ISSUES

- Whether the right shoulder arthroplasty proposed by Stewart Weinerman, M.D. is reasonable, necessary and related to Claimant's injury.

FINDINGS OF FACT

1. Claimant worked as baggage handler for Employer from approximately 1985-2006. He also worked as a supervisor. His job required heavy lifting, which he did on a daily basis.

2. Claimant's medical history was significant in that he previously suffered an industrial injury on October 8, 2002[1]. He injured his left shoulder while working for Employer and required surgery. Claimant testified he returned to work full duty after the surgery on his left shoulder.

3. Claimant sustained an admitted industrial injury to his right shoulder on July 7, 2005. The injury occurred while he was lifting a bag onto a plane. The bag should have been marked "heavy", but was not. Claimant heard a pop in his shoulder.

4. On July 7, 2005, Claimant was evaluated by Rick Artist, M.D. Dr. Artist's assessment was strain-right shoulder; question rotator cuff injury. Claimant was treated conservatively with medications and given work restrictions. The ALJ infers Claimant required treatment for the right shoulder after the injury, although specific reports relating to said treatment was not in the record.

5. An MRI arthrogram on July 27, 2005 revealed severe AC osteoarthritic changes, articular side tendinits, advanced osteoarthiritic changes at the glenohumeral joint and a probable small SLAP tear in Claimant's right shoulder[2]. JoAnne Halbrecht, M.D. reviewed the MRI arthrogram and stated Claimant's symptoms were more consistent with osteoarthritis, bursitis and impingement[3]. The ALJ infers the osteoarthritis in Claimant's right shoulder had been present for some time, as it was described as "advanced" in this note.

6. Dr. Halbrecht found Claimant to be at MMI on November 18, 2005. Dr. Halbrecht stated: "given that his osteoarthritis is bilateral, I discussed with him a genetic component for this".[4] Dr. Halbrecht stated Claimant would require bilateral shoulder replacements. There were no medical records admitted at hearing from August 2005

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[1] That case was assigned W.C. case no. 4-584-139.
[2] The MRI arthrogram was referenced in Exhibit 1, p.3-Findings of Fact, Conclusions of Law and Order issued by ALJ Friend on April 3, 2008.
[3] Exhibit 1, p. 3.
[4] *Id.*

through February 2006 which showed what treatment Claimant received for his right shoulder from any of his ATP-s, including Drs. Artist and Halbrecht.

7. Claimant was initially evaluated by Peter Weingarten, M.D. on March 28, 2006. Claimant's injury was reviewed, including the arthroscopic surgery performed on his left shoulder, as well as visco-supplementation treatment, which was temporarily helpful. Claimant had moderate discomfort at the extremes of his range of motion ("ROM"). There was mild diffuse weakness on abduction. Dr. Weingarten noted x-rays of the shoulder demonstrated moderately advanced arthritis. His impression was degenerative arthritis of the shoulder, exacerbated by the accident in question. Dr. Weingarten recommended treatment to include change of work status, such that Claimant did not do repetitive heavy lifting. He felt Claimant would ultimately require total shoulder arthroplasty, but felt this should be delayed until the symptoms warranted the surgery. The ALJ notes this record related to treatment of the left shoulder and Dr. Weingarten did not offer any opinions regarding the right shoulder.

8. On March 30, 2006, Claimant was evaluated by Jon Erickson, M.D. Dr. Erickson noted Claimant had persistent, significant pain in the right shoulder and what was described as "horrible" range of motion on both sides. X-rays taken of both shoulders revealed essentially identical end-stage degenerative arthritic changes on both sides. Claimant had almost 45° of glenoid retroversion, which was described as a significant challenge at the time of a surgical procedure or total shoulder replacement, including potential grafting. The ALJ notes Dr. Erickson did not offer an opinion regarding the impact, if any, the glenoid retroversion had on Claimant's osteoarthritis.

9. On May 25, 2006, Dr. Erickson saw Claimant in follow-up for a consultation concerning the shoulder arthroplasty. At that time, the potential complications of the procedure, including eventual loosening of the glenoid was discussed. Dr. Erickson also discussed the lack of wear and tear phenomenon in the shoulder. Claimant was advised against doing luggage handling in the future.

10. Dr. Weinerman issued a report to Insurer, dated July 24, 2006. Dr. Weinerman noted he had been asked by Dr. Weingarten (his partner) to evaluate Claimant for purpose of giving him an impairment rating for the work-related injuries to his shoulders and back. Dr. Weinerman assigned a 25% extremity impairment to Claimant's left shoulder and 14% scheduled impairment to the right shoulder.

11. Dr. Erickson issued an addendum report on or about August 10, 2006. Dr. Erickson noted Claimant continued to have significant pain and limitation in his range of motion. He had end-stage degenerative arthritis in both glenohumeral joints, with approximately 45° of glenoid retroversion. Dr. Erickson noted he would not do both procedures in one sitting and would usually do the dominant side first.

12. On October 3, 2006, Dr. Weinerman issued a supplemental report to Insurer regarding Claimant's rating and the dates of MMI for his various injuries. Dr. Weinerman noted Claimant reached MMI as of July 20, 2006 for the right shoulder. Dr. Weinerman said he was in agreement with the diagnoses and conclusions made by Dr.

Halbrecht and Dr. Erickson. He offered his opinion that Claimant's previous arthritic condition was due to his employment as a baggage handler. He opined the first surgery on 12/20/02 and his eventual need for total shoulder replacement was due to his employment over 20 years as a baggage handler, which was described as "heavy work". Dr. Weinerman limited Claimant from doing any overhead lifting. He also stated Claimant would require medical maintenance, including medical monitoring.

13. Claimant testified he stopped working for Employer in 2006.

14. Claimant was evaluated by Rolf Kirby, M.D. on April 10, 2007. Claimant told Dr. Kirby that his left and right shoulders were deteriorating from lifting and stacking bags for 22 years. On examination, Dr. Kirby noted decreased range of motion in the lumbar spine and especially the shoulders. Dr. Kirby noted Claimant had no cartilage left in his shoulders, with degenerative arthritic changes on both sides. Claimant had almost 45° of glenoid retroversion. Dr. Kirby's diagnostic impression and functional assessment was: end stage significant degenerative arthritis in both shoulders. He considered Claimant's shoulders to be actively inflamed, with decreased range of motion due to end stage degenerative arthritis. For restrictions, Dr. Kirby noted Claimant could carry up to 20 pounds, but nothing over 5 pounds anywhere above the waist and was completely impaired from any activity with the arms above his shoulders.

15. Claimant returned to Dr. Artist on October 29, 2007. He reported his symptoms were about the same, continuing to have pain in both shoulders and in his back. He also reported trouble staying in certain positions. Dr. Artist's assessment was bilateral shoulder sprains and back strain. From these medical records, the ALJ infers Claimant had persistent bilateral shoulder pain.

16. Respondents filed a Final Admission of Liability ("FAL") on April 9, 2008, admitting for a permanent medical impairment rating of 8% (whole person)[5], as well as maintenance medical benefits, provided these were reasonable, necessary and related to the injury. There were no records admitted at hearing which documented additional treatment Claimant received after 2008, other than follow-up evaluations.

17. Claimant returned to Dr. Artist on May 13, 2008, who noted poor range of motion of the shoulders, with obvious discomfort. Claimant's back had poor range of motion in all parameters. Dr. Artist's assessment was persistent bilateral shoulder and back pain. He referred Claimant to Dr. Weinerman.

18. Claimant was seen in consultation by Dr. Weingarten on May 21, 2008 for bilateral shoulder and low back pain. Claimant was able to elevate his arms a maximum of ninety-five degrees. Dr. Weingarten noted Claimant had undergone extensive physical therapy for both shoulders without improvement and he did not

[5] The whole person rating was paid pursuant to the Findings of Fact, Conclusions of Law and Order [4/3/08] issued by ALJ Friend-Exhibit 1. At that hearing, the issues of permanent total disability and permanent partial disability benefits were adjudicated. Although he noted bilateral shoulder replacements were recommended, ALJ Friend made no findings as to the relatedness of the proposed arthroplasty.

desire surgical intervention. Dr. Weingarten advised Claimant he should be re-checked on an annual basis.

19. Claimant returned to Dr. Weinerman on May 22, 2009. Dr. Weinerman stated he was suffering from "really" severe post traumatic osteoarthritis of the shoulders and had given up most activities. Claimant was also described as unemployable, as he had a real difficulty finding work. In the physical examination, Claimant could not raise his arms overhead. His forward flexion was to about 90° and abduction was to about 80°. Internal and external rotation were both markedly decreased bilaterally. Dr. Weinerman opined Claimant was an excellent candidate for total shoulder replacement surgery, if he wanted to consider it.

20. Dr. Weinerman also evaluated Claimant on August 26, 2010. Claimant had very limited range of motion and it was noted his situation had not changed much, but his range of motion was decreasing. Dr. Weinerman said Claimant may be a candidate for a bilateral shoulder arthroplasties and recommended an MRI.

21. Claimant was seen by Dr. Weinerman on April12, 2011, at which time they discussed total shoulder arthroplasty. Dr. Weinerman noted Claimant had forward flexion to 90° and abduction to 80°. Claimant had limited internal external rotation. Claimant wished to go forward with surgery and Dr. Weinerman felt the rotator cuff was intact. Dr. Weinerman indicated he would probably go forward with the left shoulder first.

22. On December 4, 2012, Dr. Weinerman examined Claimant for what was described as left shoulder pain. Limitation in Claimant's ROM was noted. The x-ray of the shoulder showed a complete loss of glenohumeral joint space with peripheral osteophytes around joint-bilaterally. The diagnosis was osteoarthritis. Dr. Weinerman recommended Claimant undergo total right shoulder arthroplasty. Dr. Weinerman's office requested authorization of the surgery by Insurer. On December 17, 2012, Insurer authorized Dr. Weinerman's request for authorization for a right total shoulder arthroplasty. The approval had a limitation providing if the date of service exceeded thirty (30) days, a new review may be necessary.

23. Claimant did not undergo the proposed surgery, which was scheduled for January 28, 2013 because his diabetes was not controlled. Dr. Weinerman indicated Claimant was not to undergo surgery until the diabetes was well-controlled.

24. Claimant returned to Dr. Weinerman on September 10, 2013. At that time, it was noted his pain was greater on the left shoulder, as opposed to the right. Dr. Weinerman's findings were moderate glenohumeral joint space narrowing on right, complete loss of glenohumeral joint space with peripheral osteophytes around joint on the left. Claimant needed to get his diabetes under control and surgery was noted as pending PCP preoperative clearance.

25. Dr. Fall performed an IME on behalf of Respondents on January 23, 2014. At that time, Claimant described his pain level as 8/10 and noted he could not reach over his head. On examination, Claimant had flexion to 115°, abduction to 80° with scapular crepitus, extension 50° and internal and external rotation 40° each. Pain was noted while range of motion testing was done. Dr. Fall's impression was bilateral end stage glenohumeral arthritis; multilevel lumbar degenerative disc disease.

26. Dr. Fall noted Claimant had early onset osteoarthritis involving both shoulders and the arthritis was in the joint. She opined this condition was most likely was hereditary, as he had uncommon positioning of his glenoid. Dr. Fall disagreed with Dr. Weinerman that shoulder arthritis was an occupational disease. Dr. Fall observed the etiology of the arthritis was hereditary at Claimant's young age. The x-rays indicated long-standing degenerative processes, which were bilateral. This was also an indication that this was hereditary. Dr. Fall disagreed with Dr. Weinerman that the repetitive nature of his job over the years led to arthritis, as well as the surgery. Dr. Fall observed the surgery did not add to his arthritis, as merely a debridement was done. Dr. Fall observed arthritis can be post-traumatic; this was more commonly seen after severe injury such as a dislocation or fracture, which did not occur here. Dr. Fall concluded while bilateral shoulder arthoplasties may be appropriate, these were not work-related. Dr. Fall also recommended the total shoulder arthroplasties should not be undertaken without addressing Claimant's poorly-controlled diabetes.

27. Dr. Weinerman issued a report, which had a date stamp of April 7, 2014, and reviewed his history of treating Claimant as well as his findings in the case. He noted Claimant reached MMI for all three injuries on July 20, 2006. He stated Dr. Halbrecht, Dr. Erickson and he were in agreement that Claimant was in need of bilateral shoulder replacements as a consequence of his work related injuries. The ALJ notes the medical records admitted at hearing do not contain such a clear expression of opinion on the part of Drs. Halbrecht and Erickson. The ALJ infers Dr. Weinerman believed these other physicians were in agreement with his opinion. However, the record contained no evidence this was the case. In fact, there is evidence Dr. Halbrecht believed Claimant's shoulder condition was hereditary.

28. Dr. Weinerman reiterated his opinion that Claimant's symptoms and need for the surgery was a direct consequence of his work activities, specifically his work as a baggage handler for over 20 years and the heavy lifting involved in that job. He previously advised Claimant to wait as long as possible before pursuing bilateral shoulder replacements, but the time was now. Dr. Weinerman also documented the right shoulder replacement surgery was first approved by Insurer on 12/17/12, but they were forced to postpone the surgery due to Claimant's underlying diabetic condition. As soon as clearance was received from his PCP, he recommended proceeding with bilateral shoulder replacements. Dr. Weinerman concluded by stating it remained his medical opinion that the recommendation for bilateral shoulder replacements was reasonable, necessary and related to Claimant's work related condition and injuries. The ALJ notes Dr. Weinerman did not address the 45° of glenoid retroversion present in Claimant's right shoulder. The failure to do so made his opinion less persuasive.

29. On September 8, 2015, an MRI was done on Claimant's right shoulder. The films were read by Bao Nguyen, M.D. Dr. Nguyen noted the presence of diffuse glenohumeral arthritis (with extensive cartilage loss) and an overlying anteriorly downsloping and curved acromion. This was "consistent with a chronic SLAP lesion and glenohumeral instability". Dr. Nguyen's impression was advanced glenohumeral arthritis, with diffuse labral degeneration, probably a reflection of chronic glenohumeral instability; concurrent central cuff tendinosis but no partial/full thickness spinal tendon tear.

30. On September 14, 2015, Claimant was evaluated by Dr. Weinerman. Dr. Weinerman's impression was: problem number one-osteoarthritis. After that evaluation, Dr. Weinerman requested authorization for a right total shoulder replacement.

31. Dr. Fall performed a W.C.R.P. Rule 16 review on September 22, 2015 concerning the request for authorization of right shoulder arthroplasty. Dr. Fall opined the bilateral shoulder osteoarthritis was not work-related. She recommended that authorization for the procedure be denied.

32. On November 12, 2015, Claimant was evaluated by his family physician, James Yeash, M.D. Dr. Yeash's assessment was type 2 diabetes mellitus, hyperlipidemia, hypertension and shoulder joint pain. Dr. Yeash noted Claimant was under consideration for bilateral shoulder surgery. Dr. Yeash opined Claimant's diabetes should be in "at least reasonable" control prior to proceeding with surgery. His diabetes was <u>not</u> in control, but had improved, as he had a hemoglobin A1C at 8.4%. Dr. Yeash described this as "not completely out of control" and "is not preclude him from having surgery" [sic]. His platelet count was stable at 106,000, which "would not necessarily preclude him from surgery", but that would be at the discretion of the orthopedic surgeon. His lipids were not abnormal enough to preclude him from having surgery. Dr. Yeash opined Claimant's overall condition, labs and physical status should not preclude Claimant "from being considered" for surgery. The ALJ notes that Dr. Yeash did not clear Claimant for surgery; rather he noted these conditions did not preclude Claimant from being considered for surgery. Dr. Yeash deferred to the surgeon. Significantly, Dr. Yeash saw Claimant after the request for authorization of the surgery was made. There was no indication in the record that Claimant was seen by Dr. Yeash since the November 2015 evaluation.

33. Dr. Fall testified as a medical expert at the hearing. She is board-certified in physical medicine and rehabilitation and is Level II accredited, pursuant to the W.C.R.P. Dr. Fall opined the proposed surgical procedure was reasonable and necessary, however, it was not related to Claimant's industrial injury. Dr. Fall testified Claimant had previously been diagnosed with osteoarthritis. More particularly, he was diagnosed with severe early onset osteoarthritis and the diagnostic studies showed his glenohumeral joints had rare positioning of the ball going into the socket. This predisposed him to develop arthritis and end stage osteoarthritis was seen at the time of the injury. Dr. Fall noted Claimant's need for surgery was because of the congenital

condition[6]. Dr. Fall opined the work injury did not alter or speed up the progression of the underlying arthritis. Even if Claimant had not suffered an injury on 7/7/05, Dr. Fall believed Claimant would require total shoulder replacement because of the osteoarthritis. Dr. Fall also expressed concerns regarding Claimant's complicating health issues (diabetes, low platelets) which led her to question whether surgery was in Claimant's best interest. The ALJ credited Dr. Fall's testimony regarding whether Claimant would have needed a total shoulder replacement for his right shoulder, even if he had not been injured on 7/7/05. The ALJ also credited Dr. Fall's opinions regarding Claimant's complicating health issues.

34. Claimant continued to treat with Dr. Weinerman as an ATP since he was placed at MMI. He testified Dr. Weinerman would recommend at various times that he have the total shoulder replacement. Claimant testified his right shoulder is stable, although he believed it has gotten worse over the last ten (10) years. Claimant said he received clearance and the ALJ infers he wishes to have the surgery.

35. The ALJ was not persuaded by Dr. Weinerman's opinion that Claimant's work as a baggage handler caused or accelerated the bilateral osteoarthritis present in his shoulders.

36. There was no evidence in the record which persuaded the ALJ that Claimant's diabetes was under control as of February 2016.

37. There was no opinion provided by Dr. Weinerman concerning Claimant's low platelet count.

38. The ALJ found Dr. Fall's opinions credible and persuasive. While the arthritis in Claimant's right shoulder required treatment in the acute phase of the injury, his need for a total shoulder arthroplasty is because of the end stage osteoarthritis, which was present at the time of the injury. The ALJ was persuaded the injury did not alter or speed up the progression of the underlying arthritis. The ALJ was persuaded Claimant would have required undergo a right shoulder arthroplasty, even if he had not been injured on July 7, 2005.

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

[6] Dr. Fall initially used the word "hereditary", which was also used by Dr. Halbrecht. On cross-examination, she explained her use of the words "hereditary and congenital". Dr. Fall stated Claimant was born with the condition.

CONCLUSIONS OF LAW

Generally

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

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 has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

Medical Benefits

Claimant argued the osteoarthritis in his right shoulder became symptomatic after he sustained the injury on July 7, 2005. Claimant asserted his work as a baggage handler aggravated and/or accelerated the osteoarthritis in his shoulder, which necessitated medical treatment. He contended the treatment he now requires was caused by the industrial injury. To support this argument, Claimant relied upon the opinions of Dr. Weinerman and, to a lesser extent, Dr. Weingarten. Claimant also pointed to the fact that the surgery was previously approved by Insurer, but did not go forward because his diabetes was not under control. Now that his diabetes is stable, Claimant requested the arthroplasty be authorized.

Respondents argued Claimant failed to meet his burden of proof that a causal relationship existed between the July 7, 2005 admitted right shoulder injury and his advanced, end-stage osteoarthritis. Respondents also argued the fact that the surgery was previously approved several years before does not compel a finding that the surgery should have been approved a second time. Respondents argued they are

entitled to challenge the reasonableness of current or newly requested treatment notwithstanding their position taken with regard to previous medical treatment. Respondents relied upon Dr. Fall's opinions that Claimant would have required the arthroplasty for his advanced osteoarthritis whether or not he had sustained an injury.

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Weinerman is reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A Claimant may be compensated if the work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought". *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990).

As a starting point, there is no dispute that Claimant was diagnosed with bilateral end stage osteoarthritis in the glenohumeral joint in both shoulders, as early as 2005. As found, the osteoarthritis in Claimant's right shoulder was not caused by his industrial injury, although it was probably initially aggravated by the injury. Claimant required treatment and was placed at MMI for the right shoulder injury. (Finding of Fact 4, 6). As conceded by Respondents' expert, Dr. Fall, the proposed total arthroplasty for the right shoulder was reasonable and necessary. However, the overriding question was whether the proposed surgery was related to Claimant's admitted industrial injury. Dr. Fall also questioned whether the proposed arthroplasty was in Claimant's best interest given some of his health conditions. Based upon the totality of the evidence, the ALJ determined Claimant failed to meet his burden of proof on the issue of relatedness. As found, Claimant requires the surgery because of the end stage arthritis in his right shoulder, as opposed to the work-related injury. (Finding of Fact 36). The medical evidence documented the presence of endstage osteoarthritis in the right shoulder joint, which arthritis was present at the time of the injury in 2005. The ALJ concluded this was not caused by the industrial injury.

As found, Dr. Fall's testimony was persuasive; first with regard to her opinion Claimant would have required the surgery, even if he had not suffered the industrial injury. The ALJ was not persuaded by Dr. Weinerman's opinion that Claimant's work activities over time caused the osteoarthritis. Rather, the ALJ credited Dr. Fall's opinion that post-traumatic arthritis most often develops after a fracture or dislocation, which did not occur here. Inferentially, Dr. Erickson's opinion regarding the lack of wear and tear in the shoulder also supported Dr. Fall's opinion.

Second, Dr. Fall's explanation regarding the location and angle of Claimant's glenoid as a cause of osteoarthritis was persuasive to the ALJ. Dr. Fall's opinion was supported by one of Claimant's early treating physicians, Dr. Halbrecht. (Finding of

Fact 6). In this regard, Dr. Weinerman did not address this latter issue, although he disagreed with Dr. Fall's opinion regarding the cause of Claimant's osteoarthritis. Dr. Weinerman appeared to only believe Claimant's work activities as the cause of his need for surgery, excluding all other potential causes. However, his failure to address the 45° of glenoid retroversion made his opinion less persuasive.

In making this determination, the ALJ also considered what impact, if any, the prior authorization of the arthroplasty had on the issue before the Court. Implicit in this analysis is consideration of the question whether Insurer waived its right or should be estopped from contesting whether the proposed procedure was reasonable and necessary, as well as related to the injury by its prior approval. The equitable doctrines of waiver and estoppel have been applied to workers' compensation hearings. *Johnson v. Industrial Commision of the State of Colorado,* 761 P.2d 1140,1145-1146 (Colo. 1988).

No authority was proffered by either party on this issue, but under the specific circumstances, the ALJ concluded Respondents were within their rights to require additional approval if the surgery was not performed within 30 days. The prior authorization of the right shoulder arthroplasty had a specific condition; namely, if the procedure was performed beyond 30 days, further approval had to be secured. (Finding of Fact 22). Under the circumstances of this case, almost 3 years elapsed until the next request for authorization was made. Respondents were within their rights to deny the requested authorization. Accordingly, there was no evidence Respondents voluntarily and intentionally relinquished a known right, giving rise to a waiver of their right to contest to the proposed surgery. *Johnson v. Industrial Commision of the State of Colorado,* 761 P.2d at 1147.

In addition, the equitable doctrine of estoppel does not apply, as there were additional relevant facts (i.e. the opinions of Dr. Fall) that were not known at the time the surgery was initially approved. Moreover, there was no showing by Claimant that he detrimentally relied upon the original approval decision made by Insurer. Indeed, the arthroplasty did not go forward because of Claimant's diabetes, not anything that had to do with Respondent-Insurer.

Finally, the ALJ was not persuaded Claimant's diabetes was stable. As found, Dr. Yeash did not unequivocally clear Claimant for surgery. (Finding of Fact 30). Based upon the evidence, the ALJ was unable to conclude Claimant's diabetes was under control and therefore there remains a significant chance for complications.

In this regard, the ALJ considered the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 4-Shoulder Injury [effective February 1, 2015] ("Treatment Guidelines") when evaluating the proposed shoulder arthroplasty. The Treatment Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. (2008). In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the Court noted that the Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. (2008).

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005).

However, an ALJ is not required to award or deny medical benefits based on the Treatment Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award or deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Treatment Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

In the case at bench, the ALJ considered the application of the Treatment Guidelines, specifically with respect to potential complications. The section entitled: "**General Guideline Principles**" addresses surgical interventions. In particular, the section provides in pertinent part:

> "Surgical Interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathological conditions."

More particularly, Section G (6) addresses **Shoulder Replacement (Arthroplasty)**. Subsection (b) is concerned with the occupational relationship and provides that it is "Usually from post-traumatic arthritis, or from trauma resulting in severe humeral head fractures."

This was not present in the case at bench and comports with Dr. Fall's opinion that significant trauma is what generally causes post-traumatic arthritis. Given the facts of the case, the ALJ determined Claimant failed to establish a relationship between his occupation and the osteoarthritis. Absent such a showing, Claimant did not make a sufficient showing under the Treatment Guidelines.

In addition, at least one surgeon (Dr. Erickson) raised the possibility that Claimant would require grafting before implantation of the glenoid component. Nothing in the record indicated this issue was addressed by Dr. Weinerman. There were also potential complications which could arise related to Claimant's diabetes and the surgery may be contraindicated. As found, Claimant's diabetes may not be under control and surgery would be contraindicated if it was not. Pursuant to the Treatment Guidelines, operative interventions must be based upon a positive correlation of clinical findings, clinical course, and diagnostic tests; without such a correlation, Claimant failed to satisfy his burden of proof regarding the proposed surgery.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the right shoulder arthroplasty is DENIED.

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 15, 2016

Digital signature

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

ISSUES

- Was Claimant's right to seek additional medical benefits and temporary disability benefits foreclosed by the failure to appeal ALJ Harr's finding that the Division-independent medical examination physician placed Claimant at maximum medical improvement on February 28, 2013?

- Is the Claimant entitled to an award of medical benefits to treat her right knee symptoms?

- Is Claimant entitled to an award of temporary total disability benefits commencing February 28, 2013 and continuing?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 though 13 were received in evidence. Respondents' Exhibits A through AA were received in evidence.

2. On November 1, 2007 Claimant sustained an admitted injury to her left knee. She slipped on a wet or greasy floor and twisted her left knee.

3. On December 1, 2008 Claimant underwent left knee surgery described as a plica resection of the medial compartment and a lateral retinacular release. On December 11, 2009 Claimant underwent a second left knee surgery described as a microfracture of the left medial femoral condyle chondral lesion.

4. On June 16, 2010 authorized treating physician John Hughes, M.D., placed the Claimant at maximum medical improvement (MMI). Dr. Hughes assessed left knee sprain, left knee arthrosis post microfracture and persistent postsurgical patellofemoral arthritis.

5. Claimant requested a Division-sponsored independent medical examination (DIME) to review Dr. Hughes's findings.

6. William Watson, M.D., performed the DIME on November 23, 2010. During the course of the DIME Dr. Watson noted that claimant walked with an "antalgic gait, quick on the left." In addition to examining Claimant's left knee Dr. Watson examined Claimant's *right* knee. With regard to the right knee Dr. Watson noted pain on patellar compression, grinding and crepitation with flexion/extension and tenderness over the lateral patella. Dr. Watson assessed the following: (1) Status post lateral

release and plica resection of the left knee; (2) Status post chondroplasty and microfracture of the medial femoral condyle; chondral lesion; (3) Chondromalacia patella of the right knee, rule out internal derangement. Dr. Watson opined Claimant was not at MMI. With regard to the left knee Dr. Watson recommended Claimant undergo a repeat MRI to assess the medial condylar cartilage defect. With regard to the right knee Dr. Watson noted Claimant had first complained of right knee pain to Dr. Robinson on February 10, 2010, to Dr. Hughes on May 5, 2010 and to Dr. Parry on August 10, 2010. Dr. Watson opined Claimant's right knee symptoms were attributable to her altered gait and excessive weight bearing that were caused by the November 1, 2007 accident. Dr. Watson opined Claimant should undergo x-rays and an MRI of the right knee and follow-up with her orthopedic surgeon.

7. Dr. Watson's November 2010 finding that Claimant had not reached MMI was not contested by either Claimant or Respondents.

8. On January 4, 2011 Claimant was seen by Dr. Hughes. Dr. Hughes wrote that Claimant's "emerging right knee symptoms" were consistent with degenerative chondromalacia patella and not attributable to the November 1, 2007 industrial injury.

9. On January 7, 2011 Claimant returned to her surgeon, Walter Robinson, M.D. Dr. Robinson recommended Claimant undergo bilateral MRI's of her knees to assess chondral defects.

10. In September 2012 Charles Gottlob performed a third surgery on Claimant's left knee. Dr. Gottlob had intended to perform a unicompartmental resurfacing arthroplasty but decided against the procedure upon detecting significant chondromalacia on the central weight bearing portion of the lateral femoral condyle.

11. On February 28, 2013 Dr. Gottlob noted Claimant had undergone an Orthovisc injection with minimal relief. Dr. Gottlob placed Claimant at MMI.

12. On May 28, 2013 Claimant returned to Dr. Watson for a follow-up DIME. Dr. Watson issued a written report in which he listed his impressions as: (1) Status post arthroscopy of the left knee times 3 with the most recent arthroscopy showing grade 4 chondromalacia of the lateral compartment and chondral defect in the medial compartment; (2) Chondromalacia of the patella of the right knee. Dr. Watson wrote that he agreed with Dr. Gottlob's finding that Claimant reached MMI on February 28, 2013. He further stated that his opinion was "unchanged on the right knee from my previous report." Dr. Watson assessed a 21% lower extremity rating for Claimant's left knee. On February 28, 2013 Dr. Watson also completed a Division IME Examiner's Summary Sheet on which he indicated Claimant reached MMI on February 28, 2013 with 21% lower extremity impairment.

13. On June 13, 2013 the Insurer filed a Final Admission of Liability (FAL). The FAL admitted for temporary total disability (TTD) benefits from December 1, 2008 through February 27, 2013. The FAL admitted Claimant reached MMI on February 28,

2013 and admitted for permanent partial disability (PPD) benefits, based on Dr. Watson's 21% lower extremity impairment rating, commencing February 28, 2013. The FAL also admitted for ongoing medical benefits "as related to the injury post MMI."

14. On June 18, 2013 Claimant filed an Application for Hearing listing the issues as medical benefits, TTD benefits commencing March 1, 2013, PPD benefits, and permanent total disability benefits. Claimant also endorsed "other issues" including whether she was at MMI, whether her right knee problems were related to the November 2007 injury and whether additional medical treatment was reasonable and necessary.

15. On October 23, 2013 ALJ Harr conducted a hearing concerning Claimant's application for hearing. ALJ Harr issued Findings of Fact, Conclusions of Law, And Order (FFCL) dated January 2, 2014. In the FFCL ALJ Harr listed the issues as follows: (1) Whether Dr. Watson determined that Claimant's right knee condition was a component of her admitted left knee injury; (2) Whether Claimant proved by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment of the left knee injury aggravated the chondromalacia patella of the right knee; (3) Whether claimant proved by a preponderance of the evidence that she was entitled to an award of medical benefits, temporary disability benefits and PPD benefits related to the right knee condition.

16. In the January 2, 2014 FFCL ALJ Harr determined as fact that it is more probably true than not that Dr. Watson, the DIME physician, found Claimant's symptoms of right knee chondromalacia patella are not related to the left knee injury. In support of this determination ALJ Harr initially found that Dr. Watsons' reports "were equivocal regarding causation of [the] chondromalacia patella disease process in claimant's right knee." Specifically, ALJ Harr noted that in the November 23, 2010 DIME report Dr. Watson recommended diagnostic tests and an evaluation to rule out symptoms of (right knee) internal derangement. However, in the May 28, 2013 follow-up DIME report Dr. Watson no longer recommended evaluation of the right knee, placed the Claimant at MMI, rated the injury based only on left knee impairment and "did not condition MMI upon treatment of the right knee." ALJ Harr inferred from this evidence that Dr. Watson determined that the "chondromalacia patella disease affecting claimant's right knee is not a component of her left knee injury."

17. ALJ Harr next found that Claimant failed to prove it is highly probable that Dr. Watson "was incorrect in his determination that claimant reached MMI, with no permanent impairment of the right knee." In support of this determination ALJ Harr credited the opinion of Dr. Hughes that Claimant's "right knee symptoms are the result of a concurrent and unrelated degenerative condition that was not in any way accelerated or aggravated by the work related left knee injury." Having determined Claimant failed to overcome by clear and convincing evidence Dr. Watson's DIME finding that Claimant was at MMI, ALJ Harr denied the claim for medical benefits, temporary disability benefits and PPD "related to [Claimant's] right knee condition."

18. Claimant appealed ALJ Harr's FFCL to the ICAO. Claimant argued in her brief that, among other things, ALJ Harr misinterpreted the follow-up DIME report and that Dr. Watson's "ultimate opinion" was that the right knee symptoms were caused by the admitted left knee injury. In support of this assertion Claimant explicitly cited that portion of the follow-up DIME report in which Dr. Watson stated that his opinion concerning the right knee was unchanged from the November 29, 2010 DIME report. As a corollary to this argument Claimant reasoned that ALJ Harr mistakenly found she was at MMI because she never received any treatment for the injury-related right knee symptoms. In a Final Order dated June18, 2014 the ICAO affirmed ALJ Harr's FFCL and concluded that ALJ plausibly interpreted the evidence to mean that Dr. Watson found Claimant to be at MMI and her right knee symptoms were not related to the left knee injury.

19. Claimant appealed the ICAO's June 18, 2014 Final Order to the Court of Appeals.

20. On December 11, 2014 the Court of Appeals issued its opinion in *Samuels v. Industrial Claim Appeals Office,* Colo. App. No. 14 CA1281 (not selected for publication). On appeal Claimant argued that ALJ Harr "erred as a matter of law in determining that the follow-up DIME report was ambiguous and that the DIME physician had changed his opinion and no longer considered claimant's right knee problems to be related to the admitted lift knee injury." The court rejected this argument finding that "when viewed in the context of the surrounding circumstances" the follow-up DIME report (May 28, 2013 report) was "ambiguous." Specifically the court concluded that the follow-up DIME could be interpreted as "determining an impairment rating solely as to claimant's left knee, while reiterating that claimant's right knee was still to be evaluated and treated." Alternatively, the court stated that the report could be interpreted as "suggesting that the DIME physician had decided to exclude claimant's right knee symptoms as a component" of the left knee injury. Thus, the court concluded that resolution of the ambiguity presented in the follow-up DIME presented a question of fact for the ALJ.

21. The Court of Appeals next considered whether the record supported ALJ Harr's finding that "the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." In so doing the court noted that a DIME physician's "opinions concerning MMI and permanent impairment inherently require him or her to assess as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the work injury." The court found "no evidence in the record to support [ALJ Harr's] finding that the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." The court explained that ALJ Harr's finding that in the follow-up DIME report Dr. Watson "changed" his opinion concerning the cause of the right knee symptoms was "directly at odds with [Dr. Watsons's] statement that his opinion was *un*changed from his previous report." (Emphasis in original). The court also concluded the record did not support ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations." The court explained that the mere fact the follow-up DIME report was susceptible to more than one interpretation did not alone support

ALJ Harr's finding that "one possible interpretation versus any other reflected the DIME physician's true opinion."

22. In light of these conclusions the court set aside the ICAO's Final Order affirming ALJ Harr's January 2, 2014 FFCL. The court remanded the case with directions to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and "conduct such additional proceedings as may thereafter be necessary and appropriate." The court specifically authorized the taking of "such additional evidence as is necessary to carry out the requirements" of its order.

23. Subsequently the ICAO entered an Order of Remand setting aside ALJ Harr's January 2, 2014 order and remanding the matter for "further proceedings consistent with the opinion of the Court of Appeals."

24. By the time the matter was remanded to the OAC ALJ Harr had retired. Consequently the matter was reassigned to ALJ Cannici to carry out the instructions of the Court of Appeals.

25. On March 30, 2015 ALJ Cannici entered Findings of Fact, Conclusions of Law, and Order on Remand (Order on Remand). ALJ Cannici did not conduct any additional evidentiary proceedings prior to issuing the Order on Remand. ALJ Cannici described the issue to be determined as whether Dr. Watsons' May 28, 2013 follow-up DIME report "reflects that Claimant's right knee injury was a component of her admitted left knee injury."

26. In the Order of Remand ALJ Cannici found that Dr. Watson's May 28, 2013 follow-up DIME report was "ambiguous." In support ALJ Cannici found the May 28 follow-up DIME report placed Claimant at MMI on February 28, 2013, awarded only a "left knee impairment rating" and did not contain any language conditioning MMI on provision of further treatment for the right knee. PALJ Cannici also found that in the May 28 follow-up DIME report Dr. Watson wrote that his opinion concerning Claimant's right knee "was unchanged from his November 23, 2010 report." ALJ Cannici then resolved the "ambiguity" in the follow-up DIME report. He found that because Dr. Watson stated in the follow-up DIME report that his opinion concerning Claimant's right knee was "unchanged" from the November 2010 report Dr. Watson "maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury." Thus, ALJ Cannici concluded that Dr. Watson's "ultimate DIME opinion was that Claimant's right knee injury was component of her admitted left knee injury." However, ALJ Cannici's Order on Remand did not purport to award or deny any specific benefits.

27. On April 17, 2015 Claimant filed a Request for Corrected Order or Petition to Review Order on Remand. This pleading requested ALJ Cannici to issue a "corrected, revised or amended" order to reflect that "any issue not addressed by the [Order on Remand] is reserved for determination at a later date." Apparently ALJ Cannici declined to issue a corrected order and the matter was transmitted to the ICAO for consideration of Claimant's petition to review.

28. On May 29, 2015 Dr. Gottlob referred Claimant to Sheba Shah, M.D., for further treatment. Dr. Shah is located in Arizona and the ALJ infers that Dr. Gottlob made the referral because Claimant had moved to Arizona.

29. On September 29, 2015 the ICAO entered an Order concerning the Claimant's petition to review the Order on Remand. Citing § 8-43-301(2), C.R.S., the ICAO ruled that it lacked jurisdiction to review the Order on Remand because it "did not award or deny specific benefits." However, the ICAO went on to state that the parties were disputing "the effect of the [Order on Remand] on future litigation." The ICAO stated that this dispute was "hypothetical and speculative" and any order that it might issue would be "merely advisory." Finally, the ICAO concluded that ALJ Harr's January 2, 2014 FFCL and ALJ Cannici's Order on Remand did not constitute "awards" of benefits that would serve to close the claim in the absence of a "reservation clause." The ICAO reasoned that ALJ Harr's order had been set aside and therefore was not an "award." The ICAO also explained that the Order on Remand was not an "award" because it did not grant or deny any benefits.

30. On June 23, 2015, while the petition to review the Order on Remand was still pending, Claimant filed an application for hearing listing the issues as medical benefits, TTD benefits commencing February 28, 2013 and "entitlement to benefits in light of" ALJ Cannici's finding that the right knee symptoms are causally related to the left knee injury. On July 23, 2015 Respondents filed a response to the application for hearing listing additional issues that included the following: (1) The claim was closed; (2) Issue preclusion; (3) Claim preclusion; (4) The ALJ did not reserve any issues for future determination in the prior findings of fact conclusions of law and order which closed the claim; (5) Claimant was at MMI pursuant to DIME.

31. Dr. Shah examined Claimant on August 11, 2015. Dr. Shah opined that Claimant "developed compensatory pain in the right knee as a consequence of the left knee issues." Dr. Shah noted Claimant had relocated to Arizona to care for her parents and had not had "active care" since leaving Colorado. Dr. Shah recommended Claimant undergo an x-ray and MRI of the right knee. She also referred Claimant for an orthopedic evaluation for "further recommendations on surgical versus non-surgical care."

32. At the hearing held on November 5, 2015 Claimant's counsel stated that Respondents had authorized an MRI of the right knee and this study had been carried out. However, according to Claimant's counsel Claimant has not had an orthopedic evaluation since the MRI study was done.

33. At the hearing held on November 5, 2015 Claimant's counsel stated that the issues include Claimant's entitlement to TTD benefits and medical benefits for treatment of the right knee. Claimant's counsel explained that from Claimant's perspective PALJ Cannici had determined the Claimant's right knee symptoms are causally related to the left knee injury but did not address the issue of what benefits were owed as a result of the right knee condition. Respondents' counsel stated that from Respondents' perspective Claimant's request for additional benefits cannot be

granted because the claim is "closed." Respondents' counsel argued that in the follow-up DIME Dr. Watson found Claimant had reached MMI. Respondents' counsel interpreted ALJ Cannici's Order on Remand as finding that although the right knee symptoms are related to the left knee injury the Dr. Watson found that no additional treatment is necessary. Therefore, Respondents' counsel reasoned that is at MMI.

34. It is Dr. Watson's opinion as the DIME physician that Claimant has not reached MMI for all conditions causally related to the industrial injury of November 1, 2007 industrial injury. PALJ Cannici has determined that Dr. Watson's true opinion, as evidenced by the follow-up DIME report, is that Claimant's right knee symptoms are causally related to the underlying industrial injury.

35. It is Dr. Watson's opinion as the DIME physician that Claimant needs additional medical treatment for the right knee injury. In the November 23, 2010 report Dr. Watson opined Claimant needed treatment of the right knee to include x-rays, an MRI and follow-up with an orthopedic surgeon. In the follow-up DIME report Dr. Watson indicated his opinions concerning the right knee were unchanged from the November 2010 DIME report. The ALJ infers from the follow-up DIME report that Dr. Watson is still of the opinion that Claimant needs treatment for his right knee.

36. The ALJ understands from comments of Claimant's counsel that some of the right knee diagnostic studies recommended by Dr. Watson have been performed. However, the evidence establishes that Claimant has not undergone an orthopedic evaluation of the right knee. As late as August 2015 Dr. Shah credibly opined that Claimant still needs orthopedic evaluation of the right knee.

37. Taken together, Dr. Watson's opinions that Claimant's right knee symptoms are causally related to the November 2007 left injury and that Claimant needs additional treatment for the right knee constitute a DIME finding that Claimant *has not* reached MMI for the industrial injury. Specifically, Dr. Watson has found Claimant needs additional evaluation of the injury-related right knee condition. Respondents did not argue at the hearing nor do they argue in their position statement that the undersigned ALJ should alter ALJ Cannici's finding that Dr. Watson's true opinion is that Claimant's right knee condition is causally related to the industrial injury. Neither do Respondents assert that they have presented clear and convincing evidence to overcome Dr. Watson's opinion that the right knee symptoms are causally related to the industrial left knee injury. Respondents do not argue they have presented clear and convincing evidence to overcome Dr. Watson's DIME opinion that Claimant needs further treatment for the right knee. Consequently, the Respondents have not sought to overcome Dr. Watson's true opinion that Claimant is not at MMI.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the claimant has 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.

MMI AND RESPONDENTS' "CLOSURE" ARGUMENTS

Claimant contends that she is entitled to an award of TTD benefits commencing February 28, 2013 and an award of medical benefits for treatment of her right knee. Claimant reasons that the Court of Appeals decision effectively determined that the May 28, 2013 DIME report was "ambiguous" regarding the question of whether the right knee is a component of the 2007 left knee injury. Claimant construes the court's order to mean ALJ Harr's finding that Claimant reached MMI because the DIME found the right knee symptoms were not causally-related to the left knee injury has been set aside and is of no force and effect. Claimant reasons that neither ALJ Harr's FFCL nor the opinion of the Court of Appeals has "closed" the issues of MMI and Claimant's right to additional benefits. Moreover Claimant construes ALJ Cannici's Order on Remand as favorably resolving the question of the cause of the right knee symptoms. However, Claimant contends that the Order on Remand failed to resolve the underlying questions of MMI and her consequent right to additional benefits.

In contrast, Respondents contend that Claimant is not entitled to any additional medical or TTD benefits because these issues have been "closed" and Dr. Watson's DIME finding that Claimant reached MMI is binding on the ALJ and the parties. Respondents argue that ALJ Harr found Claimant is at MMI and Claimant "did not appeal that determination." Consequently Respondents assert that the opinion of the Court of Appeals "in no way impacted the MMI determination from the DIME physician or Judge Harr's order pertaining to MMI." According to Respondents the only real effect of the court's order and ALJ Cannici's Order on Remand was to render Respondents liable for post-MMI medical treatment of the right knee. (Respondents' Position Statement at p. 13).

As a corollary Respondents contend that Claimant mistakenly argues the "finding of causation regarding Claimant's right knee is a determination that Claimant's work-related injuries are not at MMI." Respondents reason that there is a distinction between determining that a condition is related to a compensable injury and a determination the condition is at MMI. Respondents assert that ALJ Cannici's Order on Remand merely determined the causation issue with regard to the right knee but did not alter ALJ Harr's finding that Claimant reached MMI.

Considering the facts and procedural posture of this case the ALJ agrees with Claimant's arguments and rejects Respondents' arguments. The ALJ concludes that ALJ Harr's determination that Dr. Watson found the right knee symptoms are not causally related to the left knee injury was integral to ALJ Harr's finding that Dr. Watson placed Claimant at MMI on February 28, 2013. Further, because the Court of Appeals set aside ALJ Harr's finding that the right knee is unrelated to the left knee injury the court necessarily set aside ALJ Harr's finding that Claimant reached MMI.

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). A finding that a claimant needs additional medical treatment to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining a claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's "true opinion" concerning MMI. *MGM Supply Co. v. Industrial Claim Appeals Office, supra*; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. An ALJ may consider all statements made by a DIME physician for the purpose of determining the DIME physician's true opinion concerning MMI. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Respondents' assertions notwithstanding, Claimant has consistently appealed ALJ Harr's finding that the Dr. Watson placed her at MMI. As determined in Findings of Fact 15 through 17, the matter originally went to hearing before ALJ Harr concerning Claimant's request for additional medical and temporary disability benefits. ALJ Harr necessarily recognized that the question of MMI turned on a determination of Dr. Watson's true opinion concerning the cause of the right knee symptoms. Indeed, ALJ Harr wrote that the first issue for his determination was whether Dr. Watson found Claimant's right knee symptoms are a component of the admitted left knee injury. As determined in Finding of Fact 16 ALJ Harr found Dr. Watson's follow-up DIME report was "equivocal" concerning the cause of Claimant's right knee symptoms. ALJ Harr interpreted the follow-up DIME report to mean that Dr. Watson concluded Claimant's right knee symptoms are not related to the left knee injury, but instead to degenerative chondromalacia. That ALJ Harr based his order on the relationship between the cause of the right knee symptoms and MMI is evidenced by the fact that he placed the burden on Claimant to prove by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment for her left knee aggravated the chondromalacia patella condition of her right knee."

As determined in Findings of Fact 20 through 22, the Court of Appeals ultimately agreed with ALJ Harr that the Dr. Watson's follow-up DIME report was "ambiguous" concerning whether or not Claimant's right knee symptoms are causally related to the industrial injury. However, the Court found that ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations" was not supported by the record. Consequently the court set aside the ICAO's order affirming ALJ Harr's FFCL and remanded the matter to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and to conduct

"such additional proceedings as may thereafter be necessary" including the taking of additional evidence.

It is clear from the Court's opinion that it considers the cause of Claimant's right knee symptoms to be a matter for initial determination by the DIME physician as part of the statutorily mandated process for determining MMI. Indeed, the court explicitly noted that MMI determinations require the DIME physician to determine whether various components of the claimant's medical condition are causally related to the work injury and that the DIME physician's causation findings can be overcome only by clear and convincing evidence. Moreover the court emphasized that resolution of the MMI issue in this case depends on "record-supported findings" resolving the ambiguity in the May 28, 2013 follow-up DIME report. As the court explained the "ambiguity" in the follow-up DIME arises because the follow-up DIME can be read in two ways concerning whether or not the right knee symptoms are related to the left knee injury. Because the court recognized that the causation issue is at the very core of the DIME physician's ultimate opinion concerning MMI it necessarily set aside ALJ Harr's finding that the DIME physician placed the Claimant at MMI.

It follows that the Respondents' incorrectly argue that the issues of additional TTD and medical benefits have been been "closed" by Claimant's alleged failure to appeal ALJ Harr's determination that she reached MMI. To the contrary, Claimant contended all the way through the Court of Appeals that ALJ Harr incorrectly found the DIME physician placed her at MMI for all injury-related conditions. The basis of Claimant's argument was that the DIME physician's true opinion was that she was not at MMI because the right knee symptoms are causally related to the left knee injury and she needs additional treatment for the right knee. The court agreed with Claimant to the extent it concluded ALJ Harr's determination that Dr. Watson placed Claimant at MMI for all injury-related conditions is not supported by ALJ Harr's findings of fact

To the extent that Respondents argue that ALJ Harr's order is of any current legal significance on the issue of MMI, the ALJ disagrees. The Court of Appeals explicitly set aside the ICAO's order affirming ALJ Harr's order and remanded for new findings of fact on the issue of MMI and for additional proceedings, including the taking of additional evidence. The court's order constitutes a "general remand" that authorizes entirely new findings and conclusions with respect to MMI so long as they do not conflict with the court's order. *See Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686 (Colo. App. 1988).

EFFECT OF ALJ CANNICI'S ORDER ON REMAND

Respondents also contend that in the Order of Remand ALJ Cannici found Claimant reached MMI. Therefore, Respondents reason Claimant is not entitled to an award of additional benefits. As support for this argument Respondents cite that portion of the Order on Remand in which ALJ Cannici found that the follow-up DIME report contained no recommendation for treatment for the right knee, did not condition MMI on further treatment for the right knee, placed Claimant at MMI and provided a rating for the left knee only. The ALJ disagrees with this argument.

Respondents' argument misconstrues ALJ Cannici's findings. Consistent with the opinion of the Court of Appeals, ALJ Cannici found the follow-up DIME report was "ambiguous" with regard to the cause of the right knee symptoms. In support of this finding ALJ Cannici noted that the follow-up DIME report did not expressly recommend any treatment for the right knee, did not condition MMI on treatment of the right knee and appeared to place Claimant at MMI for the left knee. Conversely ALJ Cannici also found that in the follow-up DIME report Dr. Watson wrote that his opinions concerning the right knee were unchanged from the opinions expressed in the November 23, 2010 DIME report. Of course, in the November 2010 DIME report Dr. Watson had opined the right knee symptoms were causally-related to the left knee injury and that Claimant needed treatment for the right knee. Thus, ALJ Cannici recognized, as did the Court of Appeals, that the follow-up DIME report was ambiguous because it is subject to conflicting inferences concerning whether or not the DIME physician found the Claimant's right knee symptoms are related to the left knee injury. ALJ Cannici resolved this conflict and found as a matter of fact that "Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury."

Further, ALJ Cannici's Order on Remand does not contain any *explicit* finding purporting to determine whether or not Claimant has reached MMI. Rather ALJ Cannici limited the Order on Remand to resolving the "ambiguity" in the follow-up DIME report.

MMI DETERMINATION AND CLAIM FOR MEDICAL BENEFITS TO TREAT RIGHT KNEE

Claimant contends she is entitled to an award of additional medical benefits to treat the right knee condition. Claimant contends that her entitlement to additional medical treatment (other than maintenance treatment) is dependent on a finding that she is not at MMI. The Claimant contends that authority to determine she has not reached MMI is inherent in the remand order issued by the Court of Appeals. The ALJ agrees with Claimant's arguments.

As set forth above, Claimant has always maintained that she has not reached MMI because the right knee symptoms are causally related to the industrial injury and because she needs additional treatment for the right knee to cure and relieve the effects of the 2007 industrial injury. ALJ Harr denied the request for medical treatment of the right knee because he found that the DIME physician opined the right knee symptoms were not causally related to the injury and Claimant failed to overcome that determination by clear and convincing evidence. Claimant ultimately appealed to the Court of Appeals ALJ Harr's conclusion that the DIME physician "changed" his November 2010 opinion concerning the cause of the right knee symptoms. The court remanded the case for new "record-supported findings" to resolve the ambiguity in the follow-up DIME report and for such additional proceedings as might prove necessary and appropriate.

As determined above, a DIME physician's finding concerning whether or not a claimant has reached MMI is binding unless overcome by clear and convincing evidence. A DIME physician's finding concerning MMI necessarily includes

determinations of whether the claimant's medical conditions were caused by the industrial injury and whether additional treatment is likely to improve the claimant's condition.

Here, ALJ Cannici has already determined, pursuant to the instructions of the Court of Appeals, that it is Dr. Watson's DIME opinion that Claimant's right knee symptoms are causally related to the industrial injury. As determined in Finding of Fact 37, Respondents do not argue that the undersigned ALJ should interfere with ALJ Cannici's determination. Neither do Respondents argue that they have overcome Dr. Watson's causation finding by clear and convincing evidence. Similarly Respondents do not argue they presented clear and convincing evidence to overcome Dr. Watson's opinion that Claimant needs additional treatment for the right knee including an orthopedic evaluation.

As determined in Finding of Fact 37, Dr. Watson's findings that the right knee symptoms are causally related to the November 2007 industrial injury and that Claimant requires additional treatment are tantamount to a finding Claimant has not reached MMI. Because Respondents do not contend that they have presented clear and convincing evidence to overcome Dr. Watson's finding that Claimant has not reached MMI that finding is binding on the parties and the ALJ. *Cordova v. Industrial Claim Appeals Office, supra.*

In these circumstances Claimant is entitled to an award of additional medical benefits to treat the right knee symptoms including referral to and treatment by an orthopedic specialist.

CLAIM FOR ADDITOINAL TTD BENEFITS

Claimant contends she is entitled to an award of TTD benefits commencing February 28, 2013 until she is determined to have reached MMI. The ALJ agrees with this argument.

Where respondents file an admission of liability admitting for TTD benefits they are bound by that admission and must pay accordingly. Section 8-43-203(2)(d), C.R.S. The filing of an admission for TTD benefits amounts to an admission that Claimant has sustained the initial burden of proof to establish a right to TTD benefits. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). Once admitted TTD benefits must ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S., including the occurrence of MMI. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

Here, Respondents filed an FAL admitting Claimant was entitled to TTD benefits commencing December 1, 2008. The FAL terminated the TTD benefits on February 28, 2013, the date Claimant reached MMI according to Respondents' interpretation of Dr. Watson's follow-up DIME report. However, as determined above, Dr. Watson's true opinion was that Claimant did not reach MMI on February 28, 2013, and Respondents

have not overcome that opinion by clear and convincing evidence. Consequently, Respondents have not shown any legal basis for terminating Claimant's TTD benefits on February 28, 2013. Consequently, Claimant is entitled to an award of TTD benefits commencing February 28, 2013 and continuing until terminated in accordance with law or order. TTD benefits shall be paid at the statutory rate based on the admitted average weekly wage.

ORDER

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

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

2. Insurer shall provide reasonable and necessary medical benefits for treatment of Claimant's right knee condition including the provision of an orthopedic evaluation.

3. Insurer shall pay temporary total disability benefit at the statutory rate and based on the admitted average weekly wage commencing February 28, 2013 and continuing until terminated in accordance with law or order.

4. Issues not determined 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: March 14, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a general award of post-MMI, medical maintenance benefits for his right elbow/ hand condition.

II. Whether the Claimant has sustained disfigurement as a result of his work injury.

FINDINGS OF FACT

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

1. Claimant is currently employed by Respondent-Employer as a welding instructor for the Colorado Department of Corrections. He was promoted from welder to a welding teacher in February 2015.

2. Claimant sustained a compensable injury to his right elbow on July 22, 2010, which was ultimately diagnosed as right cubital tunnel syndrome, or right ulnar neuropathy.

3. The claim is complicated by the fact that Claimant sustained a separate and distinct compensable injury to his right shoulder, during the pendency of his elbow claim. Although the shoulder claim is separate from the right elbow injury, Claimant treated concurrently for both injuries by Dr. Richard Nanes, Respondent-Employer's authorized treating physician (ATP). Consequently, both injuries are frequently addressed in the medical records. While the condition of Claimant's right shoulder is mentioned frequently throughout the medical records, this order addresses Claimant's entitlement to maintenance medical treatment benefits for his right elbow claim only.

4. Following his right elbow injury, an electrodiagnostic study of the right elbow was ordered. The EMG was performed October 1, 2010 by Dr. Scott Ross and revealed mild ulnar neuropathy of the right elbow (right cubital syndrome). By the time of this EMG study, Claimant had been evaluated by Dr. Richard Idler on the referral of Dr. Nanes.

5. On October 29, 2010, Dr. Idler opined that Claimant was a candidate for decompression of the right ulnar nerve at the elbow.

6. Claimant underwent an in situ surgical decompression of the ulnar nerve at the right elbow on November 16, 2010 with Dr. Idler.

7. Subsequent to the surgery, Claimant continued to experience symptoms associated with entrapment/compression of the ulnar nerve at the elbow. As of January 11, 2011, Claimant continued to report numbness in the right fourth and fifth fingers, and he had some concerns about incomplete recovery.

8. In December 2011 Claimant still had paresthesias of the right fourth and fifth fingers and pain in the right hand. Claimant saw Dr. Idler on February 24, 2012 for right ulnar sided wrist pain. The etiology was uncertain. Dr. Idler recommended an MRI.

9. A March 22, 2012 MRI suggested a small metallic foreign body in the soft tissues in the wrist, and a ganglion cyst. Dr. Idler administered an injection for the ulnar carpal ganglion cyst.

10. Claimant saw Dr. Donald Luebke on July 2, 2012. Dr. Luebke noted despite Dr. Idler's injection for a ganglion cyst, Claimant continued to have right wrist symptoms. Dr. Luebke saw no clinical evidence of a ganglion cyst by the time he saw Claimant. Dr. Luebke released Claimant from his care without restrictions.

11. As noted above, Claimant injured his right shoulder while working when he slipped off of the bumper of a truck on March 25, 2013. In an effort to keep from falling, Claimant caught himself with his outstretched arm injuring the shoulder in the process. The focus of Claimant's treatment switched from the right elbow to the right shoulder at this time. Nonetheless, Claimant continued to experience right elbow/hand symptoms.

12. On August 1, 2013, a repeat EMG evaluation performed by Dr. Katherine Leppard revealed a right mononeuropathy at the elbow. Claimant returned to Dr. Nanes who referred him to Dr. Karl Larsen for further evaluation.

13. Dr. Larsen evaluated Claimant on September 9, 2013. At this appointment, Claimant reported that the numbness and tingling in his right ring and small fingers did not improve following his November 16, 2010 surgery with Dr. Idler. Dr. Larsen reviewed the results of the electrodiagnostic study performed by Dr. Leppard. He noted the EMG to be "consistent with severe ulnar neuropathy at the elbow isolated to the level of the medial epicondyle." Dr. Larsen recommended a right "revision ulnar neuroylsis at the elbow" with transpositioning and "collagen wrapping" if the nerve was heavily invested with scar tissue.

14. On April 19, 2014, Dr. Wallace Larson conducted an independent medical examination (IME) at Respondents request to address the reasonableness of repeat elbow surgery as proposed by Dr. Larsen. In his IME report, Dr. Larson opined as follows: "[r]epeat neurolysis with anterior transposition of the ulnar nerve does appear to be a reasonable opinion as long as the patient understands that the likelihood . . . of having a completely normal result is relatively low."

15. On August 5, 2014, Claimant underwent surgery by Dr. Larsen for a right recurrent ulnar neuropathy.

16. On September 22, 2014, Dr. Larsen reported that Claimant had complete resolution of his numbness and tingling. According to the clinic note from this date, Claimant had no pain, and was "doing very, very well" and was "very pleased." The clinical examination revealed negative findings in all respects.

17. On September 30, 2014, Dr. Nanes stated that Claimant was "doing extremely well."

18. Claimant returned to work after the surgery around October 1, 2014. (Resp. Exh B-1; Claimant's testimony). Approximately two months later, on December 3, 2014, Claimant returned to Dr. Nanes' office for further evaluation. At this appointment, Claimant reported "swelling of his right elbow" the night before. He also reported a pain level of 3. Outside of his swelling and pain, Claimant was noted to be "doing extremely well." In the report generated from this encounter, Dr. Nanes noted that Claimant had full range of motion in the right elbow and did not have any paresthesias of the right fourth and fifth fingers. Dr. Nanes noted: "The patient has really had a nice response to his right cubital tunnel release surgery." Dr. Nanes placed Claimant at maximum medical improvement and released him from medical care. As part of the WC164 form completed December 3, 2014, Dr. Nanes stated that maintenance care after MMI was not required. (Resp. Exh. C-0).

19. Claimant underwent a Division Independent Medical Examination (DIME) by Dr. William Watson on July 7, 2015.

20. Dr. Watson documented Claimant's report of weakness in the right hand with intermittent numbness in the fourth and fifth fingers. Dr. Watson also documented that Claimant had "full range of motion of the right elbow with normal two-point sensation and strength." Consequently, Dr. Watson did not feel there was any medical impairment associated with Claimant's right elbow injury. Furthermore, Dr. Watson said that no restrictions or maintenance care was indicated, despite Claimant's report of persistent "weakness and numbness in the fourth and fifth fingers of the right hand."

21. Based on the DIME report, Respondents filed a final admission of liability (FAL) on September 17, 2015 for zero permanent partial disability benefits. Liability for medical maintenance treatment was denied.

22. On November 17, 2015, Respondents requested an opinion from Dr. Wallace Larson regarding Claimant's need for maintenance medical treatment.

23. On December 9, 2015, Dr. Wallace Larson wrote the following with regard to the elbow injury:

> Mr. Normandin does not require medical maintenance treatment. Recommendation of medical maintenance treatment would imply the need for intervention or some type of treatment program to

> retain benefit which was achieved from his initial surgical treatment and subsequent rehabilitation. He was seen for right elbow cubital tunnel syndrome and had subsequent surgical treatment. There is no medical standard of care that suggests any type of intervention or treatment is needed to preserve benefits achieved by surgical decompression and subsequent therapy. Physiologically his condition is stable and will not be affected by any type of treatment or intervention. Medical literature does not support the need for any type of active follow-up care to maintain the benefits of ulnar nerve decompression. Additionally, the surgeon who treated this disorder has not recommended any type of medical maintenance plan.

24. Claimant testified that his right hand/elbow felt better at the time he was placed at MMI, because he had not returned to work yet. Claimant testified that once he returned to work around October 1, 2014, the pain in his elbow and tingling in his fingers returned. He testified to electric shock like sensations in the right arm extending into the right shoulder. Citing Dr. Nanes December 3, 2014 MMI report, Respondent-Employer contends that Claimant's complaints of recurring pain, numbness and tingling of the right elbow/ring and small fingers are not credible. As noted on December 3, 2014, two months after Claimant returned to work as a welder, Dr. Nanes placed Claimant at MMI noting that he was "doing extremely well." However, at the time Claimant was placed at MMI he had not been promoted to his current position as a welding instructor which subsequently required considerable hand writing.

25. As a welding instructor, Claimant spends 2 ½ - 3 hours of the day hand writing reports and completing paperwork. He is right hand dominate and works five days a week. Consequently, the ALJ finds that Claimant uses his right hand to write reports and/or complete paperwork between 12 ½ - 15 hours per week. Claimant testified that there was no writing associated with his job prior to being promoted to a welding instructor in February 2015.

26. Claimant testified that his right hand/elbow pain has been worsening secondary to the amount of writing he has to do and he has missed time from work as a consequence. Respondent-Employer challenges Claimant's assertion that his current elbow/hand symptoms could be caused by hand writing on the grounds that writing is less strenuous than the welding Claimant performed prior to his promotion in February 2015. Respondent-Employer also disputes Claimant's contention that he writes upwards of three hours per day citing common access to word processors and computers in the current work place.

27. Claimant admitted during cross examination that he has not reported increased pain and recurring numbness and tingling in his right elbow/fingers due to writing to his employer since being placed at MMI. He also admitted that he has not sought medical treatment for the recurring symptoms that he now alleges. This is in stark contrast to the continued symptoms Claimant reliably reported subsequent to his first surgery in

2010, prompting a reopening of his case for additional surgery which was performed on a maintenance basis. Consequently, Respondents argue that Claimant's failure to report his recurring worsening symptoms since being placed at MMI the second time implies that Claimant is not credible regarding his purported symptoms and/or that his symptoms are not significant enough to warrant additional medical attention.

28. Based upon the evidence presented, the ALJ finds Claimant's report of increasing pain in the right hand/elbow secondary to extensive writing duties credible and convincing. While the ALJ finds the physical demands associated with welding significant, Respondent's argument that writing is not as strenuous as welding and therefore not causative of Claimant's recurring elbow/hand pain is unpursuasive. The evidence presented persuades the ALJ that the constant handling and gripping of a writing instrument for prolonged periods of time associated with Claimant's position as a welding instructor are likely aggravating the condition of his right hand/elbow causing increased pain and dysfunction, i.e. a deterioration of Claimant's condition subsequent to MMI. Consequently, the ALJ finds Claimant's current right upper extremity and hand symptoms are, more probably than not, related to his July 22, 2010 industrial injury. Moreover, the medical history presented persuades the ALJ that Claimant's request for additional medical treatment to determine the etiology of and treat his ongoing pain, numbness and tingling is reasonable and necessary. Simply put, the ALJ finds substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury and to prevent further deterioration of the claimant's present condition.

29. Claimant has established by a preponderance of the evidence that he is entitled to maintenance treatment for his right elbow/hand as a consequence of his July 22, 2010 industrial injury.

30. Claimant has a visible disfigurement to the body consisting of a seven (7) inch long by ⅛ inch wide, rough appearing, pink surgical scar located on the flexor surface of the right forearm/elbow.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found above, Claimant's testimony regarding his current symptoms is credible and convincing.

C. A workers' compensation case is decided on its merits. *Section 8-43-201*. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Maintenance Medical Benefits

D. A claimant is entitled to ongoing medical benefits after MMI if he/she presents substantial evidence that future medical treatment will be reasonably necessary to relieve the him/her of the effects of the injury or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

E. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

F. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; he/she must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the claimant met the burden of proof to establish an entitlement to

ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Here, the ALJ concludes that Claimant has met his burden to establish his entitlement to maintenance medical treatment. Substantial persuasive evidence demonstrates that there is a need to treat Claimant's ongoing chronic pain caused the injuries sustained in this admitted claim and his current job duties. Claimant was injured in excess of five years ago and has undergone two elbow surgeries, yet he continues to have persistent pain which he credibly testified is related to the hand writing demanded in his current position as a welding instructor. Given that Dr. Wallace Larson, Respondent's retained medical expert noted that the "likelihood of having a completely normal result with repeat neurolysis is relatively low," which was likely reduced further by his age, the ALJ is not surprised that Claimant remains symptomatic and that his symptoms are worsening with exposure to extensive hand writing which he was not performing when he was placed at MMI. Without ongoing treatment, Claimant's present condition will likely deteriorate further. Claimant has proven, by a preponderance of the evidence that there is a probable need for post MMI treatment, to maintain MMI and otherwise prevent deterioration of his current condition. Accordingly, Claimant is entitled to an order for ongoing medical benefits.

Disfigurement

G. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring located on the right forearm/elbow which alters the natural appearance of his right arm. The ALJ concludes Claimant's visible scarring constitutes a disfigurement provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he is entitled to ongoing medical treatment reasonably necessary and related to his July 22, 2010 industrial injury to maintain MMI.

2. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's July 22, 2010 work injury and/or is not reasonable and necessary.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles him to additional compensation. Respondent-Employer shall pay Claimant $1,800.00 for that disfigurement and shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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 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 16, 2016

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-872-559-04

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a worsening of condition related to the admitted work injury?

- Did Claimant prove the cervical surgery recommended by Jeffrey Donner, M.D. is reasonable, necessary, or related treatment for this claim?

PROCEDURAL STATUS

The ALJ issued Findings of Fact, Conclusions of Law and Order on February 12, 2016 (mailed on February 17, 2106). Respondents filed a Motion for Corrected Order on or about March 1, 2016. Claimant filed an Objection to the Motion for Corrected Order on March 8, 2016, opposing the Motion. The undersigned ALJ issued a Procedural Order, which granted the Motion for Corrected Order (in part) and denied the motion (in part).

Respondents have conceded they are obligated to provide maintenance medical benefits. As found, *infra,* Claimant has adduced sufficient evidence to demonstrate his condition has worsened and he requires treatment. However, there is insufficient evidence in the record to establish the nature and extent of this treatment. Accordingly, the ALJ has found Respondents are required to return Claimant to his ATP for this determination.

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction site supervisor. On December 21, 2010, Claimant suffered a compensable industrial injury when he was involved in a motor vehicle accident ("(MVA") while travelling to a job site. He testified his vehicle was struck by a car travelling approximately 50 m.p.h.

2. Claimant's medical history was significant in that he had a history of degenerative changes in his low back for which he received treatment, including a low back laminectomy. Claimant took Vicodin for arthritis for a number of years[1]. There was no evidence Claimant sustained an injury or required treatment to his cervical spine prior to 12/21/10.

3. Claimant was initially seen at the Windsor Family Clinic by D. McGuire, PA-C on December 23, 2010, two days after the collision. At that time, Claimant

[1] See Dr. Mason's office note, dated 7/25/11.

complained of neck pain and stiffness, as well as describing numbness in the 3rd, 4th and 5th fingers in his left hand. The finger numbness had resolved. Claimant was diagnosed with a cervical strain, provided with pain medication and told to use alternating ice and heat on his neck.

4. On December 28, 2010, Claimant returned to the Windsor Family Clinic and was seen by R.A. Mason, M.D. Claimant reported pain on the left side of his neck, with a lot of popping and stiffness. Dr. Mason noted tenderness over the trapezius muscle, some muscle spasm but good range of motion ("ROM") in the neck. Dr. Mason diagnosed a cervical strain, recommended rest, stretching exercises and moist heat. Naprosyn and physical therapy ("PT") were also prescribed.

5. Claimant received PT from Silvia Sorensen, LPT at Ft. Collins Physical Therapy and Sports Center beginning on April 11 through April 28, 2011. He received multiple modalities of treatment including ultrasound, traction and manual treatments.

6. Claimant was examined by Jeffrey Donner, M.D. on May 5, 2011. He complained of left-sided neck pain along with occasional radicular arm pain and numbness in his fingers. Claimant's history of low back surgery was referenced. Cervical spine x-rays showed disc space narrowing. Claimant completed a Neck Oswestry index (which was a questionnaire that documented the effect of neck pain on everyday activities) at that time and was assessed a score of 18%. Dr. Donner's assessment was cervical disc degeneration and neck pain. Dr. Donner opined Claimant's neck pain was most likely related to an inflamed facet joint at C5-6. He recommended a course of chiropractic care and if that was not effective, an MRI and facet injection.

7. Claimant returned to Dr. Mason on July 25, 2011, complaining of persistent pain on the left side of the neck. He had received PT and underwent an orthopedic evaluation in which it was noted there were some facet joint problems. Dr. Mason found good strength and ROM in the neck. Claimant was to continue rest, stretching exercises, anti-inflammatory medications and moist heat. Dr. Mason prescribed Vicodin.

8. Claimant testified that he did not have health insurance and did not treat in the intervening nine (9) months. There were no records admitted at hearing which showed Claimant received any treatment during this period.

9. Insurer filed a General Admission of Liability ("GAL") for medical benefits on April 9, 2012.

10. On April 20, 2012, Claimant was examined by William Basow, M.D. to whom he was referred by his attorney. Claimant's course of treatment was reviewed, including nine (9) PT sessions which he reported did not relieve his symptoms. Claimant was having intermittent symptoms in the forearm and fingers, as well as pain

in the left neck and trapezius. Claimant had normal strength and sensation upon examination, with no neurological abnormalities noted. Dr. Basow's assessment was chronic neck pain without radicular symptoms. Claimant was to begin PT and chiropractic treatments. Claimant had no work restrictions.

11. Claimant returned to Dr. Basow on May 7, 2012, at which time he was note to have mild limitations in cervical flexion, extension and left rotation. Dr. Basow's assessment was chronic neck strain with a good initial response to PT and traction. A home traction unit was prescribed, along with chiropractic treatment. Dr. Basow noted Claimant had no work restrictions.

12. Dr. Basow saw Claimant on June 1, 2012 and made essentially the same clinical findings as the 5/7/12 exam. Claimant was to resume chiropractic treatments and physical therapy. Claimant remained at full duty.

13. Kevin O'Connell, M.D. assumed Claimant's treatment as of July 3, 2012 when the latter had complaints of intermittent left arm pain and paresthesias. Claimant was noted to have a 110-120 mile per day commute and was taking Vicodin at bedtime. Dr. O'Connell's assessment was cervical sprain, cervical arthropathy and left paracervical muscle spasms. Dr. O'Connell prescribed Flexeril, PT and recommended a cervical MRI. Claimant had no work restrictions.

14. An MRI was done on Claimant's cervical spine on July 12, 2012, which was read by Mark Reese, M.D. Dr. Reese found mild facet and uncovertebral degenerative changes at C4-5; a posterior broad based disc protrusion with an osteophyte formation contributing to severe right-sided neural foraminal narrowing at C5-6; and posterior broad-based disc protrusion with facet hypertrophic changes and severe bilateral neural foraminal narrowing with stenosis of the left aspect of the canal at C6-7. Dr. Reese characterized these as spondylitic changes, significant at C5-6 and C6-7. The ALJ drew the inference that these were degenerative changes in Claimant's cervical spine.

15. Dr. O'Connell evaluated Claimant on July 30, 2012, at which time the MRI results were reviewed. Claimant had tenderness in the left paracervical musculature at the midpoint and restrictions in his ROM. His DTR, motor and sensory nerves were intact. Dr. O'Connell's assessment was left cervical strain, cervical spondlylosis at C5-6 and C6-7. Flexeril was discontinued and Skelaxin prescribed. Claimant was to continue use of home TENS unit and receive massage therapy.

16. On September 10, 2012, Dr. O'Connell examined Claimant and he reported improvement. Claimant was having intermittent radicular symptoms into the left finger. Dr. O'Connell's assessment was cervical strain, cervical degenerative disc disease and left C7 radiculitis. Claimant was to continue with medical massage and home cervical traction. He could return to work full duty.

17. Claimant was next seen by Dr. O'Connell on October 8, 2012. He had tenderness and trigger point discomfort on palpation in the paracervical musculature. His ROM on extension was 50% of normal and his neurological exam was normal. Dr. O'Connell's assessment was cervical strain, underlying cervical spondylosis-exacerbation.

18. Claimant returned to Dr. O'Connell three times over the next three months. At the November 12, 2012 evaluation, Claimant was improved. Dr. O'Connell's assessment was left paracervical strain, cervical degenerative disc disease with foraminal stenosis triggering left cervical radiculitis. Claimant also saw Dr. O'Connell on January 14, 2013 at which time he denied radicular symptoms, but had referred pain into the scapula. Claimant was to continue conservative treatment. On February, 19, 2013, Dr. O'Connell re-examined Claimant and found no arm weakness, with minimal and sporadic left arm radicular symptoms. Dr. O'Connell assessment was the same as the 2/19/13 appointment. In each of these follow-up appointments, Claimant had no work restrictions

19. Dr. O'Connell evaluated Claimant on March 19, 2013 and his pain level on this day was 4/10. Dr. O'Connell determined Claimant was at MMI and assigned a 21% whole person impairment pursuant to the AMA Guides. Dr. O'Connell noted treatment with home cervical traction and medical massage provided Claimant relief and he required massage visits (7) as his only maintenance. Dr. O'Connell further noted Claimant's left arm symptoms "receded over time with conservative treatment, so neurosurgical consultation was never pursued." The ALJ notes throughout Claimant's treatment with Dr. O'Connell he had no work restrictions.

20. Respondents requested a Division Independent Medical Examination, which was performed by Richard Stieg, M.D. on July 30, 2013. Dr. Stieg's impression was severe cervical degenerative disease with persistent myofacial pain and pain disorder (chronic). Dr. Stieg agreed with Dr. O'Connell's MMI date and determined Claimant sustained a 27% whole person impairment under the AMA Guides. Dr. Stieg noted Claimant had no pre-existing history of neck or upper extremity problems prior to the motor vehicle collision on 12/21/10. Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis and projected Claimant would likely have continued mild to moderate pain which would require maintenance treatment. The ALJ credited Dr. Stieg's DIME findings.

21. A Final Admission of Liability ("FAL") was filed on or about December 5, 2013, admitting for the impairment rating of Dr. Stieg. The FAL was filed pursuant to an agreement between the parties, which resolved issues set for determination at hearing. As part of the agreement, Claimant did not object to the FAL and received a payment of permanent partial disability benefits based upon Dr. Stieg's rating. In its FAL, Insurer stated: "We admit for reasonable and necessary and related medical treatment and/or medications after MMI."

22. Claimant testified at hearing his pain has gradually worsened and he was having more frequent radicular complaints. He was less functional both at work and in his activities of daily living. Claimant was a credible witness, as he did not appear to overly exaggerate his symptoms.

23. Claimant returned to Dr. Donner on April 4, 2014. At that time, he was complaining of continued neck pain on a scale from 3 to 5/10 and described an aching, burning, and stabbing sensation in the left side of his neck and into his left scapular area. He described radiating pain into his left arm, with numbness in his third and fourth fingers. Claimant said the driving he was doing for work "markedly aggravated" his neck and left arm symptoms. Claimant was not in severe pain and had mild tenderness on the left side of the neck. However, Claimant completed a neck Oswestry index at this evaluation and had a score of 42%, which leads to the inference that Claimant believed his level of functioning had decreased. Claimant said he was not smoking cigarettes, but had in the past. Dr. Donner recommended a cervical MRI, but also stated Claimant was a reasonable surgical candidate for a two-level anterior cervical fusion or disc replacement.

24. Dr. Donner authored a letter, dated on April 4, 2014, in which he opined Claimant's neck related complaints were directly related to the motor vehicle collision of 12/21/10, despite preexisting degenerative changes. Dr. Donner believed a majority of the MRI findings from the initial MRI performed in 2012 were directly related to the motor vehicle collision. Dr. Donner noted Claimant continued to have symptoms of intractable neck pain and radiculopathy related to herniated discs and stenosis at C5-6 and C6-7 and he recommended obtaining an updated MRI scan of the cervical spine. Dr. Donner said Claimant was not at MMI.

25. Claimant testified he is currently employed by St. Aubyn Homes as a supervisor for residential home building and was working at this job when he was evaluated by Dr. Donner in April 2014. In that capacity, he had to drive up to seventy (70) miles per day. Claimant admitted that driving long distances sometimes caused his neck to hurt.

26. On May 21, 2014, Claimant underwent a second MRI which was read by Willis Chung, M.D. Dr. Chung said the MRI showed degeneration in the discs at C5-6 and C6-7 of Claimant's cervical spine with a 5mm right lateral disc herniation at C5-6, as well as a 3mm right lateral disc herniation at C6-7 and prominent bilateral C6-7 neural foraminal narrowing from lateral disc bulging at that level. Claimant had no central spinal stenosis. The ALJ notes that it is difficult to compare the findings of this MRI with the one of 7/12/12, as the former did not provide measurements of the disc bulges.

27. Claimant returned to Dr. Donner on May 21, 2014, who reviewed the results of his MRI. Dr. Donner noted he had very limited neck movement. Claimant was noted to be smoking cigarettes. Dr. Donner's assessment was progressive severe neck pain with radiculopathy at C5-6 and C6-7, where there were degenerative

changes, stenosis and herniated discs. Dr. Donner recommended and noted Claimant wanted to proceed with a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs.

28. Andrew Castro, M.D. (orthopedic spine surgeon) performed a physician advisor review of the request for surgery. In his note dated June 11, 2014, Dr. Castro said two level disc replacement was not cleared by the FDA and by extension the Colorado Worker's Compensation Medical Treatment Guidelines. He opined that cervical surgical intervention for primarily neck pain was questionable, as it had unpredictable outcomes. He also noted Claimant's gap in treatment from prior to the surgical recommendation raised the issue of a possible new injury or intervening event which should be investigated. Dr. Castro recommended authorization for the surgery be denied.

29. Alicia Feldman, M.D. performed an IME[2] of Claimant on June 27, 2014. Dr. Feldman noted Claimant complained of pain in his cervical spine which radiated into his left shoulder, rarely into the left upper extremity, but experienced some paresthesias down his left arm into his third and fourth fingers. Claimant was working a new job as a site supervisor which required he do a lot of driving and repetitive movement of his neck at times, which caused fatigue. Claimant had limited and painful cervical spine extension and rotation to the left. Dr. Feldman's assessment was left-sided neck pain, cervical spondylosis, left upper extremity parasthesias and foraminal stenosis of the cervical spine.

30. Dr. Feldman stated Claimant's imaging studies showed chronic degenerative changes without acute pathology and neurological compromise. Dr. Feldman stated there were no findings of acute or subacute injury in the 7/12 MRI. She believed he had a cervical sprain/strain injury which should have resolved over several months. The cervical degeneration was longstanding. Dr. Feldman believed any residual pain was likely secondary to the underlying cervical spondylosis and degenerative conditions. Claimant had reduced his chronic pain medication, which was indicative that his pain was less than it was pre-accident. Dr. Feldman found Claimant could continue to work full duty. The ALJ notes Dr. Feldman did not make any recommendations concerning Claimant's treatment.

31. Dr. Feldman produced an addendum report, dated August 4, 2014. Dr. Feldman reviewed deposition transcript for Claimant in which he said his neck got fatigued after work when he did inspections. Claimant described using his eyes when he was driving to compensate because he couldn't turn his head. He said he was very fatigued a lot of times at night in his cervical area and shoulder. Dr. Feldman made no significant changes to her previous opinion.

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[2] This IME was not requested by either party to the worker's compensation case, but rather was requested in the third party case arising out of the 12/21/10 MVA.

32. Claimant filed a Petition to Reopen alleging a worsening of condition on November 8, 2014. Dr. Donner's 4/4/14 report was attached.

33. Claimant returned to Dr. Donner on February 3, 2015, but no change was reported in Claimant's condition. Claimant reported continued neck pain with radiation to his left arm and hand.[3] Claimant was noted to be smoking. Dr. Donner reiterated his surgical recommendation and described it as Claimant's best option.

34. On March 18, 2015, Dr. Donner reevaluated Claimant. He noted Claimant had primarily neck pain radiating into his trapezial and suprascapular muscles and shoulder. Claimant was smoking cigarettes at this time. He had normal use and function of his upper extremities without any sensory or motor deficits. He once again recommended that Claimant undergo surgery.

35. Scott Primack, D.O. performed an IME on behalf of Respondents on March 30, 2015. Dr. Primack noted Claimant complained of "far more neck pain than arm pain"; that Claimant initially had facetogenic pain, but his current pain appeared to be more discogenic. Dr. Primack opined the two MRIs from 2012 and 2014 indicated that Claimant was suffering from ongoing degenerative changes, as opposed to a worsening of the injuries from the auto accident. He also noted Claimant's cervical spondylosis could be aggravated by his ongoing driving duties. Dr. Primack believed Claimant was at MMI and he had a high level of functioning given the condition of his cervical spine. He noted Claimant's condition would result in some level of ongoing discomfort, but the majority of his discomfort would be secondary to his underlying cervical spondylosis and not his work injury.

36. Dr. Primack issued an addendum report (after reviewing Dr. Feldman's IME report), dated April 20, 2015, which noted Claimant had longstanding cervical degeneration. Dr. Primack cited Dr. Feldman's conclusion the MVA caused a temporary aggravation of Claimant's underlying spondylosis and any residual pain was like secondary to the underlying degenerative condition. Dr. Primack believed Dr. Feldman's opinions supported his opinion.

37. On August 12, 2015, Brian Reiss, M.D. performed an IME on behalf of Respondents. Dr. Reiss noted Claimant had neck pain at a 4/10 level at the time he reached MMI and his only maintenance treatment was finishing his massage treatments. Dr. Reiss stated he would have recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition. Dr. Reiss felt Claimant's current symptoms were very similar to his symptoms at MMI, when Claimant stated his pain level was 5/10. The ALJ infers that Dr. Reiss' opinion regarding additional treatment was for Claimant to maintain MMI.

38. On examination, Dr. Reiss noted Claimant was not in any apparent distress. He had 0 degrees of neck extension, with full flexion, right rotation 70% of

[3] Claimant's Neck Oswestry Index was 36% at this appointment, indicating a slight lessening of symptoms. Claimant was smoking cigarettes at the time of this appointment.

normal and left rotation 50% of normal. Dr. Reiss noted Claimant's symptoms were primarily axial neck pain and opined that Claimant's symptoms were a continuation from his original injury. Dr. Reiss did not recommend a 2 level disc replacement procedure for Claimant's pain complaints. The ALJ credited the opinions of Dr. Reiss, particularly with regard to his conclusion that this procedure was not likely to help Claimant's symptoms.

39. Dr. Primack testified at hearing. He was qualified as an expert in physical medicine and rehabilitation, a specialty in which he was board certified. He was Level II accredited pursuant to the W.C.R.P. He restated his belief that Claimant's current pain was discogenic in nature, as opposed to facetogenic. He described the anatomical basis of facetogenic pain, noting the disc area was a three joint process including ligaments in the front of the vertebral bodies, the disc, ligaments and facet joints on the posterior side of the bodies. He described facetogenic pain as emanating from the facet joints, which is very common with whiplash disorders after vehicle accidents and opined this was the type of pain suffered in the immediate aftermath of the 12/21/10 MVA.

40. Dr. Primack stated Claimant's reports of pain have remained largely consistent, but there was a shift from facet-based neck pain to cervical spondylosis symptoms, which included more radicular findings. Dr. Primack further testified the MRI-s showed multiple changes over time not associated with the original work injury. Specifically, he noted with the 2014 MRI, facet changes had resolved and were listed as normal at C4-7. He felt there was a new disc herniation at C3-4 and there was also a new herniation at C4-5. The disc herniation at C5-6 previously identified was more lateral than previously identified as central and the disc heights had decreased which compressed the holes where the nerve roots exited, thereby increasing Claimant's stenosis and discogenic pain.

41. Finally, Dr. Primack reviewed the findings on the 2014 MRI, which showed edema at C6-7. This was either associated with an acute injury, endplate and compression fractures, or degenerative conditions. Dr. Primack testified that if the edema was a result of the underlying work injury, it would have developed within 4-5 months after the accident and have been visible in the 2012 MRI. He further testified the edema was more apparently related to an endplate fracture from ongoing degenerative conditions, as the progression of the underlying degenerative disease could further be seen from the new disc protrusions. The reasonable inference from Dr. Primack's testimony was that any treatment Claimant required was related to the degenerative process in his spine as opposed to the MVA.

42. Dr. Donner testified by way of evidentiary deposition. He was qualified as an expert in orthopedic surgery, a specialty in which he is board-certified. He also has a board certification in spine surgery, which has been the focus of his practice for twenty-five (25) years. He was involved in clinical trials related to artificial discs. Dr. Donner estimated he had been involved in close to one hundred cervical surgeries involving artificial discs. The ALJ credited Dr. Donner's extensive experience in performing surgeries of this type.

43. Dr. Donner stated when he first saw Claimant in May, 2011, he felt there was an inflamed facet joint at C5-6. Dr. Donner noted Claimant did not have any of the injections and when he returned in April, 2014, he was having symptoms of neural irritation and nerve root irritation. Dr. Donner opined 100% of Claimant's neck complaints were related to the 12/21/10 MVA. He believed the cause of Claimant's pain was discogenic and related to the facets, as well as nerve compression. Dr. Donner opined Claimant had chronic pain, which was unresponsive to conservative treatment and he was good candidate for cervical disc replacement. Dr. Donner noted with disc replacement there was a quicker recovery and less adjacent segment deterioration. In the absence of the artificial disc replacement surgery, the alternative was a two-level fusion procedure. Dr. Donner did not feel pain management was as good a treatment option as surgery.

44. Dr. Donner was asked about conservative treatment to maintain MMI, but returned to his opinion that surgery was more "realistic and cost effective" for Claimant. Dr. Donner did not believe Claimant should have to continue to exhaust conservative treatment or try every possible modality. Dr. Donner did not have Dr. O'Connell's treatment records or the DIME report when Claimant returned in 2014, although he subsequently reviewed Dr. Stieg's report. Dr. Donner reviewed the Treatment Guidelines and acknowledged these endorse one level disc replacement. Dr. Donner did not address the question of whether the surgical criteria were met under the Treatment Guidelines. He testified the FDA cleared two-level disc replacement, which was also validated by the North American Spine Society's treatment guidelines. (The ALJ overrules any objection and denies the Motion to Strike Dr. Donner's testimony at page 42:12-25.) The ALJ notes Dr. Donner did not consider several conservative treatment options, which could potentially ameliorate Claimant's symptoms.

45. Claimant testified he believed his symptoms have worsened over time. However, his report of pain has stayed in the 3, 4, 5/10 range. The ALJ found Claimant's pain complaints, as reported to his physicians were not appreciably worse than when he was evaluated by Dr. O'Connell and Dr. Stieg. The ALJ concludes that Claimant has not exhausted conservative treatment options, which may relieve these symptoms and/or maintain MMI.

46. The ALJ finds Claimant's need for treatment is result of his industrial injury as opposed to degenerative processes in his cervical spine.

47. The ALJ notes that although Claimant has been evaluated on several occasions since he reached MMI, he has not received active treatment since that time. The ALJ finds Claimant should be reevaluated regarding his need for additional treatment. Claimant is entitled to medical benefits, at a minimum, to maintain MMI.

48. The ALJ finds Dr. Donner made his surgical recommendation after Claimant was determined to be at MMI by the ATP, Dr. O'Connell and the DIME examiner, Dr. Stieg.

49. The ALJ concludes the proposed surgical procedure is not reasonable and necessary at this time.

50. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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 has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

Reopening

Claimant sought to reopen his claim and alleged his condition worsened. Claimant pointed to his worsening symptoms (including radiculopathy) and Dr. Donner's records to support his Petition to Reopen. Claimant testified at his hearing that his symptoms had worsened. Respondents argued that any increase in Claimant's symptoms were related to degenerative changes in his cervical spine which have progressed, as opposed to his industrial injury. Based on the evidence before the ALJ, Claimant met his burden to reopen the claim.

Section 8-43-303(1), C.R.S., authorizes an ALJ to reopen any award on the grounds of, *inter alia*, change in condition. *Heinicke v. Indust. Claims Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As found, Claimant's degenerative condition in his cervical spine was asymptomatic before 12/21/10 and then developed symptoms as a direct result of the MVA. Claimant adduced evidence that his level of functioning was worse and he had increased pain, as shown by the Oswestry cervical spine index survey he completed in 2014. The ALJ drew the reasonable inference that Claimant's increased pain in his cervical spine required additional treatment. Accordingly, the ALJ was persuaded that Claimant's condition has worsened and his claim should be reopened.

In the initial Findings of Fact, Conclusions of Law and Order, the ALJ noted there was no evidence presented as to when the last medical benefit was "due and payable", under 8-43-303(2)(b), C.R.S. That is still the case. In addition, Respondents 12/5/13 FAL admitted for *Grover* medical benefits, but Claimant has not been in active treatment since approximately March, 2013. Thus, it was unclear whether a Petition to Reopen was required in the case at bench[4]. These Corrected Findings of Fact, Conclusions of Law and Order have been issued to confirm Claimant's entitlement to medical benefits.

At this time, Respondents are obligated by the FAL to provide *Grover* medical benefits to maintain MMI. Respondents are also obligated to provide these benefits by this Order. As found, Claimant requires medical treatment, at a minimum, to maintain MMI. At least one physician (Dr. Reiss) made specific treatment recommendations and characterized this treatment as maintenance treatment. In addition, since Claimant has not been in active treatment since March, 2013 and has not completed several modalities of conservative treatment, there needs to be further evaluations by his authorized treating physicians and to what type of treatment he requires. There was no

[4] The initial Findings of Fact Conclusions of Law and Order noted at p. 13: "Assuming, *arguendo* that it has been longer than two (2) years since Respondents provided the last medical benefit, Claimant has made the requisite showing of a worsening of condition."

evidence before the ALJ on this subject and the ALJ declines to make any findings as to particular treatment Claimant may require. Therefore, the ALJ is limited his ruling to the finding that Claimant is entitled to continuing medical benefits to maintain MMI. Under this ruling, Claimant is not precluded from claiming he is not at MMI and seeking additional medical benefits to cure and relieve the effects of his industrial injury. However, those issues were not before the Court.

Based upon the totality of the evidence, the ALJ has determined Claimant requires additional treatment to maintain MMI. Respondents are required to provide those medical benefits.

Medical Benefits

Claimant seeks authorization of a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs. In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Donner is reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant asserted the MVA of 12/21/10 caused his previously asymptomatic cervical spine to develop symptoms and require treatment. Claimant argued the degenerative condition of his cervical spine has worsened over time and his need for surgery is a direct consequence of the 12/21/10 MVA. Claimant proffered the opinions of Dr. Donner to support his contentions. The ALJ concluded that Claimant did not meet his burden of proof in this instance.

There were three bases for the ALJ's conclusion that the proposed surgery is not reasonable and potentially not related to the 12/21/10 MVA; first, the ALJ was not persuaded that less invasive treatment options had been exhausted. Some examples of these available treatment options were identified by expert witnesses. These included:

5/5/11: Dr. Donner recommended a facet joint injection.

3/19/13: Dr. O'Connell recommended completion of therapeutic massage. (Claimant did not complete the treatments.)

7/30/13: Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis.

8/12/15: Dr. Reiss recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition.

Given the amount of time that has transpired since Claimant's last treatment (over 2 ½ years) and the fact that non-surgical modalities are available, the ALJ determined that surgery is not reasonable at the time.

Second, the ALJ was persuaded by Respondents' argument the criteria under the Medical Treatment Guidelines were not met and did not support the proposed surgery. Respondents also cited Drs. Reiss' and Primack's opinions, both of whom noted the proposed surgery was not warranted and might not relieve Claimant's symptoms.

The ALJ considered whether the Medical Treatment Guidelines-Cervical Spine Injury, Rule 17, Exhibit 8 ("Treatment Guidelines") applied to the requested cervical surgery. The Guidelines are contained in W.C.R.P. 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division").

The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Guidelines.[5] In fact, there is generally a lack of authority as to whether the Treatment Guidelines require an ALJ to award of deny benefits in certain situations. The decision to award or deny medical benefits is addressed to the sound discretion of the ALJ. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

In this case, the ALJ considered Rule 17, Exhibit 8 Section 3, which governs Total Artificial Cervical Disc Replacement (TDR). It provides in pertinent part:

> "Involves the insertion of a prosthetic device into the cervical intervertebral space with the goal of maintaining physiologic motion at the treated cervical segment. The use of artificial discs in motion-preserving technology is based on the surgeons preference and training" …[citing two reviews]…"There is strong evidence that in patients with single level radiculopathy or myelopathy cervical

[5] See W.C.R.P. 17-5(C), which states: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.

artificial disc produces 2 year success rates at least equal to those of anterior discetomy and fusion (ACDF) with allograft interbody fusion and an anterior plate…"

"**a. Description**

…

General selection criteria for cervical disc replacement includes symptomatic one level degenerative disc disease with radiculopathy."

"**c. Surgical Indications:** Patient meets one of the 2 sets of indications:

1) Symptomatic one-level degenerative disc disease (on MRI) with established radiculopathy and not improved after 6 weeks of therapy; **and**

Radiculopathy or myelopathy documented by EMG or MRI with correlated objective findings or positive at one level; **or**

2) **All of the following:**

- Symptoms unrelieved after six months of active non-surgical treatment and **one** painful disc established with discogram; **and**
- All pain generators are adequately defined and treated; and
- All physical medicine and manual interventions **are** completed; and
- Spine pathology limited to one level; **and**
- Psychosocial evaluation with confounding issues addressed.

The proposed surgical procedure involves disc replacement on two levels, which is beyond what is recommended in the Treatment Guidelines. In addition, there were significant gaps in Claimant's treatment and Claimant did not complete 6 weeks of therapy. (There was an indication in the record that because of his work schedule, Claimant was not able to complete the treatment which was previously recommended by his doctors.) Claimant should complete a full course of conservative treatment, including physical therapy and possibly the treatment recommended by Dr. Reiss before surgery is performed. Also, there were no findings of myelopathy, so the surgical indications under section 1) have not been met.

Furthermore, not all of the indications in Section 2) were met, including 6 months of active treatment, completion of all physical medicine and manual interventions and spine pathology limited to one level. Accordingly, Claimant did not establish disc replacement surgery was indicated under the Treatment Guidelines.

In addition, this procedure has contraindications, as noted *infra.*

"**d. Contraindications**:

…

- Symptomatic facet joint arthrosis-If imaging findings and physical finds of pain on extension and lateral bending are present, exploration of facetogenic pain should be completed prior to disc replacement for axial pain.

…

- Multiple-level degenerative disc disease.
- Spondylolisthesis greater than 3mm."

In this case, at least one physician (Dr. Primack) was of the opinion that Claimant's symptoms were originally facetogenic in nature. Dr. Donner opined that Claimant's pain was discogenic, related to the facets and nerve compression. As found, the source of Claimant's pain should be clarified.

Also, Claimant had pain on extension and lateral bending. There is also a question whether Claimant has neurological compromise and symptoms that warrant surgery, as noted by Dr. Feldman. Further exploration of these issues is warranted before an invasive surgical procedure is performed. Moreover, Claimant has degenerative changes in his cervical spine, including spinal stenosis on multiple levels in the cervical spine, as shown on MRI. In addition, the 2014 MRI revealed at least one disc herniation which was greater than 3mm. Surgery is contraindicated under these circumstances.

The ALJ also notes that the alternate procedure (ACDF) is contraindicated at this time, since Claimant was smoking as of the last evaluations with Dr. Donner. In addition, since a fusion would be at two levels the risk of adjacent segment deterioration is a significant risk.

Thus, some of the contraindications indentified by the Treatment Guidelines militate against the disc replacement surgery, as well as the ACDF procedure. In short, the ALJ considered the Treatment Guidelines, which raise a question whether proposed surgery is reasonable and necessary.

Third and finally, the ALJ found that there was a question whether the proposed medical treatment would address the symptoms from the spondylitic changes in Claimant's cervical spine and reduce his symptoms. Dr. Castor questioned whether the proposed surgery would ameliorate Claimant's symptoms. Dr. Reiss' opinion was also persuasive on this subject. Dr. Donner's testimony did not refute this or establish that the benefits were outweighed by some of the contraindications of surgery. The ALJ was not persuaded that is reasonable and necessary at this time. For these reasons, Claimant failed to prove that the surgery proposed by Dr. Donner was reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is GRANTED.

2. Pursuant to Respondents' 12/5/13 FAL and this Order, Respondents shall provide medical benefits to Claimant, who may return to Dr. O'Connell or other ATP for treatment.

3. Claimant's request for authorization of a two-level cervical discectomy, nerve root decompression and disc replacement is denied and dismissed.

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: March 18, 2016

Digital signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-875-010-10

ISSUES

- Whether the claim should be reopened?
- Whether Dr. Desai is an authorized treatment provider?
- Whether the surgical procedure recommended by Dr. Desai is related, reasonable, and necessary to cure and relieve the effects of Claimant's industrial injury?

FINDINGS OF FACT

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

1. On February 12, 2011, Claimant, a 49 year old female EMT/paramedic, hyper extended her left big toe at work when she exited an ambulance and slipped on ice. Later that day, Claimant aggravated her injury ascending stairs.

2. On February 14, 2011, Dr. Elizabeth Bisgard preformed an initial evaluation. While Dr. Bisgard notes a chief complaint of left foot pain, her history of present illness discusses "right" foot and "right" toe injuries. Dr. Allison Fall, who eventually became one of Claimant's treatment providers, also discusses Claimant's "right" foot. It is clear from the vast majority of other credible evidence that Dr. Bisgard's and Dr. Fall's reference right foot and right toe is erroneous.

3. Claimant received conservative care for several months with limited improvement.

4. On December 20, 2011, Dr. Thelander performed a bunionectomy with osteotomy at the first MP joint of Claimant's left foot. Claimant reported increased pain as a result of that surgery. On May 16, 2012, Dr. Scott Resig performed a second surgery in which he removed the hardware implanted during the first surgery and performed a partial joint replacement. Post surgery, Claimant began experiencing nerve pain in addition to "mechanical pain," and was diagnosed with CRPS (INSERT DEFINITION.)

5. On May 24, 2013, Claimant consulted with Dr. Bharet Desai.[1] The consultation outside the chain of referral and Claimant paid for the appointment through her personal insurance. Dr. Desai recommended a neurectomy of the dorsal medial and dorsal plantar sensory nerve on the first metatarsal shaft and shave down the incongruence of the plantar surface. Whether this recommended surgery is related,

[1] Dr. Desai's notes indicate that he previously saw Claimant, but lost the dictation from that visit.

reasonable, and necessary to cure and relieve the effects of Claimant's work injury is one of the issues raised by Claimant.

6. On June 12, 2013, Dr. Elizabeth Bisgard reported that Claimant had reached maximum medical improvement (MMI) and referred Claimant to Dr. Bart Goldman for a permanent impairment rating. Dr. Bisgard expressed her displeasure that Claimant had elected to see Dr. Bharat Desai, as opposed to her or Dr. Goldman, whom she expressed had "been with [Claimant} through this course of treatment and have essentially bent over backward accommodating her multiple requests for treatment." Dr. Bisgard also discussed with Claimant that she and Dr. Goldman had gone "above and beyond the medical treatment guidelines as far as extending her physical therapy and providing treatment." Dr. Bisgard noted that Dr. Desai was not a designated providers, nor was he the surgeon that she would have chosen for a second opinion, and that Claimant elected to see him on her own. Dr. Bisgard placed Claimant on permanent restrictions of no running, no climbing, and walking/standing to thirty minutes per hour.

7. On July 1, 2013, Dr. Frances Faro reviewed Dr. Desai's proposed surgery with Claimant. While Dr. Faro considered Dr. Desai's reasoning for addressing the intrinsic issues within Claimant's foot to be sound, Dr. Faro stated he was "not at all sure" that Dr. Desai's surgery would improve Claimant's range of motion issues related to the inflexibility of the tendinous structures between the sesamoids and the base of the proximal phalanx, as well as the periarticular scarring that occurs with CRPS. He considered surgery "tricky in the setting of CRPS" and instead recommended a metatarsophalangeal joint fusion to create a stiff joint that has no intrinsic pain generators. "This would then allow her CRPS to be managed and calm down without having additional contributors from the first MTP." Dr. Faro cautioned Claimant that Dr. Desai's surgery would give Claimant numbness at the first metatarsophalangeal joint and could interfere with balance necessary for her high-demand job. He encouraged Claimant to consider a first MTP fusion "as the more surgeries she has on this foot the more dysfunctional it will become with respect to her CRPS, and doing 1 definitive surgery is likely a better option for her overall health and wellbeing."

8. On July 18, 2013, Dr. Bart Goldman agreed that Claimant reached MMI as of June 12, 2013. He rated Claimant with a 7% lower extremity impairment which correlates to a 3% whole person rating. Dr. Goldman's eleven page report contains an exhaustive and comprehensive analysis of Claimant's history, treatment, and recommendations for additional care.

- He noted that both he and Dr. Bisgard were "perplexed as to why Tanya had not brought up her desire for what would be essentially a fourth opinion from a surgical perspective regarding her foot having previously been seen by Dr. Thelander, Dr. Sharp and Dr. Resig at various times (as well as having been seen for physiatric consultation prior to my initial consultation on December 27, 2012 by Dr. Primack in April of 2012)."

- Dr. Goldman disagreed with Dr. Desai's recommendation for surgery and commented that "Dr. Desai's hypothesis is that the sesamoid congruency with a plantar surface proximal to her implant would be a potential pain generator with secondary sensitivity over the dorsal sensory nerve on the median plantar surface of the metatarsal phalangeal joint.

- Dr. Goldman did not agree with Claimant's request for a referral to Dr. Desai.

- Dr. Goldman noted that Claimant's report of increased symptoms of her whole body aching did not make sense. Dr. Goldman noted that when distracted, Claimant was not hyperpathic or at least very minimally so.

- Dr. Goldman concluded that Claimant would not benefit functionally or symptomatically from surgery and that Claimant was at risk for more full blown CRPS should she undergo such procedures.

- Additionally, Claimant's desire to get back to pre-accident status was not particularly pragmatic or realistic and actually could be holding her back. "It is also clear that Tanya is also not completely comfortable with taking full ownership in terms of potential adverse outcomes that may occur from her decisions." Dr. Goldman recommended maintenance care in the form of medications suggested by Dr. Hompland such as Topamax, Zonegran, amitriptyline, nortriptyline, and Vimpat. He recommended nerve blocks without lumbar sympathetic blocks; pool therapy; and up to 15 physical therapy sessions.

9. On September 20, 2013, Dr. Bisgard noted that surgery presented a risk of worsening Claimant's sympathetically mediated pain. Dr. Bisgard's notes reflect her discussion with Claimant in which she related her concerns that "additional surgery would cause Claimant's sympathetically mediated pain to flare and would not provide Claimant with substantial relief.

10. On October 30, 2013, Dr. Hompland treated Claimant and discussed Claimant's treatment options under medical maintenance care, including a Bier block, restarting a particular medication, adding a particular medication, and compression. Claimant mentioned during the visit that she might seek medical attention from Dr. Desai.

11. On November 5, 2013, Dr. John Raschbacher preformed the Division independent medical examination (DIME). Dr. Raschbacher agreed with Dr. Bisgard and Dr. Goldman that Claimant reached MMI on June 6, 2013. Dr. Raschbacher rated Claimant with a 9% lower extremity impairment that correlates to a 4% whole person impairment. Dr. Raschbacher was aware of Dr. Desai's recommendations, but did "not see any indication for further surgery." Dr. Raschbacher concluded "there is no other ratable impairment including at the back, knee, pelvis, hip or elsewhere. The medical record simply does not support there being clear evidence of work-related injury other

than at the left foot." Claimant completed a pain questionnaire and reported "intense unrelenting pain/burning, sensitivity in L foot/leg. Deep aching bone pain, cold intolerant – breezes set it off. L Knee hip and thoracic discomfort ongoing from altered gait. Suffered a lumbar back sprain in work hardening. Also feel like my L lower leg & foot is in a vice grip being clamped down on. Also experience severe muscle spasms and contractions of L let/foot. Sleep varies – the pain is very disrupt[ive] and if the sheets and/or wt of blankets brush against my foot it will set off the pain response frequently." Dr. Raschbacher was provided 6 ¼ inches of medical records to review. His request for extra time to review the records was denied. Therefore, Dr. Raschbacher was not able to perform a formal record review with dictation.

12. On December 11, 2013, Respondents filed a Final Admission consistent with Dr. Raschbacher's report. Respondents admitted for medical maintenance care.

13. On February 20, 2014, Dr. Daniel Ocel reported that he explained to Claimant his concerns about Dr. Desai's surgical recommendation for a debridement of the first MTP joint in the face of an overstuffed first MTP joint and that the surgery "may potentially not be that fruitful for her." Dr. Orcel also expressed concern that with her underlying diagnosis of CRPS, Claimant might not receive significant relief from this particular surgery, and would ultimately end up with a first MJTP fusion." He further opined that if Claimant had a successful fusion surgery, he would not restrict any of her physical activities. He also opined that with fusion, she would only have one surgery and that fusion would "potentially give her the best possibility of resolving the regional pain syndrome."

14. Claimant focuses on an introductory sentence in Dr. Orcel's report: "I have explained to [Claimant] that in my humble opinion she is in excellent hands with Dr. Desai." Context makes clear that this sentence is a pleasantry and not an endorsement of the surgery recommended by Dr. Desai.

15. Dr. Allison Fall was designated as the treating physician for medical maintenance care. In that capacity, she referred Claimant to Dr. Hompland for lumbar sympathetic blocks and to Dr. Gurdley for acupuncture.

16. On April 2, 2014, Dr. Scott Hompland reported, in what appears to be responses to Respondents' interrogatories, that

- Nerve blocks provided Claimant with 50% increase in standing duration and walking distance; 50+% increase in sleeping duration; reduction in hyperalgesia and leg spasms; psychological improvement; and allowed Claimant to spend 20 – 60 minutes per day 4-6 times a week exercising.

- Claimant's left foot injury and the neuropathic component of her left foot injury were her only work related conditions.

- He was not clear how Dr. Goldman had arrived at the diagnosis of medial plantar neuritis.

- Claimant fulfilled the clinical components for CRPS and the diagnostic components to complete the diagnosis of CRPS.

- He opined that Claimant more closely fulfilled the components of CRPS that of medial plantar nerve neuritis.

17. On June 23, 2014, Dr. Desai noted that Claimant was "functionally okay, pretty much at baseline." Nevertheless, he recommended surgery to increase Claimant's function; an arthrotomy, synovectomy, debridement, and capsular release of adhesions and possible tenotomy of the proper dorsal sensory nerve. Dr. Desai noted that he explained to Claimant that the surgery "may not alleviate her CRP but it will definitely hopefully help her with her function of her great toe with her gait, and she understands the risks and benefits and potential aggravation of her CRP."

18. On August 13, 2014, Dr. Fall referred Claimant to Dr. Desai making him an authorized treatment provider as of that date.

19. On December 18, 2014, Dr. Desai reported that he planned to perform surgery that included MTP arthrotomy, synovectomy, and debridement of the inner sesamoid interval and also inspect her dorsal sensory nerve on her left great toe. He also proposed that "if the dorsal sensory nerve were impaired at all and does not have an ability to self-repair or if there are adhesions, we would do a neurectomy. . . . She knows fully well that this may exacerbate her CPS syndrome and her CPRS." The note mentions that Claimant wants to do the surgery despite its inherent risks. However, the note she only decided to proceed with surgery after "a good discussion was had" and "she changed her opinion."

20. On December 8, 2014, Dr. Saint-Phard performed a Respondents' independent medical examination and prepared a report on December 29, 2014.

- Dr. Saint-Phard noted that Claimant's pain was greatly reduced for two to three months by nerve blocks, and that Claimant's pain was 1/10 when she wore supportive footwear. However, Claimant explained that she did not like to wear anything but a "regular" shoes draw attention and she does not like to explain her foot problem.

- Dr. Saint-Phard concluded that the surgery recommended by Dr. Desai was not medically reasonable, necessary or indicated. She opined that surgical intervention is very aggressive treatment because when Claimant wears rocker-bottom shoes or steel-shank shoes or her clogs, she is essentially pain free and quite functional. Dr. Saint-Phard recommended Claimant wear the rocker-bottom shoes and steel-shank shoes she was provided because Claimant reported she was essentially pain free when she wore them.

- Further, surgery would likely increase Claimant's neuropathic and sympathetically-mediated pain and not provide any improvement in

function. For those reasons, Dr. Saint-Phard concluded surgery was not supported by the Treatment Guidelines.

- Dr. Saint-Phard opined Claimant remained at MMI.

- Dr. Saint-Phard also opined that Claimant's knee and back conditions were "not at all related to her left toe injury."

21. On January 9, 2015, Claimant filed a Petition to Reopen based on a change in medical condition.

22. On April 8, 2015, Claimant reported to Dr. Fall that she did not have special rocker bottom shoes and when she was active she wore her walking boot or air cast. Claimant wore a soft sandal type shoe to the appointment. Claimant reported increased stiffness and decreased mobility. Dr. Fall switched one of Claimant's medications.

23. Medical records reflect Claimant's condition was stable or improved without surgery. For example:

- On June 17, 2015, Chiropractor Jason Gridley reported Claimant "is doing quite well" and reported very good response to the sympathetic block for her low back pain and lower leg pain.

- On June 25, 2015, Dr. Fall noted that Claimant said blocks by Dr. Hompland significantly help and she still had relief five weeks later. Claimant was reported to be stable on her medications. Claimant again wore soft sandals to this appointment.

- On September 9, 2015, Claimant returned from vacation; she was active on vacation which improved her mobility for low back as well as her lower leg and Claimant responded well/favorably to her last visit with decreased pain and spasm in the low back as well as the left lower let below the knee and she felt the last sympathetic block had been quite effective.

- On September 14, 2015, Claimant reported improvement with decreased cramping and muscle spasm.

- On December 12-14 Claimant reported temporary relief of her leg cramping and pain below the knee and improvement in her lower back.

- On December 7, 2015, Claimant "states that she is stable with respect to back pain and her left lower leg, foot/ankle pain and CRPS symptoms." Objective findings reveal no obvious changes to range of motion of the left ankle/foot, and no decreased tenderness of the ankle, foot, or lower half of the left leg below the knee. The patient exhibits consistent tender

symptomatic and homeostatic acupoints below the left knee and just proximal to the ankle consistent with previous visits.

24. Claimant testified at hearing. She is 49 years old. She is independent with her home exercise program, warm water therapy, activities of daily living, and she walks without assistive devices. She presents with two main issues in her left lower extremity: orthopedic pain that feels like her foot is broken or a nail is driven up to her shin; and CRPS that manifests with intense pain/burning, temperature and touch sensitivity in her left foot and leg, deep bone pain, muscle spasms, and contractions of her left foot. Claimant cannot wear regular shoes but did wear clogs to court. Claimant has rocker bottom shoes but doesn't wear them because they no longer fit. Claimant wears an air cast that helps resolve her orthopedic pain when she increases her physical activity. Claimant testified that physical therapy/chiropractic care and medication also help with the orthopedic pain and that Dr. Hompland's blocks provide relief for the CRPS. Claimant admitted that her current treatment keeps her medically stable. Nevertheless, Claimant wants Dr. Desai to perform surgery in the hope of resolving her orthopedic pain; an MTP arthrotomy, synovectomy, and debridement of the inner sesamoid interval and possible neurectomy. Claimant first saw Dr. Desai outside the work comp system in 2013. At that time he recommended the same surgery that he recommends now. Claimant clarified that other doctors recommend a fusion surgery but Claimant only wants the court to consider the surgery recommended by Dr. Desai. Claimant understands that all of the doctors, including Dr. Desai, reported that surgery may exacerbate her CRPS.

25. Claimant, a paramedic, was articulate discussing her medical status and symptoms. Claimant described her current condition/symptoms essentially the same as she described her condition/symptoms in a November 4, 2013, pain questionnaire that Claimant prepared for Dr. Raschbacher's Division IME. Specifically, Claimant reported in both instances that she felt Intense unrelenting pain/burning and temperature and touch sensitivity in her left foot and leg, deep aching bone pain, cold intolerance, pain like a vice grip is clamped down on her leg, severe muscle spasms and contractions of her left leg and foot, and difficulty sleeping because the sheets and/or blankets will brush against her foot and set off the pain response. Claimant, however, experienced some difficulty when she attempted to describe how her conditions worsened since MMI. Claimant admitted her sleep pattern remains the same and she gave vague responses regarding any change or worsening of her pain.

26. Dr. Saint-Phard testified at the hearing. Dr. Saint-Phard reviewed medical records, evaluated Claimant, prepared a report dated December 29, 2014, and reviewed additional medical records generated after the December 29, 2014, report. Dr. Saint-Phard agreed with the division Independent medical examiner, Dr. Raschbacher that there is no indication for further surgery. Dr. Saint-Phard opined that Dr. Desai's recommended surgery is not reasonable or necessary and, in fact, is contraindicated for multiple reasons.

- Claimant responded quite well to treatment.

- Her clinical examination reflected an intact neurologic exam to light touch throughout the affected extremity; strength testing was normal in both feet; there was no atrophy in ankle muscles; ankle range of motion was unrestricted.

- Claimant was very functional for someone with CRPS: she is independent with activities of daily living; independent in her home exercise program and warm water therapy; she spends 20 – 60 minutes per day 4-6 times a week exercising; she walks without assistive devices and is close to pain free when she wears the air cast or rocker shoes.

- Surgery is very aggressive treatment and is contraindicated for a patient with CRPS when, as in this case, the patient is quite functional without surgery and when surgery will likely increase Claimant's neuropathic and sympathetically-mediated pain and not provide any improvement in function.

- Also, Dr. Desai's recommended surgery is, in part, exploratory and, as a result, the outcome uncertain.

- Any surgery for this patient is risky; however, Dr. Saint-Phard agreed with Dr. Ocel and Dr. Faro that if Claimant proceeds with surgery, a fusion surgery makes more sense because a fusion will support the foot and take away the pain similar to wearing a steel shank shoe.

Dr. Saint-Phard agreed with Dr. Goldman that Claimant's desire to get back to pre-accident status is not particularly pragmatic or realistic and that, in and of itself, does not support proceeding with surgery. Finally, Dr. Saint-Phard pointed out that surgery in this case is not supported by The Medical Treatment Guidelines that note that surgical interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. Instead of surgery, Dr. Saint-Phard recommended Claimant continue with her current and successful treatment that includes rocker-bottom shoes and steel-shank shoes, medications, lumbar sympathetic blocks, and therapy.

27. Dr. Saint-Phard testified that Claimant remains at MMI. Dr. Saint-Phard reviewed the medical records at the time of MMI and the medical records generated after MMI and heard Claimant testify in court. Dr. Saint-Phard concluded that Claimant's condition has not changed for the worse since the time of MMI.

28. The ALJ credits the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher, that Dr. Desai's recommended surgery is not reasonable or necessary over the opinion of Dr. Desai. The ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be based on a fuller and more accurate understanding of Claimant's medical situation. Dr. Desai's surgery is unlikely to result in functional gain and there is a real risk of worsening Claimant's CRPS.

Therefore, the ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be more credible and persuasive than the opinion of Dr. Desai. Claimant has not established by a preponderance of the evidence that Dr. Desai's recommended surgery is reasonable or necessary to cure and relieve the effects of her industrial injury.

29. Claimant's has not established by a preponderance of the evidence that her condition has worsened entitling her to reopening.

30. Dr. Desai is an authorized treating physician as of Dr. Fall's referral on August 13, 2014.

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. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of 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. § 8-43-201. A Workers' Compensation case is decided on its merits. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Surgery is not reasonable or necessary.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. § 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995).

Claimant failed to demonstrate that Dr. Desai's recommended surgery is reasonable or necessary. The ALJ credits the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher, that Dr. Desai's recommended surgery is not reasonable or necessary and in this case is contraindicated. Specifically, Dr. Goldman concluded that Claimant would not benefit functionally or symptomatically from surgery and that Claimant is at risk for more full blown CRPS should she undergo such procedures. Dr. Bisgard concluded that surgery presents a risk of worsening Claimant's sympathetically mediated pain. Dr. Raschbacher, the Division IME, did not see any indication for further surgery. Dr. Saint-Phard concluded that the surgery recommended by Dr. Desai was not medically reasonable, necessary or indicated because surgery is a very aggressive treatment for Claimant who responded well to non-surgical treatment and that surgery would likely increase Claimant's neuropathic and sympathetically-mediated pain and not provide any improvement in function. Dr. Saint-Phard pointed out that surgery in this case is not supported by The Medical Treatment Guidelines. Also, the ALJ credits Dr. Faro's opinion that Dr. Desai's surgery may not improve Claimant's range of motion and would lead to numbness and balance issues and could worsen the CRPS and credits Dr. Ocel's opinion that Dr. Desai's surgical recommendation may not provide significant relief and could worsen the CRPS. The ALJ credits Dr. Hompland's opinion that Claimant "more closely fulfills the criteria of complex regional pain syndrome, in my opinion, than does she fulfill the criteria of a medial plantar nerve neuritis."

The ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be based on a fuller and more accurate understanding of Claimant's medical situation. Dr. Desai's surgery is unlikely to result in functional gain and there is a real risk of worsening Claimant's CRPS. Therefore, the ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be more credible and persuasive than the opinion of Dr. Desai.

The ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate that additional surgery proposed by Dr. Desai is reasonable or necessary.

Reopening

Claimant bears "the burden of proof as to any issues sought to be reopened." § 8-43-303(4), C.R.S. 2015; *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). To warrant reopening of an award on the ground of a "change in condition," a claimant must demonstrate a change in physical or mental condition, and not merely a change in economic condition. *Lucero v. Climax Molybdenum Co.,* 732 P.2d 642 (Colo. 1987). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted as a result of the

worsened condition. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Claimant failed to meet her burden of proof and demonstrate that her condition worsened or that her case should be reopened.

Claimant filed a Petition to Reopen due to an alleged "change in medical condition" supported by Dr. Desai's medical records. Dr. Desai's records, however, do not reflect any change in treatment recommendations. Dr. Desai's proposal for surgery was initially made at or before Dr. Raschbacher's November 4, 2013, Division IME and Dr. Desai's recommendation has not changed since.

Likewise, Claimant's condition/symptoms remain stable. On November 4, 2013, Claimant completed a pain questionnaire as part of the Division IME performed by Dr. Raschbacher. Claimant, a paramedic, was very well spoken regarding her medical status and symptoms. Claimant's description of her condition at hearing was essentially the same as her description of her condition in the November 4, 2013, pain questionnaire. In both instances, Claimant reported that she felt Intense unrelenting pain/burning and temperature and touch sensitivity in her left foot and leg, deep aching bone pain, cold intolerance, pain like a vice grip is clamped down on her leg, severe muscle spasms and contractions of her left leg and foot, and difficulty sleeping because the sheets and/or blankets will brush against her foot and set off the pain response. Also, Claimant admitted that her current treatment keeps her medically stable. Claimant experienced some difficulty when she attempted to describe how her conditions changed for the worse since maximum medical improvement. Claimant admitted her sleep pattern remains the same and she gave vague responses regarding any change or worsening of her pain. Claimant did not credibly testify that her condition changed for the worse.

Other medical records support that Claimant's condition remains stable or improved. On April 2, 2014, Dr. Hompland reported that Claimant spends 20 – 60 minutes per day 4-6 times a week exercising. On June 23, 2014, Dr. Desai noted that Claimant "is doing functionally okay, pretty much at baseline." On June 17, 2015, Chiropractor Jason Gridley reported Claimant "is doing quite well" and reported very good response to the sympathetic block for her low back pain and lower leg pain. On September 9, 2015, Claimant returned from vacation; she was active on vacation which improved her mobility for low back as well as her lower leg and Claimant responded well/favorably to her last visit with decreased pain and spasm in the low back as well as the left lower leg below the knee and she felt the last sympathetic block had been quite effective. On December 7, 2015, Claimant "states that she is stable with respect to back pain and her left lower leg, foot/ankle pain and CRPS symptoms." Objective findings revealed no obvious changes to range of motion of the left ankle/foot, and no decreased tenderness of the ankle, foot, or lower half of the left leg below the knee. The patient exhibited consistent tender symptomatic and homeostatic acupoints below the left knee and just proximal to the ankle consistent with previous visits. The ALJ credits the opinion of Dr. Saint-Phard who credibly reported and testified that that

Claimant's condition has not changed for the worse since the time of MMI and that Claimant remains at MMI.

Claimant briefly mentioned symptoms in her back, knee, pelvis, and hip. Claimant did not meet her burden of proof that these conditions were related to the work injury or that they worsened. Dr. Raschbacher, the Division IME, concluded "there is no other ratable impairment including at the back, knee, pelvis, hip or elsewhere. The medical record simply does not support there being clear evidence of work-related injury other than at the left foot." Claimant may not circumvent Dr. Raschbacher's determination of relatedness or non-work relatedness of her back, knee, pelvis, hip or elsewhere at this time. Dr. Saint-Phard agreed that Claimant's knee and back conditions are "not at all related to her left toe injury." On February 23, 2015, Dr. Fall agreed that Claimant's left knee and low back conditions are not at all related to her left toe injury.

The ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate that her conditions changed for the worse and the claim should reopen.

Authorized Provider

Pursuant to C.R.S. §8-43-404(5), the employer /insurer has the right at the first instance to select the physician who attends the injured worker. Further, pursuant to C.R.S. §8-43-404(7), an employer/insurer is not liable for treatment unless treatment has been prescribed by an authorized treating physician or an emergency situation occurs.

In this case, Claimant treated with Dr. Desai outside of the workers' compensation system until August 13, 2014, when Dr. Fall referred Claimant to Dr. Desai. Respondents are not liable for treatment provided by Dr. Desai prior to August 13, 2014.

ORDER

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

1. Claimant's request for an MTP arthrotomy, synovectomy, and debridement of the inner sesamoid interval and inspection of the dorsal sensory nerve surgery recommended by Dr. Desai is denied.

2. Claimant's request to reopen her claim is denied.

3. Respondents are liable for treatment provided by Dr. Desai after Dr. Fall's August 13, 2014, referral.

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

5. 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 4, 2016

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

ISSUES

The issues addressed by this decision involve Claimant's entitlement to medical benefits. The questions to be answered include:

I. Whether Claimant produced clear and convincing evidence to overcome Dr. Sollender's Division IME opinion that Claimant reached MMI on March 9, 2015.

II. Whether Claimant's claim should be reopened based on an alleged worsening of condition related to Claimant's January 8, 2013 industrial injury.

III. Whether Claimant's need for additional surgery should be authorized as maintenance care, in the event that re-opening is denied, on the grounds that the additional surgery recommended by Dr. Phillip Marin is reasonable, necessary and related to Claimant's industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the hearing testimony of Claimant and the deposition testimony of Dr. Larson the ALJ enters the following findings of fact:

1. Claimant sustained a compensable work injury to his right hand on January 8, 2013, while employed with Bridgestone Retail Tire Operations after being bitten by a large dog.

2. Claimant's attending treating physician ("ATP") for the claim is Daniel Olsen, M.D., who works as a physician at the Centers for Occupational Medicine.

3. Claimant underwent three surgical procedures to treat the effects of his work injury. All three surgeries were performed by Dr. Phillip Marin.

4. Dr. Marin requested authorization for a fourth surgery to include operative exploration of the dorsal fifth CMC region for debridement of the joint as necessary, synovectomy, and possible neuroma excision.

5. Respondents requested an opinion from Dr. Wallace Larson, to determine whether this fourth surgery was reasonable, necessary and related to the work injury. Dr. Larson had examined claimant at Respondents request on June 17, 2014, less than a month before Dr. Marin's request for surgery. Dr. Larson noted that the back of claimant's right hand was still very sensitive.

6. Dr. Larson issued a report on August 11, 2014, in which he opined that any additional surgeries would be unlikely to help claimant's pain and limitation. Dr. Larson also concluded that there was no indication that a specific correctable condition had been identified and any additional surgery would not be beneficial to relieving or curing the effects of the industrial injury. In addition to the procedure recommended to address Claimant's right ring and little finger/CMC symptoms, due to suspected neuroma, Dr. Larson recommended against carpal tunnel release surgery based upon borderline EMG/NCV test results and lack of carpal tunnel symptoms.

7. Respondents filed an Application for Hearing, asserting that Dr. Marin's request for the fourth surgery was not reasonable, necessary and related to the industrial injury.

8. The parties proceeded to hearing on December 4, 2014, in Pueblo, to determine whether the requested surgery was reasonable, necessary and related to the work injury. ALJ Donald Walsh presided at the December 4, 2014 hearing.

9. ALJ Walsh issued his Findings of Fact, Conclusions of Law and Order on January 8, 2015. The undersigned ALJ adopts and incorporates the findings of fact set forth in ALJ Walsh's January 8, 2015 herein.

10. In denying and dismissing Claimant's request for the recommended surgery, ALJ Walsh concluded that the requested procedure was not reasonable or necessary. ALJ Walsh noted that Claimant had already undergone three surgeries by Dr. Marin and despite those procedures his condition continued to worsen. According to ALJ Walsh, another surgery, which posed a high risk of increasing Claimant's pain and suffering, was not reasonable or necessary medical treatment. ALJ Walsh found the medical opinions of Dr. Larson more credible and persuasive than medical opinions to the contrary. He also concluded that Dr. Marin ignored the recommendations of Dr. Sachar that no further surgery was indicated.

11. Following that December 4, 2014 hearing, Claimant continued to undergo medical treatment from his ATP, Dr. Daniel Olson. Respondents' expert, Dr. Larson, determined that Claimant was at MMI on June 17, 2014. Consequently, Respondents filed a Notice and Proposal for a twenty-four (24) month Division IME. The Application for a twenty-four (24) month Division IME was submitted on January 14, 2015.[1]

12. The Division exam with Dr. Sollender took place on May 19, 2015. During the Division exam, Dr. Sollender offered Claimant a trial anesthetic injection to see if further intervention would be curative in relieving Claimant's alleged ongoing right hand/wrist pain. The trial injection did not provide the degree of relief Dr. Sollender would have

[1] While Claimant endorsed the issue of whether Respondents were entitled to a 24 month Division IME for hearing, he did not make that argument in his opening statement, did not present evidence on the issue at hearing and did not raise the issue in his post-hearing position statement. Consequently, the undersigned ALJ finds that Claimant has not met his burden of proof on the issue of whether Respondents were entitled to a 24 month DIME in the first instance.

anticipated if his condition was purely from a neuroma. Physical examination also reveled a negative Tinel's test over the right median and ulnar nerve at the wrist, negative median nerve compression tests of the wrists bilaterally and no evidence of thenar or hypothenar wasting. Dr. Sollender agreed that Claimant had reached MMI. He assigned an MMI date of March 9, 2015. As Claimant reported only a 20% reduction in pain after the anesthetic injection, Dr. Sollender opined that it would be more than just a neuroma causing him pain. Dr. Sollender went on to state that while he had previously considered that burying the nerve would be advisable, the results of the trial injection changed his opinion. Accordingly, Dr. Sollender agreed that any further surgery would not likely improve his condition.

13. Dr. Sollender assigned a 28% hand impairment, which converts to a 25% upper extremity impairment. He also provided 2% upper extremity impairment for ulnar nerve sensation and another 4% upper extremity impairment for his wrist.

14. Dr. Sollender did not address Claimant's need for additional maintenance medical treatment for the work injury.

15. Subsequent to the Division examination, Respondents filed a Final Admission of Liability (FAL) based on the Division examiner's recommendations and permanent impairment ratings. The FAL was filed December 7, 2015.

16. Claimant filed an Application for Hearing on August 26, 2015 endorsing the following issues: medical benefits, reasonable and necessary medical treatment, disfigurement, permanent total disability benefits, Grover medical benefits, worsening of condition, claimant may no longer be at MMI, overpayment, and whether Respondents were entitled to a 24 month Division IME. Subsequent applications for hearing were filed on September 25, 2015 and October 28, 2015 specifically requesting authorization for a fourth surgery. As a consequence of Claimant's objection to Respondents' December 7, 2015 FAL and request for hearing, the ALJ finds that the claim has never closed.

17. Dr. Marin authored a report dated February 9, 2016. In this report he again recommends further surgery. Specifically, Dr. Marin noted:

> He also has had progressively worsening pain in the small finger CMC joint, which appeared to be progressively more sensitive and consistent with traumatic arthropathy from the crush injury. Due to his persistent symptoms I do recommend performing the carpal tunnel procedure as the crush injury could lead to subsequent carpal tunnel syndrome and neuritis which may give him some pain relief in the wrist and hand region as well as transection of the dorsal sensory branch of the ulnar nerve and bearing (*sic*) the stump and muscle as described by A. Lee Dellon for treatments of neuroma in his nerve surgery textbook.

18. As noted, Dr. Marin indicated that the contemplated fourth surgery would include

a full resection of the nerve. He previously did not recommend a full resection because he wanted to preserve sensation. However, Dr. Marin now indicates that he would bury the entire nerve into the muscle which would result in permanent numbness and pain relief.

19. Dr. Marin commented on the difference in the previously recommended surgery denied by ALJ Walsh and the recommended surgery currently at issue. Regarding the difference, Dr. Marin noted that the he performed a more "conservative initial procedure" because complete transection of the dorsal sensory nerve would have resulted in complete numbness of the dorsal surface of the ulnar portion of the hand.

20. The ALJ finds Dr. Marin's current request for a fourth surgery more aggressive than that which he recommended previously. Presently, the surgical goal is to effectuate the complete loss of sensation in the ulnar portion of the hand, including the CMC joint of the little finger encompassing the area of Claimant's greatest degree of subjective complaint.

21. As noted the Division IME specifically disagrees with Dr. Marin's request for a fourth surgery. In his June 29, 2015 DIME report, Dr. Sollender opines:

> While I had earlier considered that burying the nerve would be advisable, when the results of a trial injection was considered, it changed my opinion on treatment. I would not recommend nerve resection and burying the nerve ending of the dorsal branch of the ulnar nerve, as I do not think it will be curative or helpful in his recovery. His pain is from other factors that are not easily defined or identifiable. I agree, therefore, with Dr. Larson that further surgery will not likely improve his condition."

22. Dr. Larson testified via deposition on February 24, 2016. His testimony is consistent with his prior reports that Claimant is at MMI and requires no further surgery. Dr. Larson explained that Claimant's problems did not appear to primarily be coming from a neuroma or the nerve that was suspected by Dr. Marin. Instead, he explained that Claimant's pain was multifactorial and not fully explained. Careful review of the medical records submitted fails to establish that Dr. Marin addressed ALJ Walsh's concern at hearing regarding the true source of Claimant's ongoing pain. Consequently, the ALJ shares ALJ Walsh's expressed concern that Dr. Main has not identified with specificity that Claimant's pain is emanating from the 5th CMC joint.

23. Dr. Larson testified that Claimant is at MMI and no further surgery is necessary. He indicated that the surgery would not be expected to help Claimant's condition and instead would put the claimant at risk of further complications and additional pain. Indeed, in the face of failed symptom relief following three surgeries, Claimant was treated with injection therapy and the specter of a diagnosis of type II CRPS was raised by Dr. Leggett, a chronic pain specialist.

24. Dr. Larson's testimony is consistent with the opinions provided by Dr. Sollender

as expressed in his Division IME report. Dr. Larson indicated that any contrary medical opinions would simply be a difference of opinion between providers.

25. Dr. Larson's opinions were also consistent with Dr. Sachar's reports. Specifically, with Dr. Sachar's opinion that no further surgeries were indicated after Claimant's first procedure was completed.

26. While the undersigned ALJ finds that the January 8, 2015 Order of ALJ Walsh does not specifically address Claimant's entitlement to carpal tunnel surgery, the January 8, 2015 order was not appealed. Moreover, careful review of the evidence presented persuades the ALJ that the recommended carpal tunnel release procedure is not currently reasonable or necessary. To the contrary, the ALJ credits Dr. Larson's opinion to find that the results of Claimant's electrodiagnostic study and his physical examination do not support proceeding with a fourth surgical procedure in a gentleman whose symptoms worsened following three prior procedures and for whom a diagnosis of Type II CRPS was been raised.

27. Claimant did not present live medical testimony to rebut the conclusions reached by Dr. Sollender in his Division IME report or by Dr. Larson's in his deposition testimony. Claimant's contrary opinions regarding the source of his pain and the necessity and reasonableness of additional surgery are not convincing. While Claimant subjectively reports worsening pain, the record evidence submitted fails to support that assertion. Rather, the record evidence presented supports a continued belief in Claimant that his pain, which is likely mutifactorial in nature and which has failed to respond to three prior surgeries, will respond to forth surgery.

28. Dr. Larson's opinions are credible and consistent with the facts and evidence in this case.

29. Dr. Sollender's opinions concerning MMI and claimant's need for additional surgery are credible, persuasive and supported by the record evidence presented to him for consideration during his DIME.

30. Claimant has failed to demonstrate, by clear and convincing evidence, that Dr. Sollender's opinion that Claimant reached MMI on March 9, 2015 was highly probably incorrect. Accordingly, Claimant has failed to overcome Dr. Sollender's MMI determination.

31. Based upon a totality of the evidence presented, the ALJ finds the opinions of Drs. Larson and Sollender concerning the reasonableness and necessity of the proposed amended forth surgery more credible and persuasive than opinions to the contrary.

32. Claimant has failed to establish, by a preponderance of the evidence, that the proposed surgery, specifically transection of the dorsal branch of the ulnar nerve and carpal tunnel surgery is reasonable and necessary to cure and relieve him from the effects of his industrial injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. 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.

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

C. 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); CJI, Civil 3:16 (2007).

Overcoming the DIME Opinion of Dr. Sollender Regarding MMI

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *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 opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must

demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

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

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The instant case involves complex medico-legal questions regarding Claimant's MMI status in light of Dr. Marin's recommendation for additional surgery. As found here, the persuasive evidence supports Dr. Sollender's MMI determination as expressed in his Division IME report. Specifically, the Division IME opinion that Claimant reached MMI and does not require additional surgery is supported by the following:

- The Division IME physician is a respected hand surgeon and does not believe that the procedure would be helpful based upon objective measures, including his physical examination;

- Dr. Sachar (another hand surgeon) opined that Claimant should not proceed with any further surgeries after Dr. Marin's first procedure was completed. His opinion has been borne out and supported by the fact that Claimant continues to report worsening pain despite two additional procedures;

- Another hand surgeon (Dr. Larson) also opined that Claimant is at MMI

and another surgery would not be helpful. As a result, three different surgeons would not recommend additional surgical procedures;

- Both the Division IME and Dr. Larson have found that claimant's pain is not significantly caused by a neuroma so Dr. Marin's request to bury the nerve will not work;
- A diagnostic injection has proven that Claimant's pain is not significantly caused by a neuroma and Claimant failed to offer any credible/convincing evidence to dispute that fact.

To the extent that Claimant's and/or Dr. Marin's opinions concerning MMI diverge from those expressed by Dr. Sollender and Dr. Larson, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Claimant has failed to prove that Dr. Sollender's opinion regarding MMI was highly probably incorrect.

Reopening of the Claim and Claimant's Entitlement to Additional Medical Benefits

G. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a change of condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the Claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to §8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted). Regardless, the record evidence presented persuades the ALJ to find and conclude that this claim has never closed, rendering the need to "reopen" it for additional medical treatment contrary to the procedural posture of the claim and unnecessary. Rather, the ALJ finds the questions presented concerning Claimant's entitlement to medical benefits are whether, based on Claimant's assertions of worsening symptoms, he is at MMI and if not, whether he is entitled to additional reasonable, necessary and related medical treatment to cure and relieve him from the effects of his industrial injury or if Claimant is at MMI, whether he is entitled to maintence treatment which is designed to relieve the effects of the injury or to prevent deterioration of Claimant's present condition. As the found, Claimant has failed to establish that Dr. Sollender's opinion regarding MMI is highly probably incorrect. Consequently, the ALJ finds/concludes that Claimant is at MMI. Thus the issue concerning Claimant's entitlement to additional medical treatment becomes a question of whether Dr. Marin's recommendation for additional surgery is properly considered maintence treatment.

H. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

I. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Here, Claimant argues that the fourth amended surgical recommendation by Dr. Marin is maintenance in nature. The ALJ is not persuaded. Rather, the evidence presented persuades the ALJ that the fourth surgery is curative care to relieve Claimant's alleged ongoing pain. It is not a minimal maintenance type procedure. Moreover, even if the fourth surgery recommended by Dr. Marin could be properly deemed maintenance medical care, Claimant failed to prove, by a preponderance of evidence, that performing the recommended surgery is reasonable and necessary. As detailed above, three different hand surgeons have indicated that the procedure is not recommended. As noted in the January 8, 2015 order of ALJ Walsh, "[i]t is clear that Claimant has some type of pain problems. However, any operation in that area tends to trigger some very aggressive pain responses and will make the pain worse." Although, the surgery is designed to transect the nerve and result in complete loss of sensation, the ALJ concludes, consistent with Dr. Larson's opinion that additional surgery will cause more adjacent scar tissue and more irritation to the surrounding nerves which will likely result in reduced motion of the tendons and increased stiffness and pain in an injured worker who has had aggressive pain responses to three prior surgeries prompting injection therapy and consideration for a diagnosis of Type II CRPS. The credible evidence is that the requested surgical procedure is not reasonable and necessary. Consequently and consistent with the prior conclusion of ALJ Walsh, Claimant has failed to prove that he is entitled to a fourth surgical procedure as ongoing medical maintenance treatment.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside Dr. Sollender's opinion regarding MMI is denied and dismissed.

2. Claimant's request for medical benefits, including a forth surgery recommended by Dr. Marin is denied and dismissed as Claimant failed to prove that the recommended treatment is reasonable or necessary to cure or relieve Claimant from the effects of his industrial injury or designed to maintain Claimant at MMI.

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 11, 2016

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained functional impairment beyond the arms at the shoulders so as to justify conversion of his scheduled impairment ratings to a whole person impairment rating?

- Did Claimant prove by a preponderance of the evidence that he is entitled to a general award of ongoing medical benefits after maximum medical improvement?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 20 were admitted into evidence. Respondents' Exhibits A through J were admitted into evidence.

2. On April 23, 2013 Claimant sustained admitted injuries to both of his shoulders. The injuries occurred when Claimant fell from a ladder and tried to stop his fall by grabbing onto the ladder with both hands.

3. The left shoulder injury was diagnosed as a comminuted fracture of the greater tuberosity of the humerus, a Bankart lesion of the anterior inferior labrum, multiple glenoid labral tears and high-grade tears of the left supraspinatus and subscapularis tendons. Claimant underwent conservative treatment for these injuries and no surgery was ever performed.

4. The right shoulder injury was diagnosed as a torn rotator cuff.

5. On November 11, 2013 Claimant received a prescription for a left shoulder brace. The diagnoses for the brace were listed as fracture of the left greater tuberosity and "chronic" subluxation. At hearing Claimant described the brace as made of cloth that wraps around the entire shoulder as well as his ribs and both sides of his neck.

6. On November 15, 2013 Joseph Hsin, M.D. performed surgery to repair the torn right rotator cuff. The procedure was described as a right glenohumeral arthroscopy with limited debridement, right shoulder subacromial arthroscopy, acromioplasty and decompression and arthroscopic rotator cuff repair. During surgery Dr. Hsin noted Claimant had a "full-thickness supraspinatus tear right near the biceps."

7. The April 23, 2013 injury also caused a tear of the right distal biceps tendon. Dr. Hsin surgically repaired this tear on May 16, 2013.

8. Dr. Hsin examined Claimant on March 3, 2014. Dr. Hsin noted Claimant was 5 months out from rotator cuff surgery and was making "slow progress" in rehabilitation. Dr. Hsin described Claimant's shoulder range of motion (ROM) as "acceptable at this point post operatively." Dr. Hsin also reported that the Claimant's left shoulder was "slowly improving." Dr. Hsin recommended Claimant "be weaned to a home program of strengthening." Dr. Hsin opined Claimant "likely will need permanent restrictions."

9. On May 5, 2014 authorized treating physician (ATP) Lloyd Thurston, D.O., of Arbor Occupational Medicine (Arbor) placed Claimant at maximum medical improvement (MMI). On May 5 Claimant told Dr. Thurston that he could only tolerate 4 hours of work per day, was very limited and could not lean on the left upper extremity because it felt as though the left shoulder would dislocate. Dr. Thurston imposed permanent restrictions of a maximum 10 pounds lifting using both arms, repetitive lifting of 5 pounds using both arms, and carrying /pushing/ pulling 15 lbs. with both arms. Dr. Thurston further stated that Claimant cannot reach overhead and cannot reach away from his body. Dr. Thurston assessed 10% impairment of the right upper extremity based on reduced ROM. The right upper extremity impairment rating converted to 6% whole person impairment. Dr. Thurston assessed 33% impairment of the left upper extremity based on reduced ROM and "moderate" joint crepitus. The left upper extremity impairment rating converted to 20% whole person impairment. Combining the left and right whole person impairments Dr. Thurston assessed an overall whole person rating of 25%. Dr. Thurston stated that he had "not asked for medical maintenance care."

10. On August 5, 2014 Claimant underwent a Division-sponsored independent medical examination (DIME) performed by Scott Hompland, D.O. Dr. Hompland noted Claimant completed a pain diagram showing that he had burning, aching and pins and needles with an arrow pointed to the right shoulder and aching, throbbing and numbness with an arrow directed to the left shoulder. Claimant reported his best pain level was 2 on as scale of 10 (2/10) and the pain would go to 6/10 "with anything that takes the elbows away from his sides, especially pulling or pushing."

11. Dr. Hompland agreed with Dr. Thurston that Claimant reached MMI on May 5, 2014. Dr. Hompland explained that Claimant's right biceps and right rotator cuff repair had stabilized and that "it was agreed by all parties that he is not a candidate for left shoulder surgery with the understanding that this would most likely make his general condition and functional recovery worse." Dr. Hompland added that "it may be determined in the future that [Claimant] needs surgery on his left shoulder" and that Claimant could "re-visit this through his maintenance care with the assistance of his attorney."

12. Dr. Hompland assessed 8% impairment of the right upper extremity based on reduced ROM. The right upper extremity impairment rating converted to 5% whole

person impairment. Dr. Hompland assessed 17% impairment of the left upper extremity based on reduced ROM and "moderate" joint crepitus. The left upper extremity impairment rating converted to 13% whole person impairment. Combining the left and right whole person impairments Dr. Hompland assessed an overall whole person rating of 17%.

13. On December 2, 2014 Insurer filed a Final Admission of Liability (FAL). The FAL admitted liability for permanent partial disability (PPD) benefits based on Dr. Hompland's scheduled upper extremity impairment ratings and denied liability for medical treatment after MMI.

14. Claimant testified that in May 2015 he was at work when he reached for something and experienced pain and swelling in the area of his left lower ribs. These symptoms occurred in the same area where the shoulder brace wraps around his trunk. Claimant testified that he talked to someone at the Insurer who referred him to Arbor for treatment of this problem. Claimant went to Arbor and expected to see Dr. Thurston. However, Dr. Thurston was no longer working at Arbor.

15. On May 8, 2015 Claimant went to Kaiser Permanente (Kaiser) where he was seen by Adam Carewe, M.D. Claimant complained of left shoulder pain, kidney pain and "flank" pain. Claimant explained his left shoulder was still "bothersome" despite the fact he had been placed at MMI for the "workers comp case." Claimant also explained he wore a left shoulder brace in order to prevent the left shoulder from subluxing. The left flank pain was below the strap for the shoulder brace.

16. On May 8, 2015 Dr. Carewe authored a "to whom it may concern" letter. Dr. Carewe opined that Claimant's left flank pain represented a "superficial musculoskeletal injury likely caused from compression of the shoulder strap around his upper waist." Dr. Carewe stated he was "limited" in what he could do since this injury was likely caused by "the shoulder bracing as part of" Claimant's workers' compensation case.

17. On May 19, 2015 Claimant reported to Arbor where he was examined by PA-C Paul Springer. Claimant gave a history that on May 8 he was at work "on the floor doing some work under a desk" when he experienced pain in the left side of his rib cage. Claimant reported that the pain was "aggravated by a brace he is supposed to wear for his shoulder." PA-C Springer's impression was "may be a bruised rib." PA-C Springer commented that he could not tell if the irritation on the left side was "partially caused by the brace or not. PA-C Springer stated physical therapy was to look at the brace to "see if they can do some adjustment."

18. On May 21, 2015 Claimant returned to Arbor where he was examined by Sander Orent, M.D. Dr. Orent completed a Physician's Report of Worker's Compensation Injury (M 164) and listed the date of injury as May 8, 2015. The M 164 stated that Claimant was referred to "Dr. Gottlob" for a consultation. Claimant was also referred for 2 weeks of PT. Dr. Orent placed a check next to a box indicating that the date of MMI was unknown, but the handwriting next to this box is illegible.

19. Dr. Orent saw the Claimant again on June 16, 2015. Dr. Orent stated he was examining the Claimant "regarding [the] claim from 4/23/13." In the office note Dr. Orent noted that Arbor had received a "denial" of the request for Claimant to consult with Dr. Gottlob. Dr. Orent stated that he mistakenly submitted the request for the consultation under the May 8, 2015 date of injury rather than the April 23, 2013 date of injury. Dr. Orent explained that Claimant continued to have "an unstable shoulder" that was "subluxing" and that Dr. Orent wanted Dr. Gottlob to examine Claimant under the April 2013 claim. Dr. Orent also placed Claimant at MMI for the May 8, 2015 injury because Claimant's symptoms of chest pain and ribcage discomfort had completely resolved.

20. At hearing Claimant testified that he desires "maintenance treatment" for his left shoulder.

21. Claimant explained that he never saw Dr. Gottlob and has not seen Dr. Orent since June 2015.

22. On December 22, 2015 Anjmun Sharma, M.D., performed an independent medical examination (IME) of the Claimant. The IME was performed at the request of Respondents. Dr. Sharma is level II accredited and board certified in family medicine. Dr. Sharma took a history from Claimant, reviewed pertinent medical records and performed a PE.

23. In the IME report Dr. Sharma commented that Claimant was "uncooperative" with ROM measurements. Consequently, Dr. Sharma adopted Dr. Hompland's ROM measurements. Dr. Sharma opined the no whole person impairment rating should be assigned for the Claimant's shoulder injuries. With respect to the right shoulder Dr. Sharma stated that Claimant underwent successful right shoulder surgery and has "good" ROM with "no complaints."

24. With regard to the left shoulder Dr. Sharma opined Claimant was "symptom focused." Dr. Sharma further opined the Claimant's pain was "focused in the shoulder itself and in the upper extremity and not proximal to the glenohumeral joint." Dr. Sharma further started that there is "no impairment for physical dysfunction in either of the proximal glenohumeral joints."

25. Dr. Sharma was asked to comment on whether he believes Claimant needs any "maintenance medical care" as a result of the industrial injury. Dr. Sharma commented that Claimant had been using the left shoulder brace and his ROM is "somewhat better." Dr. Sharma recommended Claimant continue using the brace for one to two years. Dr. Sharma recommended Claimant be given a gym membership to strengthen the left shoulder. Dr. Sharma opined Claimant's left shoulder is "stable" and does not require surgery. Dr. Sharma opined that any treatment having to do with Claimant's preexisting rheumatoid arthritis (RA) "needs to be outside the comp system" because RA is an "erosive degenerative arthritis."

26. Ronald Swarsen, M.D., was retained by the Claimant to review medical records and offer testimony at the hearing. Dr. Swarsen practices occupational medicine and is level II accredited. Dr. Swarsen did not conduct a PE of Claimant.

27. Dr. Swarsen testified that the "shoulder" is not the "arm." He explained the "arm" begins at the head of the humerus and is located distal to the glenohumeral joint. Dr. Swarsen stated the scapula and clavicle are parts of the "shoulder girdle" which is located "above" the arm. Dr. Swarsen opined the "shoulder girdle" forms the "scaffold" that allows the arm to articulate.

28. Dr. Swarsen reviewed the operative reports and other medical records pertinent to Claimant's right shoulder injury. Dr. Swarsen explained that the right shoulder surgery performed by Dr. Hsin involved repair of the distal end of the supraspinatus tendon. Dr. Swarsen interpreted the operative report to mean that the tendon was debrided and surgically reattached to a groove in the greater tuberosity of the humerus. Dr. Swarsen explained that anatomically the distal end of the supraspinatus tendon is located "over the top of" and perhaps partially distal to the glenohumeral joint. He further explained the supraspinatus tendon is attached to the supraspinatus muscle that originates on the back of the scapula. Dr. Swarsen explained that the acromioplasty involved surgical removal of a part of the acromion in order to provide more space for the tendon to "glide" and to avoid future problems. He explained the acromioplasty occurred above the glenohumeral joint.

29. Dr. Swarsen opined that Dr. Hompland's right upper extremity impairment rating should be converted to the equivalent whole person impairment rating because all of the functional problems involving Claimant's right shoulder are located above the glenohumeral joint. On cross-examination Dr. Swarsen opined the "functional impairment" of the right upper extremity consists of discomfort and pain in the muscles of the shoulder girdle. He explained that the pain and discomfort in these muscles has reduced the ability of the shoulder girdle to move the right arm.

30. Dr. Swarsen reviewed the medical records pertinent to Claimant's left shoulder injury. Dr. Swarsen noted the injury caused a fracture of the greater tuberosity of the humerus and a dislocation of the humerus. Dr Swarsen explained the fracture of the humerus was an injury to the left arm. Dr. Swarsen also opined there were injuries to structures above the left glenohumeral joint consisting of the following: (1) Rotator cuff tears of the subscapularis and supraspinatus tendons; (2) Bankart lesion described as injury to the anterior inferior glenoid labrum; (3) Multiple labral tears.

31. Dr. Swarsen opined to a reasonable degree of medical probability that Dr. Hompland's left upper extremity impairment rating should be converted to the equivalent whole person impairment rating. Dr. Swarsen explained Claimant has poor function of the left shoulder that is consistent with the degree of injury to the shoulder. Dr. Swarsen explained that the Bankart lesion causes instability of the shoulder and creates the sensation that the arm will dislocate.

32. Dr. Swarsen opined that the condition of Claimant's left shoulder should be "monitored" because Claimant uses a shoulder brace for stability. Dr. Swarsen opined the use of the brace is "consistent" with the degree of injury to the left shoulder, particularly the Bankart lesion. Dr. Swarsen noted that Claimant's use of the brace should be monitored because braces tend to wear out and need to be replaced.

33. Dr. Sharma testified at the hearing. Dr. Sharma explained that RA is a severe degenerative and erosive condition that affects the synovium or soft tissue around the joints. RA can also affect the joints themselves, particularly the hands and feet.

34. Dr. Sharma testified that at the time of the IME Claimant complained of pain in both shoulders and that the left was worse than the right. Claimant indicated he had pain in the area between his neck and the outer part of the shoulders. Claimant was also wearing a "bulky" left shoulder brace and reported that the brace gave him a feeling of stability.

35. Dr. Sharma opined that at the time the April 2013 injury there was evidence Claimant already had arthritis in his shoulders. In support of this statement Dr. Sharma cited a right shoulder MRI that was performed in September 2013. According to Dr. Sharma the MRI depicted osteoarthritis and a prominent acromion without a labral tear. Dr. Sharma explained the MRI findings were suggestive of impingement of the subacromial space, which was likely a congenital condition.

36. Dr. Sharma testified to a reasonable degree of medical probability that Claimant has no "functional impairment" proximal to the right glenohumeral joint. In support of this opinion Dr. Sharma testified that Claimant underwent a subacromial decompression to relieve the effects of the acromion impinging on the supraspinatus tendon. Dr. Sharma stated that this surgery occurred between the acromion and the humeral head. He further opined that the subacromial decompression and the relief of the compression occurred distal to the glenohumeral joint, as did the supraspinatus tendon repair. Dr. Sharma noted good ROM on the right although he admitted there was some ROM impairment.

37. Dr. Sharma testified to a reasonable degree of medical probability that Claimant has no "functional impairment" proximal to the left glenohumeral joint. Dr. Sharma noted that during the examination of the left upper extremity Claimant exhibited "pain behaviors" such as holding onto the shoulder, complaining about pain and exhibiting very limited ROM. Dr. Sharma explained Claimant suffered a fracture of the humeral head that is clearly distal to the glenohumeral joint. Dr. Sharma opined that the fracture of the humeral head is the primary cause of Claimant's left upper extremity pain complaints. Dr. Sharma opined that the Bankart lesion involves the glenohumeral joint "itself."

38. Dr. Sharma testified that on examination of Claimant he did not find any functional impairment to muscles or other "structures" proximal to the glenohumeral joints. He further testified he did observe note any atrophy of the shoulder muscles.

39. Dr. Sharma testified that Claimant should discontinue use of the left shoulder brace. Dr. Sharma explained that typically a brace is used as a temporary measure to immobilize the shoulder in cases of a bone fracture or after surgery. The brace is then discontinued to prevent atrophy and allow the rotator cuff muscles to strengthen. Dr. Sharma admitted that he did not detect any muscle atrophy on PE of the claimant.

40. Dr. Sharma testified that Dr. Hompland's statement that in the future the Claimant may need surgery on the left shoulder and that this could be addressed through his "maintenance care" was reasonable. Dr. Sharma further testified that Dr. Hompland's statement regarding surgery appears to "assume" that maintenance care will be granted and that Dr. Hompland did not appear to recommend any specific maintenance treatment.

41. Dr. Sharma testified that pain is "not necessarily" the same as dysfunction and that pain can't be "rated."

42. At hearing Claimant completed a pain diagram (Claimant's Exhibit 19) to show where he currently experiences symptoms. The Claimant marked the diagram to show that he experiences burning and aching pain from his neck across the top of the right shoulder to the right glenohumeral joint. Claimant also indicated he experiences some "pins and needle" sensations and numbness in this area. Claimant further marked the diagram to indicate he experiences stabbing and aching pain on the top of the left shoulder between the neck and the left glenohumeral joint. Claimant also indicated he experiences some "pins and needle" sensations in this area.

43. Claimant testified as follows concerning the condition of his right shoulder. The shoulder becomes painful if he is required to reach above shoulder level for any length of time. He can carry up to 15 pounds on the right shoulder. He is limited to lifting 15 pounds overhead.

44. Claimant testified as follows concerning the condition of his left shoulder. Pain prevents him from carrying any weight on the left shoulder. He cannot lift objects overhead using the left shoulder because of pain and because the shoulder "dislocates." On average the left shoulder dislocates approximately once per week. Claimant wears a brace for the left shoulder that is meant to pull the shoulder "in and down."

45. Claimant testified that the condition of his shoulders prevents him from performing all of the movements that he could perform before the injury. The restricted movement sometimes affects how he uses tools at work. Claimant explained that the left shoulder is more problematic that the right shoulder. Claimant testified he cannot perform all activities of daily living without assistance from his father or sister. Claimant explained that the problems with the left shoulder require him to get assistance with washing and braiding his hair and when taking a shower.

46. Claimant testified that he needs additional medical treatment for his condition. He explained that he has not seen Dr. Gottlob pursuant to the referral of Dr. Orent, and has not seen Dr. Orent since June 16, 2015. Claimant stated that he believes he needs additional treatment because of ongoing symptoms that sometimes cause him to miss work a period of days.

FINDINGS OF FACT CONCERNING CONVERSION OF EXTREMITY RATINGS TO WHOLE PERSON RATING

47. Claimant proved it is more probably true than not that he sustained functional impairment beyond the arms at the shoulders. Therefore, Claimant proved it is more probably true than not that his upper extremity impairment ratings should be converted to Dr. Hompland's combined whole person impairment rating of 17%.

48. Claimant credibly testified that the industrial injuries of April 23, 2013 have resulted in limitations affecting the use of both his right and left shoulders. Claimant credibly demonstrated through completion of the pain diagram that he experiences pain in the areas between the neck and both shoulders. He credibly explained that this pain contributes to his inability to lift more than 15 pounds overhead or carry more than 15 pounds with the right upper extremity. Claimant also credibly testified he is limited to carrying 15 pounds on top of the right shoulder. Claimant credibly testified that pain and the sensation of "dislocating" renders him unable to lift anything overhead with the left shoulder. He also credibly explained that he cannot carry any weight on top of the left shoulder. Claimant credibly testified that the conditions of his shoulders restricts his ability to perform certain motions as well as limits his ability to perform functions of daily living including washing and braiding his hair and taking a shower.

49. Claimant's testimony is corroborated by the medical restrictions imposed by Dr. Thurston on May 5, 2014. Dr. Thurston imposed restrictions that limit Claimant to carrying no more than 10 pounds with either hand or reaching overhead and away from the body with either hand.

50. Claimant's testimony is also corroborated and supported by Dr. Swarsen's credible and persuasive testimony. Dr. Swarsen credibly explained that the scapula and clavicle are parts of the "shoulder girdle" that form the "scaffold" which allows the arm to articulate.

51. Dr. Swarsen credibly and persuasively opined that Claimant's right shoulder impairment should be converted to whole person impairment because the industrial injury has caused pain and discomfort in the shoulder girdle muscles. This pain and discomfort has in turn reduced the ability of Claimant's right shoulder girdle to move the right arm.

52. Dr. Swarsen credibly and persuasively testified that the arm begins at the humeral head and that the humeral head is "distal" to the glenohumeral joint. Dr. Swarsen persuasively explained that the right shoulder acromioplasty was performed "above" the glenohumeral joint and that the repair of the supraspinatus tendon occurred "over the top of" and partially distal to the glenohumeral joint. The ALJ infers from Dr. Swarsen's testimony that much of the right shoulder surgery was to structures entirely or partially proximal to the humeral head and, therefore, beyond the arm at the shoulder.

53. Dr. Swarsen credibly and persuasively explained that, although the fracture of the humeral head involved an injury to Claimant's left arm, the other injuries occurred above the left glenohumeral joint. The injuries to structures proximal to the glenohumeral joint include the tears of the subscapularis and supraspinatus tendons, the Bankart lesion (tear of the glenoid labrum) and multiple labral tears.

54. Dr. Swarsen credibly and persuasively opined that the injuries beyond the left glenohumeral joint have caused "poor function" of the left shoulder that is consistent with the degree of injury. Dr. Swarsen credibly explained that the Bankart lesion produces the sensation of "instability" which limits Claimant's use of the left upper extremity.

55. Dr. Sharma's opinion that all of Claimant's "functional impairment" is to his arms is not as persuasive as Dr. Swarsen's contrary opinion. Dr. Sharma did not persuasively refute Dr. Swarsen's opinion that the "arm" begins at the humeral head and that most of Claimant's injuries were to structures that are proximal to the glenohumeral joint. While Dr. Sharma argued that repair of the right supraspinatus tendon occurred distal to the arm at the shoulder, he did not deny that the supraspinatus tendon is attached to the supraspinatus muscle that originates at the scapula, well beyond the glenohumeral joint. Dr. Sharma admitted that lost ROM is a form of dysfunction, and does not deny that Claimant has reduced ROM in both shoulders. Dr. Sharma did not deny that pain can produce dysfunction, but skirted the issue by arguing that pain is not "ratable." Of course, as more fully explained below, Claimant's pain in this case constitutes a form of "functional impairment" regardless of whether it is "ratable" under the AMA Guides.

FINDINGS OF FACT CONCERNING POST-MMI MEDICAL TREATMENT

56. Claimant proved by a preponderance of the evidence that future medical treatment will be needed to relieve and/or prevent deterioration of his shoulder conditions.

57. Claimant credibly testified that he continues to experience disabling symptoms and believes he needs additional treatment.

58. Dr. Swarsen credibly opined that Claimant's left shoulder condition should be monitored, particularly in light of Claimant's continued use of the brace. Dr. Swarsen credibly explained that monitoring use of the brace is necessary because braces wear out and need to be replaced. Dr. Swarsen's opinion that Claimant's use of the brace should be monitored is supported by evidence that the brace may have caused a superficial flank injury that was treated by Dr. Carewe in May 2015.

59. Dr. Swarsen's opinion that Claimant's condition should be monitored is also corroborated by the opinion of Dr. Hompland, the DIME physician. Although Dr. Hompland opined that Claimant is not currently a candidate for left shoulder surgery, he suggested that the issue of surgery could be "re-visited" in the context of Claimant's "maintenance care." Dr. Hompland did not explain what specific "maintenance care" he

thinks is appropriate, but the ALJ infers from Dr. Hompland's statement that he believes Claimant's condition should at least be monitored with a view towards determining if surgery may become necessary in the future.

60. Dr. Swarsen's opinion that Claimant should undergo medical monitoring is also corroborated by the opinions and actions of Dr. Orent. Dr. Orent opined in June 2015 that Claimant had a subluxing left shoulder as a result of the April 2013 injury and this condition warranted a referral to Dr. Gottlob.

61. Insofar as Dr. Sharma testified that Claimant should discontinue use of the brace that testimony is not persuasive. Dr. Sharma's testimony contradicts his written opinion in which he stated Claimant should continue using the brace for one to two years. Dr. Sharma also recommended Claimant be given a gym membership to strengthen the left shoulder.

62. Although Dr. Thurston did not recommend post-MMI maintenance treatment, his opinion is outweighed by the opinions of Dr. Swarsen, Dr. Hompland and Dr. Orent.

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.

CONVERSION OF SHEDULED IMPAIRMENT RATINGS TO WHOLE PERSON RATINGS

Claimant contends that the scheduled impairment ratings for each shoulder should be converted to the whole person ratings found by Dr. Hompland. Specifically, Claimant argues that he established by a preponderance of the evidence that he sustained functional impairment beyond the arm at the shoulder. Relying heavily on the opinions of Dr. Sharma, Respondents contend that Claimant failed to prove he sustained functional impairment beyond the arm of either shoulder. The ALJ agrees with Claimant.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.*

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to medical impairment benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

Under the "situs of the functional impairment" test there is no requirement that the functional impairment take any particular form. Functional impairment is not assessed by medical means only but can involve "an overall assessment of the effect the injury has had on the claimant's ability to function in terms of movement and the performance of activities at work and daily living." *Martinez v. Pueblo County Sheriff's Office,* WC 4-806-129 (ICAO December 7, 2011). Therefore, pain and discomfort that limit the claimant's ability to use a portion of the body may constitute functional impairment. *Aligaze v. Colorado Cab Co.,* W.C. 4-705-940 (ICAO April 29, 2009); *Johnson-Wood v. City of Colorado Springs,* W.C. 4-536-198 (ICAO June 20, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. 4-452-408 (ICAO October 9, 2002). Although a physician's impairment rating may be considered in determining the situs of the functional impairment, the AMA Guides' definitions of where

the torso ends and the extremity begins are of no consequence in resolving the issue. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

As determined in Findings of Fact 47 through 55, Claimant proved it is more probably true than not that he sustained functional impairment beyond the arms in both shoulders. As found, the ALJ credits Dr. Swarsen's opinion that the arm begins at the head of the humerus, and that the April 2013 accident caused injury to Claimant's "shoulder girdles" located beyond the "arms" of the shoulder. Dr. Swarsen credibly and persuasively opined that Claimant's right shoulder impairment should be converted to whole person impairment because the industrial injury has caused pain and discomfort in the shoulder girdle muscles. This pain and discomfort in turn reduced the ability of Claimant's right shoulder girdle to move the right arm. Dr. Swarsen credibly and persuasively opined Claimant has poor function of the left shoulder that is consistent with the degree of injury to that shoulder. Dr. Swarsen explained that the Bankart lesion, located proximal to the glenohumeral joint, causes instability of Claimant's shoulder and creates the sensation that the arm will dislocate. Moreover, Claimant credibly testified that he experiences pain between his shoulders and neck that affects his ability to lift, reach overhead and perform activities of daily living. Claimant's testimony is corroborated by the permanent restrictions imposed by Dr. Thurston. Dr. Sharma's opinion that all of Claimant's functional impairment is in the arms is not persuasive for the reasons stated in Finding of Fact 55.

Permanent partial disability benefits shall be awarded based on Dr. Hompland's 17% whole person impairment rating and paid in accordance with the formula established in § 8-42-107(8)(d), C.R.S. In this regard the ALJ notes Respondents have not argued that they overcame Dr. Hompland's whole person rating by clear and convincing evidence.

POST-MMI MEDICAL TREATMENT

Claimant contends he is entitled to a "general award" award of ongoing medical benefits after MMI. Claimant argues that the need for such care is supported by Dr. Swarsen's opinion that Claimant should receive medical monitoring of his condition. Respondents contend Claimant failed to prove by a preponderance of the evidence that post-MMI medical treatment is or will be needed to relieve and/or prevent deterioration of Claimant's condition. The ALJ Agrees with Claimant.

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement

to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As determined in Findings of Fact 56 through 62, Claimant proved by a preponderance of the evidence that he needs ongoing post-MMI medical treatment to relieve the effects of his shoulder injuries and prevent future deterioration of his condition. As found, the ALJ credits Dr. Swarsen's opinion that Claimant's use of the left shoulder brace warrants medical monitoring. The ALJ considers Dr. Swarsen's opinion that Clamant needs medical monitoring to be supported by the opinions of Dr. Hompland and Dr. Orent. To the extend Dr. Sharma and Dr. Thurston opined that Claimant does not need medical monitoring, their opinions are not persuasive for the reasons stated in Findings of Fact 61 and 62.

Claimant is entitled to a general award of post-MMI medical benefits. Respondents retain the right to challenge the compensability, reasonableness, and necessity of any specific post-MMI medical treatment. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

ORDER

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

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

2. Insurer shall pay medical impairment benefits based on Dr. Hompland's 17% whole person impairment rating and the statutory formula contained in § 8-42-107(8)(d), C.R.S.

3. Claimant is entitled to an award of post-MMI medical benefits.

4. Any issues not resolved 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 26, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the Claimant is entitled to the decompressive laminectomy, an epidural steroid injection and a back brace all of which were recommended by Dr. Anje Kim. Respondents assert none of the proposed treatment is reasonable, necessary or related to the industrial injury.

FINDINGS OF FACT

1. On September 27, 2013, Claimant sustained an injury to his low back in the course and scope of his employment. Claimant was driving a tractor trailer in the mountains when he tried to pull over. The road was foggy and he missed the pull off and the vehicle rolled down the mountain. Claimant climbed up to the road and got help from a passing motorist.

2. Claimant declined to receive medical treatment at the scene of the accident, but Claimant began to experience pain in his left hip, thoracic spine and left upper arm as the day progressed. He eventually went to HealthReach in Wyoming on September 27 for "a drug screen per protocol." At the time of the evaluation, Claimant reported he was experiencing 10/10 pain in the affected body parts.

3. Although the Claimant denied loss of consciousness, the nurse practitioner noted that Claimant's speech was slurred and he appeared to stare off into space. His speech was deemed slow. Claimant's examination was positive for limited range of motion and tenderness to palpation in his upper arm, thoracic spine and hip. Claimant's gait was slow and his movements were guarded. Claimant was referred to the emergency room.

4. Claimant then went to the Cheyenne Regional Medical Center emergency room. He reported left arm, back, head and hip pain. A CT scan of Claimant's low back showed an "acute-appearing fracture of the left transverse process of L3."

5. Claimant presented to Willow Creek Family Medicine on September 30, 2013, and stated that he broke his tail bone in a rollover accident on Friday. He stated that at the hospital he was diagnosed with a fracture of his tailbone and bruising of his left upper arm/bicep. Claimant noted that he was feeling stiff and having muscle spasms. Claimant was given a prescription for Naprosyn and Percocet and instructed to follow-up in ten days or sooner if needed.

12. On October 7, 2013, Claimant reported to Willow Creek with complaints of bilateral toe numbness associated with prolonged sitting in certain positions. He reported falling three times over the prior weekend. He also complained of left hip and

coccyx pain but noted overall that his pain has not changed much in quality or intensity since the accident. His rated his pain at 8 out of 10.

13. Claimant returned to Willow Creek on October 16, 2013. Claimant stated that he has been out of flexeril since last night and having a lot of muscle spasms. He also complained that the toes on both his feet are going numb on and off. Claimant's diagnoses included closed fracture of sacrum and coccyx without spinal cord injury, lumbago and parasthesias of bilateral lower extremities.

6. On October 28, 2013 a lumbar MRI revealed a torn annulus fibrosus of the L4-5 disc, associated with disc protrusion centrally. This results in canal diameter stenosis. There was no fracture or subluxation.

7. On November 7, 2013, Claimant returned to Willow Creek. He complained that his middle back pain was rose than his lower back. Claimant was still suffering from numbness and cold in his bilateral feet. Claimant asked for stronger pain medication. Claimant was referred to a "back specialist."

8. On November 20, 2013, Dr. Steven Beer, a spine surgeon, evaluated the Claimant. Dr. Beer's assessments included lumbar stenosis, L3 transverse process fracture - left, and thoracic spine pain. He recommended a thoracic MRI, L4-5 epidural steroid injection, and L4-5 facet joint injections if pain persists.

9. Claimant underwent the L4-5 facet injections and reported some relief. An epidural steroid injection at L4-5 was performed on December 2, 2013 by Dr. Girardi.

10. Dr. Beer recommended chiropractic care and physical therapy.

11. Dr. Beer's notes are silent concerning a surgical recommendation.

12. Dr. Girardi performed bilateral L4-5 intraarticular facet joint injections on February 7, 2014.

13. Claimant presented to Dr. Beer on February 24, 2014, for a follow-up appointment. Claimant stated that he was doing better and wished to return to work without restrictions. He was afraid of losing his job because the Employer could not offer modified duty within the restrictions imposed.

14. Claimant testified that he did not like Dr. Beer, but he was never asked to provide an explanation as to why.

15. On March 18, 2014m Claimant's physical therapist discharged him after five visits. Treatment consisted of therapeutic exercises for lumbar stabilization and education for a home exercise program. "This patient made excellent progress with his pain relief as well as strengthening. He has returned to work driving truck without increased pain, only reported stiffness." The record also noted that Claimant had returned to the gym without problems.

16. An x-ray of the lumbar spine was obtained on June 12, 2014. The x-ray showed no fracture, subluxation, or bone destruction. There was a very mild broad lumbar curvature convex to the left centered at L3-4.

17. Claimant presented to an urgent care clinic on September 27, 2014, complaining of constant back pain for approximately 10 days. He reported his pain levels were 8 out of 10. He stated that he could not sleep last night, but planned to be seen by a workers' compensation doctor in Colorado. The exam showed one positive Waddell's sign which was "distracted straight leg raise while sitting on the right." Claimant was given a toradol injection and discharged.

18. Claimant sought authorization from the Insurer to see another surgeon. Thereafter on October 6, 2014, Claimant attended care with a board certified neurosurgeon in Casper, Wyoming named Anje Kim. At hearing, Respondents did not contest whether Dr. Kim was an authorized treating physician.

19. By the time Claimant attended his initial consultation with Dr. Kim, his first facet injection administered on February 7, 2014 had worn off and his lower extremity symptoms had returned. Dr. Kim requested an updated MRI.

20. Her colleague in the same clinic, Dr. Todd Hammond, administered Claimant's second bilateral L4-5 facet injections on October 15, 2014. Claimant's pain diagram documented a reduction in symptoms following this second round of facet injections.

21. On October 30, 2014 Claimant's second lumbar MRI revealed a central and left paracentral protrusion at L4-5 with lateral recess stenosis – to be correlated with a L5 radicular pattern. It also revealed L4-5 foraminal narrowing – to be correlated with a L4 radicular pattern. There was also L4-5 arthrosis.

22. On November 17, 2014 Dr. Kim reviewed the MRI results and advised Claimant that "he ha[d] a degenerative disc as well as central and canal stenosis." She recommended a CT SPECT which came back normal indicating that Claimant was not experiencing inflammatory activity on the date of the scan.

23. On December 17, 2014 Claimant returned to Dr. Kim who recommended "a L4-5 laminectomy with microlumbar discectomy to address the disc bulge that is causing impingement of the descending exiting nerve roots in the canal."

24. Dr. Brian Reiss evaluated the Claimant on February 25, 2015, at Respondents' request. Claimant told Dr. Reiss that he was driving a truck on September 27, 2013, going over Rabbit Ears Pass in fog and snow. He said that he was turning into a turnout area and ended up going off the side of the mountain. He said he rolled down the mountain but was able to climb up to the road. Apparently, his wife then picked him up and took him to the hospital in Cheyenne. Claimant said he wants to avoid a fusion and complained of central lower back pain. He also complained that sometimes he has pain in his right anterior thigh and numbness in his toes. Dr. Reiss recommended reinstituting a physical therapy program including core

strengthening, stretching, aerobic conditioning, and perhaps mobilization. He did not believe that laminectomy decompression would provide any benefit. He also stated that he would not suggest a fusion at this point.

25. Claimant returned to Dr. Kim's clinic on May 11, 2015. Claimant complained of back pain and leg pain. Dr. Kim reviewed Dr. Reiss's report and disagreed with his opinions. She then stated that she would review the file and make her own recommendations. Claimant was released to return to work without restrictions.

26. On May 26, 2015 Dr. Kim authored a letter appealing Dr. Reiss's denial of the surgery. Dr. Kim correlated Claimant's lower extremity symptoms with radiculopathy originating from his lumbar spine pathology demonstrated by two MRIs; she vehemently disagreed with Dr. Reiss's opinion that Claimant's symptoms were limited to axial back pain because he had well documented radicular symptoms; she opined that further conservative measures recommended by Dr. Reiss would merely kick the can down the road and would not remove the structural lesions documented by the two MRIs; she opined that she was "highly confident" that her proposed laminectomy surgery will alleviate Claimant's symptoms "and allow him to return to full duty work without restrictions."

27. On August 27, 2015 Dr. Hammond administered a third round of L4-5 facet injections.

28. Claimant returned to see Dr. Kim on August 31, 2015. Claimant reported marginal benefit from the injections. Dr. Kim recommended a lumbar epidural steroid injection, a back brace and non-narcotic pain medications.

29. Dr. Kim made a request for the injection and back brace on September 22, 2015. The Respondents, through counsel, wrote a letter to Dr. Kim dated September 20, 2015 denying the injection and back brace. The letter stated the "claim is closed."

30. On October 6, 2015, Dr. Kim referred Claimant to Dr. Steven D. Newman for a pre-surgical psychological consultation. On October 12, 2015, Dr. Newman evaluated the Claimant and opined that Claimant "suffers from no psychological conditions that would negatively affect his candidacy for surgical intervention or recovery."

31. Dr. Reiss testified by deposition on November 23, 2015. He opined that Dr. Kim's request for low back injections and a decompression laminectomy were not reasonable, necessary or related to the September 27, 2013 injury. He testified that Claimant's MRI does not show severe stenosis, Claimant's primary complaint was back pain which is not treated with a laminectomy decompression, and there was no instability. Dr. Reiss explained that Claimant would be having an operation designed to alleviate someone's lower extremity symptoms. Dr. Reiss noted that Claimant has not consistently complained of lower extremity symptoms, but then later admitted that the medical records document Claimant's complaints of lower extremity symptoms. He also

testified that Claimant does not have much nerve compression to even explain any lower extremity symptoms although there are findings on Claimant's MRI scans. Ultimately, he testified that performing an operation designed to alleviate someone's lower extremity symptoms, not their back pain, would not likely be helpful to Claimant.

32. Dr. Reiss explained that the Colorado Medical Treatment Guidelines indicate that surgery should only be performed after the pain generator is identified and that there is a likelihood that surgery will be helpful and better than continued nonsurgical care. Dr. Reiss opined that Claimant's pain generator is his low back, and that the recommended surgery does not treat low back pain. Dr. Reiss also testified that additional injections were not likely to help Claimant because they had been performed in the past without providing sustained relief.

33. Dr. Reiss opined that Claimant was at MMI on October 13, 2015. He recommended additional physical therapy and core strengthening, but acknowledged that therapy will not decompress an impinged nerve. Dr. Reiss acknowledged that Claimant has mild to moderate central canal stenosis, and that stenosis causes radiculopathy. He also acknowledged that Claimant has some mild radicular symptoms; and he acknowledged that a laminectomy is designed to treat radiculopathy caused by stenosis.

34. Dr. Kim also testified by deposition. She explained that the surgery was the last treatment remaining to help alleviate Claimant's pain. She further testified that the surgery was reasonable and necessary based on Claimant's ongoing complaints of radiculopathy.

35. Dr. Kim testified that the October 28, 2013 lumbar MRI performed one month after the industrial accident demonstrated neurological compression at L4-5 which had advanced by the time the second MRI was performed a year later on October 30, 2014. She explained that lumbar stenosis causes back pain and pain into the limbs due to compression of the nerves. In Claimant's particular case, his pain is caused by a combination of his spinal canal and foraminal stenosis causing neurological impingement; degenerative disc disease and facet arthritis.

36. Dr. Kim testified that the industrial accident aggravated preexisting degenerative changes that Claimant had in his lumbar spine. She opined that the laminectomy; back brace and lumbar epidural steroid injections were reasonable and necessary to cure and relieve the effects of the industrial injury.

37. Dr. Kim acknowledged that the surgery would not resolve all of Claimant's back pain, but the surgery would likely resolve some of his back pain. Dr. Kim expressed confidence that the laminectomy had a high probability of improving Claimant's symptoms. Dr. Kim also testified that the other non-surgical options were reasonable and necessary. She provided little explanation for her opinions concerning the injection or brace.

38. Although Dr. Kim is not a level II physician, she did offer testimony about the Medical Treatment Guidelines. She agreed that there was a "reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement" if she performed the laminectomy. She stated that the laminectomy "has a chance of providing that pain relief and has a long history of being successful without causing long-term issues, such as a lumbar fusion." She identified the "specific site of nerve root compression." In addition, the Claimant cleared a pre-surgical psychological evaluation.

39. Dr. Kim praised Claimant for having the character and work ethic to seek full duty work where her other patients had historically requested work restrictions.

40. Claimant had a prior workers' compensation injury on August 18, 2009 to his low back. Claimant was digging a hole and hit rocks. After taking a break, his pain worsened. Claimant presented to Willow Creek Family Medicine, complaining of 10/10 pain in his low back. It appears that this was a Wyoming workers' compensation case. Prior to Claimant's industrial accident, he sought medical treatment for lower back pain in 2009 that lasted approximately one week and then resolved. After three years of being asymptomatic, Claimant sought chiropractic treatment for lower back pain beginning in August 2012. By January 2013 Claimant's back pain was near asymptomatic and he discontinued medical treatment. He did not seek medical attention thereafter until the September 2013 industrial accident. Claimant testified that his preexisting lower back symptoms were in a different area of his back than the symptoms caused by his subsequent industrial accident.

41. The ALJ credits the opinions of Dr. Kim as more credible and persuasive than those of Dr. Reiss. Dr. Kim credibly explained, and the medical records confirm, that Claimant has reported both leg and low back symptoms throughout his treatment. She opined that Claimant has presented with neurological symptoms, and the MRI shows nerve compression. Dr. Reiss felt that Claimant's findings on MRI were not "terribly consistent" with Claimant's lower extremity symptoms, but he admitted it is possible that the stenosis visualized on the MRI is causing Claimant's lower extremity symptoms. Dr. Reiss and Dr. Kim differ in their opinions concerning the reasonableness and necessity of the surgery and the ALJ finds that Dr. Kim, who is the treating physician, has a better understanding Claimant's condition than Dr. Reiss who examined him one time.

42. Dr. Kim's referral to Dr. Newman for a pre-surgical psychological evaluation was consistent with the Medical Treatment Guidelines, and is reasonable and necessary medical treatment. This ALJ finds that Dr. Newman is an authorized treating medical provider. This ALJ finds that Dr. Kim's proposed laminectomy surgery is consistent with the Medical Treatment Guidelines.

43. Claimant has failed to prove that the epidural steroid injection and back brace are reasonable, necessary or related to the claim.

CONCLUSIONS OF LAW

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

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

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

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

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. Claimant has proven that the surgery recommended by Dr. Kim is reasonable, necessary and related to his work injury. The Claimant credits the opinions of Dr. Kim as more credible and persuasive than those of Respondents' expert, Dr. Brian Reiss. Dr. Kim credibly explained, and the medical records confirm, that Claimant

has reported both leg and low back symptoms throughout his treatment. She opined that Claimant has presented with neurological symptoms, and the MRI shows nerve compression. The Claimant understands that the laminectomy will not eliminate his back pain but he still wishes to relieve his leg symptoms and undergo the procedure. The Claimant has been cleared for surgery from a psychological perspective.

7. Dr. Reiss opined that the surgery will not benefit the Claimant because the Claimant's chief complaint is back pain with "little in the way of lower extremity problems." Dr. Reiss felt that Claimant's findings on MRI are not "terribly consistent" with Claimant's lower extremity symptoms, but it is possible that the stenosis visualized on the MRI is causing Claimant's lower extremity symptoms. Dr. Reiss, however, indicated that the MRI does not show much nerve compression to account for Claimant's symptoms. He and Dr. Kim differ in their opinions concerning the reasonableness and necessity of the surgery and the ALJ finds that Dr. Kim, who is the treating physician, has a better understanding Claimant's condition than Dr. Reiss who examined him one time.

8. The Respondents' contended that Dr. Beer "refused to recommend surgery." Such a contention is inaccurate and unsupported by the medical records. It is true that the records contain an absence of a surgical recommendation by Dr. Beer but there is no persuasive evidence that he refused to make one. Thus, the ALJ considered the absence of a surgical recommendation by Dr. Beer, but given the lack of documentation in Dr. Beer's records, it is difficult to ascertain the basis for his opinions. He obviously wanted Claimant to pursue more conservative treatment first which is not unusual. Dr. Kim provided a similar opinion.

9. In addition, the ALJ is not persuaded by Respondents' argument that Claimant's release to full duty work or his ability to return to exercising suggests that he is symptom free, and not in need additional treatment including the surgery Claimant has requested. Claimant requested full duty work over fears of losing his job. In addition, no treatment providers have prohibited Clamant from engaging in exercise. To the contrary, Dr. Beer recommended physical therapy, and Dr. Reiss recommended core strengthening and additional physical therapy.

10. The Claimant has also proven that Dr. Kim, who is an authorized treating physician, referred him to Dr. Newman for a pre-surgical psychological evaluation. The psychological evaluation is consistent with the Medical Treatment Guidelines. In addition, because the surgery is authorized, the Respondents are liable for the cost of the psychological evaluation subject to the Colorado fee schedule.

11. The Claimant's request for a back brace and epidural steroid injections is denied especially in light of the order authorizing surgery. There was little evidence or testimony concerning whether Claimant would continue to need a back brace or epidural steroid injections if he were to undergo surgery.

ORDER

It is therefore ordered that:

1. Respondents shall authorize the surgical procedure recommended by Dr. Kim.

2. Respondents are liable for the psychological evaluation performed by Dr. Newman.

3. Claimant's request for authorization of a back brace and epidural steroid injection is denied.

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 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 25, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- What is the DIME physician's true opinion concerning the date of maximum medical improvement?
- Did Claimant overcome by clear and convincing evidence the DIME physician's finding that Claimant reached maximum medical improvement on October 9, 2014?
- Did Claimant overcome by clear and convincing evidence the DIME physician's finding that Claimant did not sustain any injury related permanent impairment of the cervical and lumbar spine?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of permanent total disability benefits?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits from July 11, 2014 until October 16, 2014?
- What is Claimant's average weekly wage?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 though 3 were admitted into evidence. Respondents' Exhibits A through DD were admitted into evidence. The deposition testimony of Jeff Raschbacher, M.D., was admitted into evidence.

CLAIMANT'S TESTIMONY

2. Claimant operated an incorporated masonry business. He sustained an admittedly compensable injury on July 15, 2013 when he fell while trying to find a fuel pump in a pile of spare parts. Claimant claimed that he injured his left knee, neck and low back as a result of this fall.

3. Claimant testified as follows. He continued to work after the July 15, 2013 injury and did not seek any medical treatment for his injuries until October 29, 2013. He did not seek treatment because he had experienced prior injuries and was able to "work through" them. However, by October 29, 2013 his pain had increased to the point that he decided he needed treatment. On October 29, 2013 he was examined by Brian J.

Beatty, D.O. Claimant continued to work until approximately November 1, 2013 when he closed his masonry business. He explained that he closed the business because the economy had "tumbled" and the construction industry was depressed. Claimant noted there was no longer any profit in the business. Claimant has not worked since the masonry business was closed.

4. Claimant testified that the insurer denied his claim for workers' compensation benefits. Consequently he was required to go to hearing to establish compensability of the claim. Claimant did not seek or obtain any medical treatment for his injuries from the time the claim was denied until the claim was found compensable by an order issued in June 2014.

5. Claimant testified that he believes he is capable of working on a part-time basis. Claimant explained that he could do construction "office work" such as estimating and project management. However, Claimant stated that he experiences continuing neck and back pain and these symptoms might force him to be off work for an hour and a half at time. Therefore, Claimant considers it questionable whether he would be able to maintain employment.

MEDICAL RECORDS EVIDENCE AND RELATED ISSUES

6. On October 29, 2013 Dr. Beatty first examined Claimant. Dr. Beatty is board certified in occupational medicine and is level II accredited. On October 29 Dr. Beatty diagnosed Claimant with a left knee sprain and meniscus tear, a lumbar strain and a cervical strain. On physical examination (PE) of the Claimant's back Dr. Beatty noted bilateral paralumbar "tightness." Dr. Beatty also recorded that Claimant's back exhibited normal spinal curvature and that there was no deformity, ecchymosis, erythema or lesions. Dr. Beatty recorded lumbar range of motion (ROM) measurements. Dr. Beatty further noted there was some tenderness to palpation of the paraspinal neck musculature, but Claimant exhibited full cervical ROM. Dr. Beatty recommended an MRI of the left knee and wrote that Claimant would "follow through" with "some stretches for his neck and low back."

7. On October 29, 2013 Dr. Beatty completed a form WC M164 releasing Claimant to return to work at full duty. Dr. Beatty also marked a box on the M164 indicating that his "objective findings" were consistent with "history and/or work-related mechanism of injury."

8. Dr. Beatty next examined Claimant on November 5, 2013. Claimant reported that he had "a little bit of stiffness in his neck and his back [was] much better." Dr. Beatty noted that an MRI of the left knee had detected a tear of the posterior horn of the medial meniscus. Dr. Beatty wrote that he would refer Claimant for an orthopedic evaluation and probable surgery to the left knee. Dr. Beatty continued to release Claimant to return to work at full duty.

9. On December 1, 2013 Claimant was taken to the Castle Rock Adventist Hospital emergency department (ED) by his family. The ED report indicates that a

horse pushed Claimant backwards causing him to roll down a hill and strike his head. Claimant's wife reported that Claimant was not acting normally and he had a headache. Cervical tenderness was also reported on PE. CT scans of the brain and cervical spine were performed and were unremarkable. Claimant was assessed as suffering from a concussion and discharged home.

10. On December 30, 2013 Bruce Morgenstern, M.D., evaluated Claimant for "symptoms following a concussion." Claimant gave a history that he was continuing to experience intermittent headaches and right sided neck pain. However, the neck pain had reportedly been present since Claimant's "accident at work in July." Dr. Morgenstern did not document any complaints of back pain. On PE Claimant's neck was "supple" with normal cervical ROM. Dr. Morgenstern assessed a "mild postconcussive syndrome" from which Claimant was "largely recovering." However, Dr. Morgenstern noted depressive symptoms and prescribed Paxil.

11. Respondents denied liability for Claimant's alleged injury of July 15, 2013. On March 25, 2014 the matter proceeded to hearing before ALJ Allegretti on issues including compensability, medical benefits and temporary total disability (TTD) benefits. ALJ Allegretti issued Findings of Fact Conclusions of Law, and Order on June 20, 2014. Crediting Claimant's testimony ALJ Allegretti found that on July 15, 2013 Claimant sustained a compensable injury when he "slipped on some steel" and fell causing injuries to his left knee, back and neck. ALJ Allegretti concluded that Dr. Beatty's medical records and Claimant's credible testimony established that previously recommended treatment "for the Claimant's neck, back and left knee conditions, including but not limited to, evaluation by an orthopedic surgeon for surgery for the torn medical meniscus," were reasonable and necessary to treat the effects of the July 15, 2013 work injury. However, ALJ Allegretti denied the claim for TTD benefits commencing October 29, 2013. In support ALJ Allegretti found that Claimant did not seek medical treatment for his injuries until October 29, 2013, and that no doctor imposed work restrictions until Dr. Morgenstern took Claimant off work "after the horse incident." ALJ Allegretti also found that the effects of the injury did not cause Claimant to stop working on October 29, 2013. Rather, ALJ Allegretti found that Claimant's wage loss after October 29 was caused by his decision to close the business because it was "not competitive."

12. On July 9, 2014 Dr. Beatty examined Claimant for the first time since November 5, 2013. Dr. Beatty noted Claimant had gone to a hearing and "his neck, back, and left knee have been accepted as part of this injury." Claimant reported symptoms of intermittent neck pain, severe low back pain, left knee pain and "some right knee pain." Dr. Beatty diagnosed a meniscus tear of the left knee and lumbar and cervical strains. He recommended Claimant undergo x-rays of the lumbar and cervical spines and referred Claimant to John Davis, III, M.D., for orthopedic consultation concerning the left knee. Dr. Beatty also imposed work restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds, no repetitive lifting in excess of 5 pounds, no walking for more than one hour per day, no standing for more than one hour per day and no crawling, kneeling, squatting and climbing.

13. On July 11, 2014 Dr. Davis examined Claimant' left knee. Claimant reported that since his injury in July 2013 he had experienced persistent joint line pain, swelling and feelings of instability. Dr. Davis assessed a complex tear of the posterior horn of the medical meniscus and patellofemoral arthritis. Dr. Davis recommended Claimant undergo arthroscopic surgery to repair the meniscal tear. In connection with the July 11, 2014 visit Dr. Davis completed a Physician's Report of Workers' Compensation Injury. On this form Dr. Davis checked a box indicating that Claimant was "unable to work" from "DOI to present." The ALJ infers that the "DOI" refers to the date of injury. However, Dr. Davis also checked a box indicating Claimant had "temporary restrictions" of no lifting greater than 30 pounds, no repetitive lifting greater than 20 pounds, no carrying more than 20 pounds, no pushing and pulling, no walking and standing more than 4 hours per day and no crawling, kneeling, squatting and climbing. Resolving the apparent inconsistency in this form, the ALJ infers that Dr. Davis intended to release Claimant to work with the limitations set forth in the form.

14. On July 15, 2014 the Insurer filed a General Admission of Liability (GAL) admitting that Claimant sustained an injury on July 15, 2013. The GAL admitted for medical benefits only.

15. Dr. Beatty examined Claimant on July 23, 2014. Dr. Beatty noted Claimant had undergone x-rays of the cervical spine that showed C5-6 disc degeneration with osteophyte formation. Dr. Beatty further noted Claimant had undergone lumbar spine x-rays that showed disc degeneration at L2-3, L3-4, L4-5 and L5-S1. Dr. Beatty diagnosed a left knee meniscus tear, lumbar strain, cervical strain and added the diagnosis of degenerative disc disease (DDD). Dr. Beatty planned to initiate physical therapy (PT) following knee surgery. Dr. Beatty continued the restrictions he imposed on July 9, 2014.

16. On August 15, 2014 Dr. Davis operated on Claimant's left knee. Dr. Davis performed a transarthroscopic partial medical meniscectomy and transarthroscopic patellar shaving. On August 29, 2014 Dr. Davis noted Claimant had minimal pain and "essentially no swelling." Dr. Davis assessed a "good early result from" surgery and referred Claimant for PT. On August 29, 2014 Dr. Davis Completed a Physician's Report of Workers' Compensation Injury which indicated Claimant was unable to work from "DOS to 6-8 weeks." The ALJ infers that "DOS" refers to the date of service, August 29. Dr. Davis also completed a section of the form listing restrictions of restrictions were no lifting greater than 10 pounds, no repetitive lifting greater than 10 pounds, no carrying more than 10 pounds, no walking and standing more than 4 hours per day and no crawling, kneeling, squatting and climbing. Resolving the apparent inconsistency in this form the ALJ infers that Dr. Davis intended to release Claimant to work with the limitations set forth in the form.

17. Between September 2, 2014 and October 10, 2014 Claimant underwent a course of PT to treat his left knee, neck and back symptoms.

18. Dr. Beatty examined Claimant on October 3, 2014. Claimant reported that he had been going to PT and his knee was continuing to improve. Claimant also

reported neck pain with intermittent headaches and continuing low back pain. Claimant advised that he experienced morning "stiffness" and that he "had to use a cane for a while." On PE of the cervical spine Dr. Beatty noted tenderness of the paracervical musculature on the right and along the occipital ridge with "good" ROM. On PE of the lumbar spine Dr. Beatty noted mild tenderness to palpation. Claimant exhibited 40 degrees of lumbar flexion, 0 degrees of lumbar extension and 20 degrees of right and left bending. Dr. Beatty opined that there appeared to be a "facet component to [Claimant's] symptomatology." Therefore, Dr. Beatty decided to refer Claimant to "Dr. Primack for evaluation and further recommendations." Dr. Beatty continued the restrictions he imposed on July 9, 2014.

19. Dr. Davis examined Claimant on October 9, 2014. Dr. Davis noted Claimant was pain free and his activities were not limited. Claimant's ROM, strength and gait were normal. Dr. Davis assessed an "excellent" surgical result and released Claimant to return to work without restrictions.

20. On October 21, 2014 Levi Miller, D.O., examined Claimant for the purpose of evaluating the neck and low back pain. Dr. Miller is board certified in physical medicine and rehabilitation. Claimant gave a history that in July 15, 2013 he "slipped on a pile of scrap and landed backwards on his back and neck." Claimant reported that he did not have any neck or back pain before this fall. Claimant reported that his pain was relieved by "infrequent" use of Norco, a medication he had left over from his knee surgery. Dr. Miller reviewed the x-rays taken in June 2014. On PE of the cervical spine Dr. Miller noted pain with rotation to the right and tenderness of the cervical paraspinals and occiput. Cervical ROM was full. On PE of the lumbar spine Dr. Miller noted mild right low back pain with extension and rotation and flexion to the right. Claimant was able to forward flex with "hands to the shins and extend "roughly 10 degrees." Dr. Miller assessed "chronic cervical neck pain, likely due to posterior element etiology" and chronic low back pain with a possible right S1 radicular component. Dr. Miller opined Claimant had evidence of "mild arthritic changes" on the cervical and lumbar films that were "likely present prior to the industrial injury." Dr. Miller further opined that Claimant's current symptoms likely represented an injury-related aggravation of the arthritic changes. Dr. Miller recommended Claimant undergo a cervical MRI and medial branch blocks for cervical spondylosis at C2, C3, C4 and C5. Dr. Miller also prescribed an anti-inflammatory medication.

21. Dr. Beatty examined Claimant on October 23, 2014. Claimant reported his left knee continued to improve and he experienced only "rare pain." However, Claimant reported that his *right knee* was bothering him and had bothered him since the date of the injury. Claimant also reported continuing neck pain with intermittent headaches and low back pain. Dr. Beatty noted that the MRI and facet injections recommended by Dr. Miller had not yet been approved. Dr. Beatty completed a WC 164 and imposed restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds and no repetitive lifting in excess of 5 pounds. Dr. Beatty did no place any restrictions on walking, standing, crawling, kneeling, squatting and climbing.

22. Dr. Beatty examined Claimant on November 21, 2014. Claimant gave a history that his left knee continued to improve but the *right knee* had continued to bother him since the July 2013 injury. Dr. Beatty noted Claimant had undergone MRI's of the cervical spine and right knee. Dr. Beatty referred Claimant to Dr. Davis for evaluation of the right knee and to Dr. Miller to review the cervical MRI and recommend treatment. Dr. Beatty imposed restrictions of of no lifting, carrying, pushing and pulling in excess of 10 pounds, no repetitive lifting in excess of 5 pounds and no crawling, kneeling, squatting and climbing.

23. On December 15, 2014 Claimant returned to Dr. Davis complaining that since July 2013 his right knee had bothered him. Claimant reported medial joint line pain and feelings of instability. Dr. Davis noted that a previously completed MRI showed "ACL deficiency and advancing degenerative changes in the patellofemoral joint, but more importantly the medial compartment." Dr. Davis performed x-rays that reportedly showed "advanced degenerative arthritic changes involving the patellofemoral and medial compartments of a marked degree." Dr. Davis assessed progressive severe degenerative arthritis of the right knee and opined Claimant will eventually require joint arthroplasty.

24. Dr. Miller examined Claimant on January 8, 2015. Dr. Miller noted Claimant declined to undergo the previously recommended medial branch blocks because he preferred "to avoid interventional procedures unless his symptoms" worsened. Dr. Miller reviewed a cervical MRI performed on October 30, 2014. Dr. Miller wrote that the MRI revealed a loss of cervical lordosis, degenerative disc changes from C2-3 to C7-T1, "mild to moderate facet arthritis" and C3-4 to C5-6 central narrowing without cord signal changes. Dr. Miller listed his impressions as follows: (1) Chronic cervical pain, "likely due to posterior element etiology greater than diskogenic source." Dr. Miller observed the degenerative changes likely pre-existed the July 2013 fall but opined the fall "aggravated" the changes; (2) Chronic low back pain, possible right S1 radicular component due to the industrial injury; (3) Multilevel cervical DDD; (4) Multilevel cervical spondylosis/facet arthritis; (5) Cervical canal stenosis C3-4 to C5-6. Dr. Miller prescribed Norco for pain.

25. Dr. Beatty examined Claimant on February 25, 2015. Claimant reported that he had neck pain, low back pain, right knee pain and "hammertoes involving the right foot." Claimant expressed the opinion that his right knee problems were the result of an "abnormal gait" caused by the left knee injury. Claimant also opined the hammertoes problem was related to the low back injury. Dr. Beatty disagreed with Claimant's opinions concerning the cause of the right knee symptoms and the hammertoes issue. According to Dr. Beatty Claimant became "upset" over this disagreement and remained "adamant" that the right knee and hammertoes were related to the industrial injury.

26. Dr. Miller examined Claimant on March 5, 2015. Claimant reported little change in his symptoms except that he now reported "hammertoes in his bilateral feet." Dr. Miller referred Claimant to a podiatrist to determine whether the hammertoes problem was related to the industrial injury. Dr. Miller also referred Claimant for

chiropractic treatment of his neck and low back. Dr. Miller prescribed Percocet because Norco was upsetting Claimant's stomach. On March 7, 2015 Dr. Miller noted the Insurer denied the referral to the podiatrist. Dr. Miller opined that Claimant was approaching MMI and discussed the issue with Dr. Beatty.

27. On April 9, 2015 Claimant was apparently examined by Dr. Miller and also by Scott Primack. D.O. Both of these physicians signed an office note concerning the April 9 visit. Claimant's symptoms remained essentially unchanged. The physicians' impressions included: (1) Cervicalgia with pre-existing arthritis aggravated by the July 2013 industrial injury; (2) Chronic low back pain with possible S1 radiculitis related to the industrial injury; (3) Multilevel DDD; (4) Multilevel cervical spondylosis/facet arthritis; (5) Central canal stenosis; (6) Bilateral hammertoes "not industrial related."

28. On May 20, 2015 Dr. Beatty completed a WC 164 and imposed restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds and no repetitive lifting in excess of 5 pounds. Dr. Beatty also imposed restrictions of no walking in excess of 1 hour, no standing in excess of 1 hour, no walking, no standing, no crawling, no kneeling, no squatting and no climbing.

29. On June 4, 2015 Dr. Miller noted Claimant's symptoms remained little changed from his previous visit. Claimant advised he had undergone multiple chiropractic treatments but received "little benefit from these and stopped." Dr. Miller prescribed Percocet for pain and opined that Claimant appeared to be at MMI.

30. Dr. Beatty examined Claimant on June 10, 2015. Dr. Beatty assessed a left knee meniscus tear, lumbar strain, cervical strain and DDD. Applying the *American Medical Association Guides to Evaluation of Impairment, Third Edition (Revised)* (AMA Guides) Dr. Beatty assessed a combined 41% whole person impairment attributable to the July 15, 2013 injury. Breaking the rating into its component parts, Dr. Beatty assessed 16% for cervical spine impairment based on 4% for a specific disorder and 12% for lost ROM. Dr. Beatty assessed 21% for lumbar spine impairment based on 5% for a specific disorder and 17% for lost ROM. Dr. Beatty assessed 12% lower extremity impairment for the left knee which converted to 5% whole person impairment. Dr. Beatty stated that the lower extremity impairment rating was based on 7% impairment for lost ROM and 5% for a partial meniscectomy.

31. On June 10, 2015 Dr. Beatty completed a WC 164 and imposed permanent restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds and no repetitive lifting in excess of 5 pounds. Dr. Beatty also imposed permanent restrictions of no walking in excess of 1 hour, no standing in excess of 1 hour, no crawling, no kneeling, no squatting and no climbing.

32. Following Dr. Beatty's MMI and rating report Respondents sought a Division-sponsored independent medical examination (DIME).

33. Jeff Raschbacher, M.D., was selected as the DIME physician. Dr. Raschbacher performed the DIME on August 5, 2015 and issued a DIME report on

August 10, 2015. In connection with the DIME Dr. Raschbacher took a history from Claimant, reviewed medical records and performed a PE.

34. In the DIME report Dr. Raschbacher noted that Claimant gave a history that on July 15, 2013 he slipped on a piece of steel and landed on "iron with his neck and his back." Claimant reported he was asymptomatic prior to July 15, 2013, but since then had suffered with headaches, neck pain, back pain and his "right knee is pretty much shot." Claimant also reported paresthesias at the fronts and backs of both thighs and at the lower portion of the low back. Claimant stated that he could not sit, stand walk, lift or bend over.

35. Dr. Raschbacher noted that he reviewed medical records from March 10, 2005 revealing that Claimant had undergone an MRI of the lumbar spine, the indications for which were low back pain and foot drop. The MRI revealed a disc extrusion at L3-4 and "degenerative changes" at other levels. Claimant also underwent an epidural steroid injection (ESI) at L5-S1. Dr. Raschbacher further noted that he reviewed a June 15, 2007 record from Ranch Family Medicine noting a "chief complaint of low back pain and depression." (*See also*, Respondents' Exhibit W, p. 371).

36. Dr. Raschbacher assessed a history of a slip and fall with cervical, lumbar and left knee pain and status post-surgical procedure to repair a tear of the left medial meniscus. Using Table 40 of the AMA Guides Dr. Raschbacher assessed 5% impairment of the left lower extremity for the torn medial meniscus. Dr. Raschbacher noted that 5% lower extremity impairment converts to 2% whole person impairment.

37. Dr. Raschbacher opined that it was not appropriate to "include left knee active range of motion for the purposes of rating" Claimant's impairment. In support of this conclusion Dr. Raschbacher noted that at the time of the DIME Claimant demonstrated "great limitation of motion and much expression of pain at the left knee." However, Dr. Raschbacher observed that on October 9, 2014 Dr. Davis recorded that Claimant's left knee was pain free and that Claimant's gait and ROM were normal. Dr. Raschbacher further noted when Claimant was placed at MMI on June 10, 2015 Dr. Beatty recorded that Claimant exhibited 130 degrees of knee flexion. Dr. Raschbacher stated that Dr. Beatty's flexion measurement was "grossly inconsistent" with the flexion measurement taken at the time of the DIME. (Dr. Raschbacher measured 99 degrees of flexion according to his lower extremity ratings sheet, Respondents' Exhibit K, p. 105).

38. Dr. Raschbacher declined to assign a permanent impairment rating based on Claimant's cervical and lumbar spine complaints. Dr. Raschbacher explained that at the DIME Claimant exhibited "pain behaviors" that were "fairly remarkable." However, Dr. Raschbacher opined that this level of cervical and lumbar symptomatology was "not consistent with the medical record." Dr. Raschbacher explained that the medical records show Claimant's level of symptomatology was "variable" but at times appeared "quite benign." Moreover, Dr. Raschbacher opined that the medical records do not substantiate an objective cervical spine lesion or lumbar spine lesion that is "clearly attributable to" the July 15, 2013 injury. Dr. Raschbacher also noted Claimant had pre-

injury lumbar symptomatology that was "severe enough that an MRI was ordered and an epidural injection was done and [Claimant] was described as having foot drop, indicating a significant radicular process." However, Dr. Raschbacher observed that Claimant's pre-injury history of lumbar problems was "not offered to or obtained by subsequent examiners including Dr. Beatty and the physiatry consultants."

39. Dr. Raschbacher opined that Claimant reached MMI for the July 15, 2013 injury at the time of the "orthopedic visit with Dr. Davis on 08/15/14 [sic]." Dr. Raschbacher stated that on that date Claimant had an impairment of the left knee based on the diagnosis of medial meniscus tear. Dr. Raschbacher further opined the medical records document "so much variation and inconsistency" that it is likely that if Claimant suffered a neck injury and/or low back injury then they "would have been at MMI at the same time" as the left knee. Dr. Raschbacher added that his "reasons" for reaching these conclusions were the same as the reasons for finding there was no permanent impairment of the neck and back. (See Finding of Fact 38).

40. On October 30, 2015 Anjmun Sharma, M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Sharma was qualified as an expert in family and occupational medicine and is level II accredited. In connection with the IME Dr. Sharma examined Claimant and reviewed numerous medical records

41. Dr. Sharma issued two written reports concerning the IME. Dr. Sharma reviewed the reports of Dr. Beatty and Dr. Raschbacher. Dr. Sharma opined that the question presented is whether Claimant has "cervicolumbar spine degeneration that is related to the July 15, 2013 injury." Dr. Sharma wrote that he agreed with Dr. Raschbacher's conclusion that Claimant's spinal condition is not causally related to the July 2013 injury. Dr. Sharma stated that here is no doubt that Claimant fell at work and injured his back, neck and left knee. However, Dr. Sharma opined the neck and back did not result in "long term injuries." In support of these conclusions Dr. Sharma noted that in 2005 Claimant was obtaining medical treatment for his lumbar spine and that the March 10, 2005 lumbar MRI showed "chronic degenerative changes." Dr. Sharma stated that he felt "confident that the cervical spine" would demonstrate structural changes "similar" to those in the low back.

MEDICAL TESTIMONY

42. Dr. Raschbacher testified by deposition on November 15, 2015. Dr. Raschbacher testified that his DIME report contained an error insofar as it states Claimant reached MMI on August 15, 2014, the date Claimant underwent knee surgery. Dr. Raschbacher stated that the correct date of MMI was October 9, 2014, the date of Claimant's last orthopedic visit with Dr. Davis.

43. Dr. Raschbacher testified that determining "causation" is always a part of the DIME process when assessing whether or not a claimant has "ratable impairment."

44. Dr. Raschbacher testified that in his opinion Claimant suffered no ratable impairment of the lumbar spine that resulted from the July 15, 2013 industrial injury. In

support of this conclusion Dr. Raschbacher relied on the following factors: (1) Claimant's 2005 lumbar MRI documented "objective findings" of moderate to severe "degenerative change" and Dr. Beatty did not appear to have been aware of this history; (2) After the July 2013 injury Dr. Raschbacher did not see any "new clear findings on MRI" that could be attributed to the injury; (3) There was "not a lot of support medically" for the lumbar spine symptomatology; (4) At the DIME Claimant presented with "florid pain behaviors." Dr. Raschbacher testified that he observed Claimant engage in "pain behaviors" that included moving very slowly and grunting and clutching body parts during the straight leg raising test. Dr. Raschbacher also observed Claimant using a cane at the DIME. Dr. Raschbacher opined that Claimant should not have needed a cane; therefore Dr. Raschbacher considered the use of the cane to be a "pain behavior." Dr. Raschbacher opined that Claimant's pain behaviors at the DIME tended to "undermine" Claimant's subjective reports of symptomatology.

45. Dr. Raschbacher testified that in his opinion Claimant suffered no ratable impairment of the cervical spine that resulted from the July 15, 2013 industrial injury. In support of this conclusion Dr. Raschbacher relied on the following factors: (1) There was not "clear substantiation" for a cervical spine impairment in the medical record; (2) Claimant's pain behaviors "carried a reasonable amount of weight" in the determination that Claimant did not have ratable cervical impairment.

46. Dr. Raschbacher also testified that if there were significant injuries to the cervical spine and lumbar spine on July 15, 2013 he would have expected Claimant to seek treatment much sooner than he did. Dr. Raschbacher would not have expected Claimant to wait for two or three months before seeking treatment.

47. Dr. Raschbacher testified that during the DIME he did not tell Claimant that Claimant's "exhibition of pain" was not "helping [Claimant's] cause." Dr. Raschbacher further stated that he did not think it was his "role" to disclose his opinions concerning the significance of Claimant's pain behaviors. Rather, Dr. Raschbacher explained that his "role" was to record Claimant's "presentation and then to deal with it."

48. Dr. Raschbacher reiterated his view that ROM should not be included in the impairment rating for Claimant's left knee. Dr. Raschbacher explained that Claimant's ROM in the left knee was "grossly discrepant with that seen when he was under orthopedic care and actually as also measured by Dr. Beatty, who had a flexion of 130 degrees." Dr. Raschbacher further explained that the 99 degrees of flexion that he measured was not "physiologic" meaning that it did not "make a great deal of sense" and would not "be a true and accurate description of the actual level of impairment."

49. Dr. Beatty testified at the hearing. Dr. Beatty stated that the lumbar ROM measurements he recorded on October 29, 2013 were relatively normal.

50. Dr. Beatty testified that there are several steps necessary to complete an impairment rating for the spine. He explained the rating physician must first obtain a history of how the injury occurred in order to determine whether it is work-related. The

physician must then evaluate the course of treatment to the date of MMI. Finally the physician must assess the degree of impairment in accordance with the AMA Guides.

51. Dr. Beatty opined the Claimant met all criteria for the cervical and lumbar impairment ratings under the AMA Guides. Dr. Beatty opined the Claimant's cervical and spinal symptoms are causally related to the fall Claimant sustained at work in July 2013. Dr. explained that in his opinion the industrial injury caused a permanent aggravation of Claimant's pre-existing DDD. Specifically, Dr. Beatty opined that the fall aggravated Claimant's pre-existing cervical facet problems and lumbar degenerative disc disease. Dr. Beatty inferred the July 2013 injury caused these problems because Claimant has a history of a specific injury followed by chronic problems that failed to resolve despite treatment. Dr. Beatty stated that his opinion concerning causation was not altered by evidence that Claimant underwent evaluation and treatment of the lumbar spine in 2005. In support of this opinion Dr. Beatty explained that there are no medical records documenting treatment for the back between 2005 and the July 2013 industrial injury. Further, Dr. Beatty observed Claimant was asymptomatic at the time of the July 2013 injury.

52. Dr. Beatty opined Claimant met the criteria for specific disorder impairment ratings of the cervical and lumbar spines under Table 53 II B of the AMA Guides. Dr. Beatty explained that he did not use Table 53 II (C) because in his opinion the Claimant's moderate to severe degenerative changes were not caused by the July 2013 injury.

53. Dr. Beatty testified that only 80% of injuries to the spine are shown on MRI. Dr. Beatty explained that MRI studies may not document some injuries to the facet joints and some disc injuries. Further, an MRI may not reveal fibrous muscle changes that sometimes develop after an untreated back injury.

54. Dr. Beatty testified that when he examined Claimant on June 15, 2015 he believed Claimant displayed the requisite effort needed to complete the impairment rating. However, Dr. Beatty stated that if he had believed Claimant was not giving full effort the Claimant would have been told of this impression and advised that lack of effort could affect the impairment rating.

55. Dr. Beatty testified that he assessed impairment of the Claimant's left lower extremity by using Table 40 of the AMA Guides (Impairment Ratings of the Lower Extremity For Other Disorders of the Knee) and assessing impairment for lost ROM (flexion and extension) in the knee joint. Dr. Beatty stated that although the AMA Guides do not contain ROM validity criteria for joints, he believes his measurements were "accurate and valid." Dr. Beatty agreed that there was a "significant difference" between his measurement of knee flexion (130 degrees) and Dr. Raschbacher's measurement of knee flexion (99 degrees). Dr. Beatty explained that the difference in flexion measurements might be accounted for by several factors including a worsening of Claimant's condition between the two measurements, variant weather conditions, a "bad day" or lack of effort.

56. Dr. Beatty opined that Claimant did not reach MMI until June 10, 2015 because Dr. Beatty believes the Claimant's ongoing cervical and lumbar symptoms are causally related to the industrial injury and Claimant did not complete all necessary treatment for those conditions until June 10. Dr. Beatty acknowledged that he has a difference of opinion with Dr. Raschbacher, who placed Claimant at MMI on October 9, 2014. Dr. Beatty acknowledged that the difference results from Dr. Raschbacher's opinion that the cervical and lumbar symptoms after October 9, 2014 were not causally related to the industrial injury.

57. On cross-examination Dr. Beatty was asked why on May 20, 2015 he re-imposed restrictions on walking, standing, crawling, kneeling, squatting and climbing when these restrictions had not been in place since October 2014. Dr. Beatty answered that Claimant had experienced a subjective increase in pain.

58. Dr. Beatty acknowledged that in October 2014 Claimant reported using a cane. Dr. Beatty testified that he never prescribed a cane and was not aware that any other physician had prescribed a cane.

59. Dr. Beatty testified that it is not his opinion that Claimant is permanently and totally disabled from performing any work.

60. Dr. Sharma testified at the hearing. Dr. Sharma reiterated that he does not believe the July 15, 2013 injury caused any permanent aggravation of Claimant's pre-existing cervical and lumbar spinal disease. Dr. Sharma explained that Claimant's post-injury diagnostic imaging does not show the type of acute pathology, such as a ruptured disc, nerve compression or fractured vertebra that could result from a fall. To the contrary, Dr. Sharma opined a fall would not cause the spondylosis, spondylolisthesis and degenerative disc changes depicted on Claimant's imaging studies.

61. Dr. Sharma testified that Dr. Raschbacher's DIME impairment rating was done correctly in accordance with the AMA Guides and teachings of the level II accreditation course. Dr. Sharma explained that prior to assessing an impairment rating under Table 53 or for reduced ROM the examining physician must first determine that there is an injury-related diagnosis. Dr. Sharma testified that he disagrees with Dr. Beatty that Claimant has any cervical and/or lumbar diagnoses that are causally related to the July 2013 industrial injury. Dr. Sharma stated that a patient may have a temporary aggravation of a pre-existing condition without sustaining any permanent ratable impairment from the injury.

62. Dr. Sharma testified that he disagrees with Dr. Beatty that Dr. Raschbacher acted improperly because Raschbacher did not inform Claimant that "florid pain behaviors" might affect the impairment rating. Dr. Sharma explained that nothing in the level II teachings or the AMA Guides requires a rating physician to give the Claimant such advice. Rather, Dr. Sharma stated that an examining physician is to require a patient to actively move the body until the patient reports pain. Dr. Sharma also opined that the Division of Workers' Compensation (DOWC) "Impairment Rating

Tips" (Rating Tips) pertaining to unassisted active ROM did not require Dr. Raschbacher to tell Claimant that Dr. Raschbacher considered Claimant's ROM measurements to be "non-physiologic" and that this "impression" might affect the Claimant's impairment rating. Dr. Sharma testified that Dr. Raschbacher's observations of Claimant's "pain behaviors" pertained to the question of the cause of Claimant's impairment in the first instance and not the actual ROM measurements themselves.

VOCATIONAL EVIDENCE

63. Vocational specialist Katie Montoya (Montoya) conducted a vocational assessment of the Claimant. The assessment was done at the request of Respondents. In connection with the assessment Montoya interviewed Claimant, reviewed pertinent medical records and performed vocational research.

64. Montoya issued a report dated December 22, 2015. Montoya wrote that Claimant was 62 years of age at the time of the evaluation. Claimant had a high school degree and two years of junior college. Claimant started his masonry business in 1983. He incorporated the business in 1986 and by the late 1990's the company employed up to 250 workers. Claimant reported that he "left the field" in 1989 and no longer performed manual labor. Instead, Claimant supervised 18 managers and "looked over the work." Claimant also sought out jobs for the company, estimated costs, prepared bids and conducted contract negotiations. He used a computer to prepare estimates and bids. Claimant explained that he spent most of his time in the office at a desk. In 2008 and 2009 Claimant began to lay off workers but kept enough so that he would not have to work in the field. Claimant closed the business at the end of 2013 or the beginning of 2014 because he was not securing any jobs and there was "not enough to sustain the business." Claimant stated that he was earning about $159,000 per year at the time he closed the business.

65. Claimant told Montoya that he was not looking for work. He explained that he was taking pain medications that made him feel "dopey" and did not believe he "could provide 100% to an employer." Claimant stated that he did not think he would be hired if he told a contractor that he took prescription pain killers and that he needed to take breaks "for a few hours to get rid of pain."

66. Montoya opined that Claimant is a "skilled individual" with experience in negotiation, estimating, and bidding that can be utilized in work similar to that he performed before the injury. Montoya stated that if the opinions expressed by Dr. Raschbacher and Dr. Sharma are considered valid Claimant can return to any of his past relevant work. Montoya stated that even if the permanent restrictions imposed by Dr. Beatty are considered valid Claimant can "perform some management responsibilities within his prior industry." Montoya further opined that even if the permanent restrictions imposed by Dr. Beatty are considered valid Claimant can perform some semi-skilled and unskilled positions such as cashier, counter attendant, customer service and security worker.

FINDINGS REGARDING MMI

67. Dr. Raschbacher, the DIME physician, made conflicting statements concerning the date of MMI. In the DIME report Dr. Raschbacher listed the date of MMI the "last orthopedic visit" with Dr. Davis on August 15, 2014. However, Dr. Raschbacher later testified that August 15 was the date of surgery and the correct date of MMI is October 9, 2014, when Claimant was last examined by Dr. Davis. Dr. Raschbacher's "true opinion" is that Claimant reached MMI on October 9, 2014 when he last saw Dr. Davis.

68. Claimant failed to prove by clear and convincing evidence that Dr. Raschbacher erred in finding Claimant reached MMI on October 9, 2014.

69. The ALJ interprets Dr. Raschbacher's opinion to be that Claimant reached MMI on October 9, 2014 because treatment was complete for the injury-related knee problem and because on that date Claimant did not have any cervical or lumbar medical conditions that were causally related to the July 15, 2013 injury. It was further Dr. Raschbacher's opinion that *even if* the Claimant had suffered neck and low back injuries as a result of the July 2013 injury those injuries stabilized by October 9, 2014 and did not require any further treatment.

70. Dr. Raschbacher offered credible and persuasive reasons in support of his opinion that the industrial injury did not cause any injuries to Claimant's neck and back, and that any need for treatment after October 9 cannot be attributed to the July 2013 industrial injury. Those reasons included the Claimant's failure to seek treatment for the alleged neck and back injuries until more than 3 months after they allegedly occurred, the absence of medical records documenting cervical or lumbar lesion(s) that could be attributed to the July 2013 injury, the variability and inconsistency of Claimant's symptoms over time, and the "florid pain behaviors" displayed at the DIME which called into question the reliability of Claimant's reported symptoms.

71. Dr. Raschbacher's opinion that the medical records do not document any cervical or lumbar lesions that can be attributed to the July 2013 industrial injury is corroborated by Dr. Sharma's credible opinion that the Claimant's post-injury diagnostic imaging studies do not show the type of acute pathology, such as a ruptured disc, nerve compression or fractured vertebra that could result from a fall.

72. Dr. Raschbacher's opinion that over the life of the case Claimant has reported widely varying levels of symptomatology is supported by reference to the medical records themselves. When Dr. Beatty examined Claimant on October 29, 2013 Claimant exhibited some cervical "tenderness" and normal cervical ROM. Claimant also demonstrated some lumbar paraspinal "tightness" and essentially "normal" lumbar ROM. On November 5, 2013 Claimant reported to Dr. Beatty that his neck was "a little" stiff and his back was "much improved." On December 30, 2013 Dr. Morgenstern recorded that Claimant's neck was "supple" and that cervical ROM was normal. On July 9, 2014 Claimant reported to Dr. Beatty he was experiencing intermittent neck pain and "severe" low back pain. On October 3, 2014 Claimant told Dr. Beatty that his left knee

was improving but he had neck pain with headaches and continuing low back pain. Claimant advised that he had morning "stiffness" and "had to use a cane for awhile." Despite Claimant's October 3 report of continuing neck pain, Dr. Beatty recorded that Claimant had good cervical ROM. However, by June 10, 2015 Dr. Beatty determined that Claimant had 12% whole person impairment because of reduced cervical ROM and 17% whole person impairment because of reduced lumbar ROM. As documented by Dr. Raschbacher, at the time of the DIME in August 2015 Claimant reported that he was experiencing neck and back pain and exhibited "florid pain behaviors."

73. Dr. Beatty's opinions that the injury caused cervical and lumbar injuries, and that these injuries required treatment subsequent to October 9, 2013 are not sufficiently persuasive to overcome Dr. Raschbacher's contrary opinions. Dr. Beatty acknowledged that he did not use Table 53 (II) (C) to rate Claimant's specific disorders because the degenerative changes were not caused by the injury. Instead Dr. Beatty's opinion concerning MMI appears to be that July 15, 2013 caused permanent "aggravations" of Claimant's pre-existing cervical and lumbar degenerative conditions. Dr. Beatty's opinion appears to be based largely on the assumption that Claimant reliably reported the history of his symptoms. (Findings of Fact 50 and 51).

74. However, Dr. Beatty's opinion did not persuasively refute Dr. Raschbacher's opinion that if the Claimant sustained significant cervical and spinal injuries on July 2013 it is likely Claimant would have sought treatment for those injuries sooner than 3 months after the date of injury. (Finding of Fact 46). Dr. Beatty did not persuasively refute Dr. Raschbacher's argument that Claimant's reporting of symptoms had been inconsistent and unreliable over the course of the claim. Consequently, Dr. Beatty's reliance on Claimant's history as the basis for his opinion that there was an aggravation of Claimant's pre-existing degenerative changes is not persuasive. Moreover, Dr. Beatty acknowledged that 80% of lumbar and cervical injuries can be detected by MRI, while some 20% may not be detected. (See Findings of Fact 51 through 53). In this respect Dr. Beatty's testimony tends to support Dr. Raschbacher's opinion that the Claimant's objective imaging studies indicate only degenerative changes. Therefore, it is probable that there is no credible and persuasive objective medical documentation of a "permanent aggravation" caused by the 2013 incident.

75. To some extent Dr. Beatty's opinion concerning the date of MMI is supported by the opinions of Dr. Primack and Dr. Miller that Claimant sustained an "aggravation" of pre-existing degenerative arthritis. However, these opinions do not reflect a thorough evaluation of Claimant's history and reporting of symptoms, nor do they identify any specific cervical or lumbar lesions that were allegedly caused by the injury of July 15, 2013. Therefore, the opinions of Dr. Primack and Dr. Beatty are not sufficiently persuasive to overcome Dr. Raschbacher's opinion concerning the date of MMI.

FINDINGS REGARDING WHOLE PERSON IMPAIRMENT OF NECK AND LUMAR SPINE

76. As determined in Findings of Fact 38, 44 and 45, Dr. Raschbacher found that Claimant did not sustain any permanent ratable impairment of the cervical and/or lumbar spine that was caused by the July 2013 injury. Dr. Raschbacher's reasons for reaching these conclusions are essentially identical to the reasons he found that Claimant reached MMI on October 9, 2014. Specifically, Dr. Raschbacher found that Claimant did not sustain any cervical and/or lumbar injuries on July 15, but if he did those injuries did not cause any permanent impairment of the cervical and/or lumbar spine.

77. Dr. Raschbacher's credibly and persuasively opined that the July 2013 injury did not cause any permanent impairment of the cervical and/or lumbar spine. Specifically, Dr. Raschbacher relied on the absence of any objective medical evidence that the 2013 injury caused an acute injury to the spine, that Claimant's reporting of symptoms has been variable and that Claimant displayed "florid pain behaviors" at the DIME. (Findings of Fact 38, 44 and 45).

78. Dr. Raschbacher credibly and persuasively opined that it is within his authority as the DIME physician to consider the evidence and determine whether the industrial caused any ratable impairment. (Finding of Fact 43). Dr. Beatty agreed with Dr. Raschbacher that the rating process requires the DIME physician to determine the cause of any impairment as a first step in the rating process. (Finding of Fact 50).

79. Dr. Beatty agreed with Dr. Raschbacher that a rating physician must take a history to determine if the injury is "work-related."

80. Dr. Beatty's opinions do not rise to the level of clear and convincing evidence to refute Dr. Raschbacher's opinion that Claimant did not sustain any permanent cervical and or lumbar impairment caused by the July 2013 injury. Dr. Beatty's opinion did not persuasively refute Dr. Raschbacher's opinion that if the Claimant sustained significant cervical and spinal injuries on July 2013 it is likely Claimant would have sought treatment for those injuries sooner than 3 months after the date of injury. (Finding of Fact 46). Moreover, Dr. Beatty did not persuasively refute Dr. Raschbacher's argument that Claimant's reporting of symptoms had been inonsistent and unreliable. Consequently, Dr. Beatty's reliance on Claimant's history as the basis for his opinion that there was a permanent aggravation of Claimant's admittedly pre-existing degenerative changes is not persuasive. Moreover, Dr. Beatty acknowledged that 80% of lumbar and cervical injuries can be detected by MRI, while some 20% may not be detected. (See Findings of Fact 51 through 53). In this respect Dr. Beatty's testimony tends to support Dr. Raschbacher's opinion that the Claimant's objective imaging studies indicate only degenerative changes. Therefore it is probable that there is no credible and persuasive objective medical documentation of a "permanent aggravation" of the cervical and/or lumbar spine caused by the July 2013 injury.

FINDINGS REGARDING SCHEDULED IMPAIRMENT OF LEFT LOWER EXTREMITY

81. It is more probably true than not that Claimant is entitled to PPD benefits based on Dr. Raschbacher's scheduled impairment rating of 5% impairment of the left lower extremity.

82. Dr. Davis noted that on October 9, 2014 the Claimant was pain free and exhibited "normal" gait and "normal" ROM in the left lower extremity.

83. Dr. Raschbacher credibly stated that upon his examination Claimant exhibited "great limitation of motion and much expression of pain at the left knee." Dr. Raschbacher credibly and persuasively opined that his observations at the DIME were inconsistent with Dr. Davis's observations in October 2014. Dr. Raschbacher also noted that at the DIME Claimant demonstrated 99 degrees of left knee flexion. Dr. Raschbacher opined that his measurement of knee flexion was "grossly inconsistent" with Dr. Beatty's measurement of 130 degrees of flexion. Dr. Raschbacher credibly and persuasively opined that under these circumstances it was inappropriate to assess impairment based on lost ROM because 99 degrees of flexion was not physiologic and was not a true and accurate description of the level of impairment. Dr. Raschbacher credibly opined that Claimant's lower extremity impairment rating is 5% based on the performance of the meniscectomy.

84. Dr. Beatty's opinion that Claimant's lower extremity impairment rating should include 7% for reduced ROM is not persuasive. Dr. Beatty agreed that there was a "significant difference" between his measurement of knee flexion and Dr. Raschbacher's flexion measurement. Dr. Beatty also stated that the AMA Guides do not establish "validity criteria" for establishing knee joint ROM measurements. Dr. Beatty conceded that ROM measurements might vary based on "lack of effort." Dr. Beatty did not persuasively explain why Claimant exhibited "normal" knee ROM in October 2014 but exhibited restricted and ratable ROM measurements in June 2015.

FINDINGS CONCERNING PERMANENT TOTAL DISABLITY

85. Claimant failed to prove it is more probably true than not that he is entitled to permanent total disability (PTD) benefits. Rather, the credible and persuasive evidence establishes Claimant retains the ability to earn wages in the same or other employment

86. Montoya credibly and persuasively explained that Claimant is a skilled worker with well-established history of construction management responsibilities including estimating, bidding, negotiating and contracting. According to the information that Claimant provided to Montoya, his work as owner of the masonry business has not for many years involved "field work" and "manual labor," but instead was mostly performed at a desk. In these circumstances the ALJ credits Montoya's opinion that Claimant could perform some construction management-type jobs without running afoul of Dr. Beatty's restrictions. Similarly, the ALJ credits Montoya's opinion that considering

Dr. Beatty's restrictions Claimant can perform some semi-skilled or unskilled jobs such as cashier, counter attendant, customer service and security worker.

87. Although a claim for permanent total disability benefits can be proved without presenting expert opinion in support of the claim, the ALJ considers it significant in weighing the evidence that Claimant has not produced any credible and persuasive vocational expert to support his claim for PTD benefits. Neither has Claimant produced any credible and persuasive vocational expert to refute Montoya's opinions.

88. Dr. Beatty credibly and persuasively opined that despite the permanent restrictions he has imposed it is not his opinion that Claimant is permanently and totally disabled from performing any work.

89. On the one hand, Claimant testified that he is unlikely to be able to find and maintain employment because he takes prescription pain medications and may take time off to manage his pain. On the other hand, Claimant testified that he thinks he could perform part-time work including construction management "office work." In response to interrogatories Claimant wrote that he does not consider himself "totally" disabled. Claimant's testimony and opinions regarding his ability to obtain and maintain employment are ambiguous and somewhat self-contradictory. Insofar as Claimant testified that he is unable to return to work that testimony is not credible and persuasive.

FINDINGS CONCERNING TEMPORARY TOTAL DISABILITY BENEFITS

90. Claimant failed to prove it is more probably true than not that he is entitled to an award of temporary total disability (TTD) benefits commencing July 11, 2014.

91. It is true that on July 11, 2014 Dr. Davis imposed the restrictions set forth in Finding of Fact 13. Indeed, by July 11, 2014 Dr. Beatty had already imposed even greater restrictions than those set forth by Dr. Davis. (See Finding of Fact 12).

92. Although restrictions were in place on July 11, 2014, Claimant failed to prove it is more probably true than not that these restrictions prohibited or limited his ability to perform his pre-injury employment. As determined in Finding of Fact 64, Claimant told Montoya that at the time of his injury he was not working "in the field" and was not performing "manual labor." Rather, Claimant told Montoya that he was essentially working at a desk performing duties such as construction management, estimating and bidding. Moreover, Claimant admitted that after the July 2013 injury he continued working until he closed the masonry business in November 2013 because it became unprofitable due to an economic downturn in the construction business. The ALJ infers from all of this evidence that the restrictions imposed by Dr. Beatty and Dr. Davis in July 2014 did not prohibit Claimant from performing his pre-injury duties, nor did they impair Claimant's ability to perform his regular duties.

93. Respondents apparently concede in their position statement that Claimant became temporarily totally disabled on August 15, 2014 when Dr. Davis performed arthroscopic surgery on Claimant's left knee. (Respondents Position Statement at pp. 28-29). However, to the extent Respondents do not concede this point the ALJ finds

that Claimant became totally disabled from performing his regular duties on August 15, 2014 when he underwent knee surgery to repair the injury-related torn meniscus.

94. Claimant's argument notwithstanding, his right to TTD terminated on October 9, 2014 when he reached MMI for the industrial injury.

FINDINGS CONCERNING AVERAGE WEEKLY WAGE

95. The parties agree that at the time of the injury Claimant was earning sufficient income to entitle him to the maximum TTD rate of $875.42. The ALJ infers from this agreement that the parties agree that on the date of the injury Claimant's wages exceeded 91% of the state average weekly wage (AWW). *See* § 8-42-105(1), C.R.S. (in case of TTD employee to receive 66 & 2/3% of AWW, not to exceed 91% of state AWW).

CONCLUSIONS OF LAW

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

OVERCOMING DIME PHYSICIAN'S FINDING OF MMI

Claimant contends that clear and convincing evidence establishes that Dr. Raschbacher, the DIME physician, erred in finding that Claimant reached MMI on October 9, 2014. In support of this proposition Claimant relies heavily on the opinion of Dr. Beatty that Claimant's cervical and lumbar symptoms are causally related to the July 15, 2013 injury, and that Claimant needed treatment for these symptoms after October 9, 2014. Respondents contend that Claimant failed to overcome by clear and convincing evidence Dr. Raschbacher's finding of MMI.

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

When a DIME physician issues conflicting or ambiguous opinions concerning the date of MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). An ALJ may consider the contents of the DIME report as well as a DIME physician's subsequent deposition testimony

when resolving the inconsistency. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

As determined in Finding of Fact 67, Dr. Raschbacher's true DIME opinion is that Claimant reached MMI on October 9, 2014. Therefore, in this matter Claimant has the burden of proof to establish it is highly probable and free from serious doubt that Dr. Raschbacher was incorrect when he found Claimant reached MMI on October 9.

As determined in Findings of Fact 68 through 75 it is Dr. Raschbacher's opinion, as the DIME physician, that Claimant reached MMI on October 9, 2014 because treatment was then complete for the left knee injury. Further, it was Dr. Raschbacher's opinion that Claimant did not sustain any work-related injuries to his cervical and/or lumbar spine as a result of the July 2013 injury, but if he did those injuries did not cause any need for medical treatment after October 9. As determined in Finding of Fact 70, Dr. Raschbacher offered credible and persuasive reasons to support his opinions that Claimant did not sustain any work-related injuries to his cervical and/or lumbar spines in July 2013, but if he did those injuries stabilized by October 9 and were not the need for additional treatment.

As determined in Findings of Fact 68 through 75, Claimant failed to overcome Dr. Raschbacher's finding of MMI by clear and convincing evidence. Specifically, the opinions of Dr. Beatty, Dr. Miller and Dr. Primack are not sufficiently persuasive to render it highly probable and free from serious doubt that Dr. Raschbacher erred in placing Claimant at MMI on October 9, 2014. Dr. Raschbacher determined, within the scope of his authority as the DIME physician, that the industrial injury did not cause any cervical or spinal injuries, but if it did these injuries stabilized and did not warrant any treatment after October 9, 20145.

The ALJ finds and concludes that Claimant reached MMI on October 9, 2014, as determined by the DIME physician.

OVERCOMING DIME ON WHOLE PERSON IMPAIRMENT

Claimant contends that he proved by clear and convincing evidence that Dr. Raschbacher was incorrect in finding that Claimant did not sustain any injury related permanent impairment of the cervical and lumbar spines. Claimant relies heavily on the opinions of Dr. Beatty for the proposition that Dr. Raschbacher "failed to comply with the AMA Guides, specifically Table 53 II (B), in Finding Claimant had not suffered a ratable injury." The ALJ disagrees with Claimant's contention.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating may be overcome only by clear and convincing evidence. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME

physician's impairment rating is incorrect. *Metro Moving and Storage Co. v. Gussert*, *supra*.

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, WC 4-350-356 (ICAO March 22, 2000).

As determined in Findings of Fact 76 though 80, Claimant failed to prove by clear and convincing evidence that Dr. Raschbacher erred in finding that Claimant's lumbar and cervical impairments, if any, are not causally related to the industrial injury of July 2013. Dr. Raschbacher credibly testified, and Dr. Beatty agrees that it is the rating physician's responsibility to determine from an evaluation of the Claimant's history, medical records and examination whether any ratable impairment was caused by the industrial injury. As determined in Finding of Fact 77, Dr. Raschbacher provided credible and persuasive reasons to support his conclusion that Claimant's cervical and lumbar impairment, if any, is not causally related to the July 2013 injury. For the reasons stated in Finding of Fact 80, Dr. Beatty's opinions were not sufficiently persuasive to constitute clear and convincing evidence to overcome Dr. Raschbacher's opinion.

In his position statement Claimant argues that Dr. Beatty, Dr. Raschbacher and Dr. Sharma "all agreed that Claimant meets the diagnosis under Table 53 (II) (B) for ratable impairment." Regardless of the factual accuracy of this contention, it misses the point that Dr. Raschbacher opined that Claimant's impairment, if any, is not causally related to the July 2013 industrial injury. As noted, the mere fact that some ratable impairment exists does not create a presumption that the impairment was caused by an alleged industrial injury. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra.* In this case a finding that Claimant has some ratable impairment did not require Dr. Raschbacher to find that the impairment was caused by the July 2013 injury. In fact, Dr. Raschbacher performed the requisite causal analysis and rejected the possible inference that Claimant's impairment, if any, was caused by the July 2013 injury.

Insofar as Claimant argues that Dr. Raschbacher did not comply with the AMA Guides because he did not tell Claimant that his pain behaviors might affect the rating, the ALJ disagrees. Dr. Sharma credibly testified the AMA Guides do not require a DIME physician to disclose to a Claimant his impressions about the validity of the Claimant's symptoms and complaints. Dr. Sharma also credibly opined that insofar as the Rating Tips address the DIME physician's disclosure of his or her impressions the Rating Tips are concerned with the performance of ROM measurements and not the over-arching issue of whether the industrial injury has *caused* any ratable impairment. (*See* Finding of Fact 62).

Moreover, even if Dr. Raschbacher had committed some hypothetical violation of the rating protocols of the AMA Guides by failing to tell Claimant that his pain behaviors might affect the rating, the ALJ infers that such violation would not have affected the validity of Dr. Raschbacher's ultimate finding that the July 2013 injury did not cause any of Claimant's neck and back impairment. If Dr. Raschbacher had told Claimant at the DIME that Dr. Raschbacher thought Claimant was exhibiting "florid pain behaviors" and this could affect the rating, and then Claimant suddenly displayed fewer or less dramatic pain behaviors, the ALJ infers this sequence of events would only have reinforced Dr. Raschbacher's doubts about the genuineness of Claimant's pain behavior.

Respondents argue at length that ALJ Allegretti's finding that the July 15, 2013 incident caused injury to Claimant's neck and back does not constitute "issue preclusion" with respect to Dr. Raschbacher's finding that Claimant did not sustain any permanent impairment of the neck and back. Claimant's position statement does not overtly address this issue and it is not clear that Claimant is arguing that ALJ Allegretti's order precludes Dr. Raschbacher's causation findings. However, to the extent Claimant is making this argument the ALJ disagrees with it for the reasons set forth in *Ortega v. JBS USA, LLC,* WC 4-804-825 (ICAO June 27, 2013) (because of differences in the applicable burdens of proof ALJ's finding of causation when determining issue of compensability did not impose issue preclusion on DIME physician's reconsideration of the issue when determining cause of permanent impairment) .

IMPAIRMENT RATING FOR LEFT KNEE

Claimant argues he overcame by clear and convincing evidence Dr. Raschbacher's 2% whole person impairment for the left knee injury. Claimant asserts that the left knee rating should be based on Dr. Beatty's 5% whole person impairment rating. Conversely, Respondents contend that since Claimant failed to overcome Dr. Raschbacher's 0% rating for the neck and back Dr. Raschbacher's 5% lower extremity rating for the knee is "binding unless overcome by clear and convincing evidence. Contrary to the assumptions of both parties, Dr. Raschbacher's left knee rating is not binding on the parties unless overcome by clear and convincing evidence. Rather, in the circumstances presented by this case Claimant must prove by a preponderance of the extent of his lower extremity impairment.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in

subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.*

Moreover, the clear and convincing standard of proof mandated by the DIME procedure applies only to non-scheduled (whole person impairment) injuries, not to scheduled injuries. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000); *Maestas v. American Furniture Warehouse,* WC No. 4-662-369 (June 5, 2007). Section 8-42-107(2)(w), C.R.S., provides for scheduled compensation based on "loss of a leg at the hip or so near thereto as to preclude the use of an artificial limb." When a claimant seeks to convert a scheduled impairment rating for "loss of the leg at the hip" to the equivalent whole person impairment rating the claimant bears the burden of proof by a preponderance of the evidence to establish "functional impairment" beyond the leg at the hip. Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* supra; *Maestas v. American Furniture Warehouse, supra*.

Here, Claimant has not even argued that he presented evidence sufficient to establish that it is more probably true than not that the left knee injury caused "functional impairment" beyond the leg at the hip. Consequently, the ALJ concludes that the Claimant is not seeking conversion of the left knee extremity rating to its whole person equivalent. In any event, if the issue had been raised the ALJ would conclude there is no credible and persuasive evidence to establish that Claimant's left knee injury caused functional impairment beyond the left leg at the hip. Indeed, even if Claimant's right knee problems could constitute "functional impairment" beyond the left leg at the hip Dr. Beatty persuasively and credibly opined that Claimant's right knee problems are not causally related to the July 2013 left knee injury. (*See* Finding of Fact 25).

Because Claimant has sustained only a scheduled injury he bears the burden of proof to establish by a preponderance of the evidence the extent of the lower extremity impairment. *Maestas v. American Furniture Warehouse, supra.* Scheduled impairment ratings must be calculated in accordance with AMA Guides. Section 8-42-101(3.7), C.R.S.; *Kolar v. Industrial Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

As determined in Findings of Fact 81 through 84, the credible and persuasive evidence establishes it is more probably true than not that Claimant is entitled to PPD benefits based on a scheduled impairment rating of 5% of the left lower extremity. The ALJ has credited the opinion of Dr. Raschbacher that Claimant's knee ROM

measurements are not reliable and have been inconsistent over time. Therefore, the ALJ credits Dr. Raschbacher's opinion under the AMA Guides Claimant's ROM should not be included in the scheduled impairment rating. *Cf. Otero v. Industrial Claim Appeals Office,* WC 4-346-007 (ICAO May 4, 2000), *aff'd., Otero v. Industrial Claim Appeals Office*, (Colo. App. No. 00CA0963, November 30, 2000) (not selected for publication) (otherwise valid ROM measurements properly discounted under AMA Guides where, based on history and examination, DIME physician found claimant was not giving full effort and thus ROM impairment was not "caused" by the industrial injury). The ALJ is not persuaded by Dr. Beatty's rating that included ROM impairment for the reasons stated in Finding of Fact 84.

PERMANENT TOTAL DISABLITY

Claimant alleges that he proved by a preponderance of the evidence that he is entitled to an award of PTD benefits. The ALJ disagrees.

To prove the claim that he is entitled to PTD benefits, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*.

The question of whether the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). In this regard the ALJ acting as fact finder determines the weight and credibility assigned to expert vocational evidence. *Burchard v. Preferred Machining*, WC 4-652-824 (ICAO July 23, 2008).

As determined in Findings of Fact 85 though 89, Claimant failed to prove it is more probably true than not that he is entitled to an award of PTD benefits. Rather, the credible and persuasive evidence establishes that Claimant is capable of obtaining and maintaining employment. As determined in Finding of Fact 86, the ALJ credits Montoya's expert opinion that Claimant is capable of working in jobs similar to that he had at the time of the injury as well as other semi-skilled and unskilled positions. Montoya's opinions were not refuted or contradicted by any credible expert testimony. Claimant's own treating physician, Dr. Beatty, opined that from a medical perspective

Claimant is not totally disabled. Insofar as Claimant's testimony might support the inference that he is incapable of earning wages in any employment, the testimony is not credible and persuasive for the reasons stated in Finding of Fact 89.

TEMPORARY TOTAL DISABILITY BENEFITS

Claimant contends he is entitled to an award of TTD benefits from July 11, 2014 through October 16, 2014. Claimant reasons that on July 11, 2014 Dr. Davis took him off of work and did not release him to return to work until October 16, 2014.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Findings of Fact 90 through 92, Claimant failed to prove it is more probably true than not that he is entitled to an award of TTD benefits commencing July 11, 2014. Specifically Claimant failed to prove that the restrictions imposed by Dr. Beatty and Dr. Davis prohibited or limited his ability to perform the duties of his regular employment at the time of injury. Thus, Claimant failed to prove that his "earning capacity" was limited by the temporary restrictions.

However, as determined in Finding of Fact 93, Claimant proved that he was temporarily totally disabled on August 15, 2014 when he underwent surgery. Claimant's entitlement to TTD benefits continued until October 9, 2014 when he reached MMI for the industrial injury. Section 8-42-105(3)(a), C.R.S.

AVERAGE WEEKLY WAGE

Respondents do not dispute that at the time of injury in July 2013 Claimant earned in excess of 91% of the state AWW, and that based on these earnings Claimant would be eligible to receive TTD benefits at the applicable maximum weekly rate of $875.42. However, citing *Kittelson v. City and County of Denver*, WC 4-923-057 (February 24, 2015), Respondents contend the ALJ should exercise the statutory discretion afforded by § 8-42-102(3), C.R.S., to fairly calculate Claimant's AWW. The ALJ is not persuaded.

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 certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *partially overruled on other grounds, Benchmark/Elite v. Simpson*, 232 P.3d 777 (Colo. 2010) *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993),. Specifically, § 8-42-102(3) grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

Here, Respondents argue that when Claimant became temporarily disabled on August 15, 2014 he was "voluntarily not working." Respondents cite *Kittelson v. City and County of Denver, supra* as authority for the proposition that in these circumstances it would be "fair" to reduce Claimant's AWW below the maximum permitted by § 8-42-105(1), C.R.S. (91% of the state AWW). Respondents assert that $656.56 represents a "fair" AWW. If Respondents argument is valid the Claimant's TTD rate would be reduced to $437.26 per week.

Kittelson is a death benefits case in which the decedent firefighter voluntarily retired several years before the onset of his fatal occupational disease and consequent death. The decedent was not earning any wages at the time of his death and had not done so for some time. The ALJ exercised the discretion afforded by § 8-42-102(3) to conclude that for purposes of calculating death benefits under § 8-42-114, C.R.S., decedent's AWW could be "fairly" calculated by using his earnings just prior to his retirement. The ALJ also found that the minimum death benefit authorized by § 8-42-114 (25% of the maximum weekly benefit) did not fairly calculate the decedent's AWW. The ICAO noted that death benefits are designed to replace loss of income to dependents resulting from the "work induced death" of the employee. The ICAO ruled that the ALJ made insufficient findings of fact to explain how the decedent's earnings prior to the voluntary retirement fairly approximated the loss of income to the dependent long after decedent's voluntary retirement. The ICAO also held that the ALJ failed to

explain why the minimum allowable benefits would not fairly compensate the dependent's loss of income resulting from decedent's post-retirement death.

Respondents' argument notwithstanding, this case is not analogous to *Kittelson*. Unlike the decedent in *Kittelson* Claimant has not voluntarily withdrawn from the labor force in order to retire. Rather, Claimant credibly testified that the reason he closed his masonry business was because it was not profitable in the depressed economic environment. Such economic loss of earnings does not sever the causal relationship between a compensable injury and subsequent temporary wage loss. This is true because a temporarily disabled worker searching for employment after an economic lay-off is relatively disadvantaged when compared to other workers. *Schlage Lock v. Lahr,* 870 P.2d 615 (Colo. App. 1993); *Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989).

In these circumstances the ALJ declines to exercise his discretion to find that the Claimant's earnings at the time of the injury do not fairly reflect his earning capacity at the time of the disability. This is not a case in which the Claimant voluntarily withdrew from the labor market and thus chose not to earn any wages. Moreover, the Respondents have not offered any credible and persuasive evidentiary basis to explain why $656.56 would "fairly" approximate Claimant's injury-related wage loss. The Claimant's AWW and consequent TTD rate of $875.42 shall remain unchanged.

ORDER

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

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

2. Claimant reached maximum medical improvement on October 9, 2014.

3. Insurer shall pay permanent partial disability benefits based on a 5% impairment of Claimant's left lower extremity.

4. Insurer shall pay temporary total disability benefits in accordance with the statutory formula and at the maximum allowable rate for the period of August 15, 2014 through October 8, 2015.

5. Respondents' request to modify the average weekly wage is denied.

6. Any issues not resolved 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 14, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he is unable to earn wages and therefore is permanently totally disabled; and

b. Whether Claimant proved by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits.

c. Claimant withdrew the issue of disfigurement.

FINDINGS OF FACT

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

1.Claimant is 27 years old. Claimant has been married for nine years and he lives with his wife and two children, ages nine and two years old. Claimant sustained admitted injuries to his head, neck and back in the course and scope of his employment on November 18, 2013, when he was setting forms for an elevator and the ceiling platforms fell on top of him.

2. Claimant was first evaluated on the date of his accident at Denver Health Medical Center where he reported having 60 pounds of wood fall 10 feet onto his head at work, with loss of consciousness. Claimant's friend reported that Claimant had multiple episodes of vomiting, and "not acting normal." Claimant had complaints of headache and neck pain. X-rays of Claimant's thoracic spine showed subtle anterior wedging of one of the vertebral body in the upper lumbar region. Based on MRI findings of Claimant's lumbar spine, Claimant had a shallow, broad-based central protrusion at L5-S1, as well as straightening of the normal lumbar lordosis, which can be seen with muscular spasm.

3. Claimant's psychologist, Dr. Ricardo Esparza, diagnosed Claimant with cognitive disorder, as well as adjustment disorder with depression and anxiety.

4. The neurologist, Dr. Bennett Machanic, reported that Claimant suffered closed-head trauma with a rather significant cerebral concussion, and a posttraumatic brain injury, with a Rancho Los Amigos scale somewhere around 5 or 6*. Dr. Machanic reported that Claimant had pseudobulbar affectual disorder. He also had cervical strain, lumbosacral strain with right L4 radiculopathy. He had vestibular dysfunction, which perhaps was inner ear and associated with the head trauma. Dr. Machanic reiterated

that this was a very complex multisystem posttraumatic situation. Dr. Machanic stated, "At this point in time, the prognosis is indeed very guarded and I do not think this man is going to be returning to his previous occupational [sic] in the foreseeable future. Indeed I am quite concerned about permanent cognitive and emotional dysfunctions." (Exhibit 5) *Rancho 5 = Confused, Inappropriate, Non-Agitated: Appears alert; responds to commands; distractible; does not concentrate on task. Rancho 6 = Confused, Appropriate: Good directed behavior, needs cuing; can relearn old skills; serious memory problems; some awareness of self and others.

5. Dr. Laura Rieffel reported that Claimant's working memory was poor, stating that questions had to be repeated to him multiple times when details were involved. Claimant's speed of mental processing was noticeably slow. She also noted that Claimant ambulated slowly, cautiously and stiffly. Claimant complained of blurry vision during the peripheral vision exam. During sensory perceptual exam, Claimant became teary from tactile stimulation, of face in particular, some with touch of his hand.

6. On April 8, 2014, Dr. James Trevor McNutt reported that Claimant's EEG was abnormal due to the presence of sharp dysrhythmia noted in the left frontal and temporal regions. Dr. McNutt stated that this may indicate an underlying region of cortical hyperirritability.

7. Dr. Peter Reusswig performed multiple cervical and lumbar epidural, facet, transforaminal and rhizotomy injections throughout the course of Claimant's treatment.

8. On July 3 and 8, 2014, Claimant underwent speech/language pathology cognitive/communicative evaluation at Spalding Rehabilitation with Lois McCarthy. Claimant displayed significant deficits in cognition in terms of short-term memory, attention, and insight into his situation. He had severe deficits in oral motor skills, with significant neurogenic stuttering and weak, slow, and irregular lingual functioning. Claimant had moderate to severe deficits in visual/spatial functioning. He had difficulty with trails, symbol cancellation, clock drawing, design memory and design generation. Claimant had moderate to severe deficits in memory, as well as attention and processing. Claimant also had moderate to severe deficits in executive functions. Claimant displayed poor deficit awareness, and he also denied stuttering behavior. It was reported that Claimant required skilled speech/language therapy to address neurogenic stuttering and to initiate education and treatment for deficits in linguistic and cognitive areas.

9. Claimant was also evaluated by Dr. Steven Wilk on July 29, 2014. He diagnosed Claimant as having bilateral myalgia, bilateral anterior disc displacement with reduction, capsulitis of the bilateral temporomandibular joint, bilateral muscle spasm, and bilateral side injury to the face and neck. Dr. Wilk stated, "Patient presents with direct trauma. In my opinion, to a reasonable degree of medical certainty this disorder resulted from the accident of 11/18/2013." On November 13, 2014, Dr. Wilk reported mandibular range of motion measurements taken on 11/05/2014 were 36 mm opening, 2 mm right lateral excursion and 3 mm left lateral excursion. Normal range of motion is

44-52 mm opening and 12 mm lateral excursion. Dr. Wilk stated that due to excessive witnessed bruxism activities, he would suggest a trial of Buspirone. Dr. Wilk reported that Claimant's prognosis was unknown. However, Dr. Wilk stated, "A joint which has suffered soft tissue damage with the resultant disc dysfunction will never be normal again. It can be anticipated that the patient will have exacerbation throughout his lifetime which will require additional evaluation and treatment." Dr. Wilk also reported that Claimant continued to suffer from severe muscle spasm in the masseter muscles.

10. Dr. Brian Beatty conducted an IME for Respondents and stated, "Based on my examination, there did not appear to be any overt symptom magnification or pain behavior and overall his examination was consistent and valid."

11. About a year after Claimant's accident Dr. Machanic stated, "I have to say at this point not sure how much improvement we can achieve, and this man is very close to, if not at, maximum medical improvement." Only a few months later, on February 17, 2015, Dr. Machanic stated, "I am concerned about this man's situation. I think he has significant lingering impairments. They would include encephalopathy, neck and back pain. Not sure as to what kind of work he could do at this point."

12. Claimant participated in a Functional Capacity Evaluation on March 16, 2015, with Christine Couch. Claimant was able to demonstrate a maximum sustained sitting tolerance of 66 minutes. He was able to demonstrate a sustained standing tolerance of 28 minutes. Claimant was able to complete one of 10 laps (100 feet each). He ambulated with an antalgic gait pattern. Claimant demonstrated the ability to lift 25 pounds occasionally at all levels, with the exception of shoulder to overhead, which was limited to 5 pounds. Claimant was able to carry 25 pounds bilaterally, but only 10 pounds in either the right or left hand individually. Claimant could push 23.4 pounds of force, and pull 25 pounds of force. Claimant demonstrated consistency in 20 of 20 tests. Claimant was able to complete 10 of 40 steps of the stair climbing test, using the handrail, with antalgic gait. Claimant requested several changes of position during the evaluation due to aggravation of his symptoms. These involved seated rest breaks following standing/walking tasks and standing/walking breaks following seated tasks. Claimant had errors during testing, despite being provided with verbal instructions and demonstration. Claimant had increased heart rate during testing, and was observed as diaphoretic following testing.

13. Claimant underwent neuropsychological evaluation with Dr. Rieffel on April 21, 23, 24, and May 4, 2015. Claimant's performance was best described as slow and inaccurate with significant variability across the length of the test, suggestive of sustained attention problems. Dr. Rieffel noted that Claimant's use of a mnemonic strategy of clustering, a problem solving strategy that aids in memory recall, was actually quite ineffective for him because of his slowed mental process. Dr. Rieffel stated, "I don't know if this is a strategy that he was taught in cognitive rehab or if it was his own problem solving attempt, but unfortunately for him, it is not an effective strategy. That is, I noticed that he was expending so much energy and focus trying to cluster items on a word list, that many items were 'falling through the cracks because he

couldn't process the information quickly enough." Dr. Rieffel stated that although Claimant presented as much less distraught and depressed than on his initial presentation, mood and behavioral disturbances are still a significant impediment to gainful employment. Dr. Rieffel noted that during the feedback, Claimant's positive façade quickly dissipated, and his agitation and cognitive rigidity quickly surfaced when situations became confusing to him. The degree of Claimant's disintegration during this conversation strongly suggested that he is likely to become easily confused and consequently, irritable, perhaps acting in ways that are not typical for him, when faced with situations that are outside the norm for him. Further, although Claimant's problem solving is low normal, these skills quickly become further impaired when he is required to act/react in a stressful situation. Dr. Rieffel stated her impression that Claimant will need assistance from trusted others when making complex decisions as he is likely to have difficulty mentally managing and considering all of the variables involved. Dr. Rieffel recommended a trial of stimulant medication, if it had not already been attempted. She also recommended that Claimant continue with individual psychotherapy with a shift in focus towards what he is able to do, so that he can work against the negative self-expectations he was generating. Dr. Rieffel opined that there was enough information on the basis of Claimant's prior evaluation and current behavioral observations to diagnose him with Major Neurocognitive Disorder Due to Traumatic Brain Injury with behavioral disturbance (including disturbances of mood and agitation/irritability).

14. Claimant has treated with many different providers from the date of his injury until now and is currently being treated by David Yamamoto, M.D. On June 17, 2015, Dr. Yamamoto placed Claimant at maximum medical improvement but noted that Claimant had ongoing problems secondary to his traumatic brain injury. He continued to have headaches and dizziness. He was also still having anger issues. Claimant continued to have difficulty with his memory, as well as problems with stuttering. Claimant had ongoing problems with posterior neck pain and lower back pain. He also still had TMJ problems. Dr. Yamamoto assessed Claimant as having traumatic brain injury with ongoing symptoms including memory loss, mild confusion, mood changes, headaches, anxiety and stuttering. He also assessed Claimant as having cervical strain; lumbar strain, status post L3, L4 and L5 neurotomies; and TMJ with bruxism. Dr. Yamamoto utilized the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, to determine Claimant's impairment. For the traumatic brain injury, Dr. Yamamoto assigned 15% impairment for complex integrated cerebral function disturbances. He opined that Claimant could also receive 15% from language disturbances and emotional disturbances. For specific disorders of the cervical spine, Claimant was assigned 4% whole person impairment. For range of motion loss, he was assigned 9% whole person impairment. These combined to equal 13% cervical spine impairment. For specific disorders of the lumbar spine, Dr. Yamamoto assigned 8% whole person impairment. For range of motion loss, Claimant received 8% whole person impairment. These combined to equal 15% lumbar spine impairment. The spine impairments were combined to equal 26% whole person impairment. This was combined with the 15% traumatic brain injury impairment to equal 37% whole person impairment. Dr. Yamamoto gave Claimant a 37% whole person

impairment, and he stated that the 37% was representative of Claimant's overall clinical picture. Dr. Yamamoto recommended that Claimant be seated for at least one hour per 8 hour day, and stated that he should change positions every 30-60 minutes as needed. Dr. Yamamoto stated that Claimant would need ongoing counseling, ongoing medications for the foreseeable future, and maintenance visits every 2-4 months.

15. On July 16, 2015, Respondents filed a Final Admission of Liability, admitting liability for Medical Benefits after MMI "Per Dr. Yamamoto's report dated June 17, 2015… for related reasonable and necessary medical benefits by an authorized treating physician."

16. On August 17, 2015, Dr. Rieffel credibly reported that it is possible that further neuropsychological care will be needed as Claimant nears old age. She noted that research suggests that Claimant may experience deterioration of cognitive function at a faster rate than usual due to the loss of his cognitive reserve. If this were necessary, she would anticipate another full neuropsychological evaluation and follow ups would be needed at that time. Dr. Rieffel anticipated that Claimant will need some level of ongoing psychotherapy as well as family therapy secondary to the stress generated by his cognitive disorder and personality changes. Dr. Rieffel stated, "Due to the chronic nature of these problems, there will likely be an ebb and flow of psychological exacerbations and family/personal problems that will need to be addressed in treatment."

17. Claimant's vocational expert, Doris Shriver, reported that observations, exams and standardized tests showed Claimant had a maximum lift of 20 pounds and confirmed limitations with sitting, standing, walking, climbing, stooping, kneeling, crouching, crawling, and trunk movements when standing and sitting. Decreased range of motion, strength and motor coordination testing supported the findings. Ms. Shriver reported that Claimant's head injury, sleep deprivation and chronic pain created mental challenges. As a worker, Claimant is below the 1st percentile when compared to over 20,000 workers. Over 30 reliable and valid tests showed Claimant's traits and aptitudes to be below the 1st percentile compared to average workers. Ms. Shriver reported Claimant's weaknesses as: 1. Status-post head, neck and low back injuries; 2. English as a second language; 3. Reduced tolerance for daily tasks, leisure and work; 4. Impaired far visual acuity; 5. Impaired near visual acuity; 6. Impaired binocularity (no near depth perception); 7. Receptive language below the 1st percentile; 8. Impaired tolerance for climbing, balance, stooping, crouching, kneeling, crawling, and trunk movements when standing; 9. Positive vestibular-ocular reflexes; 10. Lifts up to 20, 15, and 15 pounds from floor to waist, waist to shoulder, and waist to overhead respectively one time; Safe lifts are 50% less when frequency is considered; 11. Impaired range of motion (trunk, neck, shoulders, hips and knees); 12. Impaired strength (bilateral upper and lower extremities); 13. Impaired light touch sensation in posterior distal arms; 14. Impaired right hand touch discrimination; 15. Scattered scores on Haptic; 16. Reading at grade level 1.6; 17. Sentence comprehension below grade level K.0; 18. Spelling at grade level K.6; 19. Arithmetic at grade level 3.5; 20. Fine motor coordination at the 0.1st percentile; 21. Gross motor coordination at the 0.1st percentile; 22. Below average

bilateral palmar pinch strength; 23. Below average right hand lateral pinch and tip pinch strength; 24. Impaired tolerance for sitting, standing, walking and lifting; 25. Emotional behaviors at the 0.2nd percentile; 26. Adaptive behaviors at the 1st percentile; 27. Clinically observed severe chronic pain; 28. Disturbed sleep due to pain. Ms. Shriver reported the following validity factors: Increase in heart rate of 20 bpm indicating valid effort with lifting; Involuntary nystagmus (jerking movement of the eyes); Limitations in ADLs consistent with impaired range of motion, strength and motor coordination; and, Chronic pain consistent with observed behaviors, loss of activity, adaptations, reliance upon others, emotional/mental challenges, pain medications and sleep disturbance. Ms. Shriver noted that many of Claimant's weaknesses were consistent with left brain hemisphere damage. Ms. Shriver recommended provisions for continued medical care and therapies, cognitive therapy and testing, emotional support for anger and frustration tolerance, complimentary alternative medicine for pain relief, essential services for self-care, shopping, cooking and household management tasks at least 2 hours per day, and a driver for medical appointments.

18. On January 19, 2016, Dr. Yamamoto noted that he had changed Claimant's lifting limits to maximum lift of 25 pounds, as his back had been bothering him more. He noted that the limits were now in line with the FCE. Also, Dr. Yamamoto noted that he did test Claimant's lifting ability and he struggled with over 25 pounds. Dr. Yamamoto reported that he did not agree with Dr. Overholt regarding weaning Claimant's medications. He also stated, "He still has some depression and in my opinion it would be a mistake to 'wean him off' antidepressants as it would likely make his depression worse." Dr. Yamamoto concluded that "If he is to work he would need constant supervision."

19. Claimant's wife and three other lay witnesses credibly testified that Claimant changed drastically after the accident. They testified that since the accident, Claimant has become intolerant, impatient, frustrated, and gets angry with everyone. He can only be around others for short periods of time before he draws away, isolates himself or goes to lie down. He has problems with concentration, comprehension and understanding since his accident. He has difficulties putting words and sentences together or engaging in conversation. Claimant has frequent headaches, at least three times a week, which are very unpredictable and can last from a day up to three days. Claimant does not get out of bed when he has the really bad headaches. Claimant's wife credibly testified at hearing. She testified that if she is not home, her mother will generally supervise Claimant and the children. Claimant's wife stated that she believes that Claimant requires constant supervision. Claimant's wife also testified that Claimant enrolled in GED classes, but that he called her during the break, halfway through the three hour class, to come pick him up because of his headaches.

20. Dr. David Yamamoto, Claimant's primary authorized treating physician, testified that he treated Claimant since January 2014, two months after his accident, and continues to treat him for maintenance care for his neck, back, depression and the traumatic brain injury (TBI). He prescribes medications for muscle spasms, neck and back pain, headaches, depression and PTSD, bruxism for TMJ, concentration and memory loss as well as medications to control his anger issues. Some of these

medications cause drowsiness, loss of appetite and jitteriness. He is taking from 10 to 12 medications at any given time. They can cause fatigue and difficulty with concentration. He is unable to control the headaches, even with medications. He has problems with concentration, focus and spatial reasoning. Claimant has problems with emotional disturbance and depression. All of these are impediments to Claimant's return to the work force. However, the major problems for Claimant are problems with memory, following instructions, confusion, concentration and staying on task. Claimant is very self-conscious due to the stuttering. He resists answering directly. Dr. Yamamoto confirmed that the medical records identify Claimant has problems with anger management, which is why he is on medication for the problem. Dr. Yamamoto stated that anger issues are common for patients with PTSD and TBI. Claimant had a significant brain injury and anger is a consequence of the brain injury. Claimant does not do well with stress.

21. Dr. Yamamoto last saw Claimant on January 19, 2016, and reviewed all the medications that Claimant is currently taking. They are important for Claimant's maintenance care. He credibly opined that Dr. Overholt was incorrect in recommending termination of maintenance medications. Dr. Yamamoto based his opinion on his evaluations, examinations and knowledge of Claimant. He also stated that Claimant's injections with Dr. Reusswig are to reduce pain and increase function. Claimant has had radiofrequency ablations that may need to be repeated as part of maintenance care. Dr. Yamamoto also does laboratory testing regarding narcotics. Dr. Yamamoto prescribes Claimant narcotics for pain and severe headaches. Dr. Yamamoto has not observed drug seeking behavior by Claimant and testing reveals that the levels of medication were appropriate. Claimant continues to be at MMI and Dr. Yamamoto opines that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto testified that Claimant's condition is chronic and that he does not anticipate that Claimant's condition will heal. Claimant requires ongoing maintenance medical care.

22. Dr. Yamamoto placed Claimant's restrictions at occasional lifting, carrying, pushing and pulling of 25 lbs., which is in addition to prior restrictions of standing and sitting up to 7 hours a day, and changing positions every 30 to 60 minutes as needed. Claimant should also avoid heights and also needs supervision because he does not have the capacity to work independently, and must be monitored or watched at all times. Claimant could do some of the jobs identified by Respondents' vocational expert so long as he was assisting someone else that was doing the jobs, could take frequent 10 minute breaks, and was allowed off when his headaches are intense. Claimant continues to report headaches consistently. He would not be able to be a car wash worker as it is very strenuous due to the bend and scrubbing of cars. Attendant car wash worker would be eliminated by the fact that he would need supervision and could not handle money. Sheltered employment might be a possibility because he needs constant supervision.

23. Dr. Yamamoto had originally given higher restrictions in order not to limit Claimant's employment search and options, but he tested Claimant personally and observed Claimant's ability to lift only up to 25 lbs. with difficulty, and with limited repetition, which was in line with the FCE evaluation performed by Christine Couch, P.T.

The FCE was a valid, consistent evaluation and Claimant was also consistent with all of Dr. Yamamoto's evaluations. Dr. Yamamoto placed him in the light to sedentary category of physical work. However, he opined that increased headaches will affect his cognitive abilities.

24. Dr. Yamamoto expected changes in the patient's traumatic brain injury between six months and a year due to the natural progression of healing. While Claimant is able to take direction, as demonstrated by his ability to take medication, those are very simple daily routines, as opposed to going to work, and very different from being in a working environment every day. Dr. Yamamoto testified that the only job Claimant could probably do is one that is around family members, in a family business, where Claimant would have people to give him specific instructions to perform different activities, though he may not be able to perform the same activities every day. Claimant has not achieved the level of recovery that would allow him to go out and work. At this time, Dr. Yamamoto opined that Claimant is not able to return to any kind of work.

25. Ms. Shriver testified as a vocational expert on behalf of Claimant. She has experience with traumatic brain injury patients, as she worked at the facility that developed the Rancho Los Amigos TBI scale and applied it in her work. A traumatic brain injury patient can have a very significant and complex array of symptoms that may include loss of range of motion, weakness, fatigue, confusion, loss of learning, inability to concentrate, inability to multitask, all of which are specifically affected by auditory and visual stimuli. Depression also affects cognition, as in this case. Claimant is unable to hide his traumatic brain injury, which is one of the reasons why Claimant is unable to obtain employment.

26. While at the hearing, Ms. Shriver observed Claimant change position frequently, lifting his buttock off of the chair by putting his weight on his arm, rubbing his head, closing his eyes, and had a nystagmus. During his FCE with Ms. Shriver, Claimant performed at the 20 lb. range. He had objective observations of demonstrated pain. He was consistently limping, showing limitation of the right leg. She observed his antalgic gait, even going into the court house, though Claimant did not know she was watching him. His loss of range of motion of the neck and low back caused foreshortening of the muscles that affect his vocational capacity, as they have limited his ability to stoop or crouch. Coordination was also assessed and gave another look at how his brain is functioning, consistent with his left brain injury. While Claimant has always been restricted to obtaining work with employers that accept primarily Spanish speaking workers, his traumatic brain injury makes his potential for employment even more difficult. Ms. Shriver, after considering all of Claimant's limitations and background, including the traumatic brain injury, testified that Claimant would be limited to a sheltered employment situation. She reviewed all of the jobs identified by Respondents' vocational expert. She stated that, in addition to his other limitations, none of the employers could handle the absenteeism that would be caused by Claimant's impairments and medical conditions, especially his headaches. Claimant does not have the skills to locate and sustain work or retain work. Claimant's wife's testimony that Claimant could not handle GED classes was expected and consistent with his testing and medical records. This brain injury is catastrophic for Claimant.

27. Ms. Shriver testified that none of the community resources or programs identified by Respondents' vocational expert effectively put people back to work, nor could they successfully rehabilitate and provide vocational retraining for Claimant due to the myriad problems facing Claimant caused by his brain injury. The only program that Ms. Shriver knows that has been of value to TBI patients is the Colorado Brian Injury Association. Also, Claimant does not have the skills required to go through any programs identified on his own. Someone would have to assist Claimant through the process. Neither is Claimant a candidate for assistance through the Division of Vocational rehabilitation. They use the McCarron Dial assessment and Claimant scored so low that they would not provide services.

28. Ms. Shriver was deemed more credible and persuasive that Respondents' vocational expert because overall she has more education, experience and training than Respondents' vocational expert and has assessed all of Claimant's physical, mental and vocational skills in reaching her ultimate opinions, not just transferable skills as Ms. Harris. Ms. Shriver testified that Claimant may be able to obtain sheltered employment and, at best, he would need to be accommodated so that he may come and go home as needed, he would need transportation when necessary and someone to help Claimant and his wife to access any kind of community support. Claimant's testing was very consistent with the diagnosis of a left brain injury. Claimant's test results could not be faked. She stated that Dr. Yamamoto's testimony at hearing only served to confirm her own opinion with regard to Claimant. Ms. Shriver further stated that, given Claimant's current functional capacity, education, background, experience, mental disabilities, she credibly opined, within a reasonable degree of vocational probability, that Claimant is not employable.

29. Finally, Claimant testified at hearing at which time he could not state his address as he could not recall it, nor could he recall the date of his injury, though he remembers that his injuries were to his back, neck, and head, and that he suffered from dizziness, headaches, and pain in his back. Claimant indicated that he has memory problems and depression. He is not allowed to be the only one with his youngest two year old daughter because he gets angry easily. Claimant believed it was due to the depression and the pain. Claimant testified that he looked for work at many places. Claimant went to school in Mexico through middle school and went to a year and a half of high school in the USA. Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

30. The ALJ observed at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant could be observed crying off and on throughout the two day hearing.

CONCLUSIONS OF LAW

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

Generally

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. 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,* 592 P.2d 792 (1979). The facts in a workers' compensation claim must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness of unreasonableness (probability or improbability) of the testimony; 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 claim is decided on its merits. Section 8-43-201, C.R.S. Further, factual findings concern only evidence that is dispositive of the issues involved; even if the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to cited findings as unpersuasive. See *Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability Benefits

3. Claimant proved by a preponderance of the evidence that he is permanently and totally disabled (PTD) as defined by Section 8-40-201(16.5), C.R.S., and has proven that he is unable to earn wages in the same or any other employment. To prove a claim for permanent and total disability, a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). For purposes of permanent total disability, "any wages" means more than zero. See *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Apps. Office*, 894 P.2d 42 (Colo. App. 1995). A claimant is not required to prove that an industrial injury is the sole cause of his inability to earn wages. However, a claimant must demonstrate that the industrial injury created some disability that ultimately contributed to the claimant's permanent total disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986). A claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.

App. 2001). The question of whether a claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

4. Here, Claimant provided overwhelming evidence that he suffered injuries to his head, neck and low back. The consequences of the injuries involve a traumatic brain injury and consequent depression. Claimant has significant symptoms of persistent headaches, dizziness, muscle spasms, neck and back pain, an antalgic gait, PTSD, TMJ, problems with concentration and memory loss as well as anger issues. Claimant is taking between 10 to 12 medications at any given time which also cause side effects, including fatigue and loss of concentration. Claimant also has problems with concentration, focus and spatial reasoning, and major problems with memory, following instructions, slowed learning, confusion, staying on task and stuttering. All of these are impediments to Claimant's return to the work force. This is consistent within the medical reports issued by Dr. Machanic and Dr. Rieffel, and as evidenced by Dr. Yamamoto and Ms. Shriver's testimony. This is also supported by the testimony of the lay witnesses.

5. The determination whether a claimant is permanently and totally disabled is made on a case-by-case basis and varies according to a claimant's particular abilities and circumstance. In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Ms. Shriver testified that considering Claimant's work restrictions as provided by Dr. Yamamoto and Claimant's left brain TBI, Claimant might be able to access some sheltered employment but only under specifically accommodated situations where he was allowed to work on good days alone and was allowed to come and go as necessary, dictated by his continuing debilitating headaches. She further testified that employers in competitive employment situations would not accommodate Claimant's particular situation.

6. Where the possibility of being retrained for employment exists, and where respondents have not offered vocational rehabilitation services, and where the injured worker would need professional assistance to be vocationally rehabilitated, and such retraining is not feasible or accessible, a finding of permanent total disability is proper. *Drywall Products v. Constuble*, 832 P.2d 957 (Colo. App. 1991) (cert. denied). See also *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Ms. Shriver testified that Claimant does not have the skills required to go through any vocational rehabilitation programs on his own. Someone would have to assist him in the process. Neither is Claimant a candidate for assistance through the Division of Vocational Rehabilitation. The Division uses the McCarron Dial assessment and Claimant scored so low that they would not provide any services.

7. One human factor is Claimant's ability to maintain employment within his physical abilities. This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining

employment. Furthermore, a claimant's occasional performance of physical activities which are useful in the labor market does not preclude a finding of permanent total disability if the evidence indicates that the Claimant is unable to sustain the activities for a sufficient period of time to be hired and paid wages. *Moller v. North Metro Community Services, W.C. No. 4-216-439, I.C.A.O., August 6, 1998*. Ms. Shriver credibly opined that, given Claimant's current functional capacity, education, background, experience, mental disabilities, within a reasonable degree of vocational probability, Claimant is not employable. She stated that Dr. Yamamoto's testimony during hearing only served to confirm Ms. Shriver's opinion with regard to Claimant. Claimant's witnesses were more credible and persuasive than Respondents' witness.

8. The crux of the inquiry is whether employment exists that is reasonably available to the claimant given his or her circumstances. This inquiry can only be answered on a case-by-case basis, and will necessarily vary according to the particular abilities and surroundings of a claimant. The factors to be considered may include consideration of the Claimant's commutable labor market or other analogous concepts which depend upon the existence of employment that is reasonably available to the claimant under his particular circumstances. The Judge is capable of making a reasoned judgment concerning a claimant's employability based on the physical restrictions, the claimant's capacity to travel, the availability of transportation, and the scope of the labor market in the claimant's community. *Weld County School District RE-12 v. Bymer, supra.* Here, Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

9. The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County*, W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer, supra.* Because the burden of proof rests with the claimant, the respondents are not obligated to find a specific job or job offer for the claimant in order to defeat a claim for permanent total disability benefits. *Moua v. Datex Ohmeda,* WC 4-526-873 (ICAO January 30, 2004); *Chavez v. Southland Corp.,* WC 4-139-718 (ICAO September 4, 1998). The ALJ may consider the failure to identify specific employment opportunities when assessing the credibility of a vocational expert's opinion that a claimant is employable and can earn wages. *Gomez v. MEI Regis,* WC 4-199-007 (ICAO September 21, 1998), aff'd., *Gomez v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA1998, June 3, 1999) (not selected for publication). Here, even though Respondents' vocational expert did identify several employment options for Claimant, the fact that Claimant applied to each one and was rejected, as well as Ms. Shriver's opinion that she would not expect any of those employers to accept Claimant as an employee given his limitations is more persuasive.

10. Section 8-40-201(16.5), C.R.S. does not mandate that a claimant produce a medical opinion that he is permanently and totally disabled because a physician does

not normally determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments. However, Claimant's authorized treating physician, Dr. Yamamoto, credibly opined that claimant is not employable. Claimant's need for constant supervision, as evidenced by the totality of his symptoms caused by his work related injuries and sequelae, is a persuasive and convincing factor in Claimant's permanent total disability.

11. A claimant's ability to earn wages within the meaning of Section 8-40-201(16.5) is not purely a medical question. Rather, in evaluating a claim for permanent total disability, the ALJ is called upon to consider the effects of the industrial injury upon the claimant's ability to earn any wages considering the claimant's physical condition, educational background, vocational history and other relevant factors. *Best-Way Concrete Company v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995)*. Further, in *Roop v. Estes/Hi-Flier, W.C. No. 4-121-928, I.C.A.O., February 17, 1994*, the I.C.A.O. held that "the claimant's testimony alone which the ALJ credited…, constitutes substantial, credible evidence of permanent total disability." In this case, lay witnesses testified that Claimant is rarely able to tolerate social interactions with family members and friends that have known Claimant for a long time. Claimant is unable to tolerate more than a limited amount of time even with his children. He has problems with frustration, anger and self-esteem, and he has a significant stutter which causes problems with communication. He is unable to tolerate stressful situations for extended periods of time including interaction with the public. This is even evidenced by Claimant's inability to continue his GED classes because of headaches caused by his TBI .

12. To the extent that a vocational counselor's testimony may be a reflection on the degree of industrial disability, such testimony cannot properly be excluded merely because it embraces an ultimate issue to be decided by the trier of fact. *Chambers v. CF&I Steel Corp., 757 P.2d 1171 (Colo. App. 1988)* (The hearing officer erred in ruling that the counselor could not testify as to which of the restrictions caused Claimant to be totally disabled from a vocational standpoint.) Respondents' vocational expert is less persuasive than Claimant's expert regarding whether Claimant has available resources that provide him access to rehabilitation that in turn would allow him to be able to earn wages in the same or other employment. Ms. Shriver was more persuasive in her opinion that any resources that may be generally available are not accessible to Claimant without significant assistance. And even if Claimant was able to access them, they would not increase his employability due to his other catastrophic limitations, including the need for supervision and the headaches that would cause excessive absenteeism. This is also supported by Claimant's wife's testimony regarding the severity of Claimant headaches.

13. Claimant proved by a preponderance of the evidence that he is unable to earn any wages and he is permanently totally disabled. Claimant's witnesses were more credible and persuasive than Respondents' witness. The ALJ observed first hand at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant has proven by a preponderance of the evidence that he is unable to earn any wages as a result of his November 18, 2013, injuries to his head, neck and low back, including his TBI and depression.

General Award of Continuing Maintenance Medical Benefits

14. Where an injured worker reaches maximum medical improvement but requires periodic medical care to prevent his condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*.

15. Once the claimant establishes the probability of need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the respondent's right to contest the compensability of any particular treatment on grounds that the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Here, Claimant has proven by a preponderance of the evidence that he continues to require maintenance care to cure and relieve him of the effects of the November 18, 2013, injuries and their sequelae. Dr. Yamamoto opined and credibly testified that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto's opinion that Claimant's condition is chronic, that he does not anticipate that Claimant's condition will heal, and that Claimant will require ongoing maintenance medical care is credible and persuasive.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant is permanently and totally disabled. Respondents shall pay Claimant permanent total disability benefits at the admitted rate commencing June 17, 2015, and continuing until terminated by law or order.

2. Claimant continues to require maintenance medical care to cure and relieve him of the work injuries and their sequelae and is entitled to a general award of maintenance medical benefits. Respondents shall pay for the Claimant's reasonably necessary medical care that is related to his November 18~~, 2103,~~2013, injuries.

3. Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

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 22, 2016

DIGITAL SIGNATURE:

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

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he is unable to earn wages and therefore is permanently totally disabled; and

b. Whether Claimant proved by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits.

c. Claimant withdrew the issue of disfigurement.

FINDINGS OF FACT

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

1.Claimant is 27 years old. Claimant has been married for nine years and he lives with his wife and two children, ages nine and two years old. Claimant sustained admitted injuries to his head, neck and back in the course and scope of his employment on November 18, 2013, when he was setting forms for an elevator and the ceiling platforms fell on top of him.

2. Claimant was first evaluated on the date of his accident at Denver Health Medical Center where he reported having 60 pounds of wood fall 10 feet onto his head at work, with loss of consciousness. Claimant's friend reported that Claimant had multiple episodes of vomiting, and "not acting normal." Claimant had complaints of headache and neck pain. X-rays of Claimant's thoracic spine showed subtle anterior wedging of one of the vertebral body in the upper lumbar region. Based on MRI findings of Claimant's lumbar spine, Claimant had a shallow, broad-based central protrusion at L5-S1, as well as straightening of the normal lumbar lordosis, which can be seen with muscular spasm.

3. Claimant's psychologist, Dr. Ricardo Esparza, diagnosed Claimant with cognitive disorder, as well as adjustment disorder with depression and anxiety.

4. The neurologist, Dr. Bennett Machanic, reported that Claimant suffered closed-head trauma with a rather significant cerebral concussion, and a posttraumatic brain injury, with a Rancho Los Amigos scale somewhere around 5 or 6*. Dr. Machanic reported that Claimant had pseudobulbar affectual disorder. He also had cervical strain, lumbosacral strain with right L4 radiculopathy. He had vestibular dysfunction, which perhaps was inner ear and associated with the head trauma. Dr. Machanic reiterated

that this was a very complex multisystem posttraumatic situation. Dr. Machanic stated, "At this point in time, the prognosis is indeed very guarded and I do not think this man is going to be returning to his previous occupational [sic] in the foreseeable future. Indeed I am quite concerned about permanent cognitive and emotional dysfunctions." (Exhibit 5) *Rancho 5 = Confused, Inappropriate, Non-Agitated: Appears alert; responds to commands; distractible; does not concentrate on task. Rancho 6 = Confused, Appropriate: Good directed behavior, needs cuing; can relearn old skills; serious memory problems; some awareness of self and others.

5. Dr. Laura Rieffel reported that Claimant's working memory was poor, stating that questions had to be repeated to him multiple times when details were involved. Claimant's speed of mental processing was noticeably slow. She also noted that Claimant ambulated slowly, cautiously and stiffly. Claimant complained of blurry vision during the peripheral vision exam. During sensory perceptual exam, Claimant became teary from tactile stimulation, of face in particular, some with touch of his hand.

6. On April 8, 2014, Dr. James Trevor McNutt reported that Claimant's EEG was abnormal due to the presence of sharp dysrhythmia noted in the left frontal and temporal regions. Dr. McNutt stated that this may indicate an underlying region of cortical hyperirritability.

7. Dr. Peter Reusswig performed multiple cervical and lumbar epidural, facet, transforaminal and rhizotomy injections throughout the course of Claimant's treatment.

8. On July 3 and 8, 2014, Claimant underwent speech/language pathology cognitive/communicative evaluation at Spalding Rehabilitation with Lois McCarthy. Claimant displayed significant deficits in cognition in terms of short-term memory, attention, and insight into his situation. He had severe deficits in oral motor skills, with significant neurogenic stuttering and weak, slow, and irregular lingual functioning. Claimant had moderate to severe deficits in visual/spatial functioning. He had difficulty with trails, symbol cancellation, clock drawing, design memory and design generation. Claimant had moderate to severe deficits in memory, as well as attention and processing. Claimant also had moderate to severe deficits in executive functions. Claimant displayed poor deficit awareness, and he also denied stuttering behavior. It was reported that Claimant required skilled speech/language therapy to address neurogenic stuttering and to initiate education and treatment for deficits in linguistic and cognitive areas.

9. Claimant was also evaluated by Dr. Steven Wilk on July 29, 2014. He diagnosed Claimant as having bilateral myalgia, bilateral anterior disc displacement with reduction, capsulitis of the bilateral temporomandibular joint, bilateral muscle spasm, and bilateral side injury to the face and neck. Dr. Wilk stated, "Patient presents with direct trauma. In my opinion, to a reasonable degree of medical certainty this disorder resulted from the accident of 11/18/2013." On November 13, 2014, Dr. Wilk reported mandibular range of motion measurements taken on 11/05/2014 were 36 mm opening, 2 mm right lateral excursion and 3 mm left lateral excursion. Normal range of motion is

44-52 mm opening and 12 mm lateral excursion. Dr. Wilk stated that due to excessive witnessed bruxism activities, he would suggest a trial of Buspirone. Dr. Wilk reported that Claimant's prognosis was unknown. However, Dr. Wilk stated, "A joint which has suffered soft tissue damage with the resultant disc dysfunction will never be normal again. It can be anticipated that the patient will have exacerbation throughout his lifetime which will require additional evaluation and treatment." Dr. Wilk also reported that Claimant continued to suffer from severe muscle spasm in the masseter muscles.

10. Dr. Brian Beatty conducted an IME for Respondents and stated, "Based on my examination, there did not appear to be any overt symptom magnification or pain behavior and overall his examination was consistent and valid."

11. About a year after Claimant's accident Dr. Machanic stated, "I have to say at this point not sure how much improvement we can achieve, and this man is very close to, if not at, maximum medical improvement." Only a few months later, on February 17, 2015, Dr. Machanic stated, "I am concerned about this man's situation. I think he has significant lingering impairments. They would include encephalopathy, neck and back pain. Not sure as to what kind of work he could do at this point."

12. Claimant participated in a Functional Capacity Evaluation on March 16, 2015, with Christine Couch. Claimant was able to demonstrate a maximum sustained sitting tolerance of 66 minutes. He was able to demonstrate a sustained standing tolerance of 28 minutes. Claimant was able to complete one of 10 laps (100 feet each). He ambulated with an antalgic gait pattern. Claimant demonstrated the ability to lift 25 pounds occasionally at all levels, with the exception of shoulder to overhead, which was limited to 5 pounds. Claimant was able to carry 25 pounds bilaterally, but only 10 pounds in either the right or left hand individually. Claimant could push 23.4 pounds of force, and pull 25 pounds of force. Claimant demonstrated consistency in 20 of 20 tests. Claimant was able to complete 10 of 40 steps of the stair climbing test, using the handrail, with antalgic gait. Claimant requested several changes of position during the evaluation due to aggravation of his symptoms. These involved seated rest breaks following standing/walking tasks and standing/walking breaks following seated tasks. Claimant had errors during testing, despite being provided with verbal instructions and demonstration. Claimant had increased heart rate during testing, and was observed as diaphoretic following testing.

13. Claimant underwent neuropsychological evaluation with Dr. Rieffel on April 21, 23, 24, and May 4, 2015. Claimant's performance was best described as slow and inaccurate with significant variability across the length of the test, suggestive of sustained attention problems. Dr. Rieffel noted that Claimant's use of a mnemonic strategy of clustering, a problem solving strategy that aids in memory recall, was actually quite ineffective for him because of his slowed mental process. Dr. Rieffel stated, "I don't know if this is a strategy that he was taught in cognitive rehab or if it was his own problem solving attempt, but unfortunately for him, it is not an effective strategy. That is, I noticed that he was expending so much energy and focus trying to cluster items on a word list, that many items were 'falling through the cracks because he

couldn't process the information quickly enough." Dr. Rieffel stated that although Claimant presented as much less distraught and depressed than on his initial presentation, mood and behavioral disturbances are still a significant impediment to gainful employment. Dr. Rieffel noted that during the feedback, Claimant's positive façade quickly dissipated, and his agitation and cognitive rigidity quickly surfaced when situations became confusing to him. The degree of Claimant's disintegration during this conversation strongly suggested that he is likely to become easily confused and consequently, irritable, perhaps acting in ways that are not typical for him, when faced with situations that are outside the norm for him. Further, although Claimant's problem solving is low normal, these skills quickly become further impaired when he is required to act/react in a stressful situation. Dr. Rieffel stated her impression that Claimant will need assistance from trusted others when making complex decisions as he is likely to have difficulty mentally managing and considering all of the variables involved. Dr. Rieffel recommended a trial of stimulant medication, if it had not already been attempted. She also recommended that Claimant continue with individual psychotherapy with a shift in focus towards what he is able to do, so that he can work against the negative self-expectations he was generating. Dr. Rieffel opined that there was enough information on the basis of Claimant's prior evaluation and current behavioral observations to diagnose him with Major Neurocognitive Disorder Due to Traumatic Brain Injury with behavioral disturbance (including disturbances of mood and agitation/irritability).

14. Claimant has treated with many different providers from the date of his injury until now and is currently being treated by David Yamamoto, M.D. On June 17, 2015, Dr. Yamamoto placed Claimant at maximum medical improvement but noted that Claimant had ongoing problems secondary to his traumatic brain injury. He continued to have headaches and dizziness. He was also still having anger issues. Claimant continued to have difficulty with his memory, as well as problems with stuttering. Claimant had ongoing problems with posterior neck pain and lower back pain. He also still had TMJ problems. Dr. Yamamoto assessed Claimant as having traumatic brain injury with ongoing symptoms including memory loss, mild confusion, mood changes, headaches, anxiety and stuttering. He also assessed Claimant as having cervical strain; lumbar strain, status post L3, L4 and L5 neurotomies; and TMJ with bruxism. Dr. Yamamoto utilized the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, to determine Claimant's impairment. For the traumatic brain injury, Dr. Yamamoto assigned 15% impairment for complex integrated cerebral function disturbances. He opined that Claimant could also receive 15% from language disturbances and emotional disturbances. For specific disorders of the cervical spine, Claimant was assigned 4% whole person impairment. For range of motion loss, he was assigned 9% whole person impairment. These combined to equal 13% cervical spine impairment. For specific disorders of the lumbar spine, Dr. Yamamoto assigned 8% whole person impairment. For range of motion loss, Claimant received 8% whole person impairment. These combined to equal 15% lumbar spine impairment. The spine impairments were combined to equal 26% whole person impairment. This was combined with the 15% traumatic brain injury impairment to equal 37% whole person impairment. Dr. Yamamoto gave Claimant a 37% whole person

impairment, and he stated that the 37% was representative of Claimant's overall clinical picture. Dr. Yamamoto recommended that Claimant be seated for at least one hour per 8 hour day, and stated that he should change positions every 30-60 minutes as needed. Dr. Yamamoto stated that Claimant would need ongoing counseling, ongoing medications for the foreseeable future, and maintenance visits every 2-4 months.

15. On July 16, 2015, Respondents filed a Final Admission of Liability, admitting liability for Medical Benefits after MMI "Per Dr. Yamamoto's report dated June 17, 2015… for related reasonable and necessary medical benefits by an authorized treating physician."

16. On August 17, 2015, Dr. Rieffel credibly reported that it is possible that further neuropsychological care will be needed as Claimant nears old age. She noted that research suggests that Claimant may experience deterioration of cognitive function at a faster rate than usual due to the loss of his cognitive reserve. If this were necessary, she would anticipate another full neuropsychological evaluation and follow ups would be needed at that time. Dr. Rieffel anticipated that Claimant will need some level of ongoing psychotherapy as well as family therapy secondary to the stress generated by his cognitive disorder and personality changes. Dr. Rieffel stated, "Due to the chronic nature of these problems, there will likely be an ebb and flow of psychological exacerbations and family/personal problems that will need to be addressed in treatment."

17. Claimant's vocational expert, Doris Shriver, reported that observations, exams and standardized tests showed Claimant had a maximum lift of 20 pounds and confirmed limitations with sitting, standing, walking, climbing, stooping, kneeling, crouching, crawling, and trunk movements when standing and sitting. Decreased range of motion, strength and motor coordination testing supported the findings. Ms. Shriver reported that Claimant's head injury, sleep deprivation and chronic pain created mental challenges. As a worker, Claimant is below the 1st percentile when compared to over 20,000 workers. Over 30 reliable and valid tests showed Claimant's traits and aptitudes to be below the 1st percentile compared to average workers. Ms. Shriver reported Claimant's weaknesses as: 1. Status-post head, neck and low back injuries; 2. English as a second language; 3. Reduced tolerance for daily tasks, leisure and work; 4. Impaired far visual acuity; 5. Impaired near visual acuity; 6. Impaired binocularity (no near depth perception); 7. Receptive language below the 1st percentile; 8. Impaired tolerance for climbing, balance, stooping, crouching, kneeling, crawling, and trunk movements when standing; 9. Positive vestibular-ocular reflexes; 10. Lifts up to 20, 15, and 15 pounds from floor to waist, waist to shoulder, and waist to overhead respectively one time; Safe lifts are 50% less when frequency is considered; 11. Impaired range of motion (trunk, neck, shoulders, hips and knees); 12. Impaired strength (bilateral upper and lower extremities); 13. Impaired light touch sensation in posterior distal arms; 14. Impaired right hand touch discrimination; 15. Scattered scores on Haptic; 16. Reading at grade level 1.6; 17. Sentence comprehension below grade level K.0; 18. Spelling at grade level K.6; 19. Arithmetic at grade level 3.5; 20. Fine motor coordination at the 0.1st percentile; 21. Gross motor coordination at the 0.1st percentile; 22. Below average

bilateral palmar pinch strength; 23. Below average right hand lateral pinch and tip pinch strength; 24. Impaired tolerance for sitting, standing, walking and lifting; 25. Emotional behaviors at the 0.2nd percentile; 26. Adaptive behaviors at the 1st percentile; 27. Clinically observed severe chronic pain; 28. Disturbed sleep due to pain. Ms. Shriver reported the following validity factors: Increase in heart rate of 20 bpm indicating valid effort with lifting; Involuntary nystagmus (jerking movement of the eyes); Limitations in ADLs consistent with impaired range of motion, strength and motor coordination; and, Chronic pain consistent with observed behaviors, loss of activity, adaptations, reliance upon others, emotional/mental challenges, pain medications and sleep disturbance. Ms. Shriver noted that many of Claimant's weaknesses were consistent with left brain hemisphere damage. Ms. Shriver recommended provisions for continued medical care and therapies, cognitive therapy and testing, emotional support for anger and frustration tolerance, complimentary alternative medicine for pain relief, essential services for self-care, shopping, cooking and household management tasks at least 2 hours per day, and a driver for medical appointments.

18. On January 19, 2016, Dr. Yamamoto noted that he had changed Claimant's lifting limits to maximum lift of 25 pounds, as his back had been bothering him more. He noted that the limits were now in line with the FCE. Also, Dr. Yamamoto noted that he did test Claimant's lifting ability and he struggled with over 25 pounds. Dr. Yamamoto reported that he did not agree with Dr. Overholt regarding weaning Claimant's medications. He also stated, "He still has some depression and in my opinion it would be a mistake to 'wean him off' antidepressants as it would likely make his depression worse." Dr. Yamamoto concluded that "If he is to work he would need constant supervision."

19. Claimant's wife and three other lay witnesses credibly testified that Claimant changed drastically after the accident. They testified that since the accident, Claimant has become intolerant, impatient, frustrated, and gets angry with everyone. He can only be around others for short periods of time before he draws away, isolates himself or goes to lie down. He has problems with concentration, comprehension and understanding since his accident. He has difficulties putting words and sentences together or engaging in conversation. Claimant has frequent headaches, at least three times a week, which are very unpredictable and can last from a day up to three days. Claimant does not get out of bed when he has the really bad headaches. Claimant's wife credibly testified at hearing. She testified that if she is not home, her mother will generally supervise Claimant and the children. Claimant's wife stated that she believes that Claimant requires constant supervision. Claimant's wife also testified that Claimant enrolled in GED classes, but that he called her during the break, halfway through the three hour class, to come pick him up because of his headaches.

20. Dr. David Yamamoto, Claimant's primary authorized treating physician, testified that he treated Claimant since January 2014, two months after his accident, and continues to treat him for maintenance care for his neck, back, depression and the traumatic brain injury (TBI). He prescribes medications for muscle spasms, neck and back pain, headaches, depression and PTSD, bruxism for TMJ, concentration and memory loss as well as medications to control his anger issues. Some of these

medications cause drowsiness, loss of appetite and jitteriness. He is taking from 10 to 12 medications at any given time. They can cause fatigue and difficulty with concentration. He is unable to control the headaches, even with medications. He has problems with concentration, focus and spatial reasoning. Claimant has problems with emotional disturbance and depression. All of these are impediments to Claimant's return to the work force. However, the major problems for Claimant are problems with memory, following instructions, confusion, concentration and staying on task. Claimant is very self-conscious due to the stuttering. He resists answering directly. Dr. Yamamoto confirmed that the medical records identify Claimant has problems with anger management, which is why he is on medication for the problem. Dr. Yamamoto stated that anger issues are common for patients with PTSD and TBI. Claimant had a significant brain injury and anger is a consequence of the brain injury. Claimant does not do well with stress.

21. Dr. Yamamoto last saw Claimant on January 19, 2016, and reviewed all the medications that Claimant is currently taking. They are important for Claimant's maintenance care. He credibly opined that Dr. Overholt was incorrect in recommending termination of maintenance medications. Dr. Yamamoto based his opinion on his evaluations, examinations and knowledge of Claimant. He also stated that Claimant's injections with Dr. Reusswig are to reduce pain and increase function. Claimant has had radiofrequency ablations that may need to be repeated as part of maintenance care. Dr. Yamamoto also does laboratory testing regarding narcotics. Dr. Yamamoto prescribes Claimant narcotics for pain and severe headaches. Dr. Yamamoto has not observed drug seeking behavior by Claimant and testing reveals that the levels of medication were appropriate. Claimant continues to be at MMI and Dr. Yamamoto opines that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto testified that Claimant's condition is chronic and that he does not anticipate that Claimant's condition will heal. Claimant requires ongoing maintenance medical care.

22. Dr. Yamamoto placed Claimant's restrictions at occasional lifting, carrying, pushing and pulling of 25 lbs., which is in addition to prior restrictions of standing and sitting up to 7 hours a day, and changing positions every 30 to 60 minutes as needed. Claimant should also avoid heights and also needs supervision because he does not have the capacity to work independently, and must be monitored or watched at all times. Claimant could do some of the jobs identified by Respondents' vocational expert so long as he was assisting someone else that was doing the jobs, could take frequent 10 minute breaks, and was allowed off when his headaches are intense. Claimant continues to report headaches consistently. He would not be able to be a car wash worker as it is very strenuous due to the bend and scrubbing of cars. Attendant car wash worker would be eliminated by the fact that he would need supervision and could not handle money. Sheltered employment might be a possibility because he needs constant supervision.

23. Dr. Yamamoto had originally given higher restrictions in order not to limit Claimant's employment search and options, but he tested Claimant personally and observed Claimant's ability to lift only up to 25 lbs. with difficulty, and with limited repetition, which was in line with the FCE evaluation performed by Christine Couch, P.T.

The FCE was a valid, consistent evaluation and Claimant was also consistent with all of Dr. Yamamoto's evaluations. Dr. Yamamoto placed him in the light to sedentary category of physical work. However, he opined that increased headaches will affect his cognitive abilities.

24. Dr. Yamamoto expected changes in the patient's traumatic brain injury between six months and a year due to the natural progression of healing. While Claimant is able to take direction, as demonstrated by his ability to take medication, those are very simple daily routines, as opposed to going to work, and very different from being in a working environment every day. Dr. Yamamoto testified that the only job Claimant could probably do is one that is around family members, in a family business, where Claimant would have people to give him specific instructions to perform different activities, though he may not be able to perform the same activities every day. Claimant has not achieved the level of recovery that would allow him to go out and work. At this time, Dr. Yamamoto opined that Claimant is not able to return to any kind of work.

25. Ms. Shriver testified as a vocational expert on behalf of Claimant. She has experience with traumatic brain injury patients, as she worked at the facility that developed the Rancho Los Amigos TBI scale and applied it in her work. A traumatic brain injury patient can have a very significant and complex array of symptoms that may include loss of range of motion, weakness, fatigue, confusion, loss of learning, inability to concentrate, inability to multitask, all of which are specifically affected by auditory and visual stimuli. Depression also affects cognition, as in this case. Claimant is unable to hide his traumatic brain injury, which is one of the reasons why Claimant is unable to obtain employment.

26. While at the hearing, Ms. Shriver observed Claimant change position frequently, lifting his buttock off of the chair by putting his weight on his arm, rubbing his head, closing his eyes, and had a nystagmus. During his FCE with Ms. Shriver, Claimant performed at the 20 lb. range. He had objective observations of demonstrated pain. He was consistently limping, showing limitation of the right leg. She observed his antalgic gait, even going into the court house, though Claimant did not know she was watching him. His loss of range of motion of the neck and low back caused foreshortening of the muscles that affect his vocational capacity, as they have limited his ability to stoop or crouch. Coordination was also assessed and gave another look at how his brain is functioning, consistent with his left brain injury. While Claimant has always been restricted to obtaining work with employers that accept primarily Spanish speaking workers, his traumatic brain injury makes his potential for employment even more difficult. Ms. Shriver, after considering all of Claimant's limitations and background, including the traumatic brain injury, testified that Claimant would be limited to a sheltered employment situation. She reviewed all of the jobs identified by Respondents' vocational expert. She stated that, in addition to his other limitations, none of the employers could handle the absenteeism that would be caused by Claimant's impairments and medical conditions, especially his headaches. Claimant does not have the skills to locate and sustain work or retain work. Claimant's wife's testimony that Claimant could not handle GED classes was expected and consistent with his testing and medical records. This brain injury is catastrophic for Claimant.

27. Ms. Shriver testified that none of the community resources or programs identified by Respondents' vocational expert effectively put people back to work, nor could they successfully rehabilitate and provide vocational retraining for Claimant due to the myriad problems facing Claimant caused by his brain injury. The only program that Ms. Shriver knows that has been of value to TBI patients is the Colorado Brian Injury Association. Also, Claimant does not have the skills required to go through any programs identified on his own. Someone would have to assist Claimant through the process. Neither is Claimant a candidate for assistance through the Division of Vocational rehabilitation. They use the McCarron Dial assessment and Claimant scored so low that they would not provide services.

28. Ms. Shriver was deemed more credible and persuasive that Respondents' vocational expert because overall she has more education, experience and training than Respondents' vocational expert and has assessed all of Claimant's physical, mental and vocational skills in reaching her ultimate opinions, not just transferable skills as Ms. Harris. Ms. Shriver testified that Claimant may be able to obtain sheltered employment and, at best, he would need to be accommodated so that he may come and go home as needed, he would need transportation when necessary and someone to help Claimant and his wife to access any kind of community support. Claimant's testing was very consistent with the diagnosis of a left brain injury. Claimant's test results could not be faked. She stated that Dr. Yamamoto's testimony at hearing only served to confirm her own opinion with regard to Claimant. Ms. Shriver further stated that, given Claimant's current functional capacity, education, background, experience, mental disabilities, she credibly opined, within a reasonable degree of vocational probability, that Claimant is not employable.

29. Finally, Claimant testified at hearing at which time he could not state his address as he could not recall it, nor could he recall the date of his injury, though he remembers that his injuries were to his back, neck, and head, and that he suffered from dizziness, headaches, and pain in his back. Claimant indicated that he has memory problems and depression. He is not allowed to be the only one with his youngest two year old daughter because he gets angry easily. Claimant believed it was due to the depression and the pain. Claimant testified that he looked for work at many places. Claimant went to school in Mexico through middle school and went to a year and a half of high school in the USA. Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

30. The ALJ observed at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant could be observed crying off and on throughout the two day hearing.

CONCLUSIONS OF LAW

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

Generally

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. 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,* 592 P.2d 792 (1979). The facts in a workers' compensation claim must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness of unreasonableness (probability or improbability) of the testimony; 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 claim is decided on its merits. Section 8-43-201, C.R.S. Further, factual findings concern only evidence that is dispositive of the issues involved; even if the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to cited findings as unpersuasive. See *Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability Benefits

3. Claimant proved by a preponderance of the evidence that he is permanently and totally disabled (PTD) as defined by Section 8-40-201(16.5), C.R.S., and has proven that he is unable to earn wages in the same or any other employment. To prove a claim for permanent and total disability, a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). For purposes of permanent total disability, "any wages" means more than zero. See *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Apps. Office*, 894 P.2d 42 (Colo. App. 1995). A claimant is not required to prove that an industrial injury is the sole cause of his inability to earn wages. However, a claimant must demonstrate that the industrial injury created some disability that ultimately contributed to the claimant's permanent total disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986). A claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.

App. 2001). The question of whether a claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

4. Here, Claimant provided overwhelming evidence that he suffered injuries to his head, neck and low back. The consequences of the injuries involve a traumatic brain injury and consequent depression. Claimant has significant symptoms of persistent headaches, dizziness, muscle spasms, neck and back pain, an antalgic gait, PTSD, TMJ, problems with concentration and memory loss as well as anger issues. Claimant is taking between 10 to 12 medications at any given time which also cause side effects, including fatigue and loss of concentration. Claimant also has problems with concentration, focus and spatial reasoning, and major problems with memory, following instructions, slowed learning, confusion, staying on task and stuttering. All of these are impediments to Claimant's return to the work force. This is consistent within the medical reports issued by Dr. Machanic and Dr. Rieffel, and as evidenced by Dr. Yamamoto and Ms. Shriver's testimony. This is also supported by the testimony of the lay witnesses.

5. The determination whether a claimant is permanently and totally disabled is made on a case-by-case basis and varies according to a claimant's particular abilities and circumstance. In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Ms. Shriver testified that considering Claimant's work restrictions as provided by Dr. Yamamoto and Claimant's left brain TBI, Claimant might be able to access some sheltered employment but only under specifically accommodated situations where he was allowed to work on good days alone and was allowed to come and go as necessary, dictated by his continuing debilitating headaches. She further testified that employers in competitive employment situations would not accommodate Claimant's particular situation.

6. Where the possibility of being retrained for employment exists, and where respondents have not offered vocational rehabilitation services, and where the injured worker would need professional assistance to be vocationally rehabilitated, and such retraining is not feasible or accessible, a finding of permanent total disability is proper. *Drywall Products v. Constuble*, 832 P.2d 957 (Colo. App. 1991) (cert. denied). See also *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Ms. Shriver testified that Claimant does not have the skills required to go through any vocational rehabilitation programs on his own. Someone would have to assist him in the process. Neither is Claimant a candidate for assistance through the Division of Vocational Rehabilitation. The Division uses the McCarron Dial assessment and Claimant scored so low that they would not provide any services.

7. One human factor is Claimant's ability to maintain employment within his physical abilities. This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining

employment. Furthermore, a claimant's occasional performance of physical activities which are useful in the labor market does not preclude a finding of permanent total disability if the evidence indicates that the Claimant is unable to sustain the activities for a sufficient period of time to be hired and paid wages. *Moller v. North Metro Community Services, W.C. No. 4-216-439, I.C.A.O., August 6, 1998*. Ms. Shriver credibly opined that, given Claimant's current functional capacity, education, background, experience, mental disabilities, within a reasonable degree of vocational probability, Claimant is not employable. She stated that Dr. Yamamoto's testimony during hearing only served to confirm Ms. Shriver's opinion with regard to Claimant. Claimant's witnesses were more credible and persuasive than Respondents' witness.

8. The crux of the inquiry is whether employment exists that is reasonably available to the claimant given his or her circumstances. This inquiry can only be answered on a case-by-case basis, and will necessarily vary according to the particular abilities and surroundings of a claimant. The factors to be considered may include consideration of the Claimant's commutable labor market or other analogous concepts which depend upon the existence of employment that is reasonably available to the claimant under his particular circumstances. The Judge is capable of making a reasoned judgment concerning a claimant's employability based on the physical restrictions, the claimant's capacity to travel, the availability of transportation, and the scope of the labor market in the claimant's community. *Weld County School District RE-12 v. Bymer, supra.* Here, Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

9. The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County*, W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer, supra.* Because the burden of proof rests with the claimant, the respondents are not obligated to find a specific job or job offer for the claimant in order to defeat a claim for permanent total disability benefits. *Moua v. Datex Ohmeda,* WC 4-526-873 (ICAO January 30, 2004); *Chavez v. Southland Corp.,* WC 4-139-718 (ICAO September 4, 1998). The ALJ may consider the failure to identify specific employment opportunities when assessing the credibility of a vocational expert's opinion that a claimant is employable and can earn wages. *Gomez v. MEI Regis,* WC 4-199-007 (ICAO September 21, 1998), aff'd., *Gomez v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA1998, June 3, 1999) (not selected for publication). Here, even though Respondents' vocational expert did identify several employment options for Claimant, the fact that Claimant applied to each one and was rejected, as well as Ms. Shriver's opinion that she would not expect any of those employers to accept Claimant as an employee given his limitations is more persuasive.

10. Section 8-40-201(16.5), C.R.S. does not mandate that a claimant produce a medical opinion that he is permanently and totally disabled because a physician does

not normally determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments. However, Claimant's authorized treating physician, Dr. Yamamoto, credibly opined that claimant is not employable. Claimant's need for constant supervision, as evidenced by the totality of his symptoms caused by his work related injuries and sequelae, is a persuasive and convincing factor in Claimant's permanent total disability.

11. A claimant's ability to earn wages within the meaning of Section 8-40-201(16.5) is not purely a medical question. Rather, in evaluating a claim for permanent total disability, the ALJ is called upon to consider the effects of the industrial injury upon the claimant's ability to earn any wages considering the claimant's physical condition, educational background, vocational history and other relevant factors. *Best-Way Concrete Company v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995)*. Further, in *Roop v. Estes/Hi-Flier, W.C. No. 4-121-928, I.C.A.O., February 17, 1994*, the I.C.A.O. held that "the claimant's testimony alone which the ALJ credited…, constitutes substantial, credible evidence of permanent total disability." In this case, lay witnesses testified that Claimant is rarely able to tolerate social interactions with family members and friends that have known Claimant for a long time. Claimant is unable to tolerate more than a limited amount of time even with his children. He has problems with frustration, anger and self-esteem, and he has a significant stutter which causes problems with communication. He is unable to tolerate stressful situations for extended periods of time including interaction with the public. This is even evidenced by Claimant's inability to continue his GED classes because of headaches caused by his TBI .

12. To the extent that a vocational counselor's testimony may be a reflection on the degree of industrial disability, such testimony cannot properly be excluded merely because it embraces an ultimate issue to be decided by the trier of fact. *Chambers v. CF&I Steel Corp., 757 P.2d 1171 (Colo. App. 1988)* (The hearing officer erred in ruling that the counselor could not testify as to which of the restrictions caused Claimant to be totally disabled from a vocational standpoint.) Respondents' vocational expert is less persuasive than Claimant's expert regarding whether Claimant has available resources that provide him access to rehabilitation that in turn would allow him to be able to earn wages in the same or other employment. Ms. Shriver was more persuasive in her opinion that any resources that may be generally available are not accessible to Claimant without significant assistance. And even if Claimant was able to access them, they would not increase his employability due to his other catastrophic limitations, including the need for supervision and the headaches that would cause excessive absenteeism. This is also supported by Claimant's wife's testimony regarding the severity of Claimant headaches.

13. Claimant proved by a preponderance of the evidence that he is unable to earn any wages and he is permanently totally disabled. Claimant's witnesses were more credible and persuasive than Respondents' witness. The ALJ observed first hand at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant has proven by a preponderance of the evidence that he is unable to earn any wages as a result of his November 18, 2013, injuries to his head, neck and low back, including his TBI and depression.

General Award of Continuing Maintenance Medical Benefits

14. Where an injured worker reaches maximum medical improvement but requires periodic medical care to prevent his condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*.

15. Once the claimant establishes the probability of need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the respondent's right to contest the compensability of any particular treatment on grounds that the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Here, Claimant has proven by a preponderance of the evidence that he continues to require maintenance care to cure and relieve him of the effects of the November 18, 2013, injuries and their sequelae. Dr. Yamamoto opined and credibly testified that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto's opinion that Claimant's condition is chronic, that he does not anticipate that Claimant's condition will heal, and that Claimant will require ongoing maintenance medical care is credible and persuasive.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant is permanently and totally disabled. Respondents shall pay Claimant permanent total disability benefits at the admitted rate commencing June 17, 2015, and continuing until terminated by law or order.

2. Claimant continues to require maintenance medical care to cure and relieve him of the work injuries and their sequelae and is entitled to a general award of maintenance medical benefits. Respondents shall pay for the Claimant's reasonably necessary medical care that is related to his November 18, 2103, injuries.

3. Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

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 11, 2016

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUE

Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment in the form of SI joint injections with sciatic nerve blocks as recommended by Usama H. Ghazi, D.O. are reasonably necessary to relieve the effects of her December 13, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

STIPULATION

The parties agreed that Respondents are financially responsible for payment of medical bills from Cherry Creek Imaging for services as delineated in Exhibit 5 and Denver Area First Assistants, LLC for services as detailed in Exhibit 6.

FINDINGS OF FACT

1. Claimant worked for Employer as a Paramedic. On December 13, 2013 she suffered an admitted industrial injury to her right knee. Claimant slipped on ice and twisted her right knee while performing her job duties for Employer. She was diagnosed with a right knee sprain.

2. Claimant initially received medical treatment at HealthOne with Authorized Treating Physician (ATP) Braden J. Reiter, D.O. She subsequently underwent conservative treatment for her right knee symptoms. A December 20, 2013 right knee MRI reflected that Claimant did not suffer an ACL tear, a meniscal tear or a medial collateral ligament injury.

3. Claimant received physical therapy, medications and injections. However, the conservative treatment failed to improve her symptoms.

4. Dr. Reiter referred Claimant to Pain Specialist Usama H. Ghazi, D.O. for an evaluation. On January 21, 2014 Dr. Ghazi evaluated Claimant for Chronic Regional Pain Syndrome (CRPS). A thermogram and QSART testing revealed that Claimant did not have CRPS.

5. On March 13, 2014 Claimant underwent an arthroscopic debridement of her right knee. She reported an approximately 70% improvement in her right knee symptoms.

6. On September 22, 2014 Claimant returned to Dr. Ghazi for an evaluation. Dr. Ghazi noted that Claimant had undergone a right patellar debridement because an arthroscopic evaluation had revealed severe fraying and tethering with an intact meniscus. Dr. Ghazi mentioned that Claimant had also received a right SI joint

injection. Claimant reported that her sciatic nerve block had alleviated her sciatica symptoms. However, although Claimant's SI joint pain significantly improved for a couple of days, it returned and she suffered severe pain. Dr. Ghazi administered right knee injections and Claimant experienced 100% pain relief. He recommended continued massage therapy and medications.

7. On November 3, 2014 Claimant returned to Dr. Ghazi for an examination. Claimant reported that she did well with her first right knee bursa injection but was still experiencing residual pain. Dr. Ghazi thus administered a repeat right knee bursa injection.

8. On January 19, 2015 Claimant reached Maximum Medical Improvement (MMI). Claimant did not receive any permanent impairment rating for her right knee or any other body part. Respondents filed a Final Admission of Liability (FAL) consistent with the January 19,2015 date of MMI and 0% permanent impairment rating.

9. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). On March 25, 2015 Stanley H. Ginsburg, M.D. was selected to perform the DIME.

10. On July 30, 2015 Claimant underwent a DIME with Dr. Ginsburg. Claimant reported continuing right knee pain as well as ongoing spasms in her back, groin, calf and thigh since her December 13, 2013 accident. Dr. Ginsburg explained that Claimant warranted a right knee permanent impairment rating but he did not assign any other rating for her right lower extremity symptoms because she only experienced intermittent spasms. He specifically remarked that Dr. Ghazi had proposed various explanations for Claimant's peripheral symptoms, but there was "no suggestion that this is lumbar radicular and a lumbar MRI was not obtained." Dr. Ginsburg also commented that "[t]here is a suggestion that SI joint problems were present, but this was not well established." He summarized that "he found no reason to rate" Claimant's psychological, chronic pain, gait abnormality, range of motion or CRPS. He emphasized that he was only assigning an impairment rating for Claimant's right knee because there was no basis for rating any other symptoms.

11. Because Claimant underwent right knee arthroscopic surgery, Dr. Ginsburg assigned an extremity impairment rating of 10% based on category 5 of Table 40 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)*. Based on Claimant's right knee range of motion deficits, he also assigned an 18% extremity impairment rating. Combining the specific disorder and range of motion impairments yields a 26% lower extremity or 18% whole person rating. Dr. Ginsburg concluded that Claimant had reached MMI on February 1, 2015. He remarked that, if there were concerns about a lumbar radiculopathy "an MRI might be considered, but this would be up to the treating physician." Dr. Ginsburg concluded that medical maintenance treatment would be appropriate for the following 12 months if the treating physician determined it would decrease Claimant's pain.

12. On August 21, 2015 Respondent filed a FAL consistent with Dr. Ginsburg's DIME determinations regarding MMI and permanent impairment. Claimant did not object to the FAL.

13. On September 16, 2015 Claimant visited Dr. Ghazi for a follow-up evaluation. She reported that she had been pain free for about five months but on August 20, 2015 she began to experience hypersensitivity in her right leg. Claimant also developed muscle spasms in the buttock area and sciatic referral pain down to her right thigh. She sought repeat SI joint injections with sciatic nerve blocks to alleviate her symptoms. Dr. Ghazi commented that Claimant had been "doing remarkably well last time I saw her, but right now she is so flared up, she looks like she has come back to square one." He scheduled Claimant for a right-sided SI joint injection with a sciatic nerve block.

14. On October 14, 2015 Claimant returned to Dr. Ghazi for an examination. Dr. Ghazi reported that Claimant's patellar debridement had caused severe knee pain. The pain caused her to walk with an abnormal gait and she developed an SI joint strain with severe gluteal spasms. Dr. Ghazi noted that Claimant experienced long-term benefits from SI joint injections with sciatic nerve blocks. He stated that he had requested authorization for repeat SI joint injections with nerve blocks on September 16, 2015 but the request had been denied. Dr. Ghazi specified that he had requested the injections to "treat the gluteal spasms and the effects of gluteal spasms on the sciatic nerve where it tunnels through the gluteal region. I believe these [we]re injured as a direct result of her knee injury secondary to gait abnormalities and left-sided side-bending and excessive use of Trendelenburg to clear the right leg."

15. On December 30, 2015 F. Mark Paz, M.D. conducted a records review of Claimant's claim. He recounted that Claimant had sustained a right knee injury at work on December 13, 2013 when she slipped on ice. After reviewing Claimant's medical records that included physical examinations and diagnostic imaging, Dr. Paz determined that Claimant's right knee patellofemoral chondromalacia was not caused by the December 13, 2013 accident. He reasoned that the chronology of Claimant's right lower extremity symptoms, including a flare-up then the resolution of symptoms, suggested that her right leg symptoms constituted a pre-existing condition. Moreover, he remarked that there had been no diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. He concluded that Claimant's right lower extremity symptoms were not causally related to her December 13, 2013 industrial injury. Dr. Paz summarized that the treatment recommendations from Dr. Ghazi for right SI joint injections with sciatic nerve blocks did not constitute reasonable, necessary and causally related medical care for Claimant's December 13, 2013 industrial injury.

16. Claimant testified at the hearing in this matter. She explained that she currently suffers pain in her lower back and SI joint region. The pain causes spasms in her right lower extremity. Claimant noted that she experiences significant pain by the end of her work shift as a Paramedic because she is on her feet for an extended period

of time. She requested the SI joint injections with nerve blocks recommended by Dr. Ghazi because they had provided past pain relief.

17. Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of SI joint injections with sciatic nerve blocks as recommended by Dr. Ghazi are reasonably necessary to relieve the effects of her December 13, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). On December 13, 2013 Claimant suffered an admitted industrial injury to her right knee. After a course of conservative treatment, Claimant underwent a right knee arthroscopic debridement on March 13, 2014. She subsequently received treatment that included SI joint injections, sciatic nerve blocks and right knee bursa injections. On July 13, 2014 Claimant underwent a DIME with Dr. Ginsburg. He explained that Claimant warranted a right knee permanent impairment rating but he did not assign any other rating for her right lower extremity symptoms because she only experienced intermittent spasms. He specifically remarked that Dr. Ghazi had proposed various explanations for Claimant's peripheral symptoms, but there was "no suggestion that this is lumbar radicular and a lumbar MRI was not obtained." Dr. Ginsburg summarized that the medical records did not reflect that Claimant had SI joint problems or gait abnormalities and thus no impairment rating other than for her right knee was warranted.

18. On September 16, 2015 Dr. Ghazi requested authorization for a right-sided SI joint injection with sciatic nerve blocks, but Respondents denied the request. Dr. Ghazi noted that Claimant had experienced long-term benefits from the procedures and specified that he had requested the injections to "treat the gluteal spasms and the effects of gluteal spasms on the sciatic nerve where it tunnels through the gluteal region." He noted that the preceding areas were injured as a direct result of her right knee injury secondary to gait abnormalities and left-sided bending. However, Dr. Paz persuasively maintained that Claimant's right knee patellofemoral chondromalacia was not caused by the December 13, 2013 accident. He reasoned that the chronology of Claimant's right lower extremity symptoms, including a flare-up then the resolution of symptoms, suggested that her right leg symptoms constituted a pre-existing condition. Moreover, he remarked that there had been no diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Dr. Paz summarized that the request for right SI joint injections with sciatic nerve blocks did not constitute reasonable, necessary and causally related medical treatment for Claimant's December 13, 2013 industrial injury.

19. Although Dr. Ghazi has recommended medical maintenance treatment in the form of sciatic nerve blocks with SI joint injections, the persuasive reports and testimony of Drs. Ginsburg and Paz reflect that the proposed treatment is not related to Claimant's December 13, 2013 right knee injury. Dr. Ginsburg summarized.that Claimant only injured her right knee and no additional ratings were warranted. Furthermore, Dr. Paz remarked that there had not been a diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Therefore, Claimant's right lower extremity symptoms were not causally related to her December 13, 2013 industrial injury. Accordingly, Claimant has

failed to present substantial evidence that any need for additional SI joint injections with sciatic nerve blocks is reasonably necessary or related to her work activities on December 13, 2013.

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. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of SI joint injections with

sciatic nerve blocks as recommended by Dr. Ghazi are reasonably necessary to relieve the effects of her December 13, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). On December 13, 2013 Claimant suffered an admitted industrial injury to her right knee. After a course of conservative treatment, Claimant underwent a right knee arthroscopic debridement on March 13, 2014. She subsequently received treatment that included SI joint injections, sciatic nerve blocks and right knee bursa injections. On July 13, 2014 Claimant underwent a DIME with Dr. Ginsburg. He explained that Claimant warranted a right knee permanent impairment rating but he did not assign any other rating for her right lower extremity symptoms because she only experienced intermittent spasms. He specifically remarked that Dr. Ghazi had proposed various explanations for Claimant's peripheral symptoms, but there was "no suggestion that this is lumbar radicular and a lumbar MRI was not obtained." Dr. Ginsburg summarized that the medical records did not reflect that Claimant had SI joint problems or gait abnormalities and thus no impairment rating other than for her right knee was warranted.

6. As found, on September 16, 2015 Dr. Ghazi requested authorization for a right-sided SI joint injection with sciatic nerve blocks, but Respondents denied the request. Dr. Ghazi noted that Claimant had experienced long-term benefits from the procedures and specified that he had requested the injections to "treat the gluteal spasms and the effects of gluteal spasms on the sciatic nerve where it tunnels through the gluteal region." He noted that the preceding areas were injured as a direct result of her right knee injury secondary to gait abnormalities and left-sided bending. However, Dr. Paz persuasively maintained that Claimant's right knee patellofemoral chondromalacia was not caused by the December 13, 2013 accident. He reasoned that the chronology of Claimant's right lower extremity symptoms, including a flare-up then the resolution of symptoms, suggested that her right leg symptoms constituted a pre-existing condition. Moreover, he remarked that there had been no diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Dr. Paz summarized that the request for right SI joint injections with sciatic nerve blocks did not constitute reasonable, necessary and causally related medical treatment for Claimant's December 13, 2013 industrial injury.

7. As found, although Dr. Ghazi has recommended medical maintenance treatment in the form of sciatic nerve blocks with SI joint injections, the persuasive reports and testimony of Drs. Ginsburg and Paz reflect that the proposed treatment is not related to Claimant's December 13, 2013 right knee injury. Dr. Ginsburg summarized that Claimant only injured her right knee and no additional ratings were warranted. Furthermore, Dr. Paz remarked that there had not been a diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Therefore, Claimant's right lower extremity symptoms were not causally related to her December 13, 2013 industrial injury. Accordingly, Claimant has failed to present substantial evidence that any need for additional SI joint injections with sciatic nerve blocks is reasonably necessary or related to her work activities on December 13, 2013.

ORDER

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

1. Claimant's request for medical maintenance benefits in the form of SI joint injections with sciatic nerve blocks is denied and dismissed.

2. Respondents are financially responsible for payment of medical bills from Cherry Creek Imaging for services as delineated in Exhibit 5 and Denver Area First Assistants, LLC for services as detailed in Exhibit 6.

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 6, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The following issues were raised for consideration at hearing:

a. Whether issue preclusion is applicable in this matter;

b. Whether Respondents overcame the opinion of the Division independent medical examiner (DIME) on the issue of maximum medical improvement (MMI) by clear and convincing evidence;

c. Whether Claimant is entitled to reasonably necessary and related medical benefits to cure and relieve her left upper extremity of the effects of the December 13, 2013, industrial injury; and

d. Whether Claimant established by a preponderance of the evidence that she is entitled to an order awarding temporary disability benefits.

FINDINGS OF FACT

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

1. Claimant is a 54 year old female who worked for Employer as a wheelchair attendant. Claimant first sought treatment on December 17, 2013, reporting that she lifted heavy luggage on December 13, 2013, and experienced pain in her bilateral hands. Claimant also reported that she squeezed pulls or handles to release the brakes on the wheelchairs which caused increased pain, swelling and catching.

2. Claimant was previously diagnosed with carpel tunnel syndrome bilaterally years earlier. Surgery was planned but the symptoms improved so surgery was never performed. Claimant reported that she had no trouble with her wrists until December 2013 when Claimant's left ring finger and right middle finger was catching and getting stuck. Claimant was diagnosed with bilateral hand tenosynovitis and trigger fingers. Claimant was referred to occupational therapy, given 800 mg ibuprofen and placed on work restrictions. Claimant also had seven sessions of physical therapy. Dr. Sachar administered trigger point injections in both trigger fingers.

3. On January 31, 2014, Claimant saw Dr. Aschberger for EMG/NCV evaluation. Claimant returned to Dr. Sachar on February 3, 2014, who noted that Claimant continued to experience bilateral numbness and tingling despite the trigger point injections and Dr. Aschberger recommended and sought authorization for surgery for trigger finger release and carpel tunnel surgery, bilaterally.

4. In February 2014, Claimant underwent an independent medical evaluation (IME) with Dr. Wallace Larsen. Dr. Larsen opined that the trigger finger and bilateral carpel tunnel was not work related and therefore, surgery was not reasonably necessary or related to the work injury. Dr. Larsen opined that Claimant's conditions were idiopathic and trigger finger could not be caused by an occupational lifting incident.

5. Respondents filed a Notice of Contest in this matter. Claimant filed an Application for Hearing on April 21, 2014. The matter proceeded to hearing on October 9, 2014, in Denver, Colorado. The matter was heard and decided by Administrative Law Judge Edwin L. Felter (ALJ Felter). A Findings of Fact, Conclusions of Law and Order was issued by ALJ Felter on October 21, 2014, on the issues of compensability and medical benefits. ALJ Felter found that the right trigger finger release surgery was a reasonably necessary and related medical benefit. ALJ Felter further ruled that the right carpel tunnel surgery may be a reasonably necessary and related medical benefits if it is a necessary and ancillary prerequisite to the right trigger finger release procedure. He ruled that Claimant's left upper extremity condition was not work related.

6. Claimant did not appeal ALJ Felter's Order denying the compensability of the left upper extremity condition. A Final Admission of Liability was filed on May 12, 2015, after the treatment for Claimant's right hand was completed.

7. Claimant objected and requested a Division Independent Medical Examination (DIME). Claimant's Application for the DIME listed the left hand and left upper extremity as issues to be addressed by the DIME doctor.

8. Respondents objected to Claimant's request that the DIME physician considered the left upper extremity. Respondents requested a prehearing conference to strike Claimant's request that the DIME physician consider the left upper extremity. Respondents contended that it was judicially determined in ALJ Felter's October 21, 2014, Order that the left hand and left upper extremity were not causally related to her work injury. Following the prehearing conference, the prehearing administrative law judge (PALJ) permitted the left hand and left upper extremity to be addressed by the DIME physician, Carolyn Burkhardt.

9. Dr. Burkhardt issued her DIME report on August 13, 2015, concluding that Claimant is not at MMI because she requires treatment for the left carpel tunnel syndrome and left trigger finger.

10. Respondents filed an Application for Hearing challenging the DIME report. Specifically, Respondents listed as an issue, "Overcoming DIME report indicating Claimant is not at MMI, even though body part in dispute has been judicially determined to not be a work related injury."

11. Prior to a hearing on the Respondents' Application, Respondents again requested a Prehearing conference and it was ordered. The PALJ issued an October 8, 2015, order requesting the DIME physician review ALJ Felter's orders of October 2014 which found that Claimant's left hand was not causally related to her work incident.

12. Dr. Burkhardt issued an Addendum to her DIME report on November 20, 2015, affirming that Claimant's left upper extremity condition is casually related to the work injury and that Claimant is not at MMI and the left carpel tunnel surgery and left trigger finger release are reasonably necessary and related medical benefits.

13. At the March 8, 2016, hearing in this matter, Respondents contend that it was Claimant's burden of proof to establish by clear and convincing evidence that Dr. Burkhardt's opinion regarding worsening of condition was most probably incorrect. Respondents took the position that issue preclusion prevented redetermination of the question whether Claimant's left upper extremity is a component of the work injury since that issue was already judicially determined. Respondents argued that the judicial determination by ALJ Felter in October 2014 that the left upper extremity was not causally related to the work injury is the law of the case and cannot be relitigated here. Thus, Respondents did not present clear and convincing evidence that the MMI determination is most probably incorrect.

CONCLUSIONS OF LAW

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

GENERAL LEGAL AUTHORITY

1.The purpose of the "Worker's Compensation Act of Colorado" (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Worker's Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Sections 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 12985); *Faulkner v. Industrial Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000). 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 Worker's Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A Worker's Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. The Findings of Fact only concern evidence that is dispositive of the issues involved. Not every piece of evidence that would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. *See*

Magnetic Engineering, Inc., v. ICAO, 5 P.3d 385(Colo. App. 2000); *Boyer v. Wal-Mart Stores, Inc.*, W. C. No. 4-460-359 (Industrial Claim of Appeals Office, August 28, 2001).

ISSUE PRECLUSION

4. Respondents contend that the issue whether Claimant's left upper extremity is work related has been judicially determined in ALJ Felter's order of October 21, 2014. The hearing before ALJ Felter concerned the issues of compensability and medical benefits. Respondents argue that on the grounds of issue preclusion the determination that Claimant's left upper extremity condition is not related to the work injury cannot be relitigated. Respondents further contend that the conclusion reached by ALJ Felter in the October 21, 2014, order that Claimant's left upper extremity condition was not work related controls the DIME determination. Respondents argue an order should be entered here finding that the DIME determination on MMI is incorrect and that Claimant is at MMI for all components of the work injury.

5. Collateral estoppel, or issue preclusion, is a judicially created, equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4403 (1981). The doctrine serves to relieve parties of multiple lawsuits, conserve judicial resources, and promote reliance on the judicial system by preventing inconsistent decisions. *Bebo Constr.*, 990 P.2d at 84. Although originally developed in the context of judicial proceedings, issue preclusion is just as viable in administrative proceedings and may bind parties to an administrative agency's findings of fact or conclusions of law. *Id.* at 85; *Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1*, 732 P.2d 616, 620 (Colo. 1987).

6. Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo Constr.*, 990 P.2d at 85; *Guar. Nat'l Ins. Co. v. Williams*, 982 P.2d 306, 308 (Colo. 1999); *Indus. Comm'n*, 732 P.2d at 619-20. Only when each of these elements has been satisfied are the equitable purposes of the doctrine furthered by issue preclusion. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001).

7. It is settled law that a full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, *Maryland Cas. Ins. Co. v. Messina*, 874 P.2d 1058, 1062 (Colo. 1994), but also that the party against whom collateral estoppel is asserted have had the same incentive to vigorously defend itself in the previous action, *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d at 1166-67; Restatement (Second) of Judgments § 28(5)(c) & cmt. j (1982). These considerations apply equally to the

adjudication of workers' compensation benefits. *Sunny Acres Villa, Inc. v. Cooper, supra*.

8. An Industrial Claim Appeal Panel (the Panel) in *Jose Ortega v. JBS USA, LLC and Zurich American Insurance Company, W.C. No.4-804-825 (June 27, 2013*) addressed a similar issue as is raised in this case applying the analysis of *Sunny Acres Villa, Inc. v. Cooper, supra,* and concluding that issue preclusion was inapplicable because the issues of compensability and the DIME's MMI determination were not identical. The Panel in *Jose Ortega, supra,* concluded since the standard of review in the compensability case is by a preponderance of the evidence and the standard of review of the DIME determination is by clear and convincing evidence issue preclusion cannot be applied to constrain either the decision of the DIME physician or the administrative law judge. The Panel explained that,

> The difficulty with the respondents' position lies in the extent it would allow for the prelitigation of the MMI and impairment rating issues prior to the application of the DIME process. Those issues would be determined at hearing by a preponderance of the evidence standard, the statute, however, provides that a DIME determination of those issues is to be reviewed at a hearing by a clear and convincing standard. The tactic of litigating those issues, by either party, as a means of obtaining an advantage in the DIME process is inconsistent with the aim of the statute.

DIME PHYSICIAN'S DETERMINATION OF MMI

9. Respondents contend that the DIME determination of MMI is incorrect. Respondents' argument is premised on the proposition that ALJ Felter's October 2014 judicial determination that Claimant's left upper extremity condition is not related to the work injury is controlling in the DIME process. Respondents argue that issue preclusion prevents relitigation of the issue of the relatedness of the left upper extremity condition. Respondents did not present medical evidence to prove that the DIME physician's MMI determination was incorrect. Respondents simply assert that the relatedness of the left upper extremity condition has already been determinate and therefore the DIME determination of MMI is incorrect.

10. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*,

supra. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

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

12. In this case, the DIME physician determined that Claimant's left upper extremity is part of the compensable work injury of December 13, 2013, and that Claimant is not at MMI because the left upper extremity requires additional medical treatment to cure and relieve Claimant from the effect of the industrial injury. Respondents failed to present clear and convincing evidence that the DIME physician's MMI determination is most probably incorrect.

MEDICAL BENEFITS

13. Claimant contends that she proved by a preponderance of the evidence that she requires reasonably necessary and related medical benefits for the left upper extremity condition. The DIME physician recommended that Claimant receive medical treatment for the left upper extremity. The DIME physician recommended treatment for the left carpel tunnel syndrome and trigger finger.

14. 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).

15. It is concluded that Claimant proved by a preponderance of the evidence that she is entitled to an order for medical treatment to cure and relieve her of the effect of the industrial injury for left upper extremity.

TEMPORARY TOTAL DISABILITY BENEFITS

16. No argument was made by Claimant in support of her claim for TTD benefits. Respondents' view of the case is that Claimant is not entitled to TTD because any incapacity or wage loss because of the left upper extremity is not compensable. 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. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal

connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in Section 8-42-105(3), C.R.S. *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. In this case, Claimant did not present evidence that she is disabled from her usual employment, thus evidence in support of an award of temporary disability benefits has not been established..

ORDER

It is therefore ordered that:

1. Issue preclusion is not applicable in this matter.

2. Respondents failed to establish by clear and convincing evidence that the DIME physician's determination of MMI is most probably incorrect.

3. Respondents shall be liable for reasonably necessary and related medical benefits to cure and relieve Claimant of the effects of the industrial injury in the left upper extremity.

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 20, 2016_

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

1. .Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-11(G) by failing to timely reimburse him for medical mileage expenses.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 15, 2016 until terminated by statute.

FINDINGS OF FACT

1. On October 24, 2013 Claimant sustained an admitted industrial injury to his left shoulder during the course and scope of his employment with Employer in case number WC 4-947-316-01.

2. On November 22, 2013 Claimant suffered additional injuries while working for a second employer in case number WC 4-935-813. The second employer admitted liability for foot and ankle injuries but denied liability for any aggravation of Claimant's left shoulder condition.

3. In a March 4, 2015 Summary Order ALJ Broniak dismissed Claimant's claim for additional benefits in case number WC 4-947-316-01. ALJ Broniak also denied and dismissed Claimant's claim for Workers' Compensation benefits in case number WC 4-935-813.

4. On July 31, 2015 the Industrial Claim Appeals Office (ICAP) affirmed ALJ Broniak's Order except in regard to additional medical benefits in case number WC 4-947-316. The ICAP reasoned that ALJ Broniak had incorrectly implicitly determined that Claimant reached Maximum Medical Improvement (MMI) in case number WC 4-947-316-01 in the absence of a finding of MMI by an Authorized Treating Physician (ATP) or a Division Independent Medical Examination (DIME) physician. The ICAP thus concluded that Claimant was not precluded from obtaining future medical benefits in case number WC 4-947-316-01 subject to Respondents' ability to challenge any particular treatment.

5. On September 4, 2014 Claimant submitted medical mileage reimbursement requests to Respondents based on his initial October 24, 2013 left shoulder injury. After Respondents requested additional information about the reimbursement, Claimant submitted a mileage log and accompanying medical records regarding his left shoulder injury.

6. On October 19, 2015 Insurer sent a letter to counsel for Claimant stating that "mileage will only be paid from 10/25/13 to 11/6/13. Mileage submitted beginning 12/17/13 through 12/18/14 will be denied. It is not clear if the mileage submitted is related solely or in part to your initial date of injury of 10/24/13 or if it is related to the subsequent injury that occurred in November 2013."

7. On November 5, 2015 Claimant responded to the October 19, 2015 letter by submitting additional details and information about the medical mileage reimbursement request. Insurer replied that the issue was whether Claimant's mileage reimbursement request pertained to his October 24, 2013 left shoulder injury or the November 22, 2013 incident.

8. On December 16, 2015 Claimant filed an Application for Hearing in the present matter or case number WC 4-947-316-03. He noted that he was seeking penalties. Claimant recited a medical mileage dispute with Insurer and detailed the correspondence between the parties. However, Claimant did not cite to the statute or a specific subsection of W.C.R.P. 16-11 on which penalties were predicated. Claimant also did not specify the dates on which the violations occurred.

9. On February 8, 2016 the employer in case number WC 4-935-813 filed a Final Admission of Liability (FAL) reflecting that Claimant had received TTD benefits for the period November 23, 2013 until January 14, 2016. The employer noted that Claimant had reached MMI in case number WC 4-935-813 on January 15, 2016 and terminated TTD benefits.

10. Claimant has not reached MMI for his October 24, 2013 industrial injury in case number WC 4-947-316-03. However, he has not received TTD benefits since January 14, 2016.

11. Claimant's Case Information Sheet in the present case only stated that he was seeking penalties based on a violation of "Rule 16-11." At the hearing in this matter Claimant requested penalties pursuant to W.C.R.P. 16-11(G) for Respondents' failure to timely pay mileage reimbursement.

12. Claimant has failed to establish that it is more probably true than not that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-11(G) by failing to timely reimburse him for medical mileage expenses. The record reveals that Claimant has failed to plead his request for penalties with specificity as required by 8-43-304(4), C.R.S. Claimant has sought penalties in a variety of fashions at various points in the proceedings. His Application for Hearing noted that he was seeking penalties. Claimant recited a medical mileage dispute with Insurer and detailed the correspondence between the parties. However, Claimant did not cite to the statute or a specific subsection of W.C.R.P. 16-11 on which penalties were predicated. Moreover, Claimant's Case Information Sheet only noted that he was seeking penalties based on a violation of "Rule 16-11." Finally, at the hearing in this matter Claimant requested penalties pursuant to W.C.R.P. 16-11(G) for Respondents' failure to timely pay mileage reimbursement.

13. Claimant's general penalty allegations did not provide Respondents with adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. He did not mention Rule 16-11(G) until the hearing in this matter. Claimant also failed to apprise Respondents of the "grounds" on which he was seeking penalties as required under §8-43-304(4), C.R.S. Because of Claimant's lack of specificity, Respondents did not receive the opportunity to properly present evidence and argument in support of their position. Accordingly, Claimant's request for penalties is denied and dismissed.

14. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period January 15, 2016 until terminated by statute. Claimant's TTD benefits were discontinued when he reached MMI in case number WC 4-935-813.on January 14, 2016. However, Claimant has not reached MMI in case number WC 4-947-316-03, he has not returned to regular or modified employment and the attending physician has not provided him with a written release to return to regular employment. Furthermore, the attending physician has not given Claimant a written release to return to modified employment, the employment was not offered in writing and Claimant did not fail to begin the employment. Because none of the criteria for terminating TTD benefits pursuant to §8-42-105(3)(a)-(d), C.R.S. has been satisfied, Claimant is entitled to receive continuing TTD benefits. Accordingly, Claimant shall receive TTD benefits in case number WC 4-947-316-03 for the period January 15, 2016 until terminated by statute.

CONCLUSIONS OF LAW

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

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

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

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

Penalties

4. A party may be penalized under §8-43-304(1), C.R.S. for up to $1,000 day for any failure, neglect or refusal to obey and lawful order made by the director or panel. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. Ct. App. 2003). The moving party for a penalty bears the burden of proving that a party failed to take an action that a reasonable party would have taken. *City of County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-65 (Colo. Ct. App. 2002). Once the prima facie showing of unreasonableness has been made, the burden of persuasion shifts to the party who committed the alleged penalty to show that the conduct was reasonable under the circumstances. *See e.g. Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Postlewait v. Midwest Barricade*, 905 P.2d 21, 23 (Colo. App. 1995).

5. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

6. Pursuant to §8-43-304(4), C.R.S. the party seeking penalties "shall state with specificity the grounds on which the penalty is being asserted." The failure to state with specificity the grounds on which a penalty is asserted subjects the claim to dismissal. *In Re Claim of Horiagon*, W.C. No. 4-985-020 (ICAP, Mar. 15, 2015); *see Salad v. JBS USA, LLC,* W.C. No. 4-886-842-04 (Mar. 5, 2014). The requirement for specificity serves two functions. First, it notifies the potential violator of the basis of the claim so that the violator may exercise its right to cure the violation. Second, the specificity requirement ensures that the potential violator will receive notice of the legal and factual basis for the penalty claim. *In Re Claim of Lovett*, W.C. 4-808-092-04 (ICAP, Aug. 30, 2013); *see Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Jakel v. Northern Colorado Paper Inc.*, W.C. No. 4-524-991 (Oct. 6, 2003).

7. The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in the due process

requirements is the concept that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *In Re Claim of Horiagon*, W.C. No. 4-985-020 (ICAP, Mar. 15, 2015); s*ee Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990); *Carson v. Academy School District # 20*, W.C. No. 4-439-660 (Apr. 28, 2003).

8. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-11(G) by failing to timely reimburse him for medical mileage expenses. The record reveals that Claimant has failed to plead his request for penalties with specificity as required by 8-43-304(4), C.R.S. Claimant has sought penalties in a variety of fashions at various points in the proceedings. His Application for Hearing noted that he was seeking penalties. Claimant recited a medical mileage dispute with Insurer and detailed the correspondence between the parties. However, Claimant did not cite to the statute or a specific subsection of W.C.R.P. 16-11 on which penalties were predicated. Moreover, Claimant's Case Information Sheet only noted that he was seeking penalties based on a violation of "Rule 16-11." Finally, at the hearing in this matter Claimant requested penalties pursuant to W.C.R.P. 16-11(G) for Respondents' failure to timely pay mileage reimbursement.

9. As found, Claimant's general penalty allegations did not provide Respondents with adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. He did not mention Rule 16-11(G) until the hearing in this matter. Claimant also failed to apprise Respondents of the "grounds" on which he was seeking penalties as required under §8-43-304(4), C.R.S. Because of Claimant's lack of specificity, Respondents did not receive the opportunity to properly present evidence and argument in support of their position. Accordingly, Claimant's request for penalties is denied and dismissed. *See In Re Claim of Lovett*, W.C. 4-808-092-04 (ICAP, Aug. 30, 2013) (affirming the ALJ's denial of penalties for the claimant because the claimant'srequest for penalties under Rule 16 "in a variety of fashions at various points in the proceedings" constituted a deficient basis for penalties because it did not "state with specificity the grounds" on which the penalties were sought).

TTD Benefits

10. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any

of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

11. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period January 15, 2016 until terminated by statute. Claimant's TTD benefits were discontinued when he reached MMI in case number WC 4-935-813.on January 14, 2016. However, Claimant has not reached MMI in case number WC 4-947-316-03, he has not returned to regular or modified employment and the attending physician has not provided him with a written release to return to regular employment. Furthermore, the attending physician has not given Claimant a written release to return to modified employment, the employment was not offered in writing and Claimant did not fail to begin the employment. Because none of the criteria for terminating TTD benefits pursuant to §8-42-105(3)(a)-(d), C.R.S. has been satisfied, Claimant is entitled to receive continuing TTD benefits. Accordingly, Claimant shall receive TTD benefits in case number WC 4-947-316-03 for the period January 15, 2016 until terminated by statute.

ORDER

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

1. Claimant's request for penalties is denied and dismissed.

2. Claimant shall receive TTD benefits for the period January 15, 2016 until terminated by statute.

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

DATED: April 12, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

#KSDPQSF60D16U0v 2

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Respondents overcame the opinion of the Division independent medical examiner (DIME) by clear and convincing evidence on the issue of maximum medical improvement (MMI);

b. Whether Claimant proved by a preponderance of the evidence that the medical benefits recommended by Dr. Snyder, revision hip arthroscopy and possible micro-fracture, are reasonably necessary and related medical benefits;

c. Whether Claimant was disabled from his usual employment by the work injury and therefore entitled to an order awarding temporary total disability benefits (TTD) beginning January 20, 2015, through August 16, 2015;

d. Whether Claimant was partially disabled from his usual employment and therefore entitled to an order awarding temporary partial disability benefits (TPD) beginning August 17, 2015, and continuing until terminated by law; and

e. Whether Claimant's average weekly wage (AWW) should be increased by COBRA as of March 1, 2015.

STIPULATIONS

The issue of permanent partial disability and, specifically, the issue of conversion is reserved for later determination.

FINDINGS OF FACT

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

1. Claimant was employed by United Parcel Service on January 30, 2014, as a delivery driver.

2. On January 30, 2014, he was unloading the back of a truck. He bent over to lift a bag weighing approximately 70 lbs. out of the truck and as he came up from a flexed position at the hip, he had immediate pain in his right groin area.

3. Claimant was diagnosed with a labral tear, femoral acetabular impingement and psoas tendon impingement. On June 9, 2014, he underwent a hip arthroscopy, decompression/reshaping of the hip socket. A labral reconstruction was attempted but the graft that was utilized would not hold. Claimant also had a cartilage injury on his femoral head and a microfracture of that was performed. The surgery was performed by Joshua Snyder, M.D.

4. On August 25, 2014, Claimant underwent a labrum reconstruction.

5. Kevin O'Toole, D.O. placed Claimant at MMI on January 20, 2015. He recommended maintenance medical care consisting of follow up examinations with the surgeon, Dr. Synder.

6. Respondents filed a Final Admission of Liability on February 4, 2015, in accordance with Dr. O'Toole's report. Respondents terminated Claimant's TTD on January 19, 2015, based upon the determination of MMI by Dr. O'Toole. Claimant requested a DIME.

7. While the DIME process was in progress, Claimant followed up with Dr. Snyder on March 26, 2015. He was still using a cane and having more pain than would be expected following a labral reconstruction. Dr. Snyder therefore ordered another MRI.

8. The MRI showed that there was "increase of chondral damage along an area that was previously damaged in the acetabulum along the fovea."

9. Dr. Snyder recommended a repeat revision hip arthroscopy.

10. Claimant was examined by Dr. O'Toole on May 21, 2015. He referred Claimant back to Dr. Snyder for repeat hip arthroscopy and recommended case reopening. Dr. O'Toole changed Claimant's permanent work restrictions back to temporary work restrictions. He intended to see Claimant again after surgery.

11. Franklin Shih, M.D. performed a DIME on June 11, 2015. He determined Claimant was not at MMI. Dr. Shih wrote, "I would consider the progressive pathology in the hip to be related back to the original injury and treatment to be reasonable and necessary associated with the original injury."

12. Respondents had a Rule 16 review of the request for authorization of surgery done by Eric O. Ridings, M.D. on June 2, 2015. He opined surgery should not be authorized because the chondral injury was "minor" and the chances of success of the surgery relieving Claimant's current complaints is low.

13. Claimant began a new job as of August 17, 2015. He is working at a restaurant called Nick's as a pizza cook.

14. Claimant lost his health insurance benefits as of March 1, 2015.

CONCLUSIONS OF LAW

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

GENERAL LEGAL AUTHORITY

1.The purpose of the "Worker's Compensation Act of Colorado" (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Worker's Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Sections 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 12985); *Faulkner v. Industrial Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000). 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 Worker's Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A Worker's Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. The Findings of Fact only concern evidence that is dispositive of the issues involved. Not every piece of evidence that would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. *See Magnetic Engineering, Inc., v. ICAO,* 5 P.3d 385(Colo. App. 2000); *Boyer v. Wal-Mart Stores, Inc.*, W. C. No. 4-460-359 (Industrial Claim of Appeals Office, August 28, 2001).

DIME DETERMINATION

4 Respondents failed to meet their burden of proof of overcoming the DIME's opinion by clear and convincing evidence that Claimant is not at maximum medical improvement.

5. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. In order to prove a fact or proposition by "clear and convincing evidence," the trier of fact, after considering all of the evidence, must find it to be highly probable and free from

serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

6. The Division Independent Medical Examiner, Franklin Shih, M.D., determined Claimant was not at MMI. He credibly opined: "I would consider the progressive pathology in the hip to be related back to the original injury and treatment to be reasonable and necessary associated with the original injury." Dr. Shih's DIME determination includes his opinion that Claimant's chondral condition is related to the work injury.

7. Dr. O'Toole, Claimant's primary authorized treating physician, credibly opined that Claimant should be not be considered at MMI due to his need for surgery. Dr. Snyder requested authorization to perform a revision hip arthroscopy. He testified that the request was made to evaluate the labrum. He explained that sometimes MRI's do not detect small injuries of the labrum. The surgery would also evaluate the cartilage injury. Dr. Snyder would perform either a chondroplasty or proceed with a second microfracture.

8. When an industrial injury leaves the body in a weakened condition and the weakened condition causes additional physical injury, the additional injury may be considered the result of the industrial injury. *See Standard Metals Corp. v. Ball,* 474 P.2d 622 (Colo. 1970). Dr. Snyder was asked to explain how Claimant developed the chondral injury. He testified that Claimant could have developed the injury in physical therapy. He also testified that it could have happened during the original injury and developed slowly over time. Dr. Snyder credibly testified that it would not have developed in an individual with a normal hip during their active daily living routine. "In someone that's had surgery on their hip, has had an injury to their hip, has had a previous pincer lesion, those patients or those people are at risk for something like that, but somebody that has a normal hip just normal daily activities you would not necessarily see a chondral injury." Dr. Snyder went on to explain that he frequently sees people with a pincer lesion that have no pain and then a labral tear often is the inciting factor for the onset of symptoms.

9. The reports of Eric Ridings, M.D., the medical records, and Joshua Snyder, M.D.'s reports and deposition testimony, did not constitute clear and convincing evidence that Dr. Shih's MMI determination was most probably incorrect.

MEDICAL BENEFITS

10. Claimant contends that he proved by a preponderance of the evidence that he requires medical treatment to cure and relieve him of the effects of the industrial injury. 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).

11. Claimant established by a preponderance of the evidence the medical benefits sought are reasonably necessary and related. Dr. Snyder credibly testified that the revision hip arthroscopy is reasonable and necessary. Dr. Shih agreed with this recommendation. Dr. Snyder credibly testified that the recommended surgery is reasonable and necessary because: a) Claimant had a good result from his prior two surgeries, he just did not have a full recovery; b) The surgery is necessary despite the fact that injury is "small" or "mild"; and c) The surgery is necessary because there is a lesion that is identified on the MRI and can be treated. Dr. Snyder further credibly opined that the surgery will likely improve Claimant's pain level and his function. Dr. Snyder noted that the natural history of the injury, without surgery, is that it will get bigger over time and Claimant will eventually progress to osteoarthritis and likely need a hip replacement.

TTD/TPD

12 . Claimant contends that he proved by a preponderance of the evidence that he is entitled to TPD and TTD. On April 13, 2016, Claimant filed a Motion to Reconsider the Summary Order in this matter. In the Motion to Reconsider, Claimant contends that the award of TTD should commence on January 20, 2015, and not on May 21, 2015, as reflected in the Summary Order. The Motion to Reconsider is granted, as follows.

13. 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. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits

ordinarily continue until one of the occurrences listed in Section 8-42-105(3), C.R.S. *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

14. The DIME determined that Claimant is not at MMI. Dr. Kevin O'Toole, the authorized treating physician, originally determined Claimant was at MMI as of January 20, 2015. Dr. O'Toole later determined Claimant was not at maximum medical improvement as of May 21, 2015. Dr. Shih opined that he was in agreement with Dr. O'Toole's assessment with regard to MMI. Claimant had work restrictions and was disabled from his usual employment commencing January 20, 2015. His disability continued until Claimant started work at Nick's on August 17, 2015. Claimant is entitled to temporary total disability benefits starting January 20, 2015, through August 16, 2015. Claimant is entitled to temporary partial disability benefits from August 17, 2015 and continuing until terminated by law.

AWW

15. Claimant has failed to meet his burden of proof regarding an increase in his average weekly wage due to his loss of health insurance benefits. The Workers' Compensation Act (Act) defines wages as follows:

> (a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.
>
> (b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or less insurance plan. If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

Section 8-40-201(19), C.R.S. 2015.

16. A claimant's AWW may include the cost of continuing the employer's health coverage pursuant to the Consolidated Omnibus Budget and Reconciliation Act of 1985 (COBRA). *Stegman v. Sears*, W.C. No. 4559482 & 4483695 (ICAO July 27, 2005).

17. Claimant testified that he lost his employer provided health insurance as of March 1, 2015 and became eligible for COBRA. The cost of COBRA coverage forms the basis of the calculation for an increase in the average weekly wage. There was no evidence presented by either party regarding the cost of COBRA and therefore the average weekly wage is not increased at this time.

ORDER

It is therefore ordered that:

1. Respondents failed to establish by clear and convincing evidence the DIME determination regarding MMI is most probably incorrect.

2. Respondents shall be liable for reasonably necessary and related medical benefits

3. Respondents shall be liable for TTD benefits from January 20, 2015, through August 16, 2015, and TPD from August 17, 2015, and continuing until terminated by law.

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 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 21, 2016

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones, 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 4-948-656-03

ISSUES

- Whether Claimant overcame the DIME's impairment rating by clear and convincing evidence?
- Whether Claimant overcame the DIME's MMI determination by clear and convincing evidence?
- The issues of disfigurement, medical benefits, and average weekly wage were withdrawn.

FINDINGS OF FACT

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

1. On July 9, 2013, Claimant sustained a compensable occupational injury while performing duties arising out of the course and scope of her employment for Employer. Claimant was lifting a heavy piece of luggage onto a conveyor belt when she lost her balance and fell, hitting her right hip, right buttocks, and her low back. Immediately after the injury, Claimant experienced pain in her lower back and right hip.

2. The same day, Claimant sought medical treatment for her lower back and right hip at OccMed Colorado. David Williams, M.D., initially diagnosed Claimant with a right hip contusion, a lumbar strain, and radiculitis. Dr. Williams also recommended obtaining MRIs of the lumbar spine and right hip which were performed on July 16, 2013.

3. The MRI of the lumbar spine revealed evidence of chronic disc desiccation and degeneration with slight loss of disc height. A broad based concentric mild annular disc bulge was present without focal protrusion of disc material. The MRI also identified that Claimant had a congenitally small spinal canal at that level and that the mild annular bulge caused minor compression of the lateral recesses, mildly abutting the L5 nerve root. No other abnormality was detected in Claimant's lumbar spine.

4. The MRI of the right hip was read to show, "mild degenerative changes in the right hip with enlargement and degeneration and tearing of the acetabular labrum superiorly, chondral thinning and mild subchondral marrow edema superiorly in the right hip, and a small right hip joint effusion."

5. On July 23, 2013, Dr. Williams referred Claimant to physical therapy for both her hip and her back. On August 6, 2013, Dr. Williams authored a progress note indicating that Claimant had "minimal discomfort" in her low back, mostly on the *left* side. He discontinued physical therapy for her hip, and continued it for her back. Dr. Williams referred Claimant to Dr. Craig Davis for her hip pain to explore whether her small labral tear might be the symptomatic pain generator.

6. Although Claimant continued to report pain in her right hip, physical therapy notes from August 2013 indicate that she regained full range of motion in her hip, that her right hip was "better" and "still better", and that she was working double shifts. Notes from August 20, 2013 state that Claimant was continuing to feel better with much less right leg pain.

7. Dr. William's exam notes from August 20, 2013 report that Claimant's "lumbar spine is asymptomatic today." Dr. Williams also had become aware that Dr. Davis did not specialize in hips and referred Claimant to Jeffrey A. Arthur, M.D., instead.

8. Dr. Arthur evaluated Claimant on August 26, 2013, diagnosing her with hip bursitis, hip sprain/strain, and pelvis/thigh joint pain. He performed a right hip trochanteric bursal injection during the appointment which did not result in significant improvement of Claimant's symptoms.

9. A September 23, 2013 progress note authored by Dr. Williams indicated Dr. Arthur was of the opinion that Claimant's protruding disc was the cause of her symptoms, and that Dr. Chan concurred.

10. On September 23, 2013, Claimant saw Samuel Chan, M.D., for evaluation and treatment of her back. Although he considered Claimant's discogenic findings to be mild, given her continued symptoms he recommended an epidural steroid injection in an attempt to identify her pain generator. Dr. Chan's report notes that Claimant had discussed the injection with "her friend," Dr. Prusmack, who felt it would be appropriate. On October 10, 2013, Claimant underwent a right L4-L5 transforaminal epidural steroid injection which afforded her significant relief. A progress note dated October 21, 2013 by Dr. Williams noted that Claimant did not have any pain on that date.

11. Claimant underwent a second epidural steroid injection on January 2, 2014, but it provided little relief. Greg Smith, D.O., authored a January 8, 2014 progress note that indicating Claimant's right leg complaints followed the dermatomal region associated with the broad based annular disc bulge at L4-L5. Dr. Smith discussed surgical options with Claimant, including a microdiscectomy to remove the part of the disc that was bulging. He provided the names of surgeons to consider. Claimant again referred to a friend who was a back surgeon she wished to consult. That surgeon was Dr. Prusmack, whom she insisted she be referred to. At hearing, Claimant testified that Dr. Prusmack was "God to [her]."

12. Dr. Prusmack evaluated Claimant on March 19, 2014. It appears from Dr. Prusmack's discussion that he may not have had Claimant's medical records. Rather than refer to specific records, he appears to rely on Claimant's reports that the epidurals only helped transiently and that her hip MRI showed significant labral tearing omitting that the condition was described as degenerative, both statements being somewhat inaccurate. He also refers to her *hip* MRI showing a very small herniated disc at L4-L5, when that finding was on the *lumbar* MRI. Dr. Prusmack found Claimant to have a normal neurologic exam. His report states, "I do not think that [Claimant's debilitating groin buttock and hip pain] is from her back or radiculopathy. I was able to reproduce the pain that went from her hip to her knee with internal adduction. Therefore, my recommendation is for her to be evaluated by Orthopedic Surgery. There are no neurosurgical issues at this time." Claimant was working full time without restrictions at the time. Dr. Prusmack referred Claimant to James Genuario, M.D.

13. On March 7, 2014, Dr. Wakeshima performed an EMG which was read as normal.

14. Dr. Smith evaluated Claimant on March 21, 2014, two days after Dr. Prusmack. Claimant, who appeared in no acute distress, reported pain of 8/10, controlled by Excedrin and naproxen.

15. On May 1, 2014, Claimant underwent right hip arthroscopic acetabuloplasty with labral refixation, femoroplasty, debridement of the acetabular chondrocalcinosis, capsulorrhaphy, and intraoperative fluoroscopy. Claimant pursued post operative physical therapy with good results.

16. Notably, on June 17, 2014, Dr. Genuario discussed that during physical therapy for her right hip, Claimant reported the onset of left sided sciatic type symptoms with numbness and tingling in her left leg. Although Dr. Genuario encouraged Claimant to return to Dr. Prusmack for reevaluation of her lumbar spine, she failed to do so.

17. On November 24, 2014, Dr. Smith placed Claimant at MMI and issued an impairment rating report. He found Claimant to be having no difficulties at that time and that she was able to do her full activities of daily living and all of her job duties. Dr. Smith assigned the following impairments:

    - 2% impairment for lumbar flexion
    - 3% impairment for lumbar extension
    - 1% impairment for right lateral flexion
    - 2% impairment for left lateral flexion
    - TOTALING 8% whole person impairment for the lumbar region, plus

- 7% for a deficit of disc space for six months[1]
- TOTALING **14% whole person impairment for the lumbar system**.
- 10% impairment for sensory and numbness of the lateral femoral cutaneous nerve[2]
- 7% lower extremity impairment for right hip flexion
- 2% lower extremity impairment for right hip extension
- Totaling 9% for right hip range of motion combining with the 10% lateral cutaneous nerve
- TOTALING **18% lower extremity rating**, which converts to a 7% whole person impairment
- This 7% whole person impairment combined with the 14% whole person impairment TOTALS 20% whole person impairment.

18. Dr. Smith also awarded Claimant maintenance care in the form of follow up visits with Drs. Prusmack, Arthur, Chan, and himself. He continued her medications for one year.

19. Claimant testified at hearing that following Dr. Smith's MMI determination, she continues to experience pain in her hip that radiates into her right leg, as well as pain in her lower back. Claimant began experiencing pain in her left leg after her hip surgery and it occurs when she sits on a hard surface or is standing for a long time. Claimant testified that prior to her July 9, 2013 occupational injury, she had never had any problems with her lower back and hip, and she had never experienced pain or tingling in either lower extremity.

20. Claimant also testified that at some point in 2014, she noticed left leg symptoms, which she "noticed the most" after flying to El Paso on a hard airplane seat and driving back to Denver on a hard truck seat. Claimant also notices pain when she rides on the hard seat of the motorcycle her husband drives.

21. At Respondents' request, Claimant underwent a DIME with Joseph Fillmore, M.D., on May 21, 2015. Dr. Fillmore's DIME report contains certain inconsistencies regarding whether he considered Claimant's potential back impairment. Specifically, the following facts indicate that Dr. Fillmore did not consider rating Claimant's back:

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[1] Dr. Smith described this as a lower extremity impairment, but correctly calculated it as a whole person impairment.

[2] A lateral femoral cutaneous nerve injury is a lower extremity impairment, not a whole person impairment as indicated by Dr. Smith. Dr. Smith correctly calculated the impairment as a lower extremity impairment.

- In his introductory statement which frames the report he writes, "I have been asked to evaluate the right hip."

- The same sentence frames the discussion potion of his report.

- Dr. Fillmore also only included the 18% lower extremity rating assigned by Dr. Smith as the previous physician's rating, and not Claimant's 14% whole person impairment for the lumbar system.

- Although Dr. Fillmore mentions that Claimant developed back pain as the result of her injury and that she received three epidural steroid injections, the bulk of that section of his report focuses on her hip symptoms and treatment.

- The only underlined portion of Dr. Fillmore's review of medical records is Dr. Prusmack's March 19, 2014 note, "<u>He did not believe the pain was coming from her back or radicular process</u>."

- The "Impairment Rating" section of Dr. Fillmore's report only specifically discusses Claimant's hip.

However, the following facts indicate that Dr. Fillmore did consider rating Claimant's back:

- Dr. Fillmore's review of medical records discusses records of both Claimant's hip and back symptoms and treatment.

- Claimant's Review of Symptoms reflects, "She reports joint stiffness, back pain."

- Dr. Fillmore's physical examination notes include that Claimant had no pain with lumbar flexion, pain with extension of her spine, and on right rotation; pain to palpation over the right lower back; some pain in the back with hip abduction; and that her lumbar range of motion was tested using dual inclinometer, what those measurements were; and that the measurements were valid.

- Dr. Fillmore included "lumbar radiculitis" in his impression.

- Dr. Fillmore stated that "it appears that the majority of the patient's pain is from her right hip issues," and adopted Dr. Prusmack's opinion that Claimant's pain issues were more hip related; and that based on his own examination that Claimant did not need to follow up with Dr. Chan.

- Although Dr. Fillmore measured Claimant's lumbar ranges of motion, he did not fill out the impairment rating box on the Figure 83 form indicating whether a percentage rating applied. The ALJ, taking judicial notice of the

AMA Guides, finds that Claimant's lumbar extension measurements could support an impairment rating, and none was given.

22. Resolving the ambiguities in the DIME report, the ALJ finds based on a totality of the evidence that Dr. Fillmore's report did not evaluate all of Claimant's conditions. As such, it does not comply with the AMA Guides as it is not clear, accurate, or complete.

23. Following the DIME, Claimant underwent a defense medical examination with Marc Steinmetz, M.D. on November 17, 2015. Dr. Steinmetz authored a report based on that examination and also testified at hearing as an expert in the field of occupational medicine.

    - He noted that Claimant has always maintained that her fall involved injuries to both her hip and her lower back.

    - Dr. Steinmetz attributed Claimant's bilateral leg pain to sitting on her thighs, or preexisting arthritis in her back, or activities since the work injury; but not to her work injury. He also opined that her leg symptoms were at the wrong level to be associated with an aggravation of her degenerative discs.

    - He opined that the first epidural steroid injection provided relief because it relieved the pain in Claimant's buttock where she had a bruised nerve, and that the follow up injections were not beneficial because the bruise had resolved.

    - Dr. Steinmetz did not address whether Claimant's L4-L5 nerve impingement was caused or aggravated by her work injury.

    - Dr. Steinmetz agreed with Dr. Fillmore's rating of Claimant's hip impairment. With respect to Claimant's back, Dr. Steinmetz opined, "So it was very clear that he addressed [Claimant's back] and didn't feel it was – needed treatment."

    - Dr. Steinmetz agreed with the November 24, 2014 MMI date.

    - Dr. Steinmetz acknowledged that Claimant was still experiencing pain and other symptoms in her hip, low back, and lower extremities.

    - Dr. Steinmetz opined that Claimant's work injury did not aggravate any of Claimant's preexisting conditions. He suggested that she see her OB-GYN to have her back checked again.

24. With respect to Claimant's back pain, Dr. Steinmetz testified that his diagnosis would be a temporary bruise to the sciