefit of their bargain with the claimant and the third-party insurer.

CONCLUSIONS OF LAW

1. "When a contract is unambiguous, the court must give effect to the contract as written, unless the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, or unless the result would be an absurdity." *Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007).

2. When a document is ambiguous, a court may consider parol evidence to explain or clarify the meaning of a document or the effect of its provisions. *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005). Courts do not, however, "consider parol evidence unless the contract is so ambiguous

that the intent of the parties is unclear.” *Janicek v. Obsideo, LLC*, 271 P.3d 1133, 1138 (Colo. App. 2011).

3. Here, the letter memorializing the parties’ settlement agreement specified that it was for “full and final settlement” of the respondent-insurer’s “subrogation lien.” A “full and final settlement” necessarily entails a settlement of all claims and debts associated with a claim. It constitutes resolution of the entire dispute between the parties. *See, e.g., River Bend Capital, LLC v. Lloyd’s of London*, 63 So. 3d 1092, 1096 (La. Ct. App. 2011) (further discovery and hearing unnecessary to ascertain meaning of “in full and final settlement” because “language is clear and unambiguous”).

4. Because the settlement letter at issue here incorporated the phrase “full and final settlement of [the respondent-insurer’s] third party subrogation lien,” the settlement unambiguously encompassed all portions of the lien, including the overpayment.

5. The respondents have failed to establish by a preponderance of the evidence that they are entitled to recover the overpayment from the claimant.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents request for reimbursement of the overpayment paid to the claimant in the amount of \$8,451.08 is denied and dismissed.
2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein, and not closed by operation of law, 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>.

DATE: April 30, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

- Whether Claimant established by a preponderance of the evidence that the recommended surgical repair of the peroneal nerve is reasonable and necessary and related to the Claimant's work injury.

FINDINGS OF FACT

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

1. Claimant sustained a work related injury on September 28, 2011 when he was assaulted while doing a security check of his employer's building. The peroneal nerve issue which is heard today is the only medical benefit that remains at issue.
2. Claimant suffered severe injuries. The injuries included facial and jaw fractures, lung contusion, kidney injury, broken fingers, and a right patellar fracture.
3. Initially, the right patellar fracture was treated non-operatively with a knee immobilizer.
4. On January 24, 2012 Denver Health Medical Center records show that Dr. Hak ordered an MRI of Claimant's right knee following the full healing of the patellar fracture for the possibility of meniscal injuries.
5. Claimant had previous right knee injuries outlined in Dr. King's February 12, 2012 evaluation. Dr. King's notes indicate that Claimant had an ACL repair in the 1980's as a result of a participating in athletics. His initial repair required revision surgery as well as treatment of catastrophic lateral meniscus tears with lateral meniscal transplant in the 1990's by Dr. Ferrari at Denver Health Medical Center. Claimant testified that following Dr. Ferrari's repair, his right knee was doing very well and he was not having any problems with his right knee. Claimant testified that he was very physically active, and engaged in activities including snowboarding, mixed martial arts, cage fighting, and a job that was very physical prior to the assault.
6. On March 20, 2012 Claimant was diagnosed with right patellar fracture, healed, with right lateral and medial meniscal issues, and mild ACL insufficiency.
7. On May 2, 2012 Dr. Jarrod King at Denver Health Medical Center performed right knee surgery on Claimant which included a partial arthroscopic medial and lateral meniscectomy; lysis of adhesions; chondroplasty of the medial femoral condyle medial facet of the patella and posterior trochlea; removal of loose bodies.

8. Claimant underwent post operative physical therapy for his right knee, and as of October 31, 2012 physical therapy notes show ongoing pain 8/10 of the right knee. Claimant continued with poor strength, antalgic gait, and decreased weight bearing of his right lower extremity with limited patellar mobility.
9. On January 22, 2013 Claimant transferred his medical care to Dr. Kristin Mason who noted Claimant's complaints of right knee pain increased by walking, standing, and driving.
10. Claimant underwent numerous treatments in attempts to relieve his right knee complaints, including physical therapy and Hyalagan injections. However his medical records document continued decreased range of motion in his right knee, increased pain with ambulation, and continued use of a knee brace and later of a cane.
11. On September 18, 2013 Claimant underwent TMJ replacement surgery using donor bone from his right hip. He stopped physical therapy while he recovered from that surgery. Following the surgery Dr. Mason recommended Claimant begin physical therapy again for his knee and back which was denied by Insurer.
12. On November 15, 2013 Insurer requested a medical record review with Dr. Allison Fall to address the issue of *relatedness of Claimants low back condition* and if related whether the low back required medical care and treatment. Dr. Fall opined at that time that there was no objective evidence of a work related lumbar spine condition.
13. On December 10, 2013, in response to Respondents' inquiry, Dr. Mason continued to opine that Claimant needed additional physical therapy for his knee.
14. Physical therapy was eventually authorized and notes from Camie Cooper, PT dated January 2, 2014 state that Claimant is very sore in right knee.
15. Claimant testified that he started to notice increased problems with his right knee during what he described as the second round of physical therapy. In January of 2014, he began to notice pain from his knee down into his shin that would cause his foot to pull up and his calf to cramp, waking him at night, and increasing over time. Claimant's testimony is consistent with Dr. Mason's medical records.
16. According to Dr. Mason during her January 3, 2014 evaluation, Claimant had restarted physical therapy. Claimant noted that his medial unloader brace had broken but he was using a neoprene sleeve for his knee. Dr. Mason noted on physical examination that Claimant's right knee lacked full extension; there was atrophy of the Vastus Medialis Obliquus ("VMO"), and hypertrophic medial compartment changes.
17. Respondent requested that Claimant attend a Respondents' IME examination with Dr. Fall which included a physical examination. This occurred on January 23, 2014. Dr. Fall performed a physical examination of Claimant's right knee as

part of her evaluation and noted obvious bony osteoarthritic changes when comparing the right to left knee. There was retro patellar crepitus bilaterally, right worse than left and noted loss of range of motion of flexion of the knee. Dr. Fall opined Claimant was at MMI as of that date and the only part of his current problems that would require physical restrictions was his right knee.

18. On February 11, 2014 Dr. Mason noted that Claimant was complaining of increased pain which she attributed in part to a more aggressive work out in physical therapy. Claimant reported having more pain in the shin below the knee as well. On physical examination she noted more tenderness over the anterior tibia, and tibial tubercle on the right.
19. Claimant testified that following his injury he always had pain in his right knee cap area which was sharp and pain around his knee, like a horseshoe around the knee cap, but the shooting pain in his shin was new.
20. On February 25, 2014 Dr. Mason noted that Claimant was experiencing more pain on the right side of his shin, especially when he walked. On exam, Claimant had decreased sensation in the superficial and deep peroneal nerve distribution on the right and lesser at the saphenous. Dr. Mason noted prominent osteophyte formation over the medial compartment and tenderness over the fibular head. Because she was concerned Claimant might be developing a peroneal nerve issue. She ordered x-rays of the right knee and an EMG.
21. On March 14, 2014 Dr. Mason performed the EMG which showed a mild lesion in the peroneal nerve across the fibular head. According to Dr. Mason, Claimant had a patellar fracture with some contracture of the knee and now peroneal nerve dysfunction. Dr. Mason referred Claimant to Dr. David Schnur for evaluation and treatment of the peroneal neuropathy.
22. On April 16, 2014 Dr. Schnur evaluated Claimant and agreed with Dr. Mason that Claimant had a lesion of the peroneal nerve. Dr. Schnur indicated that surgery to release the peroneal nerve would be reasonable for shin pain but would not alleviate much of the knee pain.
23. On April 22, 2014 Dr. Mason indicated that she agreed with the surgical plan by Dr. Schnur for the peroneal nerve release. Dr. Mason recorded ongoing right knee pain with patellar fracture and peroneal nerve entrapment due to scar tissue around the knee. Dr. Mason noted that the peroneal nerve entrapment was confirmed by clear EMG abnormalities. She advised that Claimant had significant trauma to the knee and "one must believe that included soft tissue trauma since there was enough force to fracture the patella."
24. Dr. Fall, however, found the nerve testing "inclusive" and "non-diagnostic." Dr. Fall's opinion that the nerve testing was not reliable for diagnosing an injury to the peroneal nerve was based upon the subjective nature of the testing, the lack of H-testing, as well as the lack of comparison to the left leg. Dr. Fall, noting the

lack of denervation, ultimately described the nerve testing as “soft findings.”

25. On May 14, 2014 Dr. Fall prepared another medical record review and addendum to her January 23, 2014 Respondents’ IME report. She did not re-examine Claimant even though his peroneal nerve entrapment arose after her Respondent’s IME exam. Dr. Fall provided an opinion that the recommendation for the peroneal nerve release at the right knee by Dr. Schnur was not medically reasonable and necessary as related to the work injury because (1) there was no documented injury to the nerve and (2) Claimant’s symptoms were not consistent with that diagnosis.
26. On May 27, 2014 Insurer denied Dr. Schnur’s request for authorization of peroneal nerve release based upon the opinion of Dr. Fall that the surgery was not reasonable, necessary or related to the injury.
27. On June 3, 2014 Dr. Mason defended her recommendations and noted that it was her understanding that Dr. Fall was not impressed with the EMG findings despite significant slowing across the fibular head and did not agree to the surgery although Dr. Schnur concurred and recommend it. Dr. Mason noted that Dr. Schnur is the local expert in peroneal nerve decompression. She indicated that she was continuing to recommend the peroneal nerve decompression as recommended by Dr. Schnur. She noted that in her opinion there were clear-cut EMG abnormalities and symptoms congruent with those abnormalities.
28. On June 4, 2014 Dr. Mason, in response to detailed questions from Insurer, indicated:

That with respect to Dr. Fall’s findings that the peroneal nerve release is unrelated, I disagree, I am the one who performed the EMG/NCV. I do not think the findings are nonspecific. He has swelling across the fibular head, which is the area of entrapment. Because he does not have acute denervation that does not necessarily mean he does not have a problem with the nerve. I do not even have a copy of her report to review so it is difficult me to refute her opinions when they are offered secondhand, but I believe she is mistaken on this issue. It is not difficult to presume that he had a soft tissue injury from the trauma in addition to the patellar fracture. Entrapment due to scar tissue is something that tends to occur over time and is a gradual process. I believe the patient’s symptomatology does fit in with the EMG findings and, obviously, Dr. Schnur agreed with me. I have worked with Dr. Schnur on a couple of other cases and I think he is pretty conservative about recommending surgery for this type of problem and the fact that he did recommend surgery on [Claimant] is significant.

29. The ALJ gives more weight to the opinions of the treating physicians, Dr. Kristin Mason who is board certified in physical medicine and rehabilitation and electrodiagnostic medicine, and Dr. David Schnur who specializes in peroneal nerve treatment, than the opinions of Dr. Allison Fall, an expert retained by Insurer who performed a records review and did not physically examine Claimant for a peroneal nerve problem as it developed subsequent to her physical examination of Claimant.
30. Dr. Mason's deposition testimony was persuasive and credible. Dr. Mason testified as an expert in physical medicine rehabilitation and electrodiagnostic testing, an area in which she is board certified. She testified that she assumed medical care of Claimant on January 22, 2013 for his September 28, 2011 injury. Dr. Mason testified that Claimant had significant trauma to his knee as a part of the assault including a patellar fracture and two torn menisci which required surgery. Dr. Mason testified that Claimant's right knee had multiple operations, before and after the injury, but that Claimant's knee was hit hard enough during the assault that it broke bone and tore cartilage.
31. Dr. Mason acknowledged that the symptoms that led her to perform an electrodiagnostic study were remote from the actual injury date because her theory is that the peroneal nerve injury developed because of the formation of scar tissue in the injured areas as a result of the surgical repair of the torn meniscus, and as a consequence always develops remote in time from the injury date. According to Dr. Mason Claimant began to complain of pain in the outer compartment of his leg and shin which was a new complaint in February of 2014 in addition to his other complaints of ongoing knee problems. Claimant was also having cramping on the outside of the leg along with a physical examination consistent with nerve irritation and a positive Tinel's sign at the top of his fibular head.
32. Based upon Claimant's symptoms and physical examination, Dr. Mason performed an EMG to confirm the nerve damage, and the EMG showed slowing of the nerve at the fibular head and some slowing of the sensory nerve which were significant for peroneal nerve damage. Dr. Mason testified that she could have tested Claimant's other knee to compare, but because an EMG is not a stand-alone test in physical medicine and rehabilitation but an adjunct to physical examination she did not perform the EMG test on the other leg. Dr. Mason testified that it was not necessary in her opinion to diagnosis the peroneal nerve problem by performing the EMG on Claimant's other knee because she had been following him as a patient for some time and these were new complaints, the examination was consistent with the nerve problem, and the EMG results confirmed the nerve damage. Dr. Mason also performed a new knee X-Ray to confirm that there was not some other reason for the new symptoms. There were no new findings on X-Ray.
33. Dr. Mason testified that she referred Claimant to Dr. Schnur for evaluation of peroneal nerve entrapment including treatment recommendations, and he agreed

with her diagnosis and recommended a nerve release. Dr. Mason testified that the her Deposition Exhibit 1 was a highly simplified and schematic diagram but was helpful in demonstrating where the nerve itself is located on the body that both makes it vulnerable to injury and how close it is to the patella where Claimant sustained his original injury.

34. Dr. Mason testified that once scar tissue establishes itself, it worsens over time, and that over time Claimant's nerve became entrapped in the scar tissue because of all the surgeries Claimant had to the knee. She noted that Claimant had started to develop scar tissue from the previous surgery to his knee which was apparent during the surgery that was performed for the work injury, which according to Dr. Mason showed that Claimant had a propensity to develop scar tissue.
35. Dr. Mason also discussed that Dr. Fall's opinion that Claimant did not have the diagnosis of peroneal nerve pain because of the description of shooting calf pain taken from the medical records was a mistake or misunderstanding because Dr. Mason was referring to or meant to refer to Claimant's shooting shin pain as the reason she diagnosed peroneal nerve entrapment. Dr. Mason's February 25, 2014 note indicates that Claimant is getting more pain into the right side of his shin when he walks. There is an error in the report under plan Note #2 when the medical report states that Dr. Mason will obtain x-rays and an EMG to evaluate the shooting calf pain. Dr. Mason described the three areas of the calf and the lateral part which is innervated by the peroneal nerve, but indicated that the symptom that lead to the diagnosis of a peroneal nerve entrapment was Claimant's complaint of pain into the right side of his shin particularly when he walks.
36. Dr. Mason addressed Dr. Fall's statement that Claimant's pain complaints in his entire knee were not consistent with peroneal nerve entrapment. Dr. Mason indicated that Claimant had ongoing knee pain because of other problems in the knee related to his patellar fracture and meniscus surgery which he had all along. Dr. Mason also discussed the different inferences to be drawn from Dr. Schnur's report and evaluation, her reports and evaluation, and those of Dr. Fall. According to Dr. Mason, Dr. Fall did not give a complete description of Claimant's symptoms and would pick and choose the complaints that she relied upon.
37. Dr. Mason summarized Dr. Schnur's evaluation as noting knee pathology as the pain generator of the knee separate and apart from the symptoms consistent with the peroneal nerve problems. On physical examination Dr. Schnur noted a positive Tinel sign over the fibular head, the abnormal EMG, and shooting pain complaints consistent with a peroneal neuropathy. Dr. Schnur noted that Claimant had knee pain as well, but that was not why he was evaluating Claimant for surgery. Dr. Mason indicated that Dr. Schnur noted the presence of scarring because as a plastic surgeon who releases nerves, scarring is one of the things he needs to evaluate.

38. Dr. Mason testified that both she and Dr. Schnur did not anticipate that the nerve release would help with Claimant's knee pain itself which is caused by other problems, but that the nerve release should help with the shooting pains and hopefully keep the problem from worsening.
39. Dr. Mason testified that Dr. Fall's opinion that Dr. Schnur's statement that the nerve release will not help with the knee pain as a reason to deny the requested surgery as a statement that "surgery won't do much good" was not an accurate inference of her opinion. Dr. Mason was of the opinion that Dr. Schnur was outlining in his records what he told the patient regarding a reasonable expectation of what the procedure he was recommending would do, it was not an opinion that surgery would not be a benefit for treatment of the nerve injury.
40. Dr. Mason addressed Dr. Fall's criticism of her EMG findings as support for the diagnosis of a peroneal nerve lesion and testified that EMG findings are described as chronic if they are 12 weeks out from injury. Dr. Mason indicated that you would expect this type of nerve slowing to be chronic and not acute because it developed over time, much like carpal tunnel. Dr. Mason clarified that the nerve damage itself is classified as mild because it is demyelinating, not axonal, damage to the nerve, but that the slowing in the nerve was significant in regards to nerve damage.
41. On cross-examination, Dr. Mason indicated that she did not recommend surgery or take the recommendation of surgery lightly, but that once you have nerve entrapment it worsens over time. Dr. Mason was hopeful that the surgery would alleviate the shooting pains Claimant was experiencing but was also in favor of releasing the nerve because if it were not repaired Claimant could develop significant problems in the future, including foot drop.
42. Dr. Mason also testified that there is no way to know with certainty whether the scar tissue that she believes is entrapping the nerve developed as a result of the previous knee surgeries or the surgery that occurred in May of 2012 as a result of this injury. She opined that it was medically more probably that the scarring developed from the May of 2012 surgery because scar tissue matures between one and two years and the other previous surgeries occurred decades ago.
43. It is difficult to determine how Dr. Fall could criticize or question Dr. Mason's and Dr. Schnur's findings on physical examination when she herself did not physically examine Claimant after the diagnosis of peroneal nerve entrapment was diagnosed.
44. It is also difficult to understand how not one but two doctors that are well qualified to make the diagnosis would make the same diagnosis. Regardless of the criticism regarding the EMG findings, EMG's are objective evidence of the clinical diagnosis of peroneal nerve lesion. Dr. Fall only physically examined Claimant one time on January 23, 2014, prior to the presence of the new symptoms consistent with a peroneal nerve entrapment. Dr. Fall agreed that a diagnosis in

medicine is made based upon a clinical physical examination, test results and a history from the patient. Dr. Fall also agreed that the peroneal nerve is responsible for transmitting impulses from the leg to the foot and toes, and when damaged can effect the ability to flex the foot consistent with Claimant's complaints. She also agreed on cross-examination that peroneal nerve damage is commonly caused by injuries to the leg which include knee injuries and surgery to the knee, both of which occurred in this case.

45. Claimant has proven by a preponderance of the evidence that the peroneal nerve release that has been diagnosed by Dr. Kristin Mason and surgery recommended by Dr. David Schnur is reasonable, necessary, and related to the work injury in this claim.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant also shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), *supra*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

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

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A claimant bears the burden of proof to establish a direct causal relationship between an industrial injury and the need for medical treatment. *Snyder v. Indus. Claim Apps.*

Office, 942 P.2d 1337 (Colo. App. 1997). 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).

Therefore, even when respondents have filed an admission of liability, their actions “cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.” *Sanchez v. Family Dollar Stores, Inc.*, W.C. No. 4-631-793, 2007 WL 2142098 (ICAP, July 17, 2007). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *Parker v. Iowa Tanklines*, W.C. No. 4-517-537, 2006 WL 1579866 (ICAP, May 31, 2006); *Frazier v. Montgomery Ward*, W.C. No. 3-920-202, 2000L WL 1868897 (ICAP, Nov. 13, 2000).

The ALJ concludes that the medical opinion of Dr. Fall is less persuasive than the opinions of Drs. Mason and Schnur, and entitled to less weight. The ALJ concludes that the medical opinions of Drs. Mason and Schnur about the right peroneal nerve injury are more persuasive than medical evidence to the contrary. The Claimant’s account of shooting pain is consistent with peroneal nerve entrapment. Claimant’s complaints of general knee pain are reasonably attributed to his other knee injuries. The normal examination of the peroneal nerve on December 2, 2011, over a year and a half before the onset of symptoms is consistent with peroneal nerve injury as symptoms develop as scar tissue develops over a one to two year period of time. The ALJ concludes that Claimant’s nerve conduction studies were not uncertain as they were conducted and interpreted by a doctor board certified in electrodiagnostic testing. Dr. Mason noted that Dr. Schnur is the local expert in peroneal nerve decompression, and Dr. Schnur also recommended surgery. Claimant has proven by a preponderance of the evidence that he suffered a peroneal nerve injury related to, or caused by, the assault on September 28, 2011, or treatment related thereto.

Claimant has also proven by a preponderance of the evidence that the arthroscopic surgery in May of 2012 was the cause of a peroneal nerve injury emerging in February of 2014. Dr. Fall’s testimony that arthroscopic surgery would not create or cause scar tissue near the peroneal nerve was less persuasive than Dr. Mason’s explanation that scar tissue from the surgery caused a peroneal nerve injury.

Claimant has proven by a preponderance of the evidence that surgery to release the peroneal nerve entrapment is reasonable and necessary to relieve the shooting pain Claimant experiences in his right leg and to reduce or eliminate the risk of progression and worsening of those symptoms over time. Dr. Schnur recommended the surgery knowing that it would treat Claimant’s symptoms resulting from the nerve entrapment, and would not address his other knee complaints. Dr. Fall’s testimony to the contrary was not convincing.

ORDER

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

1. Claimant suffered a compensable injury to the right peroneal nerve arising from the September 28, 2011 work related injuries and treatment of them.
2. The proposed right peroneal nerve release is reasonable and necessary medical treatment for which Insurer is liable.
3. 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 further statutory reference, see 8-43-301(2). (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>

DATED: April 6, 2015

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

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Shimon T. Blau, M.D. that Claimant suffered a 7% whole person permanent impairment as a result of his October 31, 2011 industrial injury to his cervical spine.

FINDINGS OF FACT

1. On February 14, 2004 Claimant suffered compensable Workers' Compensation injuries to his back. He ultimately received a 20% whole person impairment rating from Jill A. Castro, M.D. for his condition. The rating consisted of a 16% impairment for the cervical spine and a 5% impairment for the thoracic spine. The cervical spine rating involved 4% pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) and 12% for range of motion impairment. The thoracic rating consisted of 2% pursuant to Table 53 and 3% for range of motion deficits.

2. On July 13, 2005 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Castro's impairment rating. The FAL acknowledged that Claimant suffered a 20% whole person impairment rating as a result of the February 14, 2004 incident.

3. Claimant worked for Employer as a Technician. On October 31, 2011 Claimant sustained a industrial injuries when he was carrying a 24 foot ladder on his left shoulder while walking down a snowy slope. He slipped, landed on his buttocks and the ladder struck him in the neck region.

4. Claimant underwent conservative treatment and diagnostic studies for his condition. On February 5, 2014 he reached Maximum Medical Improvement (MMI) with a 19% whole person impairment rating.

5. On June 3, 2014 Claimant underwent a DIME with Shimon T. Blau, M.D. Claimant informed Dr. Blau of a previous Workers' Compensation injury in 2004. He specifically noted that he had suffered a T7 vertebra fracture that had healed. Claimant remarked that he was not sure whether he had received any impairment rating.

6. Dr. Blau diagnosed Claimant with "cervical spondylosis without myelopathy/facet syndrome" and degenerative disc disease of the cervical spine. Dr. Blau assigned Claimant a 7% whole person impairment rating pursuant to Table 53 of the *AMA Guides* for his cervical spine condition. However, on two separate occasions Dr. Blau attempted to obtain Claimant's range of motion measurements but they were

not within the validity criteria. He thus did not assign Claimant any impairment rating for range of motion limitations. Moreover, Dr. Blau did not attempt to apportion the rating based on the 2004 Workers' Compensation injury because he did not have any information at the time pertaining to any prior impairment rating. Accordingly, Dr. Blau assigned Claimant a 7% whole person impairment rating for the October 31, 2011 incident. He agreed that Claimant had reached MMI on February 5, 2014.

7. On February 4, 2015 Dr. Blau testified through an evidentiary deposition in this matter. He reviewed Dr. Castro's March 2005 report and the July 13, 2005 FAL pertaining to Claimant's 2004 injuries. Dr. Blau acknowledged that the impairment ratings for the 2004 and 2011 injuries both involved the cervical spine. However, he reasoned that apportionment was inappropriate because he could not tell by reviewing Dr. Castro's March 5, 2005 report the level of pathology in Claimant's cervical spine.

8. Nicholas K. Olsen, D.O. testified at the hearing in this matter. He explained that pursuant to the *AMA Guides* an individual's body is broken down into separate parts for impairment rating purposes. The *AMA Guides* specifically treat the lumbar, thoracic and cervical spines as three separate body parts. Consequently, if an individual has an injury to his lumbar spine and later suffers an injury to his cervical spine the person would receive impairment ratings for both the lumbar and cervical spines. However, if an individual injures the cervical spine and then again later injures the cervical spine the evaluating physician must treat them as the same body part for impairment rating purposes.

9. Dr. Olsen concluded that Dr. Blau was clearly wrong in failing to apportion the impairment rating for the 2004 cervical spine injury out of the rating for the 2011 cervical spine injury. Dr. Olsen noted that the impairment ratings involved the same body part for impairment rating purposes. Although the pathology may have included different levels of Claimant's cervical spine in 2004 and 2011, both injuries involved the cervical spine or the same body part for apportionment purposes. The 2004 injury consisted of a 4% whole person cervical spine rating pursuant to Table 53 of the *AMA Guides* and a 12% whole person rating for cervical spine range of motion deficits for a total 16% whole person rating for the cervical spine. Dr. Blau assigned Claimant a 7% cervical spine whole person impairment rating for the October 31, 2011 incident. Accordingly, Dr. Olsen maintained that Dr. Blau should have subtracted the 2004 rating from the 2011 impairment to yield a total 0% whole person impairment rating pursuant to the *AMA Guides*.

10. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered a 7% whole person permanent impairment as a result of his October 31, 2011 industrial injury to his cervical spine. On February 14, 2004 Claimant suffered compensable injuries to his back. He ultimately received a 20% whole person impairment rating from Dr. Castro for his condition. The rating consisted of a 16% impairment for the cervical spine and a 5% impairment for the thoracic spine. On October 31, 2011 Claimant sustained an industrial injury involving his cervical spine. DIME physician Dr. Blau assigned Claimant a 7% whole person impairment rating pursuant to Table 53 of the *AMA Guides* for his cervical spine

condition. At his deposition Dr. Blau acknowledged that the impairment ratings for the 2004 and 2011 injuries both involved the cervical spine. However, he reasoned that apportionment was inappropriate because he could not tell by reviewing Dr. Castro's March 5, 2005 report the level of pathology in Claimant's cervical spine.

11. Dr. Olsen persuasively explained that pursuant to the *AMA Guides* an individual's body is broken down into separate parts for impairment rating purposes. The *AMA Guides* specifically treat the lumbar, thoracic and cervical spines as three separate body parts. If an individual injures different parts of the cervical spine, the evaluating physician must treat them as the same body part for impairment rating purposes. Dr. Olsen concluded that Dr. Blau was clearly wrong in failing to apportion the impairment rating for the 2004 cervical spine injury out of the rating for the 2011 cervical spine injury. Dr. Olsen noted that the impairments involved the same body part for rating purposes. Although the pathology may have included different levels of Claimant's cervical spine in 2004 and 2011, both injuries involved the cervical spine or the same body part for apportionment purposes. Accordingly, Dr. Olsen maintained that Dr. Blau should have subtracted the 2004 rating from the 2011 impairment to yield a total 0% whole person impairment rating pursuant to the *AMA Guides*. Based on the persuasive testimony of Dr. Olsen, a review of the *AMA Guides* and a consideration of relevant statutory authority, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Blau's 7% whole person impairment rating was incorrect. Accordingly, Claimant suffered a 0% permanent impairment as a result of his October 31, 2011 industrial injury.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

5. 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).

6. 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).

7. Section 8-42-104(5)(a), C.R.S. provides that in cases of permanent medical impairment, the employee's award or settlement for a new injury shall be reduced when an employee has suffered more than one permanent medical impairment to the same body part and has received an award of settlement under the "Workers' Compensation Act of Colorado" or a similar act from another state. Under those cases, the permanent medical impairment rating applicable to the previous injury to the same body part or established by award or settlement shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

8. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered a 7% whole person permanent impairment as a result of his October 31, 2011 industrial injury to his cervical

spine. On February 14, 2004 Claimant suffered compensable injuries to his back. He ultimately received a 20% whole person impairment rating from Dr. Castro for his condition. The rating consisted of a 16% impairment for the cervical spine and a 5% impairment for the thoracic spine. On October 31, 2011 Claimant sustained an industrial injury involving his cervical spine. DIME physician Dr. Blau assigned Claimant a 7% whole person impairment rating pursuant to Table 53 of the *AMA Guides* for his cervical spine condition. At his deposition Dr. Blau acknowledged that the impairment ratings for the 2004 and 2011 injuries both involved the cervical spine. However, he reasoned that apportionment was inappropriate because he could not tell by reviewing Dr. Castro's March 5, 2005 report the level of pathology in Claimant's cervical spine.

9. As found, Dr. Olsen persuasively explained that pursuant to the *AMA Guides* an individual's body is broken down into separate parts for impairment rating purposes. The *AMA Guides* specifically treat the lumbar, thoracic and cervical spines as three separate body parts. If an individual injures different parts of the cervical spine, the evaluating physician must treat them as the same body part for impairment rating purposes. Dr. Olsen concluded that Dr. Blau was clearly wrong in failing to apportion the impairment rating for the 2004 cervical spine injury out of the rating for the 2011 cervical spine injury. Dr. Olsen noted that the impairments involved the same body part for rating purposes. Although the pathology may have included different levels of Claimant's cervical spine in 2004 and 2011, both injuries involved the cervical spine or the same body part for apportionment purposes. Accordingly, Dr. Olsen maintained that Dr. Blau should have subtracted the 2004 rating from the 2011 impairment to yield a total 0% whole person impairment rating pursuant to the *AMA Guides*. Based on the persuasive testimony of Dr. Olsen, a review of the *AMA Guides* and a consideration of relevant statutory authority, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Blau's 7% whole person impairment rating was incorrect. Accordingly, Claimant suffered a 0% permanent impairment as a result of his October 31, 2011 industrial injury.

ORDER

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

1. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered a 7% whole person impairment as a result of his October 31, 2011 industrial injury. Based on the persuasive testimony of Dr. Olsen, a review of the *AMA Guides* and a consideration of relevant statutory authority Claimant suffered a 0% permanent impairment as a result of his October 31, 2011 industrial injury.

2. Any issues not resolved by 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: April 10, 2015.

DIGITAL SIGNATURE:


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

ISSUES

1. Did the claimant suffer a compensable industrial injury on March 25, 2013?
2. Is the claimant entitled to medical treatment that is reasonable, necessary and causally related to the March 25, 2013 industrial injury?
3. What is the claimant's AWW?

Based upon the findings and conclusions below that the claim is not compensable the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant is employed by the respondent-employer as an aircraft mechanic. He also serves in the U.S. Air Force Reserves. The claimant's shift with his job at the respondent-employer was from 9:00 p.m. to 7:00 a.m. On March 25, 2013, the claimant arrived for work with the respondent-employer at approximately 8:30 p.m. He changed into his work uniform, got coffee, unlocked his toolbox, and prepared for his shift to begin.

2. The claimant participated in two mandatory work meetings when his shift began at 9:00 p.m. The first meeting was with his supervisor and lasted 5-10 minutes. The second meeting was with other mechanics and their "leads," and lasted 10-20 minutes. The purpose of the meetings was to identify and review the work that was to be performed on aircraft during the shift.

3. When the meetings ended, the claimant got up from the chair he was sitting in. As he did so, he felt sudden pain in his left knee. He did not strike his knee on any object, nor did he twist his knee.

4. The claimant's knee pain increased as his shift progressed. His knee started to swell. He reported his knee pain to a supervisor. He worked through lunch in order to complete the work he was assigned to perform on an airplane. He left work at

approximately 2:30 a.m. and drove himself to the emergency room at Penrose St. Francis Hospital. The claimant was seen at 2:50 a.m.

5. The emergency room nurse, Karleen Graham, RN, noted, "...Reports injury occurred on 3/25/13 at approx 2130. States he heard his L knee pop. Observed L knee to be swollen, red, and filled with fluid on palp."

6. The emergency room physician, Dr. Sooch, reported, "...34 male aviation mechanic presenting for swelling over the anterior left knee. He noticed the symptoms initially when he stood up from a work meeting..." Dr. Sooch diagnosed pre-patellar bursitis of the left knee. The claimant was discharged with prescriptions for Naproxen and Prednisone. He was instructed to follow up with Stephanie Barriere, NP, or David Matthews, M.D.

7. The claimant returned to work after being discharged from the emergency room in order to complete workers' compensation paperwork. The respondent-employer's "OJI report" confirms that; "...after shift meeting, stood up knee hurt. Continued working, it got worse, can't bend leg at knee."

8. The claimant was seen by Joseph Mullen, PA-C, at CCOM on March 27, 2013. CCOM is a designated medical provider. Mr. Mullen reported, "He developed pain and tightness in the left knee when he got up from sitting position." Mr. Mullen noted; "...Left knee has swelling and is pink over the lower patella and tibial tubercle area. It is not hot. He swelling areas [sic] approximately 2-3 inches in diameter and is very soft nearly flocculent."

9. Mr. Mullen reported that "a couple years ago" the claimant experienced swelling and pain in his *right* knee after kneeling on a bottle cap. Mr. Mullen reported the claimant also had some swelling around the left knee at the same time. The claimant fully recovered from that incident and was having no difficulty with either knee immediately prior to the incident at work on March 25, 2013.

10. Mr. Mullen diagnosed pre-patellar bursitis. He imposed work restrictions and recommended the claimant take the medications prescribed in the emergency room. Mr. Mullen recommended the claimant follow-up in two weeks.

11. The claimant did not obtain additional treatment from respondents' designated medical provider because the respondent-insurer denied his claim. The claimant has not been placed at MMI.

12. The claimant was off work due to the effects of his knee injury until April 9, 2013. The claimant then returned to work and continues to work for the respondent-employer.

13. The ALJ finds that the claimant is credible; however, the credible evidence does not establish that the claimant's knee condition arose out of his employment with the respondent-employer, only that the claimant became symptomatic during the course of his employment.

14. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. 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 disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

2. Pursuant to § 8-41-301(1)(c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury ... arising out of and in the course of the employee's employment." *See also* § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Court of Appeals*, 905 P.2d 6 (Colo. App. 1995). The question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991). "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991)).

3. However, the mere fact that a claimant develops an injury during the course of his employment does not relieve him of the duty to establish the injury arose out of that employment. The Supreme Court addressed this issue most recently in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). In *City of Brighton*, the court identified three categories of injuries. These are (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which

are neither employment related nor personal. The first category was observed to be compensable, while the second category was not. The third category of neutral risks would be compensable if the application of a *but for* test revealed that the simple fact of being at work would have caused any employee to have been injured. The Court also further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are said to be “self-originated” injuries that spring from a personal risk of the claimant. The second category contains risks that are entirely personal or private to the employee him- or herself. *See Horodyskyj*, 32 P.3d at 475–77. These risks include, for example, an employee's preexisting idiopathic illness or medical condition that is completely unrelated to his or her employment (quote from Brighton at P. 503). These types of *purely* idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. For example, when it comes to idiopathic injuries, the “special hazard” doctrine represents an important exception to the general rule of non-compensability. Under this doctrine, an injury is compensable even if the most direct cause of that injury is a preexisting idiopathic disease or condition so long as a special employment hazard also contributed to the injury. *See, e.g., Ramsdell v. Horn*, 781 P.2d 150, 152 (Colo.App.1989) (holding that a carpenter's injuries from a fall were compensable even though he had an epileptic seizure directly causing his fall because the fall occurred while he was working on a twenty-five-foot-high scaffold, a “special hazard” of employment).

4. Colorado law clearly holds that where the claimant suffers from a preexisting idiopathic condition or abnormality which becomes symptomatic at work, the resulting injuries are not compensable unless the conditions of employment contribute to the accident or to the extent of the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Ramsdell v. Horn*, *supra*. In order for there to be a sufficient employment connection for such an injury to arise out of employment the claimant must prove the employment created a “special hazard.” Ubiquitous conditions, such as concrete floors, do not qualify as special hazards. *Gates Rubber v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985).

5. There are a number of cases holding a claim not to be compensable where the claimant suffered an injury while arising from a chair. *See Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories*, W.C. No. 3 960 662 (October 10, 1991), *aff'd.*, *Crass v. Industrial Claim Appeals Office*, (Colo. App. No. 91CA1776, July 2, 1992) (NSOP) (injury not compensable where there was no evidence that arising from chair precipitated aggravation of the prior knee strain, or that the chair aggravated or elevated risk or extent of injury).

6. It's claimant's burden to prove a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. Section 8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The determination of whether the claimant sustained that burden of proof is factual in nature. The claimant bears the burden of proof, by a preponderance of the evidence, to establish that an injury arising out of and in the course of the employment was the cause of the disability and need for treatment. The question of whether the claimant has met the burden is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, *supra*.

7. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

8. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between his employment and his injuries. Colorado law does not create a presumption that injuries which occur in the course of employment, necessarily arise out of employment. *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). *See also, Industrial Commission v. London & Lancashire Indemnity Co.*, 135 Colo. 372, 311 P.2d 705 (1957).

9. 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).

10. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, claimant's testimony is credible but that testimony failed to prove by a preponderance of the evidence that he suffered

an accidental injury to his right lower extremity arising out of and in the course of his employment on March 25, 2013.

11. The claimant failed to establish that there is a causal connection between the injury and the claimant's work related functions. The simple act of standing up lacks the required causal connection, as the facts of this case do not establish that it is related to the claimant's work related functions. The claimant specifically admitted that his left knee pain resulted from the act of standing up and that such action is no different than if he was standing up from a chair at his home.

12. Additionally, the claimant failed to establish that any pre-existing condition combined with a special hazard of employment to cause the alleged work injury. The ALJ finds that no special hazard of employment has been shown by the claimant and that his left knee injury did not arise out of employment with the respondent-employer. Any pre-existing idiopathic condition of the claimant's left knee that became symptomatic by the ubiquitous act of standing up does not create a compensable injury.

13. As found, the claimant failed to prove by a preponderance of the evidence that he suffered a traumatic injury to his left knee arising out of and in the course of employment with the respondent-employer on March 25, 2013.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado 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>.

DATE: April 29, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 4-923-167 & 4-948-593**

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury while working for Employer to body parts above her right hand in the admitted claim of 4-923-167 on March 27, 2013.

2. Whether Claimant has established by a preponderance of the evidence that she received authorized medical treatment that was reasonable and necessary to cure or relieve the effects of her industrial injuries.

PROCEDURAL MATTER

Case Nos. 4-923-167 and 4-948-593 were consolidated by Order dated June 2, 2014. At the outset of the hearing, counsel for both parties briefed the Judge as to the legal theories behind Claimant's filing of an acute injury claim in case No. 4-923-167, with an assigned date of injury of March 27, 2013, and an occupational disease claim based upon an aggravation of the underlying injury claim in case No. 4-948-593, with an assigned date of injury of March 21, 2014. Both claims pertained to the same right upper extremity injury. The Judge determined that the claim in case No. 4-948-593 could not exist independently, or logically be asserted in combination with case No. 4-923-167 because of Claimant's allegations of an acute injury and symptoms on March 27, 2013. Accordingly, the Judge dismissed the occupational disease claim in case No. 4-948-593.

FINDINGS OF FACT

1. On March 27, 2013 Claimant suffered an injury to her right hand when it became caught in the rollers of a laminating machine while working for Employer. Respondents admitted liability for injuries to Claimant's right hand. Claimant is alleging that she also suffered injuries to her right shoulder, neck, and upper trapezius areas as a result of the work-related incident.

2. Claimant testified that the laminating machine jerked her right arm. She remarked that she attempted to pull her hand out of the machine. Claimant's daughter M.L. was working with Claimant at the time of the incident. Claimant stated that M.L. hopped over cardboard on the floor to get to the other side of the machine and turn it off. She remarked that they then called out to co-worker Todd, who was working nearby, once the machine was shut off. Todd began looking for a piece of equipment to loosen the rollers of the laminating machine. He returned with a piece of metal to put in between the rollers, but Claimant's daughter then told him to start turning knobs on the machine to loosen the rollers. They loosened the rollers enough that they were able to release Claimant's hand.

3. Claimant explained her right hand was caught in the laminating machine for 2-4 minutes. She noted that she was attempting to pull her arm out of the machine while the machine was still on, but acknowledged that she ceased attempting to extract her arm once the power was off. Claimant experienced immediate pain in her fingers but when she jerked her arm she felt pain all the way up to her right shoulder.

4. Owner of Employer Mike Moravec transported Claimant and her daughter to Concentra Medical Centers after the incident. Claimant initially detailed her injury to a nurse but then visited Authorized Treating Physician (ATP) Jonathan Bloch, D.O. for an examination. Claimant noted that her daughter M. L. was unable to join her in the examination room and no interpreter was available. She explained that she expressed her pain to Dr. Bloch by using her fingers to point out that her pain was located from her wrist to her right upper shoulder. They communicated with bits of Spanish and English. Dr. Bloch conducted a physical examination of her right hand and arm.

5. M.L. testified that she was working with Claimant at the time of the accident. She heard Claimant yell and try to pull her arm out of the laminating machine. M.L. accompanied Claimant to Concentra. She went with Claimant to several physician appointments and almost all physical therapy appointments. M.L. testified that Claimant would complain of pain from her fingers up her arm to the back of her neck. Nevertheless, the medical providers "refused to accept it." At physical therapy appointments the therapist would tell them he was documenting Claimant's complaints in his computer. M.L. noted that she saw him type the complaints into his system. She explained that the therapist later provided a paper to give to Dr. Bloch documenting the expanded complaints. She subsequently handed the paper to Dr. Bloch. M.L. helped Claimant complete pain diagrams at every physician visit and they submitted them to the front desk when completed.

6. Claimant's coworker Carol Kennedy testified that she did not witness Claimant's injury but examined her hand shortly afterward. Claimant's fingers were blue, her knuckles were swollen and her fingernail pads were white. Ms. Kennedy remarked that she did not see Claimant holding her shoulder. Instead, Claimant was holding her elbow with her right hand extended. Ms. Kennedy recalled that after the date of injury Claimant stated that her right hand was hurting. She did not observe Claimant ever complaining of shoulder or neck pain after the date of injury.

7. Mr. Moravec testified that he drove Claimant and her daughter to Concentra after the March 27, 2013 incident. Claimant did not complain of shoulder, neck or back pain on the way to Concentra. Mr. Moravec explained that he helped fill-in the intake forms at the initial visit because Claimant could not write with her right hand. He completed a portion of one page of the Patient Information Form, including the pain diagram, in which he circled Claimant's right hand. Mr. Moravec remarked that he only circled Claimant's right hand on the pain diagram because he had no reason to suspect Claimant suffered any other injuries. Claimant had not informed him of any pain besides her right hand nor did he see her favor any other portion of her body.

8. Dr. Bloch described Claimant's injury as "[c]leaning rollers, hand sucked in." He noted Claimant had no numbness, weakness, or tingling, and she "otherwise denies any other bodily injuries or subjective complaints related to this injury." On physical examination, Claimant's right hand was swollen and tender but without deformity. Dr. Bloch diagnosed Claimant with a "crush hand" and "IP strains." He prescribed physical therapy and released Claimant to work with restrictions of no lifting in excess of 10 pounds and no use of impact or power tools with her right arm and/or hand. X-rays of Claimant's right hand were normal.

9. Claimant testified that on some occasions her daughter accompanied her to the examining room with Dr. Bloch to serve as an interpreter. She explained to Dr. Bloch that she continued to have pain up to and in her right shoulder area. Claimant also filled out a pain diagram at each appointment that showed her pain running up to her right shoulder.

10. Claimant continued to receive medical treatment from Dr. Bloch and undergo physical therapy. From March 27, 2013 until June 17, 2013, Claimant attended five appointments with Dr. Bloch and 17 physical therapy appointments. The notes from all 22 appointments contain no reference to Claimant reporting pain to body parts above the right forearm except for a single reference to back pain that Dr. Bloch attributed to soreness from her return to work. The records reflect Claimant's consistent denial of injuries to other body parts from the March 27, 2013 incident.

11. Claimant explained that she also mentioned right shoulder complaints to her physical therapist but he apologized that he could not treat her because she was referred only for treatment of her right hand. He provided her with hot towels to put on her back and shoulder. In April 2013 Claimant's physical therapist provided an elbow brace that was meant to help her shoulder.

12. On June 17, 2013 Dr. Bloch recorded that Claimant complained of a "tolerable dull ache located at right knuckles and now radiating all the way up to neck." Dr. Bloch performed a physical examination of Claimant's right shoulder and arm. All findings were normal. Claimant completed a pain diagram showing complaints of pain through her right arm to the shoulder. Dr. Bloch kept Claimant on regular duty without restrictions.

13. On June 18, 2013 Claimant attended physical therapy at Concentra. Josh Corbin, OT noted that Claimant reported pain in the lateral epicondyle, upper trapezius and hand. OT Corbin remarked that her complaints had changed, and noted, "in what appears to be a shift in concern. . . more intense pain is located around the lateral epicondyle region pushing up to upper trapezius . . ." He commented that he placed electrical stimulation pads at her upper trapezius. The physical therapy notes preceding the date do not reference any treatment directed to her upper trapezius area.

14. Claimant explained that her physical therapist wrote Dr. Bloch a note specifying that she was complaining of pain into her right shoulder because he was not sure if Dr. Bloch was reading the computer notes. Claimant testified that her daughter

gave Dr. Bloch the note from the therapist in June 2013. She further commented that Dr. Bloch told her that her accident was in her fingers but she responded that the machine pulled her arm. Claimant thus decided to obtain an attorney and request a new physician. On June 25, 2013 Claimant filed a On-Time Change of Physician request to Flory Kreutter, M.D. at Cherry Creek Family Practice.

15. On July 10, 2013 Claimant visited Michael Johnson, PA, of Cherry Creek Family Practice. PA Johnson reported that Claimant was working on March 27, 2013 and her fingers became caught in a machine. Her arm and shoulder were also jerked forward. PA Johnson stated that Claimant had subsequently experienced pain in her fingers that radiated up her right arm to her shoulder. The pain was sharp, constant, worse with movement and improved with rest. He reported that his objective findings were consistent with the history and/or work related mechanism of injury. PA Johnson diagnosed Claimant with hand/arm/shoulder pain, neuropathy and muscle spasm. He restricted Claimant to no lifting, carrying, pushing or pulling over 10 pounds, pinching and gripping as tolerated and noted that Claimant must rest her hand for 10 minutes of every hour.

16. PA Johnson subsequently examined Claimant on numerous occasions from August 12, 2013 through May 14, 2014. On each occasion he reported that his objective findings were consistent with a work-related mechanism of injury. The record reflects that throughout Claimant's visits with PA Johnson she complained of muscle cramps, joint pain, muscle weakness, decreased sensation and strength, and muscle aches into the right upper extremity, shoulder and neck.

17. On April 6, 2014 Claimant underwent an independent medical examination with Neil Pitzer, M.D. Claimant explained that she had been experiencing continuing hand, shoulder and neck pain since the date of her industrial injury. She stated that she told her "doctors at Concentra but they told me it was all from the same thing. I kept telling them but they ignored me." Claimant noted her pain ranged from 7-9/10 throughout her hand, forearm, arm, and shoulder blade. Dr. Pitzer commented that Claimant's complaints of pain were diffuse. He determined that Claimant's symptoms were more myofascial in origin and not related to the small supraspinatus tear identified on MRI. Dr. Pitzer noted that Claimant had a non-physiologic sensory examination in the right wrist that was not consistent with a neurologic trauma. He concluded that Claimant's right hand trauma had resolved because she had negative test results and full range of motion.

18. Dr. Pitzer determined that there was no evidence of any significant pain or trauma to her right shoulder. He noted multiple examinations early in the claim showed no evidence of range of motion loss in her shoulder and her impingement testing had been normal. Dr. Pitzer remarked the "long period of time" between the injury event and her reports of right shoulder pain. He also mentioned that Claimant had 70 sessions of occupational/ physical therapy and her complaints increased over time. Dr. Pitzer ultimately concluded that Claimant's primary complaint was myofascial pain that he could not relate to the March 27, 2013 incident because there was no documentation of the complaints in her first three months of treatment.

19. On December 4, 2014 Edwin M. Healey, M.D. conducted an independent medical examination of Claimant. He noted that Claimant suffered right shoulder and neck pain immediately after the March 27, 2013 accident. Dr. Healey remarked that Claimant had completed pain diagrams for each evaluation with Dr. Bloch that documented her right shoulder and neck pain. Claimant reported current symptoms of pain in her right shoulder, right arm, lower cervical and right upper trapezius areas. She also noted tingling and numbness in the second through fourth digits of her right hand, headaches and depression. After performing a physical examination, Dr. Healey diagnosed Claimant with a right hand crush injury with chronic neuropathic pain, right lateral epicondylitis, right shoulder sprain/strain with a small rotator cuff tear, cervical myofascial pain, possible cervical disc herniation and depression. He explained that there was a prominent component of myofascial pain that could explain both her cervical and right shoulder pain due to a sprain/strain injury. Dr. Healey summarized that Claimant's diagnoses related directly to the March 27, 2013 accident.

20. On December 8, 2014 Claimant underwent an independent medical examination with Jon Erickson, M.D. Dr. Erickson recorded that Claimant was adamant that she informed all of her initial physicians and therapists about her neck and right shoulder pain. On physical examination Claimant displayed cogwheel weakness and reduced range of motion in her right shoulder with severe pain. He also noted that her only consistent behavior was that "every maneuver she was asked to perform caused severe pain. This simply goes against the physiology associated with an injury." Dr. Erickson identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, he did not believe that her shoulder pathology was related to the March 27, 2013 incident. Moreover, Dr. Erickson remarked that the small tear did not correspond with Claimant's pain level. Furthermore, Claimant's cervical spine showed no sign of acute trauma and a cervical neuropathy or compression radiculopathy had been ruled out by the negative EMG. Dr. Erickson concluded that Claimant only injured her right hand on March 27, 2013 and there was no involvement of her right shoulder or neck.

21. On January 16, 2015 Dr. Bloch testified through an evidentiary deposition in this matter. He specifically remembered his examinations of Claimant and she did not make any injury complaints above the right wrist prior to June 17, 2013. Dr. Bloch explained that his standard practice is to include in his notes all complaints a patient makes so he can determine whether they are part of a Workers' Compensation injury. He did not recall Claimant alleging that she was jerking her hand and arm back during the March 27, 2013 incident. Dr. Bloch remarked that he takes jerk injuries very seriously because they can lead to serious problems.

22. Dr. Bloch explained that his standard practice is to review any pain diagrams or handwritten notes completed by a patient either before or during an examination. He would verbally inquire as to a patient's symptoms during an examination and not rely solely upon pain diagrams. In Claimant's case, Dr. Bloch did not recall viewing any pain diagrams not included in the Concentra notes presented to

him for the deposition. He maintained that, if he had seen any pain diagrams in which Claimant marked any body parts other than her right hand, he would have examined the areas and performed a causation analysis.

23. Dr. Bloch testified that his characterization of Claimant's symptoms on June 17, 2013 as "now radiating all the way up to the neck" was meant to connote a new complaint. He commented that he reviewed Claimant's physical therapy records at each one of her office visits as a matter of standard practice. Dr. Bloch stated that he had seen no reason to collaborate with Claimant's physical therapists at Concentra because there were no red flags that Claimant was complaining of anything other than what had previously been documented.

24. Dr. Bloch testified that he referred Claimant to delayed recovery specialist Albert Hattem, M.D. He explained that Claimant's complaints by June 17, 2013 were "not physiological anymore. I was no longer treating the injury. I mean, causation and everything, it all changed. All of a sudden, it's a shoulder injury, you know, and this is a hand injury . . . now it's a shoulder injury, which obviously was associated with a different mechanism of injury, as [Claimant] reported a different mechanism of injury for that, all of a sudden."

25. Dr. Bloch stated that he has significant experience identifying and treating rotator cuff tears. He did not believe a rotator cuff tear caused by an acute injury would have a two month delayed onset. Dr. Bloch testified that Claimant did not suffer a rotator cuff tear as part of the March 27, 2013 incident because it would have appeared earlier in his clinical examinations. He remarked that Claimant may have focused on her hand pain over any other pain on the first visit, but that would not justify her lack of subsequent complaints.

26. Dr. Healey testified at the hearing in this matter. He remarked that Dr. Bloch's March 27, 2013 notes did not contain a history or mechanism of injury and were generally superficial. Dr. Healey explained that Claimant described her mechanism of injury as jerking her arm and neck back. The mechanism of injury could cause either a rotator cuff tear, shoulder sprain/strain or myofascial pain in and around the neck and shoulder. Claimant's statement that she suffered initial pain at the time of injury to her shoulder, upper trapezius and neck was consistent with the mechanism of injury. However, Dr. Healey could not state with a reasonable degree of medical probability that the rotator cuff tear was caused by the March 27, 2013 work incident. Rather, Claimant suffered a right shoulder sprain with secondary myofascial pain.

27. On cross-examination Dr. Healey reviewed Claimant's June 18, 2013 physical therapy notes. He acknowledged that the June 18, 2013 notation that there was a "shift in concern" was contradictory to Claimant's statements that the physical therapist had recognized her shoulder symptoms prior to the date. Dr. Healey also agreed that Dr. Bloch's June 17, 2013 documentation of Claimant's pain "now radiating all the way up to the neck" connoted documentation of a new complaint.

28. Dr. Erickson testified at the hearing in this matter. In evaluating Claimant's right shoulder he explained that she had moderate range of motion restrictions and displayed significant pain behaviors. However, when Claimant discussed the cause of her right shoulder symptoms and demonstrated various job activities her pain behaviors diminished. Her pain behaviors returned upon formal examination. Dr. Erickson also remarked that Claimant displayed cogwheel weakness that could be a self-limiting behavior.

29. Dr. Erickson determined that Claimant had a very small rotator cuff tear in her right shoulder. He commented that minor tears could be asymptomatic or minimally symptomatic. However, Claimant's level of pain complaints did not correlate to the size of her tear. Dr. Erickson specifically identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. He interpreted the cervical MRI as showing "very mild, early degenerative disc disease." Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, Dr. Erickson summarized that Claimant's right shoulder pathology was not related to the March 27, 2013 incident.

30. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury while working for Employer to body parts above the hand in the admitted claim of 4-923-167 on March 27, 2013. On March 27, 2013 Claimant suffered an injury to her right hand when it became caught in the rollers of a laminating machine while working for Employer. Claimant maintained that she repeatedly informed ATP Dr. Bloch that she suffered pain up her right arm into her shoulder area. She also filled out a pain diagram at each appointment that showed her pain running up to her right shoulder. Finally, Claimant explained that she also mentioned right shoulder complaints to her physical therapist but he apologized that he could not treat her because she was referred only for treatment of her right hand.

31. Despite Claimant's contentions the medical records do not reflect that she reported right shoulder symptoms to Dr. Bloch and her physical therapist until approximately three months after the March 27, 2013 accident. From March 27, 2013 until June 17, 2013, Claimant attended five appointments with Dr. Bloch and 17 physical therapy appointments. The notes from all 22 appointments contain no reference to Claimant reporting pain to body parts above the right forearm except for a single reference to back pain that Dr. Bloch attributed to soreness from her return to work. The records reflect Claimant's consistent denial of injuries to other body parts from the March 27, 2013 incident. On June 17, 2013 Dr. Bloch recorded that Claimant complained of a "tolerable dull ache located at right knuckles and now radiating all the way up to neck." Claimant completed a pain diagram showing complaints of pain all through her right arm to the shoulder. Dr. Bloch testified that his characterization of Claimant's symptoms on June 17, 2013 as "now radiating all the way up to the neck" was meant to connote a new complaint. He explained that Claimant's right shoulder complaints by June 17, 2013 constituted a different mechanism of injury that was no longer physiological. Moreover, on June 18, 2013 at a physical therapy appointment with OT Corbin Claimant reported pain in the lateral epicondyle, upper trapezius and hand. OT Corbin remarked that her complaints had changed, and noted, "in what

appears to be a shift in concern. . . more intense pain is located around the lateral epicondyle region pushing up to upper trapezius . . .”

32. The persuasive medical records and testimony reveal that Claimant’s right shoulder symptoms were not related to the March 27, 2013 accident. On April 6, 2014 Dr. Pitzer conducted an independent medical examination of Claimant. He noted the “long period of time” between the injury event and her reports of right shoulder pain. He also mentioned that Claimant had 70 sessions of occupational/ physical therapy and her complaints increased over time. Dr. Pitzer ultimately concluded that Claimant’s primary complaint was myofascial pain that he could not relate to the March 27, 2013 incident because there was no documentation of right shoulder complaints in her first three months of treatment. Dr. Bloch testified that Claimant did not make any complaints of injury above the right wrist prior to June 17, 2013. He also did not recall viewing any pain diagrams not included in the Concentra notes presented to him for the deposition. Dr. Bloch noted that he has significant experience identifying and treating rotator cuff tears. He did not believe a rotator cuff tear caused by an acute injury would have a two month delayed onset. Dr. Bloch testified that Claimant did not suffer a rotator cuff tear as part of the March 27, 2013 incident because it would have appeared earlier in his clinical examinations. Dr. Erickson specifically identified Claimant’s rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. He interpreted the cervical MRI as showing “very mild, early degenerative disc disease.” Regarding causation, Dr. Erickson stated “it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months.” Therefore, Dr. Erickson summarized that Claimant’s right shoulder pathology was not related to the March 27, 2013 incident.

33. In contrast, Dr. Healey diagnosed Claimant with a number of conditions involving her right hand, arm and shoulder that were directly related to the March 27, 2013 accident. He remarked that Claimant described her mechanism of injury as jerking her arm and neck back. The mechanism of injury could cause either a rotator cuff tear, shoulder sprain/strain or myofascial pain in and around the neck and shoulder. He commented that Claimant’s statement that she suffered initial pain at the time of injury to her shoulder, upper trapezius and neck was consistent with the mechanism of injury. However, after reviewing Claimant’s June 18, 2013 physical therapy notes he acknowledged that the “shift in concern” was contradictory to Claimant’s statements that the physical therapist had recognized her shoulder symptoms prior to the date. Moreover, the medical records and persuasive testimony reflect that the temporal proximity of Claimant’s shoulder symptoms approximately three months after the March 27, 2013 incident suggest that they were unrelated to the accident. The bulk of the evidence demonstrates that Claimant’s job activities on March 27, 2013 did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment above her right hand. .

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

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

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo.

App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury while working for Employer to body parts above the hand in the admitted claim of 4-923-167 on March 27, 2013. On March 27, 2013 Claimant suffered an injury to her right hand when it became caught in the rollers of a laminating machine while working for Employer. Claimant maintained that she repeatedly informed ATP Dr. Bloch that she suffered pain up her right arm into her shoulder area. She also filled out a pain diagram at each appointment that showed her pain running up to her right shoulder. Finally, Claimant explained that she also mentioned right shoulder complaints to her physical therapist but he apologized that he could not treat her because she was referred only for treatment of her right hand.

8. As found, despite Claimant's contentions the medical records do not reflect that she reported right shoulder symptoms to Dr. Bloch and her physical therapist until approximately three months after the March 27, 2013 accident. From March 27, 2013 until June 17, 2013, Claimant attended five appointments with Dr. Bloch and 17 physical therapy appointments. The notes from all 22 appointments contain no reference to Claimant reporting pain to body parts above the right forearm except for a single reference to back pain that Dr. Bloch attributed to soreness from her return to work. The records reflect Claimant's consistent denial of injuries to other body parts from the March 27, 2013 incident. On June 17, 2013 Dr. Bloch recorded that Claimant complained of a "tolerable dull ache located at right knuckles and now radiating all the way up to neck." Claimant completed a pain diagram showing complaints of pain all through her right arm to the shoulder. Dr. Bloch testified that his characterization of Claimant's symptoms on June 17, 2013 as "now radiating all the way up to the neck" was meant to connote a new complaint. He explained that Claimant's right shoulder complaints by June 17, 2013 constituted a different mechanism of injury that was no longer physiological. Moreover, on June 18, 2013 at a physical therapy appointment with OT Corbin Claimant reported pain in the lateral epicondyle, upper trapezius and hand. OT Corbin remarked that her complaints had changed, and noted, "in what appears to be a shift in concern. . . more intense pain is located around the lateral epicondyle region pushing up to upper trapezius . . ."

9. As found, the persuasive medical records and testimony reveal that Claimant's right shoulder symptoms were not related to the March 27, 2013 accident. On April 6, 2014 Dr. Pitzer conducted an independent medical examination of Claimant. He noted the "long period of time" between the injury event and her reports of right shoulder pain. He also mentioned that Claimant had 70 sessions of occupational/physical therapy and her complaints increased over time. Dr. Pitzer ultimately concluded that Claimant's primary complaint was myofascial pain that he could not

relate to the March 27, 2013 incident because there was no documentation of right shoulder complaints in her first three months of treatment. Dr. Bloch testified that Claimant did not make any complaints of injury above the right wrist prior to June 17, 2013. He also did not recall viewing any pain diagrams not included in the Concentra notes presented to him for the deposition. Dr. Bloch noted that he has significant experience identifying and treating rotator cuff tears. He did not believe a rotator cuff tear caused by an acute injury would have a two month delayed onset. Dr. Bloch testified that Claimant did not suffer a rotator cuff tear as part of the March 27, 2013 incident because it would have appeared earlier in his clinical examinations. Dr. Erickson specifically identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. He interpreted the cervical MRI as showing "very mild, early degenerative disc disease." Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, Dr. Erickson summarized that Claimant's right shoulder pathology was not related to the March 27, 2013 incident.

10. As found, in contrast, Dr. Healey diagnosed Claimant with a number of conditions involving her right hand, arm and shoulder that were directly related to the March 27, 2013 accident. He remarked that Claimant described her mechanism of injury as jerking her arm and neck back. The mechanism of injury could cause either a rotator cuff tear, shoulder sprain/strain or myofascial pain in and around the neck and shoulder. He commented that Claimant's statement that she suffered initial pain at the time of injury to her shoulder, upper trapezius and neck was consistent with the mechanism of injury. However, after reviewing Claimant's June 18, 2013 physical therapy notes he acknowledged that the "shift in concern" was contradictory to Claimant's statements that the physical therapist had recognized her shoulder symptoms prior to the date. Moreover, the medical records and persuasive testimony reflect that the temporal proximity of Claimant's shoulder symptoms approximately three months after the March 27, 2013 incident suggest that they were unrelated to the accident. The bulk of the evidence demonstrates that Claimant's job activities on March 27, 2013 did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment above her right hand.

ORDER

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

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

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: April 8, 2015.

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. WC 4-924-629-02**

ISSUES

The following issues were raised for consideration at hearing:

1. Average weekly wage,
2. Temporary total disability benefits if there is a change in AWW;
3. Medical benefits; and
4. Recovery of for a no show fee and transportation costs against the claimant's attorney for the claimant's failure to attend the respondent IME.

FINDINGS OF FACT

1. The claimant worked for the respondent-employer Construction Company as a laborer. His regular rate of pay was \$15.00 per hour. He was hired on September 4, 2012.

2. In addition to the claimant's regular job, the respondent-employer occasionally worked on government jobs which mandated that skilled workers were to be paid \$17.49 per hour and non-skilled workers \$23.36 per hour. Skilled workers could also be paid \$15.04 per hour for tape and finish tasks and \$17.49 per hour for framing and drywall.

3. From December 9, 2012 through February 3, 2013, the claimant worked as a non-skilled worker on a government job at Fort Carson where he earned \$23.36 per hour. The claimant verified that this 9 week time period was the only government job he worked where he earned \$23.36 per hour. During this time, the claimant did not work a 40 hour work week, but instead worked between 18.50 hours and 40 hours per week. During this time, the claimant worked a total of 216.5 hours at \$23.36 per hour, 61.5 hours at \$17.49 per hour and 24 hours at \$15.04 per hour. He continued working on this government job for 4 more weeks (February 10 through March 3, 2013), for 145 total hours and was paid \$15.04 per hour. The claimant did not work any hours at any rate for the week of March 10, 2013. After March 10, he worked his regular rate of pay of \$15.00 per hour up until the June 27, 2013 date of injury.

4. Prior to and subsequent to the Fort Carson job, the claimant earned his regular pay for the respondent-employer at \$15.00 per hour.

5. There was no other government job the claimant was scheduled to have worked for the respondent-employer at any time at the \$23.36 rate.

6. The respondent-employer First Report of Injury was filed on June 27, 2013, stating that the claimant sustained an abdomen/groin injury on that same date at 2:00 p.m. Dr. George Johnson, the claimant's authorized treating physician, reported that the claimant's primary problem, located in the left groin, began on June 27, 2013, and was described by the claimant to be severe aching and stabling. It was noted that the claimant, age 31, was using a screw gun to secure drywall on June 27th when the injury occurred.

7. A General Admission of Liability ("GAL") was filed on July 29, 2013. There was no specified average weekly wage in the admission because the claimant did not lose any time from work and the initial GAL was for medical benefits only as stated on the admission.

8. On November 1, 2013, the claimant underwent groin surgery with David Brown, M.D. Dr. Brown's surgical report indicates that hernia surgery was being done as a result of a work injury claimant had in June 2013.

9. On April 30, 2014, a second GAL was filed which admitted for temporary total disability benefits from November 1, 2013 (the date of surgery) through January 22, 2014. The respondent-insurer admitted to an average weekly wage (AWW) of \$602.45. This AWW was computed using claimant's gross wages from September 10, 2012 through June 23, 2013, which totaled \$24,700.34. The admitted AWW includes all of the increased wages from the Fort Carson job despite that this was the sole job for which the claimant earned the higher \$23.36 per hour while working for the respondent-employer.

10. The claimant began to work for a subsequent employer beginning January 23, 2014 through February 18, 2014, so the respondent-insurer did not pay TTD or TPD to the claimant for this time period. No issue was raised at hearing for TTD or TPD benefits to the claimant for this time period, as such issue, which had been endorsed by the claimant, was stricken pursuant to a pre-hearing conference order.

11. The respondent-insurer reinstated TTD to the claimant at the \$602.45 admitted AWW on March 1, 2014 through ongoing and continuing.

12. The claimant claims that his correct and only date of injury was January 24, 2013 and not June 27, 2013. The claimant testified that he sustained an admitted groin strain on January 24, 2013 while working for the respondent-employer. The claimant admitted that this was a non-lost time claim for which he was placed at MMI on February 28, 2013 with no impairment, no restrictions and no medical maintenance care. This non-lost time claim is not included in the General Admissions of Liability in Carrier No. 3576405 which admits for a date of injury of June 27, 2013.

13. The claimant did not consolidate his two claims.

14. The claimant did not endorse date of injury (“DOI”) as a hearing issue.

15. The ALJ finds that the claimant’s proposed AWW of \$738.05, using the higher \$23.36 hourly rate that the claimant earned from a one-time, temporary Fort Carson job for a 6 week period of time prior to January 24, 2013 (5 months before the admitted June 27, 2013) injury, is not a true or accurate or fair depiction of the claimant’s actual AWW while working for the respondent-employer. The ALJ rejects claimant’s computation of AWW by using wages earned exclusively during a time period that consists of 5 months before the admitted work injury and excludes in its entirety claimant’s correct hourly rate of \$15.00 per hour.

16. The ALJ finds that the admitted AWW of \$602.45 is a fair computation of AWW, as it includes the \$23.36 hourly wage earned by the claimant for the entire 9 week period of time the claimant worked at the Fort Carson job even though this government job was solely for a 9 week period of time (from December 9, 2012 through February 3, 2013) and the claimant was not scheduled to work on any other government job at the \$23.36 hourly rate at any time for the respondent-employer.

17. After undergoing hernia surgery with Dr. Brown, in November 2013, the claimant, Dr. Brown recommended an umbilical hernia repair and left groin exploration for a left groin mass.

18. The respondent-insurer sent the claimant to surgeon Janine C. Meza, M.D., for a second opinion regarding the surgery recommended by Dr. Brown.

19. Dr. Meza evaluated the claimant on October 14, 2013, and documented that the claimant developed left groin pain after heavy lifting at work. He initially was noted to have pain following an injury on June 27, 2013. Since that time, he has had persistent left groin pain that has not improved. Dr. Meza opined that the recommended surgery was reasonable and necessary.

20. On May 16, 2014, the claimant underwent a second surgery with Dr. Meza. There are no medical records following this procedure by Dr. Meza.

21. Following surgery, the claimant continued to treat with ATP, Dr. Johnson. On January 9, 2015, Dr. Johnson anticipated that the claimant would reach MMI on March 9, 2015.

22. Dr. Johnson also referred the claimant to Dr. Malinky, who opined that following an epidural steroid injection on November 13, 2014, the claimant had 75% improvement of pain for 3 weeks; that a lumbar MRI was “fairly benign”; that he did not believe any more steroid injections would be helpful; and he did not recommend surgery. During a telephone conference with Dr. Johnson on January 13, 2015, Dr. Malinky indicated that he did not have any other medical treatment to offer claimant.

23. On February 25, 2015, Dr. Johnson reported that the claimant “continues to have pain which is severe and unrelenting. No treatments have been beneficial. The patient’s subjective symptoms are not supported by objective findings. I believe he is amplifying his symptoms. An IME has been scheduled for [March 4, 2015]. I do not believe any additional treatment will help his condition. I believe he is nearing MMI. We will need a rating. May need permanent restrictions, a functional capacity exam is scheduled for [March 20, 2015]. He rescheduled the FCE because of personal issues . . .”

24. On February 26, 2015, Dr. Johnson referred claimant to John Tyler, M.D., for pain management. The request for authorization for this referral and treatment was authorized by respondent-insurer.

25. No physician in this case has referred the claimant for a surgical evaluation.

26. The claimant testified that he conducted a “Google search” of hernia physicians and found a Dr. Robert McDonald from CU Medical School. According to the claimant, he wants to see Dr. McDonald because Dr. Meza “told me” that she does not know how to fix failed hernia surgeries.

27. The claimant presented no medical records from Dr. Meza subsequent to the May 16, 2014 surgery. The claimant presented no evidence documenting Dr. Meza’s alleged statements.

28. The claimant failed to make a proper showing in support of his request for a change of physician to a hernia surgeon, Dr. McDonald.

29. There is insufficient evidence that the claimant has failed surgeries or that the claimant is in need of a surgeon to fix any failed surgeries.

30. There is no referral to Dr. McDonald by any authorized treating physician or any physician in this case.

31. Insufficient evidence was presented regarding Dr. Robert McDonald, his background or credentials.

32. A lack of evidence was presented that the claimant is not receiving adequate medical treatment for his admitted work injury. Based upon review of the medical records the ALJ finds the claimant has received adequate medical treatment in this claim.

33. The claimant has failed to establish appropriate grounds for his request to change physicians to Dr. Robert McDonald.

34. Respondents scheduled the claimant for an IME with John Raschbacher, M.D. on March 4, 2015.

35. Notice of the IME was sent to the claimant on February 9, 2015.

36. A prehearing conference was held on February 24, 2015 on issues including respondents' motion to compel the claimant to attend the March 4, 2015 IME. The ALJ did not issue a ruling on the motion because as stated in her Order, the claimant agreed to attend the IME as scheduled.

37. The claimant called Dr. Raschbacher's office on March 2, 2015 and informed them that he would be unable to attend the IME and that it needed to be rescheduled at a later date and he was informed by the person answering the phone at Dr. Raschbacher's office that he could not reschedule the IME and his attorney had to.

38. The respondent-insurer arranged for transportation of the claimant to Dr. Raschbacher's office for the scheduled IME with a business called Where 2 Transportation and gave notice of the scheduled transportation to the claimant's attorney on March 3, 2015, only hours before the scheduled IME.

39. The claimant was left a phone message by a Mr. Weishzhaar at Where 2 Transportation in the late afternoon of March 3, 2014 and the claimant returned this call shortly after receiving it and told Mr. Weishzhaar that he had tried to reschedule the IME

and that he would not be attending it the following day and they should not send anyone to pick him up.

40. The ALJ finds insufficient evidence to hold the claimant or his attorney responsible for the no show fee or the transportation fee.

CONCLUSIONS OF LAW

1. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under some circumstances, the ALJ may determine a claimant's TTD rate based upon earnings the claimant received on a date other than the date of injury. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Avalanche Industries, Inc. v. Clark*, __P.3d__ (Colo. Sup. Ct. No. 07SC255, December 15, 2008).

4. The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Where a claimant's earnings increase periodically his AWW may be calculated based upon earnings during a given period of disability, not the earnings on the date of the original injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp., supra*. Claimant has the burden to establish by a preponderance of the evidence that the admitted AWW should be increased. *Section 8-43-201, C.R.S.*

5. The ALJ, in the exercise of his discretion § 8-42-102(3), concludes that a fair calculation of the claimant's AWW is the admitted one in the amount of \$602.45.

6. There is a statutory obligation for the claimant to prescribed procedures in C.R.S. § 8-43-404(5)(a), for requesting a change of physician. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital*, 513 P.2d 228 (Colo. App. 1973). However, a claimant may seek a change of physician upon a "proper showing" to the division. C.R.S. § 8-43-404(5)(a)(VI); also see *Carlson v. Industrial Claim Appeals Office* 950 P.2d 663 (Colo. App. 1997). §8-43-404(5) does not contain a specific definition of a "proper showing."

7. An ALJ possesses broad discretionary authority to grant a change of physician depending on the particular circumstances of the claim. *Yeck v. Industrial Claim Appeals Office, supra*; *Szocinski v. Powderhorn Coal Co.*, W.C. No. 3-109-400 (I.C.A.O. December 14, 1998). An ALJ's order as to change of physician may only be overturned for an abuse of discretion. An abuse exists if the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or is contrary to law. *Rosenberg v. Board of Education of School District No. 1*, 710 P.2d 1095 (Colo. 1995).

8. In ruling as to whether or not a claimant has made a "proper showing", the ALJ may consider whether the patient and physician were unable to communicate such that the physician's treatment failed to prove effective. *Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (November 16, 1995). However, where a claimant is receiving adequate medical treatment, the court need not allow a change of physician because of a claimant's personal reasons, including mere dissatisfaction, especially where no specific evidence is provided regarding the qualifications or abilities of a different physician to treat the Claimant is presented. *Loza v. Ken's Welding*, W.C. 4-712-246 (I.C.A.O. January 7, 2009).

9. The ALJ's decision should consider the need to insure the claimant is provided reasonable and necessary medical treatment as required by C.R.S. §8-42-101(1), while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be held liable. *Solok v. Final Order Wal-Mart Stores, Inc.*, W.C. No. 4-743-263 (I.C.A.O. October 22, 2009); *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (I.C.A.O. May 5, 2006).

10. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.;

Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence

11. "Authorization" refers to the physician's legal authority to treat the claimant and to expect to receive payment from the insurer for services that are reasonable and necessary to treat the industrial injury. Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *See One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 507 (Colo. App. 1995). A physician may become authorized to treat the claimant as a result of a referral from a previously authorized treating physician. The referral must be made in the "normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

12. As found, the claimant has failed to make a proper showing for requesting a change of physician to Dr. Robert McDonald, a hernia surgeon. Moreover, no physician referred the claimant to Dr. Robert McDonald and no physician has opined that a referral to any hernia surgeon, including Dr. McDonald, is reasonable and necessary. As found, the claimant has received adequate medical treatment in this claim.

13. An ALJ has discretion to order a claimant and/or a claimant's attorney to reimburse an insurer for a no show fee and transportation costs for failure to attend a Respondent IME. *See Hummer v. CTSI*, W.C. No. 4-6120-449 (ICAO May 31, 2012). Here, given the circumstances that the claimant put everyone on notice well ahead of time that he was unable to make the appointment, the ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that either the claimant or his attorney should be responsible for the payment of those costs.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for an increase in his average weekly wage is denied and dismissed.
2. The claimant's request for a change of physician to Dr. McDonald and/or evaluation and treatment by Dr. McDonald is denied and dismissed.
3. The respondents request for reimbursement of a No Show fee and transportation costs is denied and dismissed.
4. All matters not determined herein, and not closed by operation of law, 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>.

DATE: April 14, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-925-261**

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury, staph infection and discitis during the course and scope of his employment with Employer on June 21, 2013.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of \$507.69.
2. If the claim is found compensable, Claimant is entitled to receive Temporary Partial Disability (TPD) benefits in the amount of \$1,023.84.

FINDINGS OF FACT

1. Claimant was born on May 8, 1957. On April 1, 2000 Claimant began working for Employer as a Cattleman.

2. Claimant's job duties involve caring for and feeding cattle. One of his responsibilities is "sleeving" cows. "Sleeving" is a procedure in which Claimant wears a shoulder length rubber glove and extends his left arm into the uterus of a cow to remove afterbirth products. Claimant has "sleeved" over 1,000 cows in his 35 years as a Cattleman.

3. On June 21, 2013 Claimant was sleeving a cow that had recently delivered a calf. He noticed that the cow became agitated and moved during the sleeving process. He thus stood in a sideways position with his left foot in front of his right foot attempting to brace himself. Claimant continued the sleeving process but the cow began swinging him back and forth in a manner that was different and more aggressive than in his prior experience. Claimant then pulled his arm out and experienced immediate lower back pain. His symptoms gradually increased throughout the day. By evening his family members transported him to Longmont United Hospital for medical treatment.

4. On the evening of Friday, June 21, 2013 Claimant arrived at the Longmont United Hospital Emergency Room complaining of back pain. The pain began at work when a cow jerked him forward. The treating physician reported that Claimant sustained lower back pain as a result of a work incident. There were no other diagnoses. Claimant was discharged with pain medications.

5. Claimant continued to experience lower back pain over the next several days. On June 25, 2013 he also began to develop a number of symptoms that included: right wrist pain, left shoulder pain and swelling, neck pain, a headache and a sore throat. After obtaining treatment from NextCare Urgent Care, Claimant returned to Longmont United Hospital.

6. Claimant initially received treatment from Suzanne Metcalf, M.D. However, Dr. Metcalf sought an orthopedic consultation and was also suspicious of an infectious disease process.

7. Claimant underwent treatment with infectious disease specialist Eva Patricia Gill, M.D. at Longmont United Hospital. Dr. Gill diagnosed Claimant with polyarthritis and polyarthralgia but also included differential diagnoses of rheumatic fever or an illness associated with exposure to cattle such as brucellosis or Q. fever. However, blood work revealed that Claimant suffered from staphylococcus aureus sepsis or staph infection.

8. Claimant remained at Longmont United Hospital from June 25, 2013 through July 12, 2013. During his hospitalization Claimant received antibiotic treatment for the staph infection. At his discharge Obianuju Mba, M.D. diagnosed Claimant with "subcutaneous abscess of the right wrist, status post incision and drainage with associated staph sepsis." Dr. Mba reported that infectious disease was involved in Claimant's treatment and "it was thought that the source of his infection was a subcutaneous abscess of his right wrist, which underwent incision and drainage on July 8, 2013." Claimant was discharged on July 12, 2013 and set up for home care that included IV antibiotics with a PICC line.

9. On July 17, 2013 Dr. Gill responded to a letter from Insurer regarding the causation of Claimant's symptoms. She explained that Claimant sustained trauma to his back during the incident with the cow on June 21, 2013. The incident permitted "seeding" of the piriformus muscle with staph infection that spread into other areas of Claimant's body. Consequently, Claimant's health condition was directly related to the June 21, 2013 work injury.

10. Claimant continued to receive outpatient care from Dr. Gill. All of his symptoms were resolving except lower back pain. Because Claimant's lower back pain increased, he underwent a second MRI of the lumbar spine on August 1, 2013. The second MRI revealed marked progression of discitis, osteomyelitis at the L5-S1 level with endplate erosive changes and a marked increase in infection causing moderate thecal sac compression. Claimant's infection extended into the prevertebral soft tissues at the L5-S1 level.

11. On August 7, 2013 Claimant underwent lumbar surgery to treat an infected disc at L4-L5 and L5-S1. The surgery included a partial L4 corpectomy, debridement of the L4-5 disc space and a posterior fusion.

12. On November 4, 2013 Claimant underwent an independent medical examination with Alexander Jacobs, M.D. Dr. Jacobs concluded that Claimant's lower

back symptoms were not related to the June 21, 2013 work incident with the cow. He reasoned:

[Claimant's] symptoms occurred almost immediately at the time that he was jostled by the cow. This time frame is inconsistent with any form of inoculation from the cow that would cause the lumbar discitis and the seeding of multiple other joints that he experienced...This time period is absolutely too soon to consider inoculation, bacteremia, and seeding that was ultimately proven by cultures, biopsy and surgery.

It is far more likely that the patient inoculated himself either from his skin source in the upper extremities or from poor oral hygiene. This inoculation would have taken place sometime prior to the onset of symptoms on June 21, 2013. It was because the discs were already inflamed that he experienced pain when being jostled by the cow when his left arm was inserted in her uterus.

There is no evidence whatsoever that [Claimant] had any trauma at the time of the alleged Workers' Comp injury. In fact, he told a number of physicians and interviewers that he didn't think the cow had anything to do with his pain. However, the pain in the lumbosacral area became so significant that he could barely walk. There is nothing that occurred at the time of the removal of the products of conception that could have caused him to develop a Staph aureus infection. There is no portal of entry, no fall, no kick by the cow, no hematoma, no bruising, and no skin break or laceration to prompt inoculation.

13. On July 6, 2014 infectious disease specialist Daniel Mogyoros, M.D. conducted a records review of Claimant's case. He determined that Claimant's staph infection and lower back symptoms were not caused by the June 21, 2013 cow incident. Dr. Mogyoros initially noted that a 56 year old male such as Claimant is in the right epidemiologic group to develop a spinal infection. Moreover, the lumbar spine is the most common site for an infection. Dr. Mogyoros considered whether Claimant's spine was seeded with staph infection prior to or at the time of the cow incident. He remarked that it was unlikely that seeding occurred while Claimant's left arm was in the cow because he was wearing a shoulder glove on his left arm and there was no evidence of infection in his left arm. Instead, Claimant had a "subcutaneous abscess of the right wrist and probable septic bursitis of the right elbow." Dr. Mogyoros explained that "[m]ore likely the port of entry was from one of the documented skin lesions, or possibly from either the site of the subcutaneous abscess at the wrist of the septic bursitis, prior to these events and unrelated to the incident with the cow. (In fact, [Claimant] did not begin to improve until the debridement of the wrist on July 8). He then either seeded the spine directly or developed endocarditis, and then secondarily seeded the spine."

14. Dr. Mogyoros detailed that skeletal muscles are quite resistant to infection in the absence of actual trauma to the muscle or overuse. Studies show that muscle

injected with staph aureus developed abscesses only if it had been traumatized in some fashion such as a pinch, electric shock or ischemia. There is no evidence that Claimant had the preceding type of mechanical injury to his piriformis or that there was overuse as has been described in cases of athletes who develop pyomyositis. Finally, pyomyositis is a subclinical infection that usually develops over a matter of weeks.

15. Dr. Gill testified at the hearing in this matter. She maintained that the June 21, 2013 cow incident caused Claimant to develop a Staph infection and undergo subsequent lumbar spine surgery. Dr. Gill testified that Staphylococcus is an aggressive bacteria that rapidly multiplies and can spread fairly quickly in the right circumstances. Dr. Gill explained that “seeding” occurs when bacteria circulate through the bloodstream then drop off like a farmer sowing seed. The bacteria tend to seed in an area such as an injured muscle that is fertile. Although skeletal muscle is particularly resistant to infection, this is not the case if there has been an injury. Experiments were conducted on dogs and it was not until the muscle was injured that the infection seeded in the muscle. In Claimant’s case bacteria flowed through the bloodstream, took root and began to multiply and grow in an area that was susceptible. Claimant’s lower back area was particularly susceptible to the seeding by the staph after the cow incident on June 21, 2013. Dr. Gill commented that a few days of infection can cause symptoms to develop. Several weeks of infection are not required before the development of symptoms.

16. Dr. Jacobs testified at the hearing in this matter. He maintained that Claimant’s lower back symptoms and need for surgery were not related to the June 21, 2013 work incident with the cow. He explained that the skin is the most common site for staph infections. Based on Claimant’s history of skin issues on his arms, Dr. Jacobs stated that the staph infection likely settled on his arm. Dr. Jacobs noted that it takes weeks or even months to develop an abscess or osteomyelitis on a lumbar disc. It was unlikely that the staph infection began in Claimant’s piriformis muscle in his lower back. Dr. Jacobs commented that in his 40 years of practicing medicine he has never seen a piriformis infection. A piriformis infection requires recurrent trauma or abuse as potentially exhibited by a professional athlete. Finally, Dr. Jacobs remarked that Claimant’s back pain became so severe so quickly that there was likely existing staph in his lumbar spine that caused the symptoms.

17. Dr. Mogyoros testified at the hearing in this matter. He agreed with Dr. Gill’s diagnosis of staph aureus infection. Although he has seen approximately 2,500 cases of staph in patients he does not believe he has ever treated a patient where staph developed primarily as a muscle infection then spread through the blood distally. Two observations suggestive of endocarditis or infection of the heart valve include Claimant’s multiple site and multiple joint infections. Piriformis abscesses in which the piriformis muscle is the initial site of infection is exceedingly rare. Cases in the literature reflect that the piriformis pyomyositis is typically associated with epidural catheters and overuse in athletes. Furthermore, if a common back sprain or strain could result in an infection, staph would be much more prevalent.

18. Dr. Mogyoros explained that the timing of Claimant’s symptoms suggest that his lower back condition was not caused by the June 21, 2013 cow incident. It

would take a couple of weeks for the muscles to abscess, the bacteria to infiltrate the infected area and Claimant to develop inflammation causing symptoms. Dr. Mogyoros summarized that Claimant had a brewing spinal infection by the time of the cow incident that caused the already inflamed muscles to go into spasm. Claimant's extreme initial symptoms and intractable pain were consistent with a preexisting infection. The infection would have spread regardless of the June 21, 2013 incident.

19. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury, staph infection and discitis during the course and scope of his employment with Employer on June 21, 2013. Claimant maintained that on June 21, 2013 he was sleeving a cow that began to swing him back and forth. Claimant then pulled his arm out and experienced immediate lower back pain. His symptoms gradually increased throughout the day. After receiving initial medical treatment his lower back pain continued to increase and he was diagnosed with staph infection. The staph infection of Claimant's piriformis muscle in his lower back caused an abscess that required lumbar surgery to treat an infected disc at L4-L5 and L5-S1. Dr. Gill explained that Claimant sustained trauma to his back during the incident with the cow on June 21, 2013. The incident permitted "seeding" of the piriformus muscle with staph infection that spread into other areas of Claimant's body. Consequently, Claimant's lower back symptoms and need for surgery were directly related to the June 21, 2013 work injury.

20. In contrast to Dr. Gill's opinion, the bulk of the medical evidence demonstrates that the Claimant was already infected with staph at the time of the cow incident. Drs. Mogyoros and Jacobs explained that the degree of pain and symptoms reported by Claimant were caused by the presence of the staph infection at the time the incident occurred. They testified that it is extremely difficult to seed staph infection in the piriformus muscle. In fact, studies show that when pyomyositis is diagnosed, it normally occurs in overuse by athletes. Drs. Mogyoros and Jacobs explained that Claimant's lower back sprain or strain would be insufficient for the seeding of staph infection. Otherwise, based on the high incidences of lower back sprains and strains, many more patients would develop staph infection. It is more likely that Claimant developed staph on one of his upper extremities prior to June 21, 2013 that settled in the piriformus muscle in his lower back. Claimant's discs were thus likely already inflamed while he was sleeving the cow on June 21, 2013.

21. The development of symptoms consistent with a staph infection within days of the cow incident suggests that the staph infection in Claimant's lower back existed prior to June 21, 2013. Drs. Mogyoros and Jacobs persuasively maintained that the timing of Claimant's symptoms suggest that his lower back condition was not caused by the June 21, 2013 cow incident. It would take a couple of weeks for the muscles to abscess, the bacteria to infiltrate the infected area and Claimant to develop inflammation causing symptoms. Dr. Mogyoros summarized that Claimant had an already brewing spinal infection by the time of the cow incident that caused the already inflamed muscles to go into spasm. Claimant's extreme initial symptoms and intractable pain were consistent with a preexisting infection. The infection would have spread regardless of the June 21, 2013 incident. The temporal proximity between Claimant's

work activities and lower back symptoms does not mean there is a causal connection between his lower back condition and his work. Accordingly, Claimant's June 21, 2013 cow incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for

medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between claimant’s injury and his work.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury, staph infection and discitis during the course and scope of his employment with Employer on June 21, 2013. Claimant maintained that on June 21, 2013 he was sleeving a cow that began to swing him back and forth. Claimant then pulled his arm out and experienced immediate lower back pain. His symptoms gradually increased throughout the day. After receiving initial medical treatment his lower back pain continued to increase and he was diagnosed with staph infection. The staph infection of Claimant’s piriformis muscle in his lower back caused an abscess that required lumbar surgery to treat an infected disc at L4-L5 and L5-S1. Dr. Gill explained that Claimant sustained trauma to his back during the incident with the cow on June 21, 2013. The incident permitted “seeding” of the piriformus muscle with staph infection that spread into other areas of Claimant’s body. Consequently, Claimant’s lower back symptoms and need for surgery were directly related to the June 21, 2013 work injury.

8. As found, in contrast to Dr. Gill’s opinion, the bulk of the medical evidence demonstrates that the Claimant was already infected with staph at the time of the cow incident. Drs. Mogyoros and Jacobs explained that the degree of pain and symptoms reported by Claimant were caused by the presence of the staph infection at the time the incident occurred. They testified that it is extremely difficult to seed staph infection in the piriformus muscle. In fact, studies show that when pyomyitis is diagnosed, it normally occurs in overuse by athletes. Drs. Mogyoros and Jacobs explained that Claimant’s lower back sprain or strain would be insufficient for the seeding of staph infection. Otherwise, based on the high incidences of lower back sprains and strains, many more patients would develop staph infection. It is more likely that Claimant developed staph on one of his upper extremities prior to June 21, 2013 that settled in the piriformus muscle in his lower back. Claimant’s discs were thus likely already inflamed while he was sleeving the cow on June 21, 2013.

9. As found, the development of symptoms consistent with a staph infection within days of the cow incident suggests that the staph infection in Claimant's lower back existed prior to June 21, 2013. Drs. Mogyoros and Jacobs persuasively maintained that the timing of Claimant's symptoms suggest that his lower back condition was not caused by the June 21, 2013 cow incident. It would take a couple of weeks for the muscles to abscess, the bacteria to infiltrate the infected area and Claimant to develop inflammation causing symptoms. Dr. Mogyoros summarized that Claimant had an already brewing spinal infection by the time of the cow incident that caused the already inflamed muscles to go into spasm. Claimant's extreme initial symptoms and intractable pain were consistent with a preexisting infection. The infection would have spread regardless of the June 21, 2013 incident. The temporal proximity between Claimant's work activities and lower back symptoms does not mean there is a causal connection between his lower back condition and his work. Accordingly, Claimant's June 21, 2013 cow incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

ORDER

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

1. Claimant's request for Workers' Compensation benefits is denied and dismissed.
2. Claimant earned an AWW of \$507.69.
3. 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: April 2, 2015.

DIGITAL SIGNATURE:

A handwritten signature in cursive script that reads "Peter J. Cannici". The signature is contained within a rectangular box.

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

ISSUE

Whether the surgery recommended by Alexander Mason, M.D. is reasonably necessary to cure and relieve the effects of Claimant's September 1, 2013 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a driver, with duties that included driving semi-trailer trucks and delivering fuel to various locations.

2. On September 1, 2013 Claimant suffered an admitted work related injury. On that date, Claimant moved a loading arm on the truck, twisted, and felt a sharp pain in his lower back.

3. Prior to the work related injury, Claimant had three surgeries on his back. Claimant underwent two laminectomies/discectomies at the L4-5 level and in 2005 underwent a lumbar interbody fusion at L4-5. *See Exhibit 10.*

4. From 2005 until Claimant's September 1, 2013 work related injury Claimant did not have any ongoing back problems. His fusion in 2005 was considered successful.

5. On September 1, 2013 Claimant sought medical treatment at North Suburban Medical Center. He reported to the emergency room physician that he was turning a large pivot arm when he felt a pull in his lower back. Claimant reported sharp back pain in the left mid lumbar spine, left lower lumbar spine, left gluteus, and pain in the left leg. *See Exhibit P.*

6. On September 3, 2013 Claimant saw Michael Ladwig, M.D. Claimant reported to Dr. Ladwig that he was positioning a load and while moving the arm and twisting, he felt a sharp pain in his lower back which shot pain into his right leg and buckled his legs. Claimant reported back pain and pain into his right foot. *See Exhibit O.*

7. Dr. Ladwig referred Claimant for an MRI of his lumbar spine. Claimant underwent the MRI on September 14, 2013.

8. The MRI report was interpreted by Bao Nguyen, M.D. Dr. Nguyen confirmed prior surgical changes from an L4-5 interbody fusion and decompressive laminectomy. He also noted at the L3-4 level, and above the L4-5 fusion block that the disc was desiccated, moderately narrowed, and associated with a broad-based

protrusion which extended into both neural foramina and combined with facet arthrosis to produce moderate bilateral L3-4 neural foramina stenosis. He noted that the central spinal canal was also mild to moderately narrowed. See Exhibit 8.

9. Dr. Nguyen's impression was L4-5 interbody fusion with disc degeneration above the fusion block, accounting for moderate bilateral foraminal stenosis and mild to moderate central spinal canal narrowing at L3-4. See Exhibit 8.

10. Dr. Ladwig referred Claimant for physical therapy and also referred Claimant to Rehabilitation Associates of Colorado for treatment. See Exhibit O.

11. On October 16, 2013 Claimant saw Franklin Shih, M.D. Claimant reported discomfort in his low back with radiation into the right leg. Claimant reported his current pain level as 4/10 with his worst level 10/10 and best level 3/10. Dr. Shih assessed Claimant with status post work injury with secondary low back pain – mechanical and radicular features. Dr. Shih noted that the lumbar MRI was remarkable for disc pathology at L3/4 with bilateral foraminal stenosis. He noted multilevel multifactorial degenerative changes contributing to the stenosis. He opined that the likely cause of Claimant's acute symptomatology was the disc pathology superimposed on the other degenerative features and that Claimant had some radicular irritation associated with the foraminal stenosis. Dr. Shih thought it would be appropriate for Claimant to be evaluated by Dr. Olsen for selective injections. See Exhibit L.

12. On October 21, 2013 Claimant saw Nicholas Olsen, D.O. Claimant reported his pain level as 4/10 and reported it was as high as a 10/10 at the time of his injury. Dr. Olsen assessed lumbar sprain/strain, work related injury that occurred on September 1, 2013 and assessed clinical signs of facet arthrosis, right L5-S1. Dr. Olsen opined that Claimant's subjective symptoms correlated with the MRI. Dr. Olsen noted Claimant's facet arthrosis was quite significant, clearly painful, and opined that Claimant's complaints were due to his acute work injury. See Exhibit L.

13. On October 29, 2013 Dr. Olsen performed an L4/5 diagnostic facet injection, which provided some relief, but not significant enough relief to return to full duty work safely or effectively. See Exhibit L.

14. On November 12, 2013 Dr. Olsen performed a right L4 medial branch block which did not provide relief. Following the block, Claimant reported his pain complaints were at a 2-3/10. See Exhibit L.

15. On November 25, 2013 Dr. Olsen noted that Claimant had a nondiagnostic response to the medial branch block and that Claimant was not a candidate for a radiofrequency neurotomy. See Exhibit L.

16. On December 16, 2013 Claimant again saw Dr. Olsen. Claimant reported a pain level of 4/10. Dr. Olsen recommended a bilateral L4-5 and L5-S1 medial branch

block for diagnostic purposes. Dr. Olsen noted that the surgical site from Claimant's prior surgery was uncomplicated and a very unlikely pain generator. See Exhibit L.

17. On January 7, 2014 Claimant saw David Yamamoto, M.D. Claimant reported pain in his back and down his right leg at a level ranging from 4-7/10. Dr. Yamamoto diagnosed lumbosacral strain and referred Claimant to Centeno-Shultz Clinic for treatment. See Exhibit 3.

18. On January 27, 2014 Claimant saw Christopher Centeno, M.D. who noted Claimant's low back pain, right greater than left. Dr. Centeno reviewed the September 2013 MRI and noted facet arthropathy in the L4-5 and L5-S1 regions of the lower back. Dr. Centeno recommended Claimant undergo an EMG/nerve conduction study and recommended epidural injections at the L4-L5 and L5-S1 regions of the right low back. See Exhibit K.

19. On February 13, 2014 Ben Newton, M.D. saw Claimant. Dr. Newton noted that Claimant's EMG showed abnormalities. See Exhibit 4.

20. In April of 2014, Claimant was referred to and began treating with Peter Reusswig, M.D. Claimant noted pain down both legs, and indicated that the left leg was worse. Dr. Reusswig diagnosed neuropathic pain and opined that Claimant's pain was from posterior elements above and below Claimant's prior fusion hardware level with associated left radicular pain. Dr. Reusswig performed medial branch blocks from L2 to L5 bilaterally that provided 65% temporary pain relief. During the course of treatment with Dr. Reusswig, Claimant's pain complaints ranged from 2-8/10. See Exhibit 5.

21. In July of 2014, Claimant was referred to Alexander Mason, M.D. for a surgical evaluation. On July 28, 2014 Dr. Mason noted that Claimant had lumbar degeneration at L3-4 above his previous fusion that became symptomatic after his work incident. Dr. Mason noted the leg symptoms were somewhat nonspecific and were of secondary importance. Claimant rated his back pain as an 8/10 and his leg pain as 4/10. Dr. Mason requested a new MRI be performed. See Exhibit 1.

22. On August 27, 2014 Claimant underwent an MRI interpreted by Scott Loomis, M.D. Dr. Loomis' impression included evidence of prior L4-L5 discectomy and posterior spinal fusion, mild to moderate degenerative changes throughout the lumbar spine, L1-L2 mild central canal narrowing and mild bilateral neural foraminal narrowing, and L-3-L4 mild central canal narrowing and mild to moderate bilateral neural foraminal narrowing. See Exhibit 1.

23. On September 22, 2014 Dr. Mason, after reviewing the new MRI, recommended surgery consisting of hardware removal at L4/5 with transfer lumbar interbody fusion (TLIF) at L3/4. See Exhibit 1.

24. On September 26, 2014 Respondents applied for a hearing regarding whether the surgery recommended by Dr. Mason was reasonable and necessary. See Exhibit 12.

25. On October 1, 2014 Dr. Yamamoto noted that he was in agreement with Dr. Mason's plan for L3-5 fusion. See Exhibit 3.

26. On October 7, 2014 Robert Messenbaugh, M.D. performed an independent medical examination at Respondents' request to review the reasonableness and necessity of the surgery recommended by Dr. Mason. Dr. Messenbaugh issued a report dated October 9, 2014. Dr. Messenbaugh opined that Claimant's low back was asymptomatic following his 2005 lumbar spine surgery and that Claimant returned to full work activities following the 2005 surgery. Dr. Messenbaugh also opined that Claimant injured his lower back on September 1, 2013 while working and that he had failed proper and extensive conservative treatment. Dr. Messenbaugh opined that diagnostic testing and examinations had been employed and determined that Claimant's major source of lumbar pain was from the broad-based disc protrusion, facet arthrosis, and neural foraminal stenosis at the L3-4 level as noted by MRI. Dr. Messenbaugh opined that the surgery recommended by Dr. Mason was the next reasonable, necessary, and related treatment for Claimant. See Exhibit D.

27. At the October 7, 2014 appointment with Dr. Messenbaugh Claimant presented with exaggerated symptoms. At the appointment Claimant reported a 10/10 pain level. Claimant presented with extreme difficulty and excruciating pain while standing to an erect position, ambulating, walking, and sitting down. Claimant complained of severe constant debilitating back pain. Dr. Messenbaugh could not recall seeing an individual exhibit such horrifically restricted motion.

28. Part of Dr. Messenbaugh's opinion that the surgery recommended by Dr. Mason was reasonable, necessary, and related was based upon his physical examination of October 7, 2014. Dr. Messenbaugh indicated he would only recommend surgery based upon Claimant's symptoms in conjunction with the findings on the MRI, and not based solely on MRI findings.

29. On October 18, 2014, October 20, 2014, October 21, 2014, and October 22, 2014 surveillance video of Claimant was taken. The surveillance shows, amongst other things, Claimant raking leaves, bending forward at the waist, standing erect, getting into and out of vehicles, driving a vehicle, vacuuming and cleaning a vehicle, using an electric leaf blower and an electric powered vacuum, bending onto one knee, and carrying bags of leaves. See Exhibits 14, 15, 16.

30. Dr. Messenbaugh viewed the surveillance videos and issued a supplemental report on October 31, 2014. Based upon his review of the surveillance videos, Dr. Messenbaugh opined that Claimant did not require the lumbar surgical procedure previously recommended, nor would Claimant benefit from such a surgical procedure. See Exhibit D.

31. Dr. Messenbaugh found the activities he viewed on the surveillance videos to be completely inconsistent with the October 7, 2014 examination. He testified that he would not recommend such an extensive lumbar surgical procedure for an individual capable of performing the wide range of unrestricted activities shown by the surveillance video.

32. On November 3, 2014 Claimant saw Dr. Yamamoto. Dr. Yamamoto noted Claimant's pain level in the back was 8/10. Dr. Yamamoto noted that there was apparently video surveillance of Claimant raking leaves that he had not viewed. Dr. Yamamoto again concurred with Dr. Mason's recommendation for an L3-5 fusion. See Exhibit 3.

33. On January 5, 2015 Claimant returned to Dr. Mason's office and saw Gene Cook, P.A. PA Cook noted Claimant's pain was at an 8-9/10, that Claimant has good and bad days, and that Claimant's level of functioning improves somewhat on high doses of pain medication. P.A. Cook noted that the office had not reviewed the surveillance video and did not feel that it was appropriate to provide investigational oversight or interpretation. P.A. Cook noted that the recommendation by Dr. Mason for surgical intervention was continued in light of failure of other conservative options and the imaging culprit at L3-4. P.A. Cook noted that Claimant could possibly seek a second opinion regarding this case. See Exhibit B.

34. On January 8, 2015 Dr. Yamamoto referred Claimant to Jeffrey Kleiner, M.D. for a second opinion. See Exhibit 3.

35. On February 3, 2015 Claimant saw Dr. Kleiner. Dr. Kleiner recommended that Claimant have decompression and stabilization at the L3-4 level to assist Claimant with his severe symptoms and to allow Claimant to resume active work activity and improve his functionality. See Exhibit 2.

36. Dr. Kleiner opined after reviewing Claimant's history, the MRI reports, and after physical examination that Claimant's symptoms emanate from the L3-4 area.

37. The surgery recommended by Dr. Kleiner is essentially the same procedure as the surgery recommended by Dr. Mason. Both Dr. Kleiner and Dr. Mason opined that there is a high probability that the surgery will help relieve Claimant's symptoms.

38. Dr. Kleiner also reviewed the surveillance videos. Dr. Kleiner has previously changed surgical opinions based on surveillance. However, Dr. Kleiner opined that the surveillance in this case did not change his opinion as to the recommended surgery. Dr. Kleiner indicated that the videos would have to have shown much greater physical activity in this case to have changed his mind and to contraindicate surgery.

39. Currently, Claimant is in constant pain. Claimant cannot drive a semi-trailer truck or perform the heavy work he performed prior to his September 1, 2013 injury. Claimant understands the risks and possible benefits of the recommended L3-L5 fusion and wants to undergo the procedure.

40. Although Claimant is in constant pain, he is not in as much pain as he exhibited at his October 7, 2014 appointment with Dr. Messenbaugh. Claimant understood that appointment to be a second opinion that would potentially determine whether or not he received the surgery recommended by Dr. Mason and Claimant exaggerated his symptoms.

41. Although Claimant exaggerated his symptoms at the October 7, 2014 appointment, Claimant is found credible that he is in continuous varied pain due to the work injury. The pain Claimant suffers is consistently documented from the date of injury, and is supported by the MRI imaging and objective testing performed by multiple medical providers.

42. The surveillance videos do not show any physically demanding activities. In the surveillance videos, although Claimant is able to perform many activities and has much better movement than Claimant displayed at his appointment with Dr. Messenbaugh, Claimant often moves slowly, stiffly, and at points in the video Claimant walks with a slight limp.

43. The testimony and opinion of Dr. Kleiner is found credible and persuasive that the surveillance videos do not change his surgery recommendation and that surgery is still both reasonable and necessary for Claimant.

44. The testimony and opinion of Dr. Messenbaugh that the surgery is not reasonable or necessary is not found as 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. The 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. 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); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). 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*, 441 P.2d 21 (Colo. 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).

Claimant has met his burden to show that the hardware removal at L4/5 with transfer lumbar interbody fusion (TLIF) at L3/4 surgery recommended by Dr. Mason, Dr. Kleiner, and Dr. Yamamoto is reasonable and necessary to cure and relieve the effects of his industrial injury. As a result of Claimant's September 1, 2013 admitted workplace injury he has had consistent pain that has been documented by multiple medical providers. Both Dr. Mason and Dr. Kleiner opined that there is a high probability that the surgery will be successful in relieving Claimant's pain and the effects of the work injury. Claimant has undergone more conservative treatments including injections and physical therapy that have not relieved his symptoms. Although Claimant is found to have exaggerated his symptoms at the October 7, 2014 appointment with Dr. Messenbaugh, Claimant does have continuous pain which limits his function. Claimant's continuous pain is consistently documented from the time of his injury until now. Claimant's MRI also objectively supports the recommendation for surgery. Dr. Kleiner's opinion is persuasive and the surveillance video does not show a level of physical activity that would contraindicate surgery.

In weighing the evidence to determine if the recommended treatment is both reasonable and necessary the ALJ looks to alternative options and also to the potential risks involved with the treatment. The L3-L5 fusion surgery will potentially allow Claimant to live without constant pain if the surgery is successful. Although the risks of the procedure are notable, two surgeons as well as Claimant's authorized treating provider have reviewed the MRI and Claimant's symptoms and have recommended surgery after necessarily weighing the risks. The ALJ defers to their opinions that surgery is a reasonable and necessary option for Claimant. As found above, Claimant has undergone extensive treatments without success. To require Claimant to just live with the pain and stop treatment at this time is not reasonable when there is a viable surgical option that will possibly cure and relieve his pain. Therefore, the recommended surgery is found both reasonable and necessary.

ORDER

1. The surgery recommended by Dr. Mason is reasonable and necessary to cure and relieve the effects of Claimant's September 1, 2013 industrial injury. Respondents shall authorize and pay for the surgery.
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: April 2, 2015

/s/ Michelle Jones

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

ISSUES

The issues presented for determination include:

1. Compensability;
2. Medical Benefits;
3. Temporary disability benefits;
4. Deviation from employment.

FINDINGS OF FACT

1. The claimant was a resident of Pueblo in November of 2013.
2. The claimant worked for the respondent-employer on or about November 1, 2013.
3. The claimant had been employed by the respondent-employer for approximately 3 years at that time.
4. The claimant was employed as a CNA technician.
5. Between 8:00 a.m. and 4:30 p.m., the claimant would report to work at 401 W. Northern Ave., Pueblo, Colorado, the respondent-employer's principal place of business.
6. The claimant's duties include assisting participants with activities of daily living, such as feeding, bathing, dressing, grooming, hair care, mouth care, taking vitals, weighing participants, making sure medication is taken as prescribed, and encouraging social interactions.
7. The claimant worked 40 hours per week at the respondent-employer's principal place of employment.
8. During the summer of 2012, the claimant, in addition to working at the respondent-employer's principal place of employment, began providing homecare to

patients through the respondent-employer.

9. The claimant's homecare duties include traveling to patient's homes, monitoring participants' health status, household chores, and providing care similar to the care provided at the respondent-employer location.

10. The respondent-employer Manager, Darlene Espinosa, would organize a weekly schedule for the claimant to provide care on the respondent-employer's behalf.

11. The claimant's adherence to the provided homecare schedule was required and not optional. The claimant was expressly required to "meet or exceed" punctuality and attendance expectations/requirements in the homecare manual.

12. If the claimant did not meet attendance requirements of the provided schedule, the claimant would be reprimanded by her employer and could possibly lose her healthcare licensure.

13. The claimant was required to make home visits to participants who live in non-handicapped accessible dwellings.

14. The respondent-employer required the claimant to intermittently drive throughout the day between patients' homes.

15. The claimant was required to provide a personal vehicle for transportation, hold a valid driver's license, and maintain insurance on the vehicle.

16. The respondent-employer received a benefit by the claimant providing her own transportation for homecare purposes because the respondent-employer is relieved from having to own and maintain a fleet of vehicles and associated insurance.

17. The claimant's travel to participants' houses using her own personal car was a special benefit to the respondent-employer beyond that of simply having the claimant show up for work.

18. The respondent-employer's homecare employment manual advised that the claimant may be subjected to adverse driving conditions.

19. The respondent-employer's homecare employment manual states, "There may be moderate pressure to meet transportation schedules while dealing with frail and confused participants."

20. The claimant would provide homecare to approximately two (2) to five (5)

patients in a week.

21. The claimant's homecare schedule would vary. Due to time constraints, the claimant would sometimes be required to leave straight from the respondent-employer's principal place of employment. At other times, the claimant would have a two (2) hour "gap" between duties at the respondent-employer and homecare. In these instances, the claimant would return to her house before traveling to the scheduled homecare.

22. The respondent-employer would reimburse the claimant for miles driven between homecare participants' houses.

23. The claimant was paid wages for fifteen (15) minutes of travel to homecare participants' houses.

24. The respondent-employer was not able to explain why the claimant was arbitrarily paid for fifteen (15) minutes of travel even though distances to homecare participants' houses varied.

25. On November 1, 2013, at 4:30 p.m., the claimant had completed her shift at the respondent-employer's principal place of employment.

26. The claimant was scheduled to provide homecare at 6:00 p.m.

27. Between 4:30 p.m. and 6:00 p.m., the claimant went home.

28. In order to meet or exceed punctuality and attendance expectations/requirements, the claimant left her house around 5:30 p.m.

29. The claimant lived on the east side of Pueblo and her scheduled homecare was at a location on the southwest side of Pueblo.

30. There was only one reasonable route to take to the patient's house, and that route was heading west on Highway 96.

31. The claimant would take the same route, west on Highway 96, to arrive at the respondent-employer's principal place of employment located at 401 W. Northern Ave, Pueblo, CO.

32. A Loaf 'N Jug is located directly off Highway 96 between the claimant's residence and the homecare patient's location.

33. The claimant was headed west on Highway 96 when she turned into the Loaf 'N Jug.

34. The claimant intended to make a brief stop in order to return a rental DVD.

35. The Loaf 'N Jug was crowded when the claimant pulled in and there was no place for her to park.

36. The claimant's van's automatic transmission was in "drive" when she had come to a stop near the entrance of the Loaf 'N Jug.

37. The claimant did not park her van, exit her van, or return any DVD.

38. The claimant was then struck by a large, fifty-three (53) foot "lowboy" tractor-trailer attempting to exit the Loaf 'N Jug.

39. The claimant's van was dragged several feet in a jerking motion when the trailer of the truck partially impaled her van.

40. The collision happened after 5:30 p.m. and before 5:45 p.m.

41. After the collision, the Loaf 'N Jug employees instructed the claimant and the truck driver to move both vehicles as they were obstructing the entrance.

42. An Accident Report was filed by the Pueblo County Sheriff's Office corroborating the claimant's testimony that she had just entered the Loaf 'N Jug when she was impacted by the large trailer and pulled a short distance.

43. The Accident Report notes that the claimant was indicating pain on the right side of her body.

44. An ambulance arrived at the scene, but the claimant did not wish to take the ambulance. The claimant was worried about incurring substantial expenses associated with medical transportation.

45. The claimant immediately informed the respondent-employer management of the collision and reported her injury.

46. After the Accident Report was filed, the claimant was taken to the hospital by her husband. The claimant was complaining of back pain and was diagnosed with a back strain at the time.

47. The claimant attempted to return to work on modified duty, but was unable

to continue working due to her pain. The claimant's doctor eventually took her off work.

48. In addition to back pain, the claimant experienced an onset of pain in her neck and the pain continued to increase over time.

49. The claimant did not return to work until December 2, 2013.

50. Before November 1, 2013, the claimant was able to perform her duties pain-free.

51. After November 1, 2013, the claimant could not perform work duties pain-free.

52. Restrictions placed on the claimant, as well as continuing pain, affected the claimant's ability to return to the same level of employment as it was prior to November 1, 2013.

53. The respondent-employer told the claimant that medical benefits were being denied because the collision happened five (5) minutes before she "clocked-in."

54. The claimant's van was damaged and lengthy repairs rendered the vehicle unavailable, limiting her ability to return to performing healthcare.

55. The claimant's back has improved, but her neck pain is still bothersome and hindering her ability to work at the same level as before.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

3. The 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).

4. 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).

5. 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.

6. In *Madden v. Mountain West Fabricators*, 977 P.2d 861, (Colo. 1999), the court reiterated the longstanding rule that injuries sustained by claimants going to work from home and while returning, are not compensable because they are not seen as arising out of employment. The *Madden* opinion however, acknowledged the facts of any particular case may justify an exception to this general rule. The decision set forth four categories of evidence that may establish a travel injury to be an exception to the going and coming exclusion: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

7. The *Madden* opinion observed that many of the exceptions to the going and coming rule recognized in previous cases were pertinent to the third exception asking if "the travel was contemplated by the employment contract." The court then listed three categories of cases generally recognized as exceptions to the going and coming exclusion because travel is contemplated by the employment contract: (a) the particular journey was assigned or directed by the employer, (b) the travel was at the

express or implied request of the employer and conferred a benefit beyond the employee's arrival at work, and (c) the travel was singled out for special treatment as an inducement to employment. The common element in these types of cases is that the travel is a substantial part of the service to the employer. Finally, if the claimant establishes only one of the four "variables," recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from the work arises out of and in the course of employment. *Id* at 865.

8. The ALJ concludes that the claimant was engaged in transportation to her assignment and that the travel conferred a benefit upon the respondent-employer beyond that of just arriving at work and that this travel was contemplated by the contract of employment.

9. To obtain compensation for an injury, an injured employee must, at the time of injury, have been "performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. 2009. Under Colorado's Workers' Compensation Act (Act), the terms "in the course of and "arising out of are not synonymous. *Popovich v. Irlanda*, 811 P.2d 379 (Colo. 1991). However, whichever theoretical framework is applied, the issue remains whether the claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing activity for his sole benefit. *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). It is not essential to compensability that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer, as long as they are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Under the Act, it is generally not necessary for an employee to be actually engaged in work duties at the time of an accident for an injury to be compensable. See *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). It is sufficient if the injury arises out of a risk, which is reasonably incidental to the conditions and circumstances of the particular employment. *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Roache v. Industrial Commission*, 729 P.2d 991 (Colo. App. 1986).

10. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is one of fact for determination by

the ALJ. See *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, *supra*.

11. Our state has adopted the "dual purpose" doctrine. See *Deterts v. Times Pub. Co.* 38 Colo. App. 48, 552 P.2d 1033 (Colo. App. 1976). That doctrine holds that an injury suffered by an employee while performing acts for the mutual benefit of the employer and employee is usually compensable. Thus, when some advantage to an employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to employment.

12. The "dual purpose" doctrine shows that if the trip is essentially a business trip with a business destination and a separate personal destination along the same route, a mutual benefit to both employer and employee may occur and thus the personal deviation is not a "sole benefit" of the employee during a minor deviation.

13. "An injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of, and in the course of, the employment; and this rule is applicable, even though the advantage to the employer is slight." *Berry's Coffee Shop v. Palomba*, 161 Colo. 369, 423 P.2d at 5 (1967); See also *In re Claim of Hanson*, 072313 COWC, 4-892-321-01.

14. The ALJ concludes that the claimant has shown by a preponderance of evidence that her injury was in the course of, and arose out of, her employment.

15. The ALJ concludes that the claimant falls within an exception to the "coming and going" rule and that benefits being received by both employer and employee place the claimant in the compensable category of the "dual purpose" doctrine.

16. The ALJ finds that travel to and from the respondent-employer's homecare participants' houses was contemplated by the contract of employment because travel was an integral part of the requirement of the employer to fulfill its contract with the participants. The claimant's travel by way of her personal car was a special benefit to the employer beyond that of simply having the claimant show up for work.

17. The ALJ concludes the claimant's transport of her car to work was a benefit to the employer contemplated by the contract of hire when the injury occurred on the way to perform homecare.

18. The ALJ concludes this travel was, of necessity, accomplished through the use of the claimant's personal automobile.

19. The ALJ concludes that the claimant providing her own transportation was an essential and substantial part of the job and the respondent-employer had contemplated that benefit as they reimbursed mileage to the claimant between homecare locations, and they paid the claimant fifteen (15) minutes of wages for traveling to and from those locations.

20. The ALJ concludes that the dominant purpose of the claimant's trip was for employment purposes and the claimant's slight deviation did not remove the benefit to the employer of providing transportation to and between off-site locations caring for patients on the respondent-employer's behalf. A substantial deviation is required for the claimant to be found not within the course and scope of employment. The mere act of pulling into a gas station parking lot is not a substantial deviation from the claimant's employment.

21. Accordingly, the Claimant's auto accident injuries were incurred performing an activity which arose out of and in the course of her employment and benefits are awarded.

22. Because this matter is compensable, the respondent-insurer is liable for medical treatment which is reasonably necessary to cure or relieve the the claimant from the effects of her industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). All of the medical treatment the claimant received for her industrial injury, from November 1, 2013 and onward, was reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

23. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Here, as a result of the injury the claimant experienced an unspecified partial wage loss beginning December 3, 2013 and continuing.

24. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish

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

25. The ALJ concludes that the claimant was unable to work from November 1, 2013 through December 2, 2013 as a result of her industrial injuries.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.
2. The respondent-insurer shall pay for all reasonable, necessary, and related medical expenses to cure and relieve claimant from the effects of her industrial injury.
3. The respondent-insurer shall pay the claimant TTD benefits from November 1, 2014 through December 2, 2013.
4. The respondent-insurer shall pay the claimant TPD beginning December 3, 2013 and continuing until terminated by operation of law.
5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
6. All matters not determined herein, and not closed by operation of law, 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>.

DATE: April 7, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant is barred from litigating the issues of average weekly wage and temporary benefits for concurrent employment that was previously explicitly reserved;
2. If the claimant is not barred, whether the claimant is entitled to temporary total disability (TTD) benefits for her concurrent employment with Service Master; and,
3. If so entitled to TTD, whether the claimant has established an average weekly wage for the concurrent employment.

FINDINGS OF FACT

1. The claimant sustained an injury on November 13, 2013.
2. At the time of the injury, the claimant worked for the respondent-employer as a Special Education Assistant.
3. The claimant also held concurrent employment with Service Master at the time of injury.
4. The respondent initially denied liability for the claimant's injury.
5. On January 22, 2014, the claimant filed an application for hearing on compensability, temporary benefits, medical benefits, and average weekly wage.
6. Hearing on the claimant's January 22, 2014 application went forward on May 6, 2014. The claimant proceeded on AWW and "temporary partial and/or temporary total disability benefits from November 13, 2013 and ongoing" but reserved "concurrent employment" for future determination.
7. On May 28, 2014, the undersigned ALJ issued Findings of Fact, Conclusions of Law, and Order finding claimant's injury compensable, ordering the respondent to pay medical benefits, and fixing claimant's AWW at \$342.19. Neither party appealed the order.

8. The ALJ denied claimant's claim for temporary benefits. It was specifically found that claimant failed to show by a preponderance of the evidence that she suffered a wage loss as the result of her injury.

9. Respondent subsequently filed a General Admission of Liability on July 18, 2014 admitting for medical benefits and AWW.

10. On November 12, 2014 the claimant filed an Application for Hearing on the issues of AWW, TPD and TTD.

11. The claimant alleges that she is entitled to an increased AWW based on concurrent employment at the time of injury. She further alleges she is entitled to temporary benefits due to her inability to work at her concurrent employment as a result of her injury.

12. The ALJ finds that the claimant was unable to continue her concurrent employment with Service Master as a result of her injury beginning with the date of injury, November 13, 2013 and ongoing. The claimant claims entitlement based on lost wages from Service Master from the date of injury and ongoing.

13. At the current hearing the claimant established that as of May 6, 2014 (the date of the first hearing) she was aware she earned eligible wages from concurrent employment with Service Master. The claimant further testified that as of May 6, 2014 she was aware that she lost wages from Service Master as a result of her November 13, 2014 injury beginning November 13, 2013 and ongoing.

14. The ALJ finds that the AWW and temporary benefits at issue in the current dispute are not identical to the AWW and temporary benefits at issue in the May 6, 2014 hearing.

15. The ALJ finds that the temporary benefits sought as a result of claimant's lost wages from Service Master were specifically reserved at the time of the initial hearing as stated in the order on May 28, 2014.

16. The ALJ finds that claimant is not collaterally estopped from litigating the issues of AWW and entitlement to temporary benefits.

17. The claimant obtained wage records from Service Master after the May 6, 2014 hearing, as indicated by the date of faxing on those records of May 30, 2104.

18. In November of 2013, the claimant was employed by both the respondent-employer and Service Master. She began working for Service Master in the beginning

of August of 2013. She worked Monday through Friday from 7pm until 10pm. Her rate of pay was \$7.78 per hour. She worked 3 hours per day, five days per week for a total of 15 hours per week. This equates to an AWW of \$116.70.

19. The claimant last worked for Service Master on November 12, 2013, the date before her compensable injury occurred. On November 13, 2013 and up to her recovery from surgery on January 21, 2015 the claimant did not work due to her injury. She has not yet returned to work for Service Master since the surgery.

20. The claimant's typical duties for Service Master included taking out trash, vacuuming, and cleaning. The vacuum was the type that was required to be carried on her back. Her job required her to be on her feet the entire three hour shift, except for her 10 minute break.

21. The claimant was having difficulty walking after her injury. She was on crutches for almost two months and had been wearing a brace since then. She could not go up and down stairs without significant pain, nor could she squat or kneel. This prevented her from performing her job duties at Service Master.

22. The claimant had surgery on her right knee on January 21, 2015 and her knee has been doing well since that date. The claimant's knee remained essentially unchanged between the date of the injury, November 13, 2013, and the date of her surgery, January 21, 2015.

23. The claimant first sought treatment from Dr. Miguel Castrejon on November 13, 2013, the day of the injury. Dr. Castrejon made a determination that the injury was not work related and referred the claimant to Memorial Hospital for x-rays. He did not address any work restrictions.

24. Claimant sought treatment from Memorial Hospital after her visit with Dr. Castrejon. She then followed up with Dr. Charles Waldron on November 22, 2013 per instructions given at Memorial.

25. Dr. Waldron instructed the claimant to not work for three weeks or until further evaluation.

26. The claimant was unable to receive any further treatment in the following months due to the fact that the respondent had contested compensability that was set for determination on May 6, 2014.

27. The claimant's next examination was with Dr. Timothy Hall on July 28, 2014, after a finding of compensability had been made.

28. Dr. Hall determined that the claimant has had restrictions that precluded her from performing her work with Service Master, including no kneeling, no squatting, limited bending, no prolonged standing or walking, and limited lifting from floor to waist of no more than 15 pounds.

29. Dr. Hall explained that her job with Service Master is outside these restrictions, as opposed to her day job with the School District where she is sitting most of the day. Her condition had not improved over time.

30. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to TTD benefits for her concurrent employment only beginning November 13, 2013 and continuing until terminated by operation of law.

31. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to an AWW of \$116.70.

32. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to indemnity benefits for periods of time that she was unable to work with Service Master at the weekly rate of \$77.80.

33. The ALJ finds that the claimant has established that it is more likely than not, that she is entitled to an AWW of \$342.19 + \$116.70 equaling \$458.89 for periods of time when the claimant was unable to work for both the respondent and Service Master.

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. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The respondent cites various equitable defenses in opposing the claimant's pursuit of the benefits requested herein. As found above, the issue of concurrent employment was specifically reserved at the previous hearing and subsequent Order. Reserving such issue would be meaningless unless all attendant corollary issues are reserved as well. By finding and concluding that the claimant has established concurrent employment, all benefits flowing from that decision are necessarily included within the reservation of the concurrent employment issue.

5. To receive temporary disability benefits, the claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc.* W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

6. The claimant was fully able to perform her duties with Service Master from her date of hire through November 12, 2013. It was not until she sustained an injury to her right knee while working for the respondent-employer that she became unable to perform her work with Service Master. Dr. Castrejon was the workers' compensation physician that first examined the claimant on the date of injury. Dr. Castrejon made an erroneous legal determination that the claimant's injury was not compensable. He did not address her work restrictions at that time for this reason. The claimant's work

restrictions were not addressed until November 22, 2013 when she was examined by Dr. Waldron. He took her off of work for a few weeks, but with the assumption that she would receive further evaluation to better determine her ability to work. She did not see another doctor until July 20, 2014 as a result of litigation.

7. The claimant's knee condition remained virtually unchanged between the date of injury until her surgery more than a year later. Dr. Hall, the claimant's ATP, was clear in his assessment of the claimant's work restrictions. He opined that she has been completely unable to perform her job with Service Master because of its physical demands being outside of the restrictions she has had since the injury occurred. It is evident that the claimant is entitled to TTD benefits for her job with Service Master.

8. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), *See Also* § 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p. 1457. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

9. The claimant earned \$7.78 per hour with Service Master. She worked three hours per day, from 7pm to 10pm, Monday through Friday. Her wage records support her testimony. \$7.78 per hour, multiplied by 15 hours per week, equals an AWW of \$116.70 for her concurrent employer and a TTD rate of \$77.80. The claimant's AWW for the respondent-employer is \$342.19. Therefore, the claimant's combined AWW is \$458.89.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent's defenses are denied and dismissed.
2. The claimant's AWW from concurrent employment is \$116.70.
3. The respondent shall pay the claimant temporary total disability benefits based upon her concurrent employment beginning on and including November 13, 2013 and continuing until terminated by operation of law at the weekly rate of \$77.80.
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein, and not closed by operation of law, 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>.

DATE: April 24, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-941-271-02**

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that she sustained a cervical spine injury arising out of and in the course of her employment with the respondent-employer on February 3, 2014;
2. Whether the claimant has proven by a preponderance of the evidence that she is entitled to authorized, related, reasonable and necessary medical benefits for her cervical spine injury, including cervical injections recommended by Dr. Bainbridge;
3. Whether the claimant has proven by a preponderance of the evidence that she is entitled to authorized, related, reasonable and necessary medical benefits for her right wrist injury including surgery as recommended by Dr. Larsen; and,
4. Whether the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 20, 2014 and continuing.

FINDINGS OF FACT

1. The claimant is a 53 year old female who was employed with the respondent-employer as a physical therapy assistant for seven years. The claimant's job duties included assisting with outpatient rehabilitation at the YMCA location. Those duties specifically involved writing, typing, filling out forms, compliance with patient care, lifting and moving equipment, and massage.
2. On February 3, 2014, the claimant sustained work related injuries at 7:25 a.m. when she slipped on ice and fell onto her tailbone and left elbow outside of the front doors at the respondent-employer. The claimant had immediate burning in the left elbow, right wrist, right hand, she was dizzy, and had neck pain. The claimant filled out an accident report for the respondent-employer in which she described the slip and fall incident and noted that her injured body parts were "tailbone/R wrist/neck."
3. The claimant presented to Michael A. Dallenbach, M.D. on February 3, 2014, for an initial evaluation. Dr. Dallenbach documented the claimant's "chief complaints of right wrist and low back pain." Dr. Dallenbach further noted that, "At this point in time she complains only of right wrist and low back pain." The claimant denied

any prior trauma to her right wrist, but admitted to a prior C5-C6 fusion and “left shoulder SLAP/biceps tendon tear for which she is scheduled to undergo operative repair on 02/20/14 as per Rickland Likes, M.D. [The claimant] denies new injury to her left shoulder.” There is no indication in Dr. Dallenbach’s report of claimant injuring her cervical spine. However, the pain diagram submitted to Dr. Dallenbach at this visit did indicate aching pain in the cervical spine region (as well as low back and right wrist). Dr. Dallenbach testified at hearing that he must have missed the neck during this initial evaluation. He testified that he focused on the low back due to the severity of this low back pain (8 out of 10).

4. The claimant continues to have neck and right wrist pain “the same” as after her fall on February 3, 2014. The claimant’s symptoms in her left elbow and low back have resolved.

5. On February 4, 2014, the claimant returned to Dr. Dallenbach in follow-up with complaints of “constant” pain in her right wrist and low back. The claimant had also “begun to complain of left posterior elbow pain.” Dr. Dallenbach ordered an MRI of the lumbar spine and right wrist and radiographs of the left elbow. He did not order diagnostic tests with respect to the cervical spine and recommended no treatment for the neck. Finally, Dr. Dallenbach referred the claimant to “Occupational and Physical therapy” for strength, endurance, flexibility and coordination.

6. On February 6, 2014, the claimant presented to Parkview Medical Center–Emergency Room with an admitting diagnosis of “LBP/R WRIST/THUMB PAIN/L ELBOW PAIN.” There was no indication of neck pain.

7. On February 6, 2014, the claimant presented to Parkview Medical Center – Outpatient Rehab for an initial evaluation. The claimant reported her slip and fall accident with ongoing symptoms in her low back and right lower extremity. She admitted to a prior cervical fusion and right foot surgery with present non-industrial left shoulder condition. No complaints of neck pain or any cervical spine symptoms were documented.

8. On February 11, 2014, the claimant presented to Dr. Dallenbach in follow-up with persistent complaints of pain in her left elbow, right wrist and low back. Dr. Dallenbach performed a physical examination and noted that claimant had begun OT and PT. He recommended that the claimant continue in OT and PT and return for reevaluation. Dr. Dallenbach assigned work restrictions to include, “Wear splint; may use upper extremities only to do activities with the plane of gravity; no bend, twist, turn;

no crawling, kneeling, squatting, climbing; no pinching or gripping activities; sitting essentially 100% of the time must be allowed to change position as needed for comfort.”

9. In his “Physicians Progress Notes” of February 18, 2014, Dr. Dallenbach documented claimant’s preexisting SLAP tear in the left shoulder, bilateral hand numbness and symptoms in the left elbow arising out of the fall on 2/3/14. Notations were made on a “stick figure” of the claimant’s symptoms. There were no indications neck complaints.

10. On February 18, 2014, claimant presented to Dwight K. Caughfield, M.D. for an EMG of the left upper extremity on referral from Dr. Dallenbach. The claimant described the work incident, reporting immediate neck/elbow pain. Dr. Caughfield’s document noted “Old Left C6 and/or C7 radiculopathy...No acute changes noted” with mild left carpal tunnel syndrome and no EDX evidence of an ulnar neuropathy or radial neuropathy or brachial plexopathy.” Dr. Caughfield recommended “cervical imaging for c/o Bilateral hand numbness in C6 pattern after a fall. She had prior fusion and sensor findings may be old but given onset of numbness with the fall I believe cervical imaging is merited.”

11. On February 19, 2014, the claimant underwent cervical spine x-rays with comparison to those of March 18, 2013 at Parkwest Imaging Center. The impression was “No malalignment with flexion or extension. No evidence of hardware complication.”

12. In his follow-up evaluation report of February 19, 2014, Dr. Dallenbach documented the claimant’s report of improving symptoms in the left arm and low back, with constant pain in her right upper extremity. Dr. Dallenbach noted the claimant’s examination with Dr. Caughfield and the subsequent recommendations with regard to cervical spine imaging. Dr. Dallenbach also documented the claimant’s preexisting history of left shoulder and cervical spine pathology that led to the claimant’s cervical fusion in December of 2012. With respect to the cervical spine symptoms that the claimant reported to Dr. Caughfield on February 18, 2014, Dr. Dallenbach stated,

13. Because of the nature of her mechanism of injury 02/03/14 [the claimant] was questioned repeatedly regarding neck pain or any upper extremity radicular symptoms at that point in time she had none. At that time of reevaluation the following day on 02/04/14 though [the claimant] had in addition to her right wrist and low back pain began to complain of left elbow pain she had no complaints of neck pain and she denied, “Any radiation or radicular component to her pain.”

14. On physical examination, Dr. Dallenbach found, "Cervical AROM is within functional limits. There is no cervical or upper thoracic paraspinal hypertonicity. There is no cervical spinous process or facet joint tenderness. Cervical AROM is within functional limits."

15. Dr. Dallenbach's assessment with regard to the new neck symptoms was "questionable acute cervical spine pathology." He ordered an MRI and 7-view radiographic series of the cervical spine to rule out acute cervical spine pathology.

16. Dr. Dallenbach added an "ADDENDUM" in which he noted that the "7-view radiographic series of the cervical spine revealed no acute changes or malalignment with flexion or extension."

17. At hearing on cross-examination, the claimant testified that she couldn't remember telling the PT and OT therapists at Parkview Medical Center whether she had cervical spine symptoms in her treatment from February 6, 2014 through February 17, 2014. The claimant also stated that she couldn't remember whether Dr. Dallenbach had questioned her "repeatedly" as to whether the claimant was experiencing any neck pain or symptoms in her examinations and treatment with Dr. Dallenbach through February 18, 2014.

18. On March 18, 2014, the claimant underwent a cervical spine MRI at Parkwest Imaging Center with comparison to MRI of 11/28/12 that showed no acute findings and no significant central canal or neuroforaminal stenosis. The final impression was status post anterior C5-C6 fusion, status post C5-C6 discectomy, and age-related changes as detailed in the body of the report.

19. On March 26, 2014, the claimant presented to Rickland Likes, M.D. in follow-up for her non-work related left shoulder surgery. She reported that she was doing well until a couple of weeks prior when she was putting on her brace and heard a loud pop with immediate onset of pain with ongoing discomfort. Then, in a second incident, the claimant nearly slipped and fell in the shower and braced herself with her left shoulder. Over the past couple of weeks, the claimant noted popping in the shoulder and increased pain.

20. The claimant underwent an EMG/NCV of the right upper extremity with Dr. Caughfield on April 9, 2014. The impression included, "Subacute right C7 radiculopathy with reinnervation and progress via axonal sprouting. No acute findings. No EDX evidence of ulnar neuropathy."

21. As of April 10, 2014, Dr. Dallenbach remained unclear with respect to whether the claimant's neck pain was related to the industrial incident of February 3, 2014. He stated in his report, "further evaluation is required to more definitely define work relate casualty (sic) in terms of [the claimant's] neck pain." Dr. Dallenbach referred claimant to J. Scott Bainbridge, M.D. for further assessment of the claimant's neck pain and bilateral upper extremity symptoms.

22. On April 28, 2014, the claimant underwent cervical spine x-rays at Parkview Medical Center with comparison to records from 2/19/14. It was noted that the claimant had, "Stable postsurgical appearance of C5-C6 ACDF, and Moderate to severe C6-C7 cervical spondylosis.

23. The claimant initially presented to Julie Archibald, PA-C at the office of J. Scott Bainbridge, M.D. on the referral of Dr. Dallenbach on April 29, 2014, for evaluation of the upper extremities and issue of causation with respect to the neck symptoms. Ms. Archibald noted that the "Left forearm sx as well following her fall that does not seem, today, to be directly correlated to her neck sx, will continue to monitor." Ms. Archibald recommended Left C4-5 +/- C6-7 facet blocks.

24. In his Physician Advisor report dated May 7, 2014, Joseph Fillmore, M.D. recommended denial of the left C4-5 and left C6-7 facet blocks due to inconsistencies in reporting and questions of causation with respect to the alleged neck injury.

25. On May 9, 2014, the claimant presented to James H. Evans, Ph.D. on referral from Dr. Dallenbach for psychological care. In his initial evaluation report, Dr. Evans noted that "psychological factors are going to play a large role in terms of her response to treatment and recovery from this injury" due to chronic anxiety and depression and possible mild thought disorder."

26. On May 21, 2014, the respondent-employer authored a letter to the claimant in which the claimant was advised that her FMLA expired on May 14, 2014. The claimant was placed on inactive status for up to twelve weeks from May 16, 2014. The employer advised the claimant that when she was released to full duty work, she could apply for any open position. However, if she failed to return to active status by August 8, 2014, the employer would terminate the claimant's employment. Finally, the employer noted, "If you return to work, you **must** present to the **Employee Health Office a release from your doctor stating whether or not you have any work restrictions.** (Emphasis in the original.)

27. On July 1, 2014, Dr. Bainbridge examined the claimant for the first time following the examination and recommendations of Ms. Archibald. He recommended “bilateral C6-7 TFESIs for both diagnosis and potentially therapeutic benefit. We will put the request for cervical facet blocks on hold for now.”

28. On July 9, 2014, Dr. Caughfield completed a repeat EMG.NCV of the left upper extremity. The impression included, “Old left C6 radiculopathy without acute axonal loss. No EDX evidence of a C7 radiculopathy either acute or chronic.”

29. In review of Dr. Bainbridge’s recommendations from July 1, 2014, Dr. Fillmore again noted on July 9, 2014, “inconsistency with the reports of this injury.” He recommended denial of the requested bilateral C6-7 transforaminal ESI as there had been “no clarification upon the treating providers of how the neck pain is directly related to this work injury.”

30. On July 9, 2014, after reviewing the cervical MRI and EMG results, Dr. Bainbridge retracted his request stating in his follow-up note of July 16, 2014, “I would not recommend CTFESIs at this point.”

31. On July 23, 2014, claimant verbalized to Dr. Evans “that if she did not back (sic) to work by 08/08/2014, she will be terminated from her employment.”

32. On August 8, 2014, Albert Hattem, M.D. completed a Physician Advisor review with respect to Dr. Bainbridge’s recommendations. He noted the prior requests for authorization and questions of causation regarding the cervical spine. Dr. Hattem agreed with Dr. Fillmore’s two determinations that the neck condition is not causally related to the 2/3/14 slip and fall. He recommended against authorizing the medial branch blocks.

33. On October 22, 2014, Jonathan Sollender, M.D. – Orthopedic Hand Surgery, completed a Physician Advisor reviewed issued his report. Dr. Sollender noted his prior staffing report in which he recommended authorization for a right pisiform excision and carpal tunnel release which was performed on 5/20/14 with minimal improvement post-operatively. He also reviewed Dr. Larsen’s records with respect to “multiple injections...attempting to chase her pain with (sic) any significant benefit.” Dr. Sollender had reviewed the “extensive Independent Medical Evaluation on 09/08/14 by Dr. Bisgard. She recommended against any further invasive treatment for her neck or hand...concern about psychological overlay...for these reasons, I do not recommend any invasive procedures, especially ones which rely on subjective response or any pain medications, especially narcotics.” In the context of Dr. Larsen’s request for right wrist

surgery, Dr. Sollender opined that, “For the reasons recommended by Dr. Bisgard...I would recommend denial of the surgery as requested.”

34. At hearing, when questioned regarding her understanding of the FMLA procedures and her prior claims for FMLA benefits in 2008, 2010, 2012, and in 2014 the claimant initially claimed that she could not remember filing for FMLA prior to 2014. Later in her testimony she agreed that she had filed previously for FMLA. On July 14, 2010, the respondent-employer sent the claimant a letter similar to that of May 21, 2014 in which the respondent-employer warned the claimant that her employment would be terminated without a release to return to work from her doctor. The claimant agreed that she complied with the FMLA provisions outlined by her employer and she returned to work in her regular position in 2010. Similarly, the claimant agreed at hearing that had she been released to return to work from her non-work related left shoulder condition prior to August 8, 2014, she would have been able to return to work for the respondent-employer without being terminated. The claimant agreed that but for her inability to return to work because of her left shoulder condition, she would have been employed with the respondent-employer and would not have sustained lost wages. Finally, the claimant agreed that she did not obtain a release to return to work from Dr. Likes until November 19, 2014.

35. Tisha DeNiro, RN was present at the hearing and offered credible hearing testimony. She is a registered nurse with Parkview Medical Center and is employed in the Employee Health Services office. In that capacity, Ms. DeNiro handles workers' compensation and FMLA claims. With regard to FMLA procedures, Ms. DeNiro credibly testified that employees on FMLA must stay in contact with the employer particularly when FMLA is expiring. When an employee receives a release from their doctor prior to FMLA expiring or before the 12 week post-FMLA inactive period expires, the employee is permitted to return to work. That precise scenario had occurred with claimant in several instances since 2008. Ms. DeNiro credibly testified that had claimant in this case provided employer with a release to return to work from her doctor with respect to the non-work related left shoulder condition, employer would have permitted claimant to return to work. On cross-examination, Ms. DeNiro stated that employer would have accommodated claimant's work-related restrictions had claimant been timely released from the left shoulder condition. However, employer does not accommodate restrictions for non-work related conditions. The claimant was not initially placed on modified duty, but was instead on administrative leave through February 19, 2014, because the claimant's drug screen had been positive. The claimant was supposed to have met with EAP in order to return to work, but the claimant failed to do so before going out on FMLA on February 20, 2014, for the non-work related left shoulder condition. On cross-

examination, Ms. DeNiro agreed that the claimant had not been terminated due to her intoxication as the claimant failed to follow-up with EAP and it is not the respondent-employer's general policy to terminate employees for their first positive drug screen. Rather, the respondent-employer's general policy is to refer the employee to EAP for treatment of their problem.

36. Dr. Dallenbach was present at the hearing, listened to all testimony and provided his own testimony. He testified that he is licensed to practice medicine in the state of Colorado, that his specialty is Occupational Medicine, and that he is Level II accredited with the Division of Workers' Compensation. Dr. Dallenbach was qualified as an expert in Occupational Medicine. Dr. Dallenbach testified that the claimant's symptoms in the low back and left elbow had resolved. The claimant's primary complaints as of the date of the hearing were in the right wrist and neck. In general, Dr. Dallenbach refers patients to specialists, defers to their expertise, and incorporates the specialist's recommendations in his own treatment plan. That is true with respect to Dr. Evans and his psychological assessment and recommendations. Dr. Dallenbach also agreed with the current recommendations of Drs. Larsen and Bainbridge with respect to treatment for the claimant's symptoms in the right wrist and neck, respectively. Dr. Dallenbach stated with respect to the claimant's right wrist and Dr. Larsen's recommendation of exploratory surgery that there was nothing left to be done, this was the last step for claimant, and that there was no guarantee that surgery would provide pain relief. He further believed that Dr. Bainbridge's request for facet blocks was reasonable.

37. On direct examination, when asked why he initially opined that the cervical spine was not work-related, Dr. Dallenbach stated, "I dropped the ball initially." He didn't look at the neck. That is why, after the fact, Dr. Dallenbach referred the claimant to Dr. Bainbridge in order to address causation.

38. On cross-examination, Dr. Dallenbach agreed that it is extremely important to take careful notes when interviewing and examining a patient, and that his narrative reports are generally quite comprehensive. Having admitted that, Dr. Dallenbach agreed that his initial reports of his examination of the claimant and her corresponding complaints were completely void of cervical spine complaints or objective pathology.

39. Dr. Dallenbach's report of February 4, 2014 documented that the claimant "has no new complaints specifically no complaints of neck pain." He further documented that he performed a physical examination, documenting no problems in the cervical spine, and recommended no diagnostic tests with respect to the cervical spine.

40. Elizabeth W. Bisgard, M.D. was present at hearing, listened to all testimony, and provided her own testimony. Dr. Bisgard is licensed to practice medicine in the state of Colorado, she has been a Level II accredited physician with the Division of Workers' Compensation since 1995, and she is Board Certified in Occupational Medicine. She explained that the Board Certification requires a Masters Degree in Public Health which she acquired, and additional training with respect to causality. She has undergone additional training with Katherine Mueller, M.D. at the Division and Dr. Bisgard teaches the Division course on Causality to other physicians. Finally, Dr. Bisgard was invited and she joined the faculty of the University of Colorado School of Medicine as an Assistant Clinical Professor in PM&R two years ago. Dr. Bisgard was qualified as an expert in Occupational Medicine.

41. Dr. Bisgard credibly and persuasively testified at hearing consistently with her comprehensive IME report of September 8, 2014. Dr. Bisgard opined that the claimant's fall on February 3, 2014, did not result in an aggravation, exacerbation or worsening of the claimant's significant pre-existing cervical disc disease. Furthermore, the claimant's reported subjective cervical spine symptoms do not correlate with the objective evidence, a clear pain generator has not been identified, there is nothing documented in the initial medical records regarding cervical spine pain or any pathology, and as a result, the alleged cervical spine condition is not work-related, and no further injections are indicated. With regard to the claimant's right wrist symptoms and Dr. Larsen's recommendation for arthroscopic debridement of the right wrist with limited denervation, Dr. Bisgard testified similarly that she did not find the recommendation reasonable. Dr. Larsen had provided appropriate and reasonable treatment for claimant's right wrist pathology to that point. However, at this point, it appears that Dr. Larsen is chasing the claimant's symptoms hoping to find a cure. Dr. Bisgard cautioned against any further invasive procedures as the claimant's symptoms appear to be migrating, and Dr. Bisgard agreed with Dr. Evans in that psychological factors were playing a large role in the claimant's response to treatment and recovery.

42. Dr. Bisgard testified consistently with her IME report that she agreed with Dr. Evans that psychological factors are playing a large role in this claim. Dr. Bisgard noted claimant's pre-existing problems with pain out of proportion to what would be expected when the claimant had right foot surgery. She also noted multiple occasions when the claimant was treated in emergency rooms for chest pain deemed non-cardiac.

43. Dr. Bisgard testified that none of the diagnostic examinations (i.e. X-rays, EMG/NCV, MRIs) demonstrated any acute pathology and the results of those tests could not explain the claimant's subjective complaints. The claimant's symptoms were non-physiologic and appear to be psychologically based. As a result, with respect to the

cervical spine and right wrist, no pain generator had been identified which would support the invasive procedures recommended by Dr. Bainbridge and Larsen. For these reasons, Dr. Bisgard strongly recommended against proceeding with the invasive procedures. Instead, Dr. Bisgard recommended that claimant be placed at MMI and that the treating physicians do nothing at this time. She concluded that the “worst treatment is to go in and have a complication” with the recommended procedures.

44. The ALJ finds Dr. Bisgard’s opinions to be credible and more persuasive than medical evidence to the contrary.

45. The ALJ finds that the claimant has failed to establish that it is more likely than not that her neck symptoms are causally related to her industrial injury of February 3, 2104.

46. The ALJ finds that the claimant has failed to establish that it is more likely than not that the treatment recommended for the claimant’s wrist condition is reasonable or necessary to cure or relieve the claimant from the effects of her industrial injury.

47. The ALJ finds that the claimant has failed to establish that it is more likely than not that she is entitled to temporary total disability benefits from November 20, 2014 and ongoing.

CONCLUSIONS OF LAW

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

2. In deciding whether claimant has met her burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness’ testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness’ testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *See* C.R.S. §8-41-301(1)(c); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). In other words, Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *See Wal-Mart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

4. In meeting her burden of proof that her claim is compensable, Claimant must prove that the injury arose out of and in the course of employment. *See* C.R.S. §8-41-301(1)(b); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003); *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). In this case, claimant’s alleged cervical spine injury did not arise out of and in the course of her employment with employer.

5. The respondents rely on the hearing testimony and report of Dr. Bisgard with respect to causation of the claimant’s cervical spine conditions. The respondents further rely upon the opinions of Drs. Fillmore, Evans, Sollender, and Hattem, and the lack of cervical spine complaints or pathology in Dr. Dallenbach’s initial records, as evidence that claimant did not sustain a work-related injury to her cervical spine on February 3, 2014.

6. The ALJ concludes that Dr. Bisgard’s opinions are credible and more persuasive than medical opinions to the contrary.

7. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained a work related injury to her neck area on or about February 3, 2014. Thus, no medical treatment for this condition is the responsibility of the respondent-insurer.

8. C.R.S. §8-42-101(1)(a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. An award of future medical benefits is proper when there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of the industrial injury or prevent a deterioration of a claimant's condition. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if ongoing benefits have been provided, the insurer retains the right to contest the reasonableness, necessity, or relatedness of a particular treatment. *Rizo v. Monfort, Inc.*, W.C. No. 4-310-241 (ICAO June 16, 1999). While an ALJ may find that a particular condition is related to the industrial injury, the ALJ may also find that a specific treatment is not necessary, nor reasonable. *Terry v. First American Insurance Co.*, W.C. No. 4-314-361 (ICAO June 16, 1999).

9. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R*, W.C. No. 3-062-779 (ICAO May 4, 2007). Claimant is not entitled to medical care that is not causally related to her work-related injury or condition. Respondents do not "implicitly" admit for a disputed condition by paying for medical benefits. *Hays v. Hyper Shoppes*, W.C. No. 4-221-570 (ICAO April 13, 1999). The respondents remain free to contest the compensability of any particular treatment. *Id.* As noted in *Ashburn, supra*, "it has generally been held that payment of medical services is not in itself an admission of liability. This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of being held thereby to have made an irrevocable admission of liability."

10. As found above, and relying upon the opinions of Dr. Bisgard, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the recommended surgery for her wrist is reasonable or necessary to cure or relieve her from the effects of her industrial injury.

11. According to *Romayor v. Nash Finch Co.*, W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001). To establish a causal connection, claimant must prove that the industrial injury caused a "disability" lasting more than three work shifts, and that he left work as a result of the disability. *Id.*

12. Tisha DeNiro credibly and persuasively testified that had the claimant provided a release to return to work from claimant's doctor, claimant's employment with employer would have continued. Ms. DeNiro testified that respondent-employer would have accommodated claimant's work-related restrictions. However, claimant failed to provide the necessary release and claimant's employment was thus terminated.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 20, 2014 and ongoing.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits for her neck related symptoms is denied and dismissed.
2. The claimant's request for wrist surgery is denied and dismissed.
3. The claimant's request for temporary total disability benefits is denied and dismissed.
4. All matters not determined herein, and not closed by operation of law, 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>.

DATE: April 8, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues presented for determination are as follows:

- Whether the Claimant sustained a compensable injury to his right shoulder,
- Whether the Claimant is entitled to medical benefits to treat his right shoulder including surgery already performed by Dr. Phillip Stull; and
- The appropriate calculation of Claimant's average weekly wage ("AWW").

STIPULATIONS

If the matter is deemed compensable, the parties agree to the following:

1. Claimant would receive temporary total disability ("TTD") benefits from December 15, 2014 through January 4, 2015.
2. Claimant would receive temporary partial disability ("TPD") benefits from January 5, 2015 through ongoing.
3. The surgery performed by Dr. Phillip Stull on December 15, 2014 is reasonable and necessary.
4. Claimant earned an average weekly wage with the Employer of \$305.17. If the ALJ determines that Claimant's wages from his concurrent employment should be included in the AWW, this amount would equal \$951.97. The total AWW would equal \$1,257.14.

FINDINGS OF FACT

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

1. Claimant is a 63 year old man who works part time for the Employer as a material handler. As a material handler, Claimant's job duties include driving tugs, loading and unloading airplanes, sorting packages, loading containers, and taking containers from the dock out to the airplanes to be loaded.
2. On July 23, 2013, while working for the Employer, Claimant grabbed two dollies, pulled them around, and began walking backwards while pulling the dollies. The dolly is a flat bed, with two wheels in the front and two in the back. The dolly is pulled with a tongue similar to a wagon. The dollies are moved by grasping the end of the

tongue and pulling the dolly. While walking with the dollies, Claimant slipped and fell onto his right side.

3. Claimant continued to hold onto the tongue with his right arm when he fell so his right arm was pulled over his head. He did not break his fall because it happened so fast. Claimant could not specifically recall whether his right arm was close to his side or out from his side because he recalls that he was still holding onto the dolly with his right hand when he initially fell.

4. Claimant reported his fall to his supervisor, David King. After going to the restroom and cleaning up the abrasions on his leg, Claimant continued working and did not seek medical treatment.

5. Over the next few months, Claimant continued to perform his regular work activities for the Employer.

6. On January 17, 2014, Claimant presented to his personal physician, Dr. Alan Ruff, to refill medications. During the examination, Claimant complained of pain over his right shoulder for the past three to four months. Claimant described the pain as getting worse, with less mobility in the right shoulder and he was unsure if it was a rotator cuff problem. Physical examination revealed full range of motion in the right shoulder with some discomfort in the deltoid area.

7. After the appointment with Dr. Ruff, Claimant returned to the Employer and indicated a need to see a physician. Employer referred the Claimant to OccMed of Colorado.

8. Claimant underwent an initial evaluation with Dr. Gary Smith at OccMed on February 3, 2014. Claimant reported that he fell on July 26 and hit the pavement. He reported that his right shoulder hurt approximately in the range of 2-3 out of 10 on most days. He described difficulty raising his right arm above chest height. Claimant denied any previous injuries or treatment to his right shoulder. Dr. Smith recommended Claimant undergo an MRI. Claimant remained at full duty status.

9. On the M164 form, Dr. Smith noted that Claimant's work related diagnosis was a rotator cuff tear and he checked the "yes" box indicating that the objective findings are consistent with the history and/or work related mechanism of injury.

10. On February 5, 2014, Respondent prepared an Employer's First Report of Injury.

11. On February 10, 2014, Claimant underwent the recommended MRI which showed a large tear in the supraspinatus component of the rotator cuff with the defect measuring between 2.5 and 3 cm in diameter. Additionally, the MRI showed chronic, moderate changes at acromioclavicular joint. The radiologist's impression was:

“massive tear of the rotator cuff and chronic, age appropriate arthrosis at the acromioclavicular joint.”

12. On February 10, 2014, Claimant returned to Dr. Smith. After reviewing the MRI, Dr. Smith recommended Claimant undergo an orthopedic evaluation with Dr. Phil Stull. Claimant told Dr. Smith he would like to continue working up until the point in time he needs surgery. Claimant reported difficulty using his right arm with certain activities, but that he was still able to complete his job. Dr. Smith noted that Claimant still had strength of 4 out of 5 in his right arm which was surprising to Dr. Smith.

13. On February 27, 2014, Claimant presented to Dr. Stull. Dr. Stull recommended Claimant undergo right shoulder reconstructive surgery. Dr. Stull requested that Respondent authorize the surgery.

14. Respondent filed a Notice of Contest, contending that Claimant's right shoulder symptoms and conditions were not caused by any work incident. Thereafter, Claimant underwent the surgery through his personal insurance on December 15, 2014.

15. Dr. Mark Paz, a level II accredited physician, examined the Claimant, reviewed the medical records, and prepared an Independent Medical Evaluation (“IME”) report. Dr. Paz's report reflects that on the date Claimant fell, he was walking backwards, pulling the dolly, when he slipped and fell to the ground, landing onto his right side as he was turned slightly to the right while walking backwards. Claimant reported to Dr. Paz that immediately following the fall he experienced pain in his right shoulder, among other symptoms. Claimant's other symptoms resolved over time. Claimant also reported to Dr. Paz that later in 2013 he started working more hours which increased his shoulder pain.

16. Dr. Paz examined the Claimant and found that Claimant had reduced range of motion in his right shoulder compared with his left shoulder.

17. Dr. Paz concluded that based upon the direct history provided by the Claimant during the evaluation, findings on physical examination, and review of the prior medical records, to a reasonable degree of medical probability it was not probable that Claimant's right shoulder impingement syndrome, right shoulder rotator cuff tear, or right shoulder acromioclavicular arthritis were related to his fall on July 23, 2013. Dr. Paz explained that the mechanism of injury associated with an acute rotator cuff tear in the shoulder is lifting, pushing or pulling with the upper extremity in an outstretched fashion, above chest level, applying excessive force across the rotator cuff unit. The mechanism of injury specifically described by Mr. Foster was inconsistent with an acute traumatic rotator cuff tear. Dr. Paz explained that the presence of asymptomatic right shoulder rotator cuff tears in the population over the age of 45 is well documented in the literature. Even assuming Claimant had a pre-existing asymptomatic rotator cuff tear, Dr. Paz opined that it remained not medically probable that the July 23, 2013 event aggravated or accelerated the preexisting right shoulder rotator cuff tear. Rather, Dr.

Paz opined Claimant's right shoulder condition is consistent with chronic degenerative changes of the right shoulder joint.

18. David King testified during the hearing. King has been employed with the Employer for over 31 years. His current position is manager of ramp operations. He supervises approximately 35 employees. King testified that the physical requirements of Claimant's job include lifting 75 lbs. and up to 150 lbs. with assistance. King testified this sort of lifting activity is something his employees do every day. King testified that Claimant's job activities include lifting overhead up to 25% of the time or 15-20 minutes out of a two-hour shift. King confirmed that when an employee loads a dolly, the heavier items are loaded on bottom and the lighter items are placed on top. Thus, items lifted at shoulder height or above would be lighter items.

19. King confirmed Claimant reported falling at work on July 2013. Claimant was wearing shorts and King observed abrasions on the Claimant's legs. King testified that Claimant advised him that he had fallen, hitting his shoulder on his right side. However, Claimant was much more concerned with his knee than his right shoulder. King asked Claimant whether he required medical treatment, and Claimant declined.

20. Because the Claimant reported an incident at work, King filled out an incident report. King testified that the Employer requires these forms to be completed so that if a Claimant later does seek medical treatment, the form may be forwarded to the workers' compensation carrier.

21. Claimant testified that in the weeks subsequent to the July 23, 2013 incident, he did not seek medical treatment. Rather, Claimant continued to work his regular activities. King observed Claimant on a daily basis through the fall and into 2014, and he did not observe any pain behaviors on the part of the Claimant. Additionally, Claimant did not request assistance or otherwise indicate he was unable to perform his work activities as a result of a shoulder injury.

22. According to King, Claimant did not mention the July 23, 2013 incident again until January 2014 when he reported that his shoulder was hurting and he believed it was related to the incident in July 2013.

23. Claimant did not miss any work as a result of the fall on July 23, 2013 until his shoulder surgery in December 2014. Claimant knew he had a rotator cuff tear as of February 2014 and his symptoms were bothering him to the point that he wished to pursue surgery as of February 27, 2014, yet he continued to work.

24. Claimant was not permitted to return to work for this Employer or his other employer following the shoulder surgery until January 5, 2015 when he was released to return to work for SFI Compliance. As of the date of the hearing, he had not been released to return to work for the Employer.

25. Dr. Paz testified at the hearing as an expert in occupational medicine. Dr. Paz observed the testimony of Claimant and King. Dr. Paz testified that as a level II accredited physician, he is trained to address causation in workers' compensation matters. Dr. Paz testified that to address causation, a medical diagnosis must first be established based upon history and physical examination findings. Then, the physician would address the circumstances regarding the injury, for example, whether it is an exposure or an acute injury, to determine the mechanism of injury. Finally, taking all that information together, the physician renders an opinion as to whether it is greater than 50% likely that the diagnosis is related to the mechanism of injury reported.

26. Dr. Paz testified he applied the level II causation training to the present case and reached the conclusion to a reasonable degree of medical probability that Claimant's right shoulder symptoms and conditions did not relate to Claimant's work activities, specifically the July 2013 incident.

27. Dr. Paz testified that when he examined the Claimant in June 2014, the Claimant was unable to fully extend his right arm in front of himself. Dr. Paz opined that it would be unlikely that the Claimant would "casually involve himself with lifting anything upwards of 35 pounds to an area at or above chest height."

28. Dr. Paz testified that with regard to a rotator cuff tear, the mechanism of injury is very important. He opined that an acute injury results from a load or tension across the rotator cuff, or at least the segment which is injured. In this particular case, Dr. Paz opined that there was no load across the supraspinatus tendon at the time of the fall. Dr. Paz testified that the supraspinatus muscle is fully engaged between 60 and 120 degrees, so at about chest level and up to above the horizon with the right upper extremity. Beyond that other muscles take over the lifting load and overhead activity. Accordingly, for an injury such as Claimant's to occur as a result of a fall, the right upper extremity would have to have been out away from the body between 60 and 120 degrees.

29. Dr. Paz went on to explain the circumstances relayed by the Claimant would not have created a rotator cuff tear because falling onto the right shoulder with the arm against the body would not result in a supraspinatus rotator cuff tear. Additionally, Dr. Paz testified he was present when King and Claimant described Claimant's job duties performed for the Employer. Dr. Paz opined that an individual with an acute rotator cuff tear could not have performed those work activities in the 6 months subsequent to an acute injury. Dr. Paz did not render an opinion concerning whether a person with a chronic rotator cuff tear that has become symptomatic could perform full duty work for approximately 17 months.

30. Dr. Paz admitted that he could not determine from the MRI scan whether Claimant's rotator cuff tear was acute or chronic.

31. Dr. Paz testified that more likely than not Claimant suffered from an asymptomatic preexisting degenerative tear in his rotator cuff. Dr. Paz opined that

numerous morbid symptoms can increase a person's likelihood of developing such a degenerative condition, such as vascular problems, and that Claimant does suffer from a number of these conditions.

32. Dr. Paz opined that assuming the rotator cuff tear preexisted the July 23, 2013 fall, it is not likely Claimant's fall aggravated the condition and rendered it symptomatic. He explained that to aggravate a preexisting condition the same mechanism of injury is necessary as with an acute tear. In other words, Claimant falling on his right shoulder with his arm against his body would not aggravate a rotator cuff tear. In contrast, Claimant falling with his arm outstretched could potentially aggravate the preexisting condition. Dr. Paz concluded it is more likely than not that Claimant's asymptomatic rotator cuff tear became symptomatic over a period of 6 months time. Claimant simply sought care when the symptoms became progressively worse. Dr. Paz opined that the mechanism of injury as described by the Claimant is not consistent with either an acute injury causing the rotator cuff tear or an aggravation of the preexisting condition.

33. Dr. Paz agreed that the surgery Claimant underwent on December 15, 2015 was reasonable and necessary.

34. Claimant had some previous problems with his upper extremities in 2002. Claimant recalled that he underwent treatment for ganglion cysts in his biceps, but did not have specific treatment for shoulder pain. Claimant did not recall any type of medical treatment to his right shoulder other than the cyst removal nor did he recall being told that he had subacromial bursitis in his right shoulder. There are no medical records documenting treatment to Claimant's right shoulder over the ensuing 11.5 years until January 2014. Given the remoteness of Claimant's prior right shoulder issues, the ALJ does not find it significant that Claimant failed to remember any prior shoulder problems.

35. Following the July 23, 2013 incident, Claimant testified he continued to work not only his job with the Employer but with two other employers. He did not experience any issues with his right shoulder while performing his other jobs.

36. Dr. Paz's opinions are unpersuasive. First, Dr. Paz assumes that Claimant fell onto his right side with his right arm against his body; however, Dr. Paz's report does not state that Claimant reported that he fell with his right arm against his body. Even Claimant could not specifically recall if his right arm was up against his body because he also remembered that he continued to hold onto the dolly tongue with his right arm as he fell. If Claimant fell onto his side while still holding the dolly, his arm could certainly have been extended to 60 degrees. Further, Dr. Paz also discounts the notion that Claimant suffered an aggravation or exacerbation of a pre-existing rotator cuff tear stating that the mechanism of injury would need to be similar to that which would produce an acute tear. Again, it is not clear that Claimant fell with his right arm against his body. He described recalling that he held onto the dolly tongue when he initially fell onto his right side. As Claimant described, the fall happened fast and he

cannot recall his body's exact positioning, which is not unreasonable for a person who is in the midst of falling.

37. Claimant has proven that on July 23, 2013, in the course and scope of his employment with the Employer, he sustained an injury to his right shoulder. The Claimant credibly testified on July 23, 2014 he was performing his job pulling dollies when he slipped on wet cement and went down landing on his knee, hip and shoulder while holding on to a dolly. Since that date, Claimant has had right shoulder pain that he hoped would resolve with time. The fact that Claimant continued to work after the industrial accident is of little consequence. The medical records reflect that Claimant asked to continue working up through the date of his surgery which was approximately 10 months even after he learned he had a rotator cuff tear. It is apparent that Claimant wished to and had the ability to work through any symptoms he was experiencing.

38. The medical treatment provided by OccMed Colorado through Dr. Smith, his referral for an MRI on February 10, 2014 at Denver Integrated Imaging, and the visits with Dr. Stull following the first visit on February 27, 2014 were reasonable, necessary and related to the injury of July 23, 2013.

39. Claimant has proven that the medical treatment in the form of a right shoulder rotator cuff repair is related to his July 23, 2013 industrial injury. The record reflects that Claimant did not have any limitations, symptoms or complaints related this is right shoulder prior to his July 23, 2013 industrial injury. There are no medical records reflecting any treatment of Claimant's right shoulder prior to the industrial incident and after 2002.

40. Claimant is entitled to temporary total disability benefits from December 15, 2014 through and including January 4, 2015 pursuant to the stipulation of the parties. Although Claimant has returned to work at SFI Compliance, he has not been permitted to work for the Employer as of the date of the hearing.

41. Pursuant to the parties' stipulation, Claimant is entitled to temporary partial disability benefits from January 5, 2015 and ongoing.

CONCLUSIONS OF LAW

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

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

Compensability

4. 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 occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. The Claimant has proven by a preponderance of the evidence that he sustained an injury to his right shoulder while in the course and scope of his employment with the Employer on July 23, 2013. While it is difficult to ascertain whether Claimant suffered an acute right rotator cuff tear or whether he aggravated a pre-existing asymptomatic condition, the ALJ nevertheless finds and concludes that the industrial accident produced the need for medical treatment to Claimant's right shoulder. The Claimant consistently reported that he experienced right shoulder pain immediately following the fall, and that he hoped it would resolve with time. After the symptoms increased over time, he pursued medical treatment. As found above, the opinions of Dr. Paz to the contrary are not persuasive.

Medical Benefits

6. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant has proven that he is entitled to medical treatment to cure and relieve him of the effects of his right shoulder injury. Drs. Smith and Stull have

provided Claimant with reasonable and necessary medical treatment, and as found, such treatment, including the shoulder surgery, is related to the industrial injury.

Average Weekly Wage

7. Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

8. The Claimant urges the ALJ to include the wages he earns working for SFI Compliance as part of his overall AWW for this claim. Claimant missed work at SFI while undergoing and recovering from the shoulder surgery related to this workers' compensation claim. As such, Claimant's overall wage loss was directly impacted by his industrial injury. Claimant's average weekly wage for the purposes of indemnity benefits shall include his earnings from SFI of \$951.97 making Claimant's total AWW \$1,257.14. Because permanency is not at issue, any determination of AWW as it relates to permanency is reserved for future determination.

Temporary Disability Benefits and Temporary Partial Disability Benefits

9. As stipulated by the parties, the Claimant is entitled to TTD from December 15, 2014 through January 4, 2015, and TPD from January 5, 2015 and ongoing until terminated pursuant to law.

ORDER

1. Claimant sustained an injury to his right shoulder in the course and scope of his employment for Employer on July 23, 2013.
2. All medical care rendered by Dr. Smith at OccMed of Colorado, Dr. Stull at Colorado Orthopedic Consultants and their referrals are reasonable, necessary and related, including the surgery performed to Claimant's right shoulder by Dr. Stull on December 15, 2014. Respondent shall pay for such treatment consistent with the fee schedule.
3. Claimant's average weekly wage is \$305.17 with the Employer, and with SFI Compliance \$951.97. These two wages combine for a combined average weekly wage of \$1,257.14, for the purposes of indemnity benefits only.

4. Respondent shall pay temporary total disability benefits for the period of time between December 15, 2014 and January 4, 2015, a period of 21 days, at the average weekly wage rate of \$1,257.14.
5. Claimant is entitled to temporary partial disability benefits from January 5, 2015 and ongoing for his wage loss from Employer until terminated pursuant to law.
6. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.
7. All matters not determined herein are reserved for future determination.

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: April 9, 2015

DIGITAL SIGNATURE:



LAURA A. BRONIAK
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that his lumbar spine problems are related to his claim, and that lumbar-directed chiropractic care is reasonable, necessary, and related to his claim?
- Did Claimant prove by a preponderance of the evidence that his right knee arthritis and chondromalacia are related to his claim, and that repeat Orthovisc injections are reasonable, necessary, and related to his claim?
- Did Claimant prove by a preponderance of the evidence that repeat arthroscopic right knee surgery is reasonable, necessary, and related to his claim?

FINDINGS OF FACT

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

1. Claimant worked for Employer as a facility maintenance technician starting on October 27, 2011. Claimant's job duties involved facilities maintenance, and removing snow and ice as needed.

2. Claimant's history is significant for low back problems that date back years, and moderately to severely impacted his daily activities. Claimant complained of low back problems to his personal care physicians ("PCP") between September 2008 and January 10, 2014. On January 10, 2014, less than a month before his work accident, Claimant saw his PCP for cervical, thoracic, and lumbar back pain associated with muscle spasm. Claimant described the pain as fluctuating, intermittent, deep, and diffuse. Claimant received lumbar directed osteopathic manipulation that day.

3. Claimant's history is also significant for right knee problems that pre-date his work accident. On January 31, 2014, less than ten days before his work accident, Claimant saw his PCP for right knee pain and crepitus, aggravated by climbing and descending stairs. Claimant requested a right knee adjustment on that date.

4. On Friday, February 7, 2014, while at work, Claimant was de-icing a cooling tower catwalk for Employer when he slipped on ice, twisting his right knee.

5. On Saturday, February 8, 2014, Claimant went to the emergency department at St. Anthony North Hospital, where he reported right knee pain after a twisting fall injury at work. At that time Claimant denied any other injury. On examination of Claimant's right knee, no significant swelling, effusion, or obvious deformity were noted. An x-ray revealed a small effusion but not fracture. An MRI was recommended

6. On Monday, February 10, 2014, Claimant reported a right knee injury to Employer by email, making no mention of a back injury. That day, Employer prepared

an Employers' First Report of Injury which reflected Claimant twisted his knee on an icy catwalk, but did not mention a back injury.

7. Claimant chose Arbor Occupational Medicine ("Arbor") as his designated provider, and on February 11, 2014, Claimant was seen at Arbor by Richard Shouse, PA-C, who obtained a history that Claimant slipped and twisted his knee while walking on a slick catwalk. Claimant reported no previous knee injuries. Claimant was assessed with a right knee strain and a suspected meniscus tear. A right knee MRI was ordered.

8. On February 13, 2014, Claimant's right knee MRI was interpreted as showing a horizontal tear in the posterior horn of the medial meniscus, and moderate chronic chondromalacia of grades 3-4. Claimant followed up with Mr. Shouse on February 17, 2014 and was assessed with knee strain with meniscus tear. Mr. Shouse referred Claimant to Dr. Joseph Hsin for a surgical evaluation.

9. On February 18, 2014, Dr. Hsin reviewed Claimant's MRI, noting it showed a complex posterior horn medial meniscus tear, consistent with the work injury. Dr. Hsin recommended an arthroscopic meniscectomy.

10. On February 19, 2014, Claimant started in therapy at Alpha Rehab, where he denied a pre-morbid history of right knee problems.

11. On February 27, 2014, Dr. Hsin, performed a right knee arthroscopy, partial medial meniscectomy, and right knee chondroplasty. Dr. Hsin reported intraoperative findings of Grade 3 to almost Grade 4 chondral lesions.

12. On March 3, 2014, Claimant started post-operative therapy. As of April 11, 2014, Claimant had eleven therapy sessions without documentation of low back issues.

13. On March 10, 2014, Insurer filed a general admission.

14. On March 12, 2014, Dr. Thurston of Arbor noted that he and Claimant's physical therapist were puzzled by Claimant's degree of pain. Dr. Thurston opined that "much of the sharp pains and popping have to do with the chondroplasty of the medial femoral condyle."

15. On March 21, 2014, Dr. Hsin noted Claimant's recovery from routine surgery had been slower than normal with inexplicable sharp stabbing pains. Dr. Hsin injected Claimant's knee with Lidocaine, Marcaine, and Celestone. Claimant reported only transient benefit for the next two or three days.

16. On March 26, 2014, Dr. Thurston again noted that he could not explain Claimant's slow progress. He further noted that Claimant and his wife were unhappy with Dr. Hsin, and wanted a second opinion. Although Dr. Thurston was pleased with Dr. Hsin's care, he referred Claimant for a second opinion with another orthopedic surgeon.

17. On April 8, 2014, Claimant was evaluated by Douglas Foulk, M.D., an orthopedic surgeon, who diagnosed the issue as right knee osteoarthritis, and who recommended a repeat right knee MRI to evaluate the degree of osteoarthritis progression. X-rays taken on April 14, 2014 revealed mild medial narrowing with osteophytes formation along the femur and tibia and patellofemoral joint. Dr. Faulk also

recommended three Orthovisc injections, as Claimant had failed all other treatments. He also opined a medial unloader brace would likely help.

18. On April 10, 2014, a post-operative right knee MRI was interpreted as showing Grade 4 chondral thinning and subcortical cystic change. The radiologist noted that the chondral degeneration was similar to the prior MRI.

19. On April 14, 2014, Claimant presented to Dr. Ray at Chiropractic Plus, where he was seen under his personal insurance on his wife's referral. Claimant filled out paperwork in which he admitted to a long history of low back problems that severely limited his activities of daily living. Claimant filled out a pain diagram, noting he had back problems for "years." Dr. Ray reported that Claimant had "[c]onstant burning and aching lower back pains, pelvic pains" and "The patient stated that he has had this problem for years and with an acute attack today." Claimant received 17 chiropractic treatments from Dr. Ray between April 14, 2014 and May 27, 2014.

20. At no time did Claimant tell any of his workers' compensation physicians that he had prior low back problems, that he had an acute attack on April 14, 2014, or that he was receiving chiropractic care under private insurance.

21. On April 16, 2014, just two days after his acute attack of low back pain, Claimant told his workers' compensation physical therapist that he had a low back problem which Claimant related to crutch use.

22. On April 22, 2014, Dr. Foulk reviewed the April 10, 2014 right knee MRI, and formalized a treatment plan of medications, an occasional cortisone injection and/or an Orthovisc injection series "as a mean[s] to treat arthritic symptoms."

23. On April 28, 2014, Dr. Thurston referred Claimant to Dr. Ronald Carbaugh, a psychologist, secondary to concerns of depression and delayed recovery. Dr. Carbaugh provided psychological care from May 22, 2014 through January 7, 2015. Dr. Carbaugh noted Claimant had high pain behaviors, a profound dependence on his wife, with development of the helpless role. He also noted "It is very likely that psychological symptoms will interfere with physical pain treatment." He noted significant concerns regarding [Claimant's] cognitive functioning. Dr. Carbaugh's July 29, 2014 notes record Claimant reporting his back pain as 9/10. Dr. Carbaugh's diagnosis includes somatic symptom disorder and adjustment disorder with depressed mood.

24. On April 29, 2014, Dr. Stephen Horan, an orthopedic surgeon, performed a record review. Dr. Horan opined that the wearing down of cartilage in Claimant's knee to cause Grade 3-4 chondromalacia was "certainly" pre-existing. Dr. Horan also opined the Orthovisc injections and unloader brace would be beneficial in the post-operative period to help the chondromalacia and arthritis, but not the work injury related medial meniscus tear. Dr. Horan opined that "should the patient have persistent pain and discomfort in the future, I feel that it would be solely due to the pre-existing knee issues".

25. On May 2, 2014, Claimant was fitted for the unloader brace. Claimant then underwent a series of Orthovisc injections through Dr. Foulk's office, administered on May 8, 2014, May 15, 2014, and May 22, 2014.

26. The Orthovisc injections failed to provide a functional gain lasting at least three months, as documented in the following reports: (1) on May 22 2014, Claimant told Dr. Carbaugh that recent Orthovisc injections were of no benefit; (2) on May 28, 2014, Dr. Thurston noted Claimant had his third Orthovisc injection on May 22, 2014, and had not noticed any significant benefit; (3) on June 24, 2014, Dr. Carbaugh noted that Claimant reported the Orthovisc injections were completed, without noticeable change in his knee pain; (4) on July 8, 2014, Dr. Foulk noted that Claimant was reporting he did not believe the Orthovisc injections had improved his symptoms; (5) on July 23, 2014, Dr. Patel noted that Claimant reported cortisone and Orthovisc injections offered "slight" improvement; (6) on July 29, 2014, Dr. Carbaugh reported Claimant "underwent a previous series of Orthovisc injections some four to five weeks ago with no noticeable change in his knee pain or function."; (7) on August 13, 2014, Dr. Carbaugh reported that cortisone and Orthovisc injections had yet to provide any significant benefit; (8) on October 8, 2014, Dr. Thurston reported Claimant had cortisone and Orthovisc injections without significant improvement; and (9) on November 4, 2014, Dr. Thurston noted that Claimant still had significant knee pain that did not respond to the first set of Orthovisc injections.

27. On May 28, 2014, Dr. Thurston noted that Claimant was complaining of low back pain, and his wife had been complaining of it for a while. Claimant concealed from Dr. Thurston his history of chronic, disabling low back pain. Without this history, Dr. Thurston surmised that Claimant's pain was due to myofascial imbalance and overcompensation.

28. On June 18, 2014, Claimant was sent for a lumbar MRI after complaining of low back, left buttock, and left posterior leg pain for six to eight weeks. The MRI was interpreted as showing multi-level degenerative issues, including stenosis, an osteophyte complex formation, and annular tearing at L5-S1. Dr. Thurston reviewed the MRI, opining Claimant's symptoms were due to an exacerbation of degenerative joint disease and lumbar spondylosis.

29. Again, on July 8, 2014, Claimant told Dr. Foulk that the Orthovisc injections did not improve his symptoms, and the combination of injections and the unloader brace had only helped slightly. Dr. Foulk told Claimant he should see a total joint doctor and referred Claimant to Dr. Nimesh Patel.

30. On July 23, 2014, Dr. Patel opined that Claimant had right knee osteoarthritis. Dr. Patel's plan was to administer additional cortisone injections. On July 23 or 31, 2014, Dr. Patel re-injected Claimant's right knee with cortisone.

31. Claimant treated with Dr. Leif Sorensen for pain management between June 24, 2014 and December 31, 2014. On August 12, 2014, Dr. Sorensen administered left sided L4-5 and L5-S1 transforaminal ESI injections. On September 9, 2014, Dr. Sorensen noted that the prior injection provided 10% relief, and Claimant was a candidate for repeat injections, or interlaminar ESI at L5-S1, but he first wanted Claimant evaluated for surgical options. On October 1, 2014, Dr. Andrew Castro evaluated Claimant and noted significant pain behaviors. He assessed a lumbar sprain/strain injury. Dr. Castro noted the onset of Claimant's injury as February 7, 2014,

which is inconsistent with the majority of the medical records and Claimant's reports. Dr. Castro opined that Claimant was not a lumbar surgical candidate.

32. On October 10, 2014, Dr. Sorensen recommended L5-S1 interlaminar ESIs. Thereafter, Dr. Gregory Reichardt performed a medical record review, and in a report dated October 17, 2014, Dr. Reichardt recommended the injections be denied pending an IME to address work relatedness, indicating "of concern is how a disc abnormality would occur as a result of a gait deviation." On October 20, 2014, Insurer formally denied the injection request.

33. On October 22, 2014, Claimant returned to Dr. Patel, who continued to opine that Claimant's right knee pain was secondary to osteoarthritis. Dr. Patel indicated Claimant was a candidate for repeat Orthovisc injections after November 22, 2014.

34. On November 17, 2014, Dr. Horan reviewed Dr. Patel's recommendation, he noted that the prior Orthovisc injections provided somewhere between no improvement, to slight improvement, and he opined that per the *Medical Treatment Guidelines*, to qualify for repeat injections, there must be a showing functional gain lasting three months, which in this case had not been met.

35. On December 3, 2014, Dr. Scott Primack performed an IME at Respondents' request. Dr. Primack performed a comprehensive causation evaluation with the information available, although he did not have any medical records from before the date of injury. Claimant specifically denied having prior low back or right knee issues. With regard to Claimant's right knee, Dr. Primack opined that Claimant had a work-related meniscus tear, but a total knee replacement would not be work-related. Further, he felt psychosocial perceptions precluded Claimant from doing well with any additional interventional procedures. With regard to Claimant's low back, Dr. Primack opined that Claimant's lumbar symptoms were not work-injury related; that there was no evidence of a specific, acute injury on February 7, 2014; and "it would be unusual for the patient to have compensatory back pain with radiating symptoms going down the left lower extremity well over 3 months following his injury."

36. On December 3, 2014, Claimant was seen by Dr. David Orgel of Arbor. (Clf. Ex. 4, bn 23-24) Dr. Orgel, who was not aware of Claimant's preexisting chronic low back problems, or that Claimant had already had numerous sessions of chiropractic care, recommended chiropractic care directed at the sacroiliac joint. On December 17, 2014, Paul Springer, PA-C noted Claimant had not received much relief from anything, and he was not sure chiropractic care would be of any benefit.

37. Between January 6, 2015, and January 16, 2015, Claimant received chiropractic care through Summit Chiropractic. At each session, Claimant reported his low back pain was at a level of 8/10, present 80% of the time, verifying that this care provided no benefit.

38. On January 7, 2015, Dr. Patel appealed the denial of repeat Orthovisc injections, indicating repeat injections were warranted because he was trying to exhaust all conservative measures, and Claimant told him that the first Orthovisc injections

provided relief. This history is contradicted by the medical records following the May 2014 Orthovisc injections.

39. On January 14, 2014, Dr. Horan reiterated that there must be functional gain lasting three months to support repeat injections, there was no new medical evidence showing the prior injections were helpful, and therefore repeat injections should be denied. On January 15, 2015, the appeal was denied.

40. On January 23, 2015, Dr. Patel referred Claimant to his partner, Dr. David Schneider, for a surgical opinion. On January 28, 2015, Dr. Schneider examined Claimant, and issued a limited report which recommended arthroscopic knee surgery. On January 30, 2015, Dr. Orgel noted that Dr. Schneider was recommending arthroscopic knee surgery, but based upon a New England Journal of Medicine article about meniscal surgeries on the substrate of arthritis, it was unlikely arthroscopic surgery would be beneficial.

41. On January 28, 2015, Mark Testa, D.C., performed a record review to address whether additional chiropractic care was warranted. By that date, Respondents had obtained Claimant's PCPs' records, including records from Chiropractic Plus, which Dr. Testa reviewed. Dr. Testa noted that Chiropractic Plus and Summit Chiropractic records failed to demonstrate that chiropractic care had resulted in functional gains, achievement of treatment goals, reduction of pain, or reduction of medication use. Dr. Testa concluded that "in light of how [Claimant] has responded to other treatment modalities, including the previous 21 chiropractic visits, the overlying pain behavior, helplessness, depression, it is my opinion and experience, more visits of manipulation will not lead to significant improvement."

42. Dr. Testa also noted Claimant's long history of low back pain, and that causation of Claimant's current low back symptoms had not been adequately demonstrated, so he could not state to a reasonable degree of medical probability that the low back symptoms were causally related. On January 28, 2015, Insurer denied the request for additional chiropractic care.

43. On February 4, 2015, Mark Failinger, M.D., an orthopedic surgeon, reviewed Dr. Schneider's request for a repeat right knee arthroscopy. Dr. Failinger was provided with a complete set of medical records, including Claimant's prior records. Based upon his record review, Dr. Failinger opined that a right knee arthroscopy was totally inappropriate, and did not provide even a slight chance of improvement. Dr. Failinger based his opinions on the fact Claimant had severe pain dramatically out of proportion to anything his providers could explain, Claimant's prior arthroscopy did not help, and Claimant had post surgery severe and chronic pain complaints with the inability to tolerate therapy.

44. Dr. Failinger also opined that the recommended surgery was not to address problems related to this claim. Dr. Failinger explained that the work related meniscus tear had already been surgically addressed, and the recommended surgery and any ongoing medical care was to address preexisting conditions, including osteoarthritis and chondromalacia. Dr. Failinger opined that Claimant was at MMI, and "any further treatment for arthritis would be to treat preexisting degenerative changes and not for the meniscal tear which was addressed at surgery by Dr. Joseph Hsin."

Finally, Dr. Failinger opined that no further visco-supplementation was reasonable as Claimant failed to demonstrate any benefit from the prior injections. On February 9, 2015, Insurer formally denied Dr. Schneider's request for a right knee arthroscopic procedure.

45. On February 18, 2015, Dr. Primack testified by deposition that he is a board certified physical medicine and rehabilitation physician, he is Level II accredited, and he teaches the causation section for the Division of Labor. Prior to his deposition, Dr. Primack was provided additional medical records, including records generated after his IME, and medical records from Claimant's PCPs. Dr. Primack testified that the history provided in Claimant's PCPs' records bolstered his opinion that Claimant's lumbar symptoms were not work related. Dr. Primack explained that he went through a five step causation evaluation, and the preexisting history of chronic symptomatic low back pain represented a significant factor. Dr. Primack disagreed with Dr. Thurston's opinion on lumbar causation, explaining that if Claimant's lumbar problems were related to altered gait or a compensatory phenomenon, the problems would have started immediately after the knee surgery, and would not "jump the hip" and first present at the lumbar spine. Dr. Primack further opined the findings documented on lumbar MRI were the product of the degenerative cascade of the spine, not an altered gait. Finally, Dr. Primack agreed that further chiropractic care was not reasonable and necessary, regardless of causation.

46. With regard to Claimant's right knee problems, and need for treatment, Dr. Primack opined that now that he had documentation proving Claimant had a preexisting, symptomatic right knee problem, Claimant's post surgery ongoing right knee pain and need for care are not causally related to the work injury. Dr. Primack explained the chondromalacia seen on Claimant's right knee MRIs was preexisting, and unrelated to this claim, noting that chondromalacia develops over time, and is not caused by an acute injury unless the person dislocates or fractures his or her patella.

47. Dr. Primack opined that Orthovisc injections are not causally related to the February 7, 2014 work injury. Dr. Primack administers Orthovisc injections, and indicated that the injections should be providing benefit on the short side within five days, and within two to three weeks the patient should really be feeling better lubrication and less discomfort. Dr. Primack testified that the first series of Orthovisc injections did not provide three months of functional gain, and therefore, as per the Medical Treatment Guidelines Rule 17, Ex. 6.F.5.d., repeat injections were not reasonable and necessary. Dr. Primack stated his opinions to a reasonable degree of medical probability.

48. Dr. Primack persuasively opined that regardless of causation, the arthroscopy recommended by Dr. Schneider was not reasonable and necessary. Dr. Primack explained that medical literature, including Dr. Moseley's New England Journal of Medicine article, verified that the procedure recommended by Dr. Schneider (an arthroscopy in the face of a degenerative condition) does not work for patients with Claimant's knee conditions. Dr. Primack fully agreed with Dr. Failinger's opinion that the procedure did not provide even a possibility of improvement for Claimant.

49. Dr. Primack explained that Claimant's lumbar problems are preexisting and related to a degenerative cascade of the spine. Dr. Primack's opinions are comprehensive, based upon complete information, and persuasive.

50. Dr. Testa's and Dr. Primack's opinions that additional chiropractic care is not reasonable or necessary, in light of the lack of benefit from previous chiropractic care, is credible and persuasive.

51. The ALJ finds that Claimant did not prove by a preponderance of the evidence that his lumbar spine condition was causally related to his February 7, 2014 claim, and also did not prove by a preponderance of the evidence that further lumbar-directed chiropractic care is reasonable and necessary.

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" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, 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 that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may 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).

A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Respondents are required to provide medical benefits reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. (2014); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Similarly, the question

of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa*, 53 P.3d at 1197.

When evaluating the issue of causation and reasonable and necessary medical care the ALJ may consider the provisions of the Colorado *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 *Medical Treatment Guidelines* are not dispositive, and the ALJ need not give them more weight than she determines they are entitled to in light of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (ICAO February 23, 2009).

Claimant's Lumbar Spine Condition is Not Causally Related to this Claim, and Additional Lumbar Spine Chiropractic Care is Not Reasonable and Necessary

The first issue for the ALJ's determination is whether Claimant proved by a preponderance of the evidence that his lumbar spine condition was causally related to his February 7, 2014 claim, and if so, whether Claimant also proved that additional lumbar-directed chiropractic care is reasonable and necessary. As found, Claimant failed to meet his burden. Claimant's lumbar spine condition is not causally related to this claim, and additional chiropractic care is not reasonable and necessary.

As found, Claimant has a long history of low back pain that preexisted his claim. For years, Claimant intermittently sought and received care for his low back pain, including seeking and receiving osteopathic manipulation for chronic low back pain less than a month before his work injury. Following his work injury, Claimant made no complaints of low back pain to any of his medical providers until April 14, 2014, when Claimant sought chiropractic care under private insurance after having an acute attack of low back pain earlier that day. Dr. Testa and Dr. Primack are the only medical providers to address causation who had complete documentation of Claimant's prior and post accident history. Dr. Testa could not relate Claimant's back problems to his claim. Dr. Primack, who teaches physicians on how to evaluate causation, persuasively opined that Claimant's low back problems and MRI findings are not causally related to the initial work accident, and are not causally related to this claim through an altered gait or compensatory phenomenon theory. Dr. Primack explained that Claimant's lumbar problems are preexisting and related to a degenerative cascade of the spine. Dr. Primack's opinions are comprehensive, based upon complete information, and persuasive. Claimant's low back condition is not causally related to this claim.

Claimant concealed his prior lumbar history and post accident acute attack from all of his workers' compensation physicians, so that none of his physicians had any knowledge Claimant had preexisting chronic back issues. Dr. Thurston's and Dr. Orgel's causation opinions were based upon incomplete and inaccurate information, and are therefore less persuasive than the opinions of Dr. Testa and Dr. Primack.

Claimant also failed to prove by a preponderance of the evidence that additional lumbar-directed chiropractic care was reasonable and necessary. Dr. Orgel, who recommended chiropractic care in December 2014, was unaware at that time that Claimant had already received 17 sessions of chiropractic care at Chiropractic Plus without benefit. Claimant then received four additional sessions of chiropractic care in

January 2015, again without any documented benefit. Dr. Testa's and Dr. Primack's opinions that additional chiropractic care is not reasonable or necessary, in light of the lack of benefit from previous chiropractic care, are credible and persuasive. Claimant's request for additional chiropractic care is not reasonable or necessary, and is denied.

Claimant's Right Knee Chondromalacia and Arthritis Are Not Causally Related to this Claim, and Repeat Orthovisc Injections and Repeat Arthroscopic Knee Surgery are Not Reasonable, Necessary, or Related to this Claim

As found, Dr. Primack credibly testified: (1) Claimant had a work related right medial meniscus tear; (2) Claimant also had preexisting, symptomatic, and unrelated right knee osteoarthritis and chondromalacia; (3) Claimant had received an adjustment less than ten days before his work injury; and (4) Claimant concealed this information from his workers' compensation providers.

On February 7, 2014, in the face of his preexisting and symptomatic condition, Claimant sustained a work related accident, which resulted in a torn medial meniscus. Respondents admitted to this injury, and provided medical care, which included a right knee medial meniscus repair. Following surgery, Claimant's right knee pain and dysfunction did not improve, and if anything, escalated. Dr. Thurston, Dr. Hsin, Dr. Foulk, Dr. Patel, Dr. Horan, Dr. Primack and Dr. Failinger have all opined that Claimant's ongoing right knee issues are related to preexisting chondromalacia and arthritis. Claimant's current right knee condition and need for medical care for that condition, are not causally related to his work injury.

Claimant failed to prove by a preponderance of the evidence that repeat Orthovisc injections are reasonable and necessary care for his right knee condition. While the *Medical Treatment Guidelines* are not dispositive, they are instructive of the standard of medicine, and in this regard, the Guidelines instruct that there is good evidence that these injections will only provide a small effect, if any, in terms of improvement of pain and dysfunction. The *Guidelines* further indicate that the first set of injections must provide functional benefit lasting three months to warrant repeat injections. As found, the Orthovisc injections provided in May 2014 failed to provide functional benefit for any amount of time, and as such, repeat injections are not reasonable and necessary. Claimant's request for repeat Orthovisc injections is denied.

Claimant failed to prove by a preponderance of the evidence that the right knee arthroscopy recommended by Dr. Schneider is reasonable and necessary, or related to this claim. The contrary opinions of Dr. Fallinger, Dr. Orgel and Dr. Primack are more persuasive. Arthroscopic surgery in the face of a degenerative process is not reasonable and necessary. Claimant's request for repeat arthroscopic knee surgery is denied.

ORDER

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

1. Claimant failed to prove that his lumbar spine condition is causally related to this claim. Claimant's claim for additional medical benefits for his low back is denied.
2. Claimant failed to prove that his right knee chondromalacia and osteoarthritis are causally related to this claim, or that care for those conditions including repeat Orthovisc injections are reasonable, necessary, or related to this claim. Claimant's claim for repeat right knee Orthovisc injections is denied.
3. Claimant's claim for a right knee arthroscopic procedure is denied as Claimant failed to prove that this care was reasonable, necessary, or related to this claim.

DATED: April 15, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 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 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>.

ISSUES

The issue presented for determination is whether the Claimant is entitled to temporary total disability ("TTD") benefits from May 2, 2014 and ongoing. The Respondents contend that Claimant was responsible for the termination of his employment which would preclude an award of TTD benefits. If Claimant is entitled to TTD, Respondents seek an offset for unemployment insurance benefits ("UIB") Claimant received.

FINDINGS OF FACT

1. The Employer is a fast food chain. Claimant worked for the Employer as an assistant manager in one of its restaurants. His job duties included manual labor such as stocking food and supplies, doing preparation work, ordering supplies and food, scheduling shifts, safety monitoring, managing employees and hiring new employees.

2. On April 15, 2014, Claimant sustained an injury to his left shoulder. Respondents accepted this claim and filed a medical only general admission of liability because Claimant returned to modified duty following his injury.

3. Claimant was initially restricted to lifting no more than 10 pounds, but on April 23, 2014, a Concentra physician modified his restrictions to lifting no more than five pounds, no pushing/pulling over five pounds of force, and no reaching above his shoulders.

4. Claimant continued to work for the Employer within his restrictions. His job duties often required him to ask for help from other employees so he could remain in compliance with his restrictions.

5. The Employer provided a computer in the office at the restaurant site in which Claimant worked. Claimant was authorized to use the company computer, and did so for the purpose of accessing a web application called Job Apps, which allows Claimant to access the online applications of individuals who have applied for employment with the Employer.

6. At the time claimant was initially hired by the Employer, he was provided a company handbook. Claimant signed a statement verifying that he read the policies outlined in this handbook and agreed to abide by the same. One of the policies Claimant agreed to comply with was the Electronic Communications System policy. That policy states:

Electronic Communications System tools are provided for business purposes and are not to be used for any other

reason, including solicitations for commercial ventures, religious or political causes or other personal uses. Inappropriate messages are strictly prohibited. Team members are responsible for avoiding anything that is offensive, disruptive, harmful to morale or considered to be harassment. Inappropriate messages may be grounds for termination.

7. In April 2014, Employer's employees were experiencing difficulty accessing the Job Apps web application through whichever web browser they had been using, so the Employer installed the Google Chrome web browser.

8. On April 22, 2014, Claimant logged on to the company computer and accessed the Chrome web browser to obtain an internet connection. At that same time, he also logged into Google Chrome using his personal Gmail account log in name and password. When Claimant finished working on the computer, he did not log out of his personal account.

9. On April 22, 2014, prior to reporting for work at 2:00 p.m., Claimant had accessed a number of adult websites on his mobile device using the Google Chrome web browser. The Claimant did not log out of Google Chrome on the Employer's computer so the adult websites accessed on Claimant's mobile device appeared in the browsing history on the Employer's computer.

10. Deb Kendall is a regional director for the Employer. She oversees the district managers within her region. During the hearing, Kendall testified that all employees were properly trained on how to use the computer, including turning it on, logging on to the internet, and logging off. She further testified that the Chrome web browser was installed for the sole purpose of allowing Claimant to access the Job Apps web application, and that there is absolutely no need to log into a personal email account or into Google Chrome to access the internet or Job Apps website.

11. On April 29, 2014, Kendall learned that the Employer's IT department had found pornographic material on the computer located at the restaurant where Claimant worked. A screen shot of a list of the adult websites was obtained which listed several websites all of which were accessed on April 22, 2014, between 12:58 p.m. and 1:08 p.m.

12. Also on April 29, 2014, the Employer suspended Claimant pending a completion of an investigation into the inappropriate websites.

13. An Employee Reprimand Record was completed on April 29, 2014. It is unclear who drafted the language found in the Employee Reprimand Record. It states that Claimant was signed into his personal Google Chrome account on the Employer's computer and that the browsing history "over several days" indicates that Claimant was accessing inappropriate websites from the computer. In the "Action Taken" section, it states, "Third written reprimand or Major Offense – Termination." Claimant's signature,

Kendall's signature and Ali Aljormandi's signature. Kendall's signature has a date of May 2, 2014 next to it.

14. Another document concerning the circumstances surrounding Claimant's termination is dated May 2, 2014, and it states:

[Claimant] signed into his personal Google Chrome account on the [Employer's] back office computer. History browsing over several days indicates that [Claimant] was accessing inappropriate websites from the office computer and the same sites were in his browsing history and accessed from his mobile device. [Claimant] also gave his login to other managers which is against company policy. Signing into a personal [G]oogle [C]hrome account and browsing inappropriate pornographic sites violate the company policy. [Claimant] is being terminated immediately.

15. Another version of the May 2, 2014 document contains handwritten notes including a comment that Claimant refused to sign the separation notice. This version contained the signatures of Kendall and Aljormandi.

16. Kendall testified that on May 2, 2014 she met with the Claimant to discuss his violation of the Electronic Communications System policy. Kendall testified that during the meeting Claimant denied accessing Google Chrome with his personal account. Claimant, however, testified that he admitted to accessing Google Chrome with his personal account.

17. Kendall testified that one of the primary purposes of the Electronic Communications System policy is to protect the company computer system from potential viruses and security breaches, as all of the Employer's computers are linked across the country.

18. Claimant was terminated on May 2, 2014 for violating the Electronic Communications System policy.

19. Claimant testified, and the ALJ finds, that he did not understand that logging into Google Chrome with his personal Gmail account would cause the browsing history to appear on the Employer's computer. The Claimant also did not realize that logging into his personal account was in violation of the Employer's policy. There is no evidence in the record that Claimant actually accessed any inappropriate web sites or any other personal sites, including e-mail, while logged into Google Chrome.

20. On May 1, 2014, Claimant was assessed temporary work restrictions to include no use of his left upper extremity. Kendall testified that Employer was able to, and did accommodate this restriction. The Claimant, however, had been suspended from working as of April 29, 2014 and never worked with the "no use of the left upper extremity" restriction. As such, the Employer never had the opportunity to accommodate the Claimant's restrictions that had been imposed on May 1, 2014.

21. Claimant continued to have some form of work restrictions regarding his left shoulder through December 17, 2014.

22. Following the termination of his employment, the Claimant continued to receive medical treatment, which included a referral to Dr. Michael Hewitt for a surgical consultation. On August 6, 2014, Claimant saw Dr. Hewitt's physician's assistant, Nickolas Curcija. Curcija noted that Claimant was permitted to return to work on August 6 with restrictions that included no lifting over 10 pounds, no pushing/pulling more than 10 pounds of force, and no reaching above shoulders. Curcija also noted that starting the day of surgery, Claimant should engage in no activity, which was anticipated to last 4-6 weeks following surgery.

23. Dr. Hewitt performed surgery on Claimant's left shoulder on September 23, 2014.

24. Claimant testified that he was removed from work entirely by his treating physician subsequent to his surgery.

25. The surgery discharge records reflect that restrictions to include no lifting greater than 3 pounds with the left upper extremity and no strenuous activity. These surgery discharge instructions dated September 23, 2014 are not an indication of work restrictions. They are the surgeon's instructions for the days immediately following surgery. They cannot be construed as work restrictions especially when read in context of the other medical evidence.

26. On September 30, 2014, Dr. Hewitt indicated Claimant could return to work "per PCP" with no repetitive overhead use of his arm and no lifting more than five pounds.

27. The next record admitted into evidence is from Concentra dated October 23, 2014, which reflects that Claimant is released to return to work on October 24, 2014 with restrictions of no lifting more than five pounds; no pushing/pulling more than five pounds of force; and no reaching above the shoulder with the left arm. It is apparent from both Dr. Hewitt's record and the Concentra record that Claimant was restricted from working in any capacity from September 23, 2014 through October 24, 2014 due to his work injury.

28. None of the evidence presented reflects that Claimant has been placed at maximum medical improvement.

29. Claimant received \$6,120.00 between May 24, 2014 and September 20, 2014, in UIB.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge makes the following conclusions of law:

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

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

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

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

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

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

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

7. A claimant, however, is not necessarily precluded from receiving TTD benefits if a worsening of the claimant's work-related condition causes the wage loss. See *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). A wage loss is caused by a worsened condition if the worsening results in physical restrictions which did not exist at the time of the termination and such restrictions cause a limitation on the claimant's temporary earning capacity which did not exist when the claimant caused the termination. *Martinez v. Denver Health*, W.C. 4-527-415 (August 8, 2005). The question of whether a worsened condition has caused a claimant's wage loss following a termination from employment is a factual determination for the ALJ. *Harris v. Diocese of Colorado Springs*, WC 4-669-016 (ICAP, Sept. 3, 2008).

8. The ALJ concludes that Claimant did not commit a volitional act that constituted a violation of an established company policy when he logged into Google Chrome with his personal Google login and password. The mere act of logging in with no evidence that Claimant accessed his personal e-mail or used the Google Chrome browser for personal use is insufficient to establish that Claimant violated the Employer's Electronic Communications System policy. While it is true that Claimant caused the inappropriate website links to appear in the Google Chrome web browsing history on the Employer's computer, Claimant did not do so intentionally. He was unaware that the browsing history from his mobile device would appear on the Employer's computer when he logged into Google Chrome on the Employer's computer. The Employer presented no credible or persuasive evidence that Claimant accessed inappropriate web content while using the Employer's computer. Claimant merely made a mistake which the ALJ finds does not constitute a volitional act under the circumstances. As such, the Claimant is not precluded from receiving TTD based on the termination of his employment.

9. Claimant has proven entitlement to TTD benefits. Claimant has had work restrictions since the date of his injury. Beginning on May 1, 2014, Claimant's work restrictions included no use of his left arm. Claimant's restrictions then varied over the ensuing months until the Claimant had surgery on September 23, 2014, during which Claimant clearly could not use his left arm. Contrary to Respondents' assertion, the surgery discharge instructions dated September 23, 2014 are not an indication of work restrictions. They are the surgeon's instructions for the days immediately following surgery, and cannot be construed as work restrictions. On September 30, 2014, Dr. Hewitt indicated Claimant could return to work "per PCP" with no repetitive overhead use of his arm and no lifting more than five pounds. The next record admitted into evidence is from Concentra dated October 23, 2014, which reflects that Claimant is released to return to work on October 24, 2014 with restrictions of no lifting more than five pounds; no pushing/pulling more than five pounds of force; and no reaching above the shoulder with the left arm. It is apparent from both Dr. Hewitt's record and the Concentra record that Claimant was restricted from working in any capacity from September 23, 2014 through October 24, 2014. Claimant's work restrictions have continued and there is no evidence he has been placed at MMI.

10. Finally, Respondents' assertion that it accommodated the restriction of "no use of the left upper extremity" for one day defies logic. First, both Kendall and Claimant testified that Claimant was suspended from working starting on April 29, 2014 pending the outcome an investigation into the adult website issue. It was not until May 1, 2014, when Claimant's physician restricted the use of his left arm. The Employer terminated the Claimant on May 2, 2014. There is no evidence that the Claimant actually performed any work for the Employer between April 29 and May 2, 2014. Kendall's testimony concerning Employer's future or anticipated accommodations of Claimant's restrictions is hereby rejected as unpersuasive.

ORDER

It is therefore ordered that:

1. The Respondents are liable for TTD commencing on May 6, 2014, and ongoing (Claimant conceded that although his employment was terminated on May 2, 2014, TTD should not commence until May 6, 2014).
2. Because Claimant received unemployment insurance benefits in the amount of \$6,120.00 between May 24, 2014 and September 20, 2014, Respondents are entitled to a credit against TTD owed to the Claimant.
3. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

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: April 10, 2015

DIGITAL SIGNATURE:



Laura A. Broniak
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 4-851-315 & 4-967-736**

ISSUES

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

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of a work-related injury.

FINDINGS OF FACT

1. Claimant is a 47 year old male. On April 16, 2012 Claimant began working for Employer as a Customer Service Representative. His job duties included dealing with accounts and supporting their needs regarding imports. He predominantly worked with ocean imports and cargo ships. Claimant detailed three incidents that he asserts subjected him to unusual mental stress while working for Employer.

2. Claimant testified that in 2013 he had a cold sore and requested the day off from work to address his condition. However, Employer denied his request and required him to report to work. Claimant explained that the supervisor of the Brokerage Department Ms. Jill told him to remain 10 feet away from her desk because he was spreading germs. He complained to his supervisor Ms. Dolly in her cubby. However, after Claimant left the cubby another supervisor sprayed bug repellent around the area where he had been standing. Claimant remarked that the activity humiliated him in front of other office staff.

3. Claimant explained that a second incident causing unusual mental stress occurred on June 18, 2014. His direct supervisor Branch Manager John Krupar called him into his office to discuss a promotional opportunity for which Claimant had been denied. Claimant commented that Mr. Krupar told him to "look at your face in the mirror" and then made a face that Claimant interpreted to be that of a monkey.

4. Claimant subsequently filed a complaint and a claim for Workers' Compensation. Claimant took family medical leave to address the stress from the June 18, 2014 incident. He visited his primary care physician at East West Health Centers on two occasions in June 2014. On July 5, 2014 Claimant visited designated medical provider Concentra Medical Centers and was released to full work duty on July 14, 2014.

5. After returning to Employer's office Claimant sent an e-mail to Mr. Krupar inquiring about additional training to become a better employee. Claimant testified that

on November 14, 2014 Mr. Krupar called him into his office for a closed door meeting. Claimant noted that Mr. Krupar was aggressive in tone and once again stated that he should look at his face in the mirror. Claimant interpreted Mr. Krupar's remark as again comparing him to a monkey. He commented that Mr. Krupar told him not to tell anyone about the meeting or he would be terminated from employment.

6. After the November 14, 2014 meeting Claimant returned to his desk and felt sick. He explained that he lost consciousness and paramedics were called. Claimant was taken to an ambulance but refused medical treatment. He returned to work approximately one hour later.

7. Mr. Krupar testified at the hearing in this matter regarding the three incidents of mental stress outlined by Claimant. Mr. Krupar explained that the "bug spray" mentioned by Claimant was a Wal-Mart brand disinfectant in a white can with an orange label that said "disinfectant." He commented that there was no bug spray in the office that had a mosquito on it and that they used the disinfectant on all employees' desks to prevent the spread of germs. Mr. Krupar stated that he used spray and wipes in his own office to prevent the spread of germs. He noted that an employee recently had pink eye and he wiped down the person's desk to prevent the spread of the condition.

8. Mr. Krupar testified that around June 18, 2014 Claimant applied for his supervisor's position with Employer because she was retiring. He noted that Claimant did not receive the position and Chad Tessler was hired. Mr. Krupar remarked that Mr. Tessler had more experience and was a better candidate for the job. He explained that at an office meeting Claimant became angry and started yelling at him. Mr. Krupar told Claimant that he needed to speak in a professional manner. He noted that Claimant was upset because he was not given the promotion. Claimant filed a Workers' Compensation claim shortly after the incident.

9. Mr. Krupar also testified that at no time did he ever call Claimant a monkey or refer to him as a chimpanzee. He detailed that on June 23, 2014 he had a meeting with Claimant to discuss Claimant's attitude. Mr. Krupar mentioned that Claimant needed to look at himself in the mirror because he was becoming upset. Moreover, Claimant had a facial expression of scowling and gritting his teeth when he looked at supervisor Dolly Dallacarus.

10. Claimant filed another claim for Workers' Compensation alleging an injury date of November 14, 2014. Mr. Krupar testified that on that day he was trying to meet with Claimant prior to having a group meeting to discuss account assignments. He noted that the meetings were common and occurred on a regular basis. Mr. Krupar testified that he wanted to meet with Claimant because he had undermined a co-worker by going directly to an account that was already assigned to another employee. When Mr. Krupar approached Claimant to discuss the matter he became upset, said that this was bothering his heart and the meeting ended. Mr. Krupar reported that he told Claimant he could not refuse to meet and he was going to call human resources. Claimant was ultimately terminated from employment on December 17, 2014.

11. On October 29, 2014 Claimant underwent an independent medical examination with Psychiatrist Stephen A. Moe, M.D. Claimant reported various episodes of workplace harassment and humiliation. However, Dr. Moe's report preceded the November 14, 2014 incident. Dr. Moe considered whether Claimant had suffered a compensable work-related mental health stress claim under the mental impairment statute. He concluded that his "opinion on the fundamental question is unavoidably conditional" because it hinged upon the "validity of [Claimant's] report of mistreatment in his workplace." Dr. Moe explained that mental stress for failure to receive a promotion and disciplinary issues are specifically excluded from Workers' Compensation coverage. Moreover, any mental stress associated with the "misinterpretation of normal workplace hijinks" was not compensable. However, if Claimant was subject to repeated episodes of harassment and humiliation that were sanctioned or insufficiently controlled, then his mental stress claim was work-related. Notably, Dr. Moe commented that an average worker under the mental stress statute "is expected to possess some degree of resilience."

12. Dr. Moe testified at the hearing in this matter. He explained that the mental stress statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. Dr. Moe noted that traumatic events include things like witnessing a co-worker fall off a building and seeing a friend or co-worker that has been physically injured or shot at work. Dr. Moe testified he did not believe the incidents described by Claimant at the hearing constituted psychologically traumatic events. He summarized that Claimant did not suffer a compensable mental stress impairment while working for Employer.

13. Dr. Moe testified that Claimant was an over-sensitized individual so that little things tended to bother or irritate him more than the average worker. He specifically noted that the event in which Claimant stated he was called a monkey did not constitute a traumatic event that qualified as mental stress claim under the statute. The event did not traumatize Claimant as he stated because he continued to contact Mr. Krupar and other co-workers. Dr. Moe testified that the incident sounded more like an argument involving two people at work. It may have been a heated moment but everything settled down. Dr. Moe commented that the incident was "possibly a work-related frustration matter that workers' comp is not designed to address."

14. Dr. Moe testified that the mental stress statute contemplates the "average worker." He explained that "you do not take the worker as you find them but rather flip it on its end and then you are focused on the average worker, and if we were to encounter a highly sensitive person who is then upset by relatively common place experiences, that is actually a bar to recovery so it is a flip. It is kind of striking."

15. On cross-examination Claimant's counsel suggested that Dr. Moe essentially changed his opinion from his report. However, Dr. Moe clarified his opinion. He initially noted that Claimant's claim was based on three distinct incidents and he considered the testimony of Claimant's supervisor. Dr. Moe commented that, if we assume Claimant was subjected to several years of bullying or harassment, a

compensable claim could exist. Claimant would have experienced long term stress based on the length of time. However, Claimant's contention was based on three distinct incidents and he was more sensitive than others to stressful events. Dr. Moe explained that the mental stress statute focuses on the average worker as compared to the subjective response of a particular individual. Accordingly, Dr. Moe maintained that Claimant did not suffer a work-related mental stress impairment during the course and scope of his employment with Employer.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable mental impairment during the course and scope of his employment with Employer. Claimant asserted that he suffered a compensable mental impairment claim based on three workplace incidents during 2013 and 2014. He detailed a bug spray incident, Mr. Krupar's actions in a closed door meeting that he interpreted to suggest he was a monkey and a subsequent closed door meeting in which Mr. Krupar was aggressive and again suggested Claimant was a monkey. In contrast, Mr. Krupar explained that the bug spray was actually a disinfectant to kill germs. Moreover, around June 18, 2014 Claimant applied for his former supervisor's position. At a closed door meeting Mr. Krupar mentioned that Claimant needed to look at himself in the mirror because he was becoming upset. Finally, Mr. Krupar testified that on November 14, 2014 he wanted to meet with Claimant because he had undermined a co-worker by going directly to an account that was already assigned to another employee. When Mr. Krupar approached Claimant to discuss the matter, Claimant became upset, said that this was bothering his heart and the meeting ended.

17. Dr. Moe conducted an independent medical examination and testified at the hearing in this matter. He concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that the mental stress statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. Dr. Moe testified he did not believe the incidents described by Claimant at the hearing constituted psychologically traumatic events. He noted that the mental stress statute focuses on the average worker as compared to the subjective response of a particular individual. Dr. Moe determined that Claimant was an over-sensitized individual so that little things tended to bother or irritate him more than the average worker. He acknowledged that, if we assume Claimant was subjected to several years of bullying or harassment, a compensable claim could exist. However, Claimant's contention was based on three distinct incidents and he was more sensitive than others to stressful events. Accordingly, Dr. Moe persuasively maintained that Claimant did not suffer a work-related mental stress impairment during the course and scope of his employment with Employer. Based on the testimony of Mr. Krupar and persuasive opinion of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Customer Service Representative for Employer.

CONCLUSIONS OF LAW

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

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. The Workers’ Compensation Act has authorized recovery for a broad range of physical injuries, but has “sharply limited” a claimant’s potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because “evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury.” *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19,

2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), *affd* 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

6. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment." *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer. Claimant asserted that he suffered a compensable mental impairment claim based on three workplace incidents during 2013 and 2014. He detailed a bug spray incident, Mr. Krupar's actions in a closed door meeting that he interpreted to suggest he was a monkey and a subsequent closed door meeting in which Mr. Krupar was aggressive and again suggested Claimant was a monkey. In contrast, Mr. Krupar explained that the bug spray was actually a disinfectant to kill germs. Moreover, around June 18, 2014 Claimant applied for his former supervisor's position. At a closed door meeting Mr. Krupar mentioned that Claimant needed to look at himself in the mirror because he was becoming upset. Finally, Mr. Krupar testified that on November 14, 2014 he wanted to meet with Claimant because he had undermined a co-worker by going directly to an account that was already assigned to another employee. When Mr. Krupar approached Claimant to discuss the matter, Claimant became upset, said that this was bothering his heart and the meeting ended.

8. As found, Dr. Moe conducted an independent medical examination and testified at the hearing in this matter. He concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that the mental stress statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. Dr. Moe testified he did not believe the incidents described by Claimant at the hearing constituted psychologically traumatic events. He noted that the mental stress statute focuses on the average worker as compared to the subjective response of a particular individual. Dr. Moe determined that Claimant was an over-sensitized individual so that little things tended to bother or irritate him more than the average worker. He acknowledged that, if we assume Claimant was subjected to several years of bullying or harassment, a compensable claim could exist. However, Claimant's contention was based on three distinct incidents and he was more sensitive than others to stressful events. Accordingly, Dr. Moe persuasively maintained that Claimant did not suffer a work-related mental stress impairment during the course and scope of his employment with Employer. Based on the testimony of Mr. Krupar and persuasive opinion of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Customer Service Representative for Employer.

ORDER

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

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

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: April 14, 2015.

DIGITAL SIGNATURE:

A handwritten signature in cursive script that reads "Peter J. Cannici". The signature is contained within a rectangular box.

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

ISSUES

- Whether Claimant established compensability by a preponderance of the evidence.
- Whether Claimant established by a preponderance of the evidence that he is entitled to medical benefits.
- Whether Claimant established by a preponderance of the evidence that he is entitled to a disfigurement award.

STIPULATION

The parties stipulated that Claimant's AWW equaled \$580.00.

FINDINGS OF FACT

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

1. Claimant was employed by Employer beginning February 20, 2014. Employer's business is providing temporary workers to its clients. At times relevant to this claim "EMJ" was a client of Employer and the entity where Claimant worked as a metal-cutter. At the time he was hired by Employer, he signed a contract that provided in relevant part:

- "Any individual assigned to a position by [Employer] is an employee of [Employer] and not of the client company."
- "On the Job Injury: . . . If the accident is life or limb threatening, call 911 or go to the nearest emergency facility."

2. Claimant testified working he was injured early on the morning of August 6, 2014 while on the night shift which started on August 5, 2014 and ran through the morning of August 6, 2014, while performing functions of his job. Specifically, Claimant testified that he was pulling a metal tube onto a table saw when the tube became unstable. Claimant tried to stabilize the tube by reaching for the left end of the tube with his left hand while holding the right end of the tube with his right hand. When Claimant caught the left end of the tube it forced his right hand up and into the saw blade. Although the saw was turned off, the force of the action was sufficient to cause a deep cut into Claimant's right index finger. Claimant's testimony is consistent with Employer's August 29, 2014 form in which Claimant reported that on August 5, 2014, he "smashed and cut right index finger – pipe smashed then cut on saw blade (not running)," and his August 29, 2014 written statement he provided to Ms. Roemer. His testimony is also consistent with his report to Lutheran Medical Center where he eventually sought treatment.

3. Claimant testified that the cut is depicted in Claimant's exhibit 2 which is a photograph of the cut which Claimant took immediately after the incident in the break room and accurately represented the condition of his finger at that time.

4. Claimant testified that he immediately notified his supervisor on duty at EMJ, Manual, who helped him clean and dress his wound. Claimant further testified that he was not offered treatment.

5. Claimant misunderstood that EMJ was his employer and that Aspen was EMJ's payroll service, stating that his injury happened at EMJ "on [Employer's] clock." Claimant testified that he was not hired by Employer, but was hired by EMJ. Thus, he thought that reporting the injury to Manual was sufficient reporting of his injury.

6. On or about August 5, 2014, EMJ fired Claimant for reasons unrelated to his injury.

7. On August 18, 2014, Employer terminated Claimant for not reporting that he had been let go by EMJ and for not calling in when he missed work.

8. Claimant testified that when he saw Ms. Roemer, Employer's business manager in charge of workers' compensation matters, on August 18, he did not discuss his injury with her because he did not know at that time that he had a workers' compensation injury; he did not appreciate or understand that Employer, not EMJ, was his employer; and that he thought reporting the injury to EMJ had been sufficient. Claimant's testimony was consistent with that of Ms. Roemer who testified that she noticed Claimant's finger was very swollen and injured when she saw him on the 18th. Ms. Roemer's notes of her investigation include substantially similar comments. Ms. Roemer testified that when she asked Claimant what happened; he said he smashed it but did not indicate that it was work-related. Claimant's testimony is also corroborated by notes from Ms. Roemer's investigation which state, "I received a call from [Claimant] stating he was not sure if he should be telling me or not about an injury that he states happened while working at EMJ."

9. Claimant continued communicating with Manual in an effort to seek treatment for his finger. It was not until approximately August 20, 2014 that Claimant understood that EMJ would not provide him with medical treatment. At some point after he was fired but before he obtained treatment, Claimant understood that EMJ would not provide treatment, and that he should report his injury to Employer.

10. Claimant testified that he first reported his injury to Employer after he was told that EMJ would not help him seek medical treatment. Ms. Roemer began an investigation and filed a first report of injury with Insurer on August 27, 2014, to which she attached her notes of her investigation. Based on her discussions with "Loren" at EMJ, Employer filed a notice of contest asserting that the injury was not work related.¹

11. Ms. Roemer testified that she first learned that Claimant was injured at work when he called her on August 27, 2014 to report that he had had surgery on his finger.

¹ Notes of Ms. Roemer's investigation are admissible to show the effect on listener. However, to the extent the investigation notes include hearsay and hearsay within hearsay, the ALJ declines to consider them for the truth of the matter asserted.

Claimant testified that Employer told Claimant a co-employee had reported that Claimant injured his hand outside of work, he “was disgusted to hear that because it happened at work.”

12. On August 20, 2014, Claimant’s finger worsened to such an extent that he texted his supervisor Manual, “Bro im going to have to see a doctor my finger isn’t doing well im scared I don’t want to lose it.”

13. The ALJ finds that Claimant sought emergency medical treatment as provided by his employment contract (“If the accident is life or limb threatening, call 911 or go to the nearest emergency facility.”), and pursuant to section 8-42-101(1)(a) and Colorado case law.

14. The record contains medical records from Lutheran Medical Center, Denver Health Medical Center, and ancillary medical treatment associated with these providers.

15. Claimant presented to Lutheran at approximately 1:00 a.m. on August 22, 2014 for evaluation of his right index finger injury and pain. His report of the injury to all of his providers was consistent with his testimony. Notes of Claimant’s visit provide that Claimant reported that over the last two days there had been a significant increase in redness, swelling, and pus drainage; and that he had not been able to extend his finger at the injured joint since the injury. Upon examination, the doctor noted :

Evaluation of the right hand reveals significant edema at the PIP joint of the index finger with associated erythema. There is an overlying crusting lesion consistent with a recent laceration. . . . There is no active extension at the PIP or DIP joints of the index finger.

Claimant’s finger was x-rayed at Lutheran by SVB Stress Services and the radiology report identified a mildly displaced fracture involving the distal aspect of the index finger. Claimant was diagnosed with (1) open fracture of finger, (2) Extensor tendon laceration of finger with open wound, and (3) Cellulitis and abscess of finger, unspecified. Claimant was given oral and IV antibiotics and pain medication.

16. The orthopedic surgeon at Lutheran assessed that Claimant needed to be evaluated by a hand surgeon and the hand surgeon at Denver Health accepted Claimant for emergency department to emergency department transfer. Claimant was then transferred from Lutheran to Denver Health by ambulance.

17. Upon arrival at Denver Health Claimant immediately underwent right index finger exam under anesthesia, irrigation and debridement down to the bone, and extensor tendon repair. Claimant was prescribed pain medication and placed in a splint.

18. Claimant had a follow up visit with his hand surgeon on September 9, 2014. He was sent for therapy to work on range of motion exercises and to have a custom splint made. He was to return back to the hand clinic in six weeks.

19. Respondents did not provide any persuasive evidence that they exercised the right to designate the first “non-emergency” physician after the emergency situation resolved.

20. The ALJ finds that Claimant may now designate an ATP to continue providing reasonable, necessary and related medical treatment for his injury.

21. Claimant testified he still needs physical therapy to regain function in his injured finger.

22. The ALJ finds that treatment rendered by Lutheran Medical Center, Denver Health Medical Center, and ancillary treatment was reasonable and necessary to cure and relieve the effects of the industrial injury.

23. Claimant's testimony was reasonable, consistent throughout the hearing, was corroborated by the record, and corroborated at least in part by Ms. Roemero's testimony. The ALJ credits Claimant's testimony as credible and persuasive.

24. Ms. Roemer's testimony was often consistent with Claimant's, but offered from a different perspective. For example, Claimant testified he did not report his injury to Ms. Roemer on August 18 because he was mistaken about who his employer was. Ms. Roemer also testified that Claimant did not report his injury to her on August 18, but the inference from her testimony was that Claimant's failure to report to her then indicated that he was not injured at work. In addition, the ALJ finds Ms. Roemer's testimony less reliable to the extent it was based on hearsay within hearsay reports she received during her investigation.

25. The ALJ finds Claimant's testimony to more persuasive and reliable than that of Ms. Roemer.

26. To the extent Respondents assert the defense that Claimant's injury occurred off the job, the ALJ finds no persuasive evidence to support that defense.

27. To the extent Respondents assert a penalty for late reporting, the ALJ finds any such penalty inapplicable to Claimant's claim because he does not seek disability benefits to which such penalty would apply. See section 8-43-102(1)(a), C.R.S. 2014.

28. It is uncontested that Employer has not offered Claimant any medical treatment.

29. The ALJ finds it more likely than not that Claimant suffered a work related injury for which Employer was required to provide medical treatment.

30. Claimant suffers a permanent disfigurement as provided in section 8-42-108(1) consisting of a discolored and irregular scar running a total of one and three-quarter inches long across his right index finger over the PIP joint.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within

the course of his/her employment. Section 8-41-301(1), *supra*; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

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

COMPENSABILITY

Claimant contends the evidence establishes that the injury he sustained to his right index finger, on the morning of August 6, 2014 is compensable because it arose out of and in the course of his employment. The ALJ agrees.

In order to recover benefits 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. Section 8-41-301(1)(b) & (c), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with her work-related functions. See *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Triad Painting Co. v. Blair, supra*.

The ALJ concludes that early on August 6, 2014 Claimant sustained a compensable injury arising out of and in the course of his employment.

MEDICAL BENEFITS

Claimant seeks a general award of medical benefits and appointment of an authorized treating physician (ATP) to continue care.

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).

Section 8-43-404(5)(a)(I)(A), C.R.S. gives the respondents the right in the first instance to select the ATP by offering a list of at least two providers to the claimant. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 P.2d. 677 (Colo. App. 1997).

Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). If upon notice of the injury the employer fails forthwith to exercise its right to designate an ATP, the statute provides that the right of selection passes to the claimant. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

Generally, medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Of course, the claimant may obtain “authorized treatment” without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first “non-emergency” physician. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

The ALJ concludes Claimant proved by a preponderance of the evidence he needs reasonable and necessary medical treatment to cure and relieve the effects of the injury he sustained. The medical records establish that the care and treatment provided at Lutheran Medical Center, ambulance transportation to Denver Health Medical Center, Denver Medical Health Center, and follow up care with Dr. Kyros Ipaktchi, Claimant’s hand surgeon, was reasonable, necessary and related to the industrial injury. Further, the treatment received at these facilities was authorized since it resulted from a bona fide emergency. Insurer is liable to pay for treatment rendered at Lutheran Medical Center and Denver Health Medical Center, as well as ancillary medical costs associated with these providers.

There is no credible or persuasive evidence that after the conclusion of the emergency (when Claimant was first released from Denver Health Medical Center) that Employer promptly designated any ATP to continue to provide Claimant’s care. In these circumstances the ALJ concludes the right of selection passed to Claimant and he may now designate an ATP to continue providing reasonable, necessary and related medical treatment for his injury.

Respondents remain free to challenge the reasonableness, necessity or cause of the need for any medical treatment not specifically addressed by this order.

The ALJ finds and concludes that as a result of Claimant’s August 6, 2014 work injury, Claimant has a visible disfigurement to the body consisting of a discolored and irregular scar running a total of one and three-quarter inches long across his right index finger over the PIP joint. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation of \$775. Section 8-42-108 (1), C.R.S. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

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

1. Insurer shall pay for authorized, reasonable and necessary medical treatment including the cost of treatment provided to Claimant at Lutheran Medical Center and Denver Health Medical Center, as well as ancillary medical costs associated with these providers.
2. Claimant may designate an authorized treating physician to provide medical treatment as ordered.
3. Insurer shall pay Claimant \$775 for his permanent disfigurement.
4. Issues not addressed by 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: April 1, 2015

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-960-953-01**

ISSUES

- Whether the Claimant established by a preponderance of the evidence that her accident and injury were work-related?
- If Claimant met her burden of proving compensability, whether Claimant established by a preponderance of the evidence that Dr. Swarsen is her authorized treating provider?
- At hearing Claimant withdrew the issues of temporary total disability and temporary partial disability.

STIPULATION

The parties stipulated to an average weekly wage of \$428.59.

FINDINGS OF FACT

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

1. Claimant is employed by Employer as a tour consultant. Her job duties include interacting over the telephone with customers and travel agents. She has worked for Employer for approximately twenty-one years.
2. Claimant asserts that at the end of the work day on September 2, 2014, she was moving items from her cubicle to the adjacent cubicle and sustained an injury while pushing a rolling office chair with some light weight files on it. She testified that she did not feel pain immediately, but that pain came on as or after she stood up from the bent position she was in while pushing the wheeled chair.
3. Claimant testified that she needed the help of six people, including her supervisor and two others whom she named, to help her from her work area on the second floor down to the building's lobby. No confirming evidence from any of the named witnesses was presented.
4. Claimant testified that she reported her injury to Employer and that the human resources department authorized her to seek treatment at HealthOne Occupational Medicine Center-Englewood.
5. On September 3, 2014 Dr. White, a Health One physician, evaluated Claimant. Claimant reported to Dr. White that she was pushing a rolling chair when she started to feel some pain which came on gradually but worsened. She reported

initial pain “located behind her right shoulder blade, above the shoulder blade, and down to her right low back . . . up into the trapezius as well.” Dr. White noted the onset of pain occurred without trauma or heavy lifting and involved only “very minimal pushing and pulling.” Dr. White also noted “questionable pain behavior on exam.” Dr. White assessed myofascial pain, noting, “Pain and injury out of proportion to the mechanism of injury.” Dr. White did not agree to Claimant’s request to be taken off work. He prescribed six massage therapy sessions, a home exercise program, Naproxen and Flexeril. While Claimant initially denied any prior neck or back pain, she later told Dr. White she had experienced a couple of self-limited back pains about six months earlier but did not seek care. Dr. White’s diagnoses were: myofascial syndrome, Thoracic Spine and myofascial syndrome, Lumbar Spine.

6. On September 4, 2014 Claimant presented to the emergency department at the Medical Center of Aurora where she was evaluated by Rachelle Klammer, M.D. There Claimant reported the mechanism of injury as lifting, and gave the location of her initial pain as her right low back and left chest/rib pain. Claimant reported that her symptoms were then radiating into her right shoulder and right leg. Claimant denied nausea, vomiting, headaches and repeatedly denied neck pain. She also denied any similar prior symptoms. Notes from the visit state, “[Patient] reports she saw a workmans [sic] comp doc, but wanted a second opinion so came to ER.” Claimant reported lumbar and thoracic pain but denied neck pain. On examination, Dr. Klammer noted that Claimant reported tenderness out of proportion to light palpation. Dr. Klammer’s primary impression was “Back muscle spasm.” Claimant was given Acetaminophen, Hydrocodone, and Diazepam, which improved her function and ambulation. She was discharged with prescriptions for Norco and Valium. Dr. Klammer noted that there was no indication in the history or exam for imaging. Dr. Klammer ultimately assessed myofascial syndrome, thoracic spine and lumbar spine, consistent with Dr. White’s diagnoses.
7. On September 4, 2014 Respondents responded to Claimant’s request for a change of treatment provider by notifying Claimant that she could go to a different HealthOne Occupational facility.
8. On September 8, 2014 Claimant transferred care to HealthOne-Centennial where Kristina Robinson, M.D. evaluated her. Claimant reported to Dr. Robinson that when she went to move her chair, she felt a sudden sharp pain in her back. On September 8, 2014 Claimant’s chief complaint was bilateral neck and shoulder pain with radiation to the right leg, nausea, and vomiting. She reported then-current symptoms of pain from her neck all the way down to her right leg and ankle. Claimant reported that she had been to the ER “because she was unable to lift her head, stating that the pain was so bad, she could not raise it up straight.” The ALJ finds that Claimant’s reports to Dr. Robinson are inconsistent with records from the ER visit four days earlier when Claimant repeatedly denied neck pain, nausea, and vomiting, and stated she presented to the ER for a second opinion.

9. With respect to transfer of care Claimant reported to Dr. Robinson that “she felt that Dr. White had not properly addressed her issues and that he stated that he did not believe that the mechanism of injury, mainly transfer of the chair, would result in the injury and complaints that she was describing . . . The patient is now asking for further evaluation, treatment, and documentation to remain off work.”
10. Dr. Robinson opined that the injury was not work-related, “given the mechanism of injury compared to the exaggeration of symptoms and pain out of proportion to [the] mechanism that she is exhibiting at this time. It is, therefore, less probable than not that injury is work related.”
11. Dr. Robinson discharged Claimant from care due to the non-work related nature of her injury. She asked Claimant to follow-up with her primary care doctor for further evaluation and treatment.
12. Claimant testified that Dr. Messa is her primary care doctor, but was unavailable to treat her. The record contains an undated note signed by Dr. Messa stating that she could not get Claimant in for an appointment.
13. On September 9, 2014 Insurer filed a notice of contest on the stated basis that the mechanism of injury was not consistent with the injury.
14. On September 10, 2014 Claimant began treating with a chiropractor, Chad Cotter, D.C. at HealthSource Chiropractic & Progressive Wellness. The records, which are very difficult to read, appear to reflect that Claimant received adjustments to areas including her right side ribs, and for pain generating down her left arm.
15. On October 10, 2014 the Office of Administrative Courts received Claimant’s application for hearing on the issues of compensability; medical benefits including authorized provider, change of physician, reasonably necessary, and related to injury; Average weekly wage, TTD; and TPD. At the commencement of the hearing, Claimant’s counsel noted that they were pursuing only compensability and authorizing treatment provider.
16. On October 13, 2014 Claimant was evaluated by Dr. R.J. Swarsen upon her counsel’s recommendation and referral. Dr. Swarsen’s report indicates that he performed a records review and spent sixty minutes face-to-face with Claimant. Claimant reported to Dr. Swarsen that she experienced instant pain across her whole low back, and that she was not able to stand up straight for about three days. She did not report to Dr. Swarsen any neck or upper or mid back pain as she had in her initial evaluation with Dr. White or her later evaluation by Dr. Robinson. Claimant reported that her left shoulder “started bugging her” three weeks earlier, on approximately September 22, twenty days after the alleged injury. These reports are inconsistent with Claimant’s earlier reports of shoulder pain occurring at the time of injury, neck pain, and mid back pain.

17. With respect to this claim, Dr. Swarsen assessed (1) sprain sacroiliac – chronic; and (2) likely upper back, sprain of thoracic spine – resolved. Dr. Swarsen reviewed x-rays of Claimant’s spine from the cervical to sacral regions and noted mild osteoarthritic changes most obvious at the mid to lower lumbar levels with some mild disc space narrowing of the lower lumbar segments. No persuasive evidence was presented to suggest that Claimant’s osteoarthritic changes and lumbar disc space narrowing were not the cause of her alleged injury.
18. Dr. Swarsen’s plan was to return Claimant to work full duty with caution. With respect to medications and treatment, Dr. Swarsen had Claimant take extra strength Tylenol, Ibuprofen, and the Flexeril that had been previously prescribed. He indicated “Hold Vicodin.” Dr. Swarsen did not recommend any treatments or make any referrals.
19. Dr. Swarsen opined that because Claimant was required to change cubicles, she was required to move her chair, and her injury was therefore work-related. He stated that symptom magnification did not negate symptoms or a mechanism of injury. “The history, mechanism of injury, onset of symptoms related to a work-related activity, [all] suggest a causal relationship to a work-related activity.”
20. The ALJ finds Dr. Swarsen’s opinion on work relatedness lacks analysis of proximate causation; specifically he does not address how moving a rolling chair, an act involving only minimal force could have caused Claimant’s alleged injury.
21. Claimant testified she still experiences back pain that restricts her activities of daily living.
22. Claimant testified that she is satisfied that Dr. Swarsen understood her condition and would agree to his treatment.
23. On November 10, 2014 Dr. Cotter wrote a “To Whom It May Concern” letter which stated he had seen Claimant for injuries sustained from a workplace accident. However, he does not state what the alleged accident was or describe any mechanism of injury. He states he took x-rays of Claimant’s spine, and recommended (1) non-surgical spinal decompression for her bulging or herniated disc without specifying its level, (2) physical therapy for the injured and spastic muscles, again without identification, and (3) adjustment for an unidentified subluxated vertebra. However, there is no persuasive evidence that Dr. Cotter recommended or performed any of those treatments during the two months that he treated Claimant. Without any analysis, Dr. Cotter opined, “Based on the condition of her spine, it is plausible and likely that the workplace accident caused the injuries.” And finally, Dr. Cotter purports to refer Claimant to Dr. Swarsen for “another” opinion.
24. The ALJ finds Dr. Cotter’s opinions to be based on his presumptive conclusion that Claimant had sustained injuries in a workplace accident, putting the proverbial cart before the horse. The ALJ fault’s his opinion for not including any

mechanism of injury, lack of specificity, failure to contain any analysis about the condition of her spine as it related to her alleged injury, and his failure to treat or refer Claimant for treatment he did not identify or document as necessary until after two months of treatment.

25. Given that both Dr. White and Dr. Robinson diagnosed Claimant with myofascial pain of her thoracic and lumbar spine, and that Claimant responded positively to treatment for a muscle spasm under the care of Dr. Klammer, the ALJ finds it more likely than not that Claimant suffered from a muscle spasm in her lower and mid back. The ALJ further finds that Dr. Swarsen's recommendations that Claimant continue taking anti-inflammatory medication and a muscle relaxant, without recommending any additional treatment, are not inconsistent with such a diagnosis.
26. The ALJ finds the opinions of Dr. White, Dr. Robinson and Dr. Klammer more credible than those of Dr. Cotter and Dr. Swarsen.
27. Claimant inconsistently reported her symptoms to her treatment providers. The ALJ also finds it unlikely that the act of pushing a wheeled chair could cause the extensive injuries Claimant alleges, a finding supported by the fact that Claimant's first three doctors did not find it necessary to perform any imaging diagnostics. Finally, the ALJ finds that Claimant's conduct was in part based on a motivation to find a doctor who would take her off work. Based on all of these considerations, the ALJ finds Claimant is not credible.
28. The ALJ finds Claimant has failed to demonstrate that it is more probable than not that she suffered a compensable injury arising out of and in the course of her employment and therefore denies her claim.
29. As the ALJ has found the claim not compensable, the issue of authorized treatment provider need not be addressed.

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) 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.

It is the ALJ’s sole province to assess the credibility of the witnesses. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). 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). The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

The ALJ’s finding that Claimant is not credible is supported by Claimant repeatedly reporting inconsistent symptoms, the unlikelihood that pushing a chair with wheels could cause significant injury, her positive response to treatment for back spasm, and her motivation to be taken off work.

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). 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).

As found, Claimant did not meet this burden of proof. Claimant admitted experiencing back pain six months prior to her alleged work injury. In addition, x-rays of Claimant's spine revealed mild osteoarthritic changes most obvious at the mid to lower lumbar levels with some mild disc space narrowing of the lower lumbar segments. However, the record contains no persuasive evidence that Claimant's employment aggravated or accelerated any pre-existing condition. Rather, the ALJ concludes that Claimant's occurrence of symptoms at work represents the result of or natural progression of her pre-existent back pain, and the conditions revealed by x-ray that are unrelated to her employment. This conclusion is further supported by the opinions of Drs. White and Robinson who found Claimant's symptoms to be inconsistent with pushing a rolling chair, the alleged mechanism of injury.

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). As found, the opinions of Dr. White, Dr. Robinson and Dr. Klammer more credible than those of Dr. Cotter and Dr. Swarsen on the issue of work relatedness.

ORDER

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

1. Claimant failed to establish by a preponderance of the evidence that her injury is work related.

2. It is therefore ordered that Claimant's claim for worker's compensation benefits is denied and dismissed.

3. 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: April 9, 2015

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

ISSUES

- Did the claimant prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment?
- Did the claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and authorized medical expenses?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 through 9 were admitted into evidence. Respondents' Exhibits A through E and G through M were admitted into evidence.

2. The claimant testified as follows. On Sunday, October 26, 2014 she worked for the employer performing sanitation duties such as sweeping and cleaning surfaces. She had been employed since September 9, 2014. On October 26 between 8:45 a.m. and 9:00 a.m. she felt something strike her from behind in the area of her right waist and hip. She was pushed forward and realized had been hit by a large yellow barrel on casters. The barrel contained 55 to 65 gallons of "solution" used to rinse ovens and the floors. She did not fall to the ground but felt immediate pain. She also experienced the sensation that the bones in her back were "moving like dominos" and that the bones in her knees were also moving.

3. The claimant testified that at the time of this incident coworker Juan Lopez (JL) was to her side and another man was in front of her. Maribel Osequera (MO) and Leticia Garcia (LG) were behind her. The claimant had the impression that the LG had deliberately pushed the barrel into her because LG was closer than MO. The claimant explained that LG and MO had been "aggressive" towards her and had mocked her. The claimant believes that is the reason that they tried to hurt her on purpose.

4. The claimant further testified as follows. About one hour after this incident she reported the injury to a lead person named Guillermo Mora (GM). However, Mora did not take any action. The next day she reported her injury to Elga Flores (EF). Flores made a notation of the report but did not have her fill out any paperwork. On Tuesday, October 28, 2014 EF told the claimant that a manager named Vasquez wanted her to explain what had happened. Vasquez told the claimant that the next day he would fill out paperwork to see a doctor for the injuries. The next day, October 29, 2014, Vasquez wanted the claimant to sign a paper but she refused to do so because

the paper stated that she was “rejecting medical treatment.” The next day she was again given the same paper but refused to sign it.

5. The claimant testified that she was not given any notice of her right to select a treating physician until November 14, 2014. She noted that the designated provider form (Claimant’s Exhibit 9) contains the dates November 14, 2014 and November 3, 2014. The claimant stated that she actually signed the form November 14. The date of November 3, 2014 was placed on the form by Vasquez pursuant to the instructions of “Mr. Black.”

6. The claimant testified that she injured her low back in a motor vehicle accident in 2001. However, she testified that she recovered from this injury and was not experiencing any back problems prior to the alleged events of October 26, 2014. The claimant testified she still works for the employer but experiences whole body pain when walking. The claimant specifically identified pain in the low back and spinal cord that is “like giving birth.”

7. Matthew Miller, M.D., examined the claimant at Concentra on November 3, 2014. The claimant gave a history that on October 26, 2014 someone ran into her with a large container of water. She was hit in the lower back on the right side but not knocked down. She reported pain in both of her hips, her back, neck and head. She reported dizziness, tingling and numbness. On physical examination Dr. Miller noted that the lumbosacral spine did not exhibit erythema, ecchymosis or swelling. There was no tenderness and range of motion was full in extension and flexion. The neurologic examination did not exhibit abnormalities. Dr. Miller assessed a lumbar contusion. He noted that the claimant “described a fairly minimal blow to the back” and that her reported symptoms were more than he expected from the described mechanism of injury. Other than the lumbar contusion Dr. Miller stated that the claimant had very diffuse complaints and he didn’t see how the “other complaints would be a result of this blow.” Dr. Miller ordered an x-ray that showed no fracture. He also released the claimant to full duty work and prescribed over the counter medications. Dr. Miller wrote that if the claimant was not better at the next visit he would suggest physical therapy (PT) or “possibly chiro.” Dr. Miller completed a Physician’s Report of Workers’ Compensation Injury in which he marked a box stating that his “objective findings” were “consistent with history and/or work related mechanism of injury/illness.”

8. EF testified as follows. She is the claimant’s supervisor. She was working on Sunday October 26, 2014 but was not present when the claimant alleges she was injured. The claimant first reported an injury to EF on Monday, October 27, 2014. The claimant advised EF that the day before between 8:00 a.m. and 9:00 a.m. she had been “pushed” by a bucket full of water and needed to go to the doctor. The claimant asked EF to complete an accident report but the claimant then refused to sign the report. EF then took the claimant to a manager, Juan Vasquez (JV). EF was present at the meeting between the claimant and JV. The claimant again asked to go to the doctor but she was not sent to one. EF denied that she ever tried to have the claimant sign a statement rejecting medical treatment. EF recalled that on several occasions before the alleged accident the claimant asked to leave work early because she felt tired.

9. JV testified as follows. He is sometimes known as Juan Manuel Vasquez. He is the employer's senior sanitation manager and the claimant's indirect supervisor. He testified that he learned of the alleged injury on Monday October 27, 2014 and conducted an investigation. On October 27 JV spoke to claimant and asked her about the claimed injury. He presented her with the incident report paperwork, including a designated provider list. However the claimant refused to sign any paperwork that day. JV also spoke to EF and JL.

10. JV testified that video cameras are present at all locations on the employer's premises and recordings are taken "twenty-four seven." As part of his investigation JV reviewed the video at the location and time the claimant was allegedly struck by the bucket. JV testified that he felt sure he watched the video during all of the relevant time periods. Although he saw the claimant on the video he did not see the claimant get hit by a bucket. JV testified he viewed the video in the presence of EF, JL and the claimant. JV testified that he did not see anything in the video that he thought was important to save. However, on cross-examination he stated that he thought it would have been a good idea to keep the video to prove that nothing happened to the claimant. JV testified he had no control over how long the employer saved the video.

11. Blake Brown (BB) testified as follows. He is the employer's health and safety manager. He believes he is the person that the claimant referred to as "Mr. Black." BB stated the employer's injury packet contains an incident report, a designated provider list and a rejection of medical treatment form. BB believes the claimant confused the incident report with the rejection of care form and therefore refused to sign anything. BB states that the claimant signed the designated provider list on November 14, 2014 after refusing to sign it on November 3, 2014. That is why he wrote the date November 3 on the designated provider form. BB denied that he ever asked the claimant to sign the rejection of care form.

12. BB testified that he watched the video of the claimant working on October 26, 2014. He did not see any accident or incident involving claimant. BB stated he was in a position to order that the video be preserved. He admitted that he had reviewed video footage in previous cases but stated he had never preserved it. BB testified that after he reviewed the video he did not feel there was any reason to preserve it. He explained that after the witnesses confirmed that nothing happened and after considering the medical reports he did not think it was necessary to preserve the video.

13. JL testified as follows. He is a lead in claimant's department and was working with the claimant on October 26, 2014. He did not see the claimant get hit with a bucket. As a lead person the claimant should have reported any injury to him so he could notify his supervisor. However, the claimant did not tell him that she had been hit by a bucket and injured. JL moved the claimant from one location to another that day because he wanted her to have an easier job and because he did not think it was safe for her to be in an area with certain chemicals.

14. On November 3, 2014 BB completed a First Report of Injury stating the claimant sustained an injury on October 26, 2014 when another employee allegedly "pushed a barrel of water into her." The report states the employer was notified of this injury on October 27, 2014.

15. On November 5, 2014 the respondents filed a Notice of Contest on the grounds that the injury was not work-related.

16. On November 4, 2014 radiologist Steven Handler, D.O., issued a report concerning his review of the claimant's lumbar x-rays. He noted "no acute lumbar pathology."

17. On November 15, 2015 Ted Villavicencio, M.D., examined the claimant at Concentra. She reported that she had pain all over her body that felt like "labor pain." The claimant also reported chest pain, chest pressure, headaches, lightheadedness, arm and leg weakness, confusion and lower extremity edema. She complained of joint pain, back pain, neck pain, joint stiffness and limping. Dr. Villavicencio assessed a "lumbar contusion." He also opined that the claimant's subjective complaints were greater than objective findings and the reported mechanism of injury would not cause the diffuse symptoms described. Dr. Villavicencio wrote that the claimant should return for treatment in 4 or 5 days and he anticipated she would reach MMI on December 12, 2014. The treatment plan states the claimant should start Cyclobenzaprine and refers the claimant for 2 weeks of physical therapy (PT). Dr. Villavicencio wrote the claimant could lift up to 20 pounds and "push/pull up to 40 pounds."

18. On November 15, 2014 Dr. Villavicencio also issued a Physician Work Activity Status Report. This report is somewhat contrary to his office note. The activity status report releases the claimant from care and releases her to return to "regular duty on 11/15/14." The activity report also lists November 3, 2014 as the "actual date" of MMI.

19. On November 19, 2015 Dr. Villavicencio completed a Physician's Report of Workers' Compensation Injury. This report was apparently based on the November 15, 2014 examination of the claimant. In the report Dr. Villavicencio states the claimant was able to return to full duty on November 15, 2014 and reached MMI on November 15, 2014 without any impairment.

20. LG testified as follows. She worked on October 26, 2014. She saw the claimant on October 26 but she did not push a bucket into the claimant and did not accidentally hit the claimant with a bucket. She did not see the claimant hit by a bucket. The employer has two buckets. One is yellow and contains acid and the other is white and contains sanitizer.

21. MO testified as follows. She worked with claimant on October 26, 2014. She did not see claimant get hit by a bucket. The first or second day that the claimant worked for the employer she asked for a belt because her back hurt. MO had never gotten in an argument with the claimant. MO did not have any relationship with the

claimant because the claimant was “kind of apart.” MO never saw LG have an argument with the claimant.

22. The claimant testified that she did not attend any PT sessions. She explained that the “receptionist” told her that the company would have to reopen the case in order for her to receive PT.

23. On December 8, 2014 the claimant filed a formal Worker’s Claim for Compensation.

24. The claimant failed to prove it is more probably true than not that she sustained any injury arising out of and in the course of her employment.

25. The claimant’s testimony that on October 26, 2014 that she was struck in the back by a large container or bucket of fluid is not credible. The claimant testified that she reported the injury to lead person GM on October 26, but that testimony is not corroborated by any other credible evidence. The claimant testified that at the moment she was struck by the container JL was right beside her. However, that testimony was contradicted by JL’s credible testimony that he was the claimant’s lead person on October 26 and did not see the claimant struck by a bucket. JL also credibly testified that if the claimant had been injured she should have reported the injury to him, but she did not. The claimant also testified that she believed LG deliberately pushed the container into her because LG and MO were “aggressive” towards her. However, the claimant’s testimony that LG and MO were “aggressive” towards her is not corroborated by any other credible and persuasive evidence.

26. The claimant’s testimony that on October 26, 2014 she was struck in the back by a large container and injured is also substantially contradicted by the medical evidence. When Dr. Miller examined the claimant on November 3, 2014 (8 days after the alleged injury) his spinal and neurological examinations were essentially normal. Despite diagnosing a “lumbar contusion,” Dr. Miller did not find any lumbar erythema, ecchymosis or swelling. The claimant’s spine was not tender and she exhibited full ROM in flexion and extension. Although the claimant reported a number of symptoms in addition to back pain, Dr. Miller credibly opined that these other complaints were not consistent with a “minimal blow to the back” and more than he would expect from the described mechanism of injury. This evidence undermines the claimant’s credibility because it evidences a willingness to dramatize her testimony for the purpose of proving her case.

27. The claimant’s testimony that she was injured on October 26, 2014 is also undermined by Dr. Villavicencio’s report of November 15, 2014 report. Once again the claimant listed a large array of symptoms in addition to back pain. Dr. Villavicencio opined that the claimant’s subjective symptoms were “greater than objective findings” and that the reported mechanism of injury would not cause the “diffuse symptoms described.”

28. The claimant's tendency to dramatize her case is also evidenced by her testimony that at the time the bucket impacted her she felt as though the bones in her back were "moving like dominos." The claimant gave this testimony after describing a mechanism of injury which Dr. Miller classified as a "minimal blow to the back." The claimant admitted that the impact was not sufficient to knock her down, a fact which she also reported to Dr. Miller on November 3.

29. As an evidentiary matter the ALJ declines to draw any "adverse inference" from the employer's destruction of the video taken on October 26, 2014. Considering the finding that the claimant's testimony is not credible and has been contradicted in the manner described above, the ALJ finds as a matter of fact that the video did not depict the incident described by the claimant. In this regard the ALJ finds that in order to infer that the video showed the incident described the claimant he would be required to find that both JV and BB lied about the contents of the video. However, their testimony that nothing is depicted on the video is corroborated by the testimony of JL, the supervisor whom the claimant testified was just to her side when she was allegedly struck by the bucket so hard that her bones "moved like dominoes." JL denied seeing any incident.

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

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). 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.

LAW OF COMPENSABILITY

The claimant contends that she proved by a preponderance of the evidence that she sustained a compensable injury proximately caused by being struck in the back by a large yellow bucket on casters. In so doing the claimant argues that because the employer destroyed the video the ALJ should draw an “adverse inference” that the video would corroborate her testimony by showing the incident as it occurred. The respondents contend the claimant did not prove that she sustained any injury arising out of and in the course of her employment. Alternatively, the respondents argue that if an “incident” occurred on October 26, 2014 the claimant failed to prove that the incident amounted to a “compensable injury.” The respondents also argue that an “adverse inference” is not justified in this case.

The 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 her employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair, supra*.

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.*, W.C. No. 4-650-711 (ICAO February 15, 2007).

LAW OF SPOILIATION

The claimant’s argument that the ALJ should infer that the video depicts her injury is based on the law of “spoliation” or destruction/loss of evidence. Generally an ALJ has wide discretion in making procedural and evidentiary rulings. This discretion encompasses the authority to impose appropriate sanctions where a party “spoils” evidence. *Trinkline v. Mini Mart, Inc.*, WC 4-734-561 (ICAO December 12, 2008). Assessing sanctions against a party that destroys evidence serves the “punitive

function” of deterring parties from destroying evidence to prevent its introduction at trial. Sanctions also serve the “remedial function” of restoring the putatively injured party to the same position it would have held prior to the destruction of the evidence. *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d 999 (Colo. 2006).

In *Pfantz v. Kmart Corp.*, 85 P.3d 564 (Colo. App. 2003), the Court of Appeals held that where the trial judge found that the defendant intentionally or recklessly destroyed evidence (a bench), after the plaintiff requested that it be preserved, the trial court did not abuse its discretion by instructing the jury that it could “presume” the bench was defective and that the defendant’s conduct caused the defect. (The court noted that it was not expressing any opinion on the difference between an inference and a presumption). The defendant argued that the court did not have power to impose any sanction for spoliation unless the destruction was “intentional.” The court held that bad faith, recklessness and gross negligence all describe conduct that is not necessarily deliberate or intentional but is “more than negligent and less than intentional.” The court reasoned that reckless or bad faith destruction of evidence is “so aggravated as to be all but intentional” and that the spoliator’s conduct need not be “intentional” to justify sanctions. The court further held that “merely negligent” destruction of evidence may justify the imposition of an adverse inference as a remedial sanction when the inference is “reasonably likely to have been contained in the destroyed evidence.” *Pfantz v. Kmart Corp.*, 85 P.3d at 568-569.

In *Aloi v. Union Pacific Railroad Corp.*, *supra*, the Supreme Court held that a trial court did not err when instructing the jury that it could infer from the defendant’s destruction of relevant documents that the documents would have been unfavorable to the defendant. In *Aloi* the trial court found the defendant “willfully” destroyed the documents. The defendant argued on review that an adverse inference instruction can’t be given unless the trial court finds “intentional” or “bad faith” destruction of the evidence. However, the Supreme Court held that the trial court’s finding of “willful” destruction justified issuance of the adverse inference instruction to the jury. The court discerned “no useful distinction” between bad faith destruction of evidence and willful destruction of evidence. The court reasoned that that the “remedial” purpose for imposing sanctions is served regardless of the destroying party’s “mental state” because the opposing party will suffer the same prejudice in either case. Further the court stated that permitting an “adverse inference” from the willful destruction of evidence serves a “punitive purpose” because it deters a parties from destroying evidence “that they know or should know will be relevant to litigation.” *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d at 1003.

The *Aloi* court also rejected the argument that in the absence of “bad faith” the trial court cannot give an adverse inference instruction unless there is “extrinsic evidence” that the destroyed evidence would have been unfavorable to the spoliator. The court determined that at a minimum it would have to appear from the evidence that the evidence “would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence.” *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d at 1004. The court concluded that this rule serves the “remedial purpose” of an adverse inference instruction because it minimizes prejudice to the “non-destroying

party.” It reasoned that the rule serves the “punitive purpose” because it places the risk that the destroyed evidence “may not have been detrimental on the party responsible for the destruction.” *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d at 1004.

In *People In the Interest of A.E.L. and K.C-M.*, 181 P.3d 1186, (Colo. App. 2008) the Court of Appeals cited *Pfantz v. Kmart Corp.*, *supra*, for the proposition that a court is “not limited to imposing a sanction only for intentional spoliation, but may impose one based on mere negligence.” In *Castillo v. Chief Alternative, LLC*, 140 P.3d 234 (Colo. App. 2006) the Court of Appeals relied on *Aloi v. Union Pacific Railroad Corp.*, *supra*, as supporting the proposition that destruction of evidence may justify the imposition of sanctions for pre-complaint destruction of evidence where the “evidence was relevant to pending, imminent, or reasonably foreseeable litigation.”

The ALJ concludes that in the civil context the facts of this case would justify the imposition of an “adverse inference” instruction as a sanction for the employer’s destruction of the video taken on October 26, 2014. While the employer may not have destroyed the video with the “intent” to eliminate evidence favorable to the claimant, the conduct of its employees amounts to at least “willful” destruction of evidence that it knew or reasonably should have known would be relevant to foreseeable litigation. BB admitted that as the employer’s safety manager he was in a position to preserve the video but decided it was not necessary to do so in light of other evidence which he considered favorable to the employer. When BB reached the conclusion that the video need not be preserved the claimant had already reported the alleged work-related injury and requested medical treatment. Thus, BB was aware of foreseeable workers’ compensation litigation when he permitted the destruction of the video. Further, the ALJ infers that BB knew or should have known that the video was “relevant” to the potential litigation since he himself reviewed it and had reviewed video in other cases. Moreover, JV, who also reviewed the video as part of his investigation, credibly testified that it would have been a “good idea” to keep the video to prove that nothing happened to the claimant.

However, this issue does not arise in a purely civil matter but instead in the context of a workers’ compensation case. Thus, the ALJ serves as the fact-finder and there are no jury instructions to be given. Consequently, the ALJ concludes that as a legal matter it is sufficient to find the employer’s destruction of the video warrants a sanction for spoliation of the video. The ALJ concludes that the specific sanction to be imposed is the workers’ compensation equivalent of the “adverse inference instruction” given in civil cases. Put another way, the ALJ recognizes that the employer’s conduct would permit him to draw the “adverse inference” that the video documented the claimant being struck in the back by a large container of fluid while at work on October 26, 2014. Conversely, the ALJ understands that in his role as fact-finder the imposition of the “adverse inference” sanction does not *mandate* that he draw the adverse inference. Rather, the inference ultimately to be drawn from the destruction of the video, if any, is left to the ALJ after considering the totality of the evidence. *Cf. Aloi v. Union Pacific Railroad Corp.*, *supra* (“adverse instructions” given to jury were that: (1) Based on destruction of the documents by defendant it was reasonable to infer that the destruction was willful and designed to impede the plaintiff’s ability to prove the case;

(2) The jury “may infer” the evidence contained in the documents was unfavorable to the defendant).

COMPENSABILITY OF ALLEGED INJURY

The claimant failed to prove it is more probably true than not that she sustained any injury arising out of and in the course of her employment. For the reasons stated in Findings of Fact 25 through 28, the claimant’s testimony that she sustained an injury when a large bucket container was pushed into her is not credible and persuasive. While the ALJ recognizes that the facts of this case would permit drawing an “adverse inference” from the employer’s destruction of the video, the ALJ declines to draw such an inference for the reasons state in Finding of Fact 28. In light of this determination the ALJ need not discuss the respondents’ alternative argument.

ORDER

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

1. The claim for workers’ compensation benefits in WC 4-965-591 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: April 6, 2015

DIGITAL SIGNATURE:


David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on November 5, 2014.

FINDINGS OF FACT

1. Claimant works for Employer as an underwriting team manager.
2. On November 5, 2014 Claimant attended a voluntary blood draw program, which was sponsored by Employer.
3. Employer offered a \$15/month reduction in all employees' medical insurance premiums if the employees participated in Employer's sponsored monthly blood draw program.
4. Claimant regularly participated in the program in order to receive a reduction in his monthly medical insurance premium.
5. On November 5, 2014 while at the monthly blood draw donation clinic, the medical technician had a hard time finding a vein from which to draw blood from Claimant's right arm. Claimant was "stuck" in his right arm several times with a needle, without success.
6. The technician then attempted to switch to Claimant's left arm in order to draw blood. Before the technician attempted to draw blood from Claimant's left arm, Claimant started feeling poorly. Claimant put his elbows on his legs, and put his head in his hands. Claimant passed out, fell forward, and hit the epoxy cement floor. Claimant came to, lying on his right side, with blood coming out of his nose.
7. After Claimant came to, he did not believe he needed medical attention and thought he would be okay.
8. Approximately two weeks later, Claimant was still experiencing pain and sought medical treatment.
9. On November 19, 2014 Claimant was evaluated by John Charbonneau, M.D. Dr. Charbonneau diagnosed syncopal episode. Dr. Charbonneau opined that Claimant was not in the course of his normal employment at the time of the injury but was having blood drawn at a wellness event, and that it appeared to be a "premises

injury.” Dr. Charbonneau opined that Claimant fractured his nose and had trauma to the right orbit. See Exhibit B.

10. Dr. Charbonneau ordered X-rays and a CT scan of the nose and facial bones and referred Claimant to Dr. Sabour for otolaryngology consultation and treatment. Dr. Charbonneau indicated he would see Claimant after the x-rays and consultation. See Exhibit B.

11. On December 3, 2014 Respondents filed a Notice of Contest alleging the injury/illness was not work related. Claimant filed an Application for Expedited Hearing on December 12, 2014. See Exhibit E.

12. Claimant had several visits with Front Range ENT. Sarmad Sabour, M.D. saw Claimant on February 19, 2015 and assessed fracture of nasal bones, nasal septal deviation, nasal obstruction, and snoring.

13. Dr. Sabour noted that Claimant had a prior nasal septoplasty in 2009 that provided only minimal improvement in Claimant’s nasal symptoms at that time.

14. Claimant had two syncopal episodes prior to November 5, 2014. One episode was approximately two years prior when he was also having his blood drawn, felt light headed, and passed out. The other episode was approximately five years prior when medical personnel were removing the packing from Claimant’s nose following nasal surgery, and Claimant again passed out.

15. Claimant appeared pro se at hearing and testified that he believed the injury should be compensable since he was at a company sponsored event at the time of the injury. Claimant asked for Respondents to be held responsible for paying for visits to the ENT, X-ray and CT testing, and follow up care.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), 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. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. (2014). 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); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). 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

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained the burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. See § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two pronged requirement by a preponderance of the evidence. See § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). Employment is defined by §8-40-201(8), C.R.S. (2014). The definition specifically excludes as employment "...the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." In the present case, Claimant has failed to establish that his injury occurred within the time and place

limits of his employment relationship or during an activity that had some connection with his job-related functions. Rather, at the time of Claimant's injury, Claimant was participating in a voluntary blood draw program. The voluntary program, although sponsored by Employer, is specifically excluded from the definition of employment under the Workers' Compensation Act.

Claimant has not show that the injury occurred while he was performing any work related activities. There was no benefit to Employer of having Claimant participate in the voluntary blood draw program. Claimant was the sole beneficiary of the program as he received a monthly deduction in his health insurance premium by participating. Claimant has failed to meet his burden to show the injury arose out of or in the course of his employment. Rather, the injury occurred during Claimant's voluntary participation in a blood draw program that had no connection to his job or job duties.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show he suffered a compensable injury on November 5, 2014. The claim 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: April 13, 2015

/s/ Michelle E. Jones

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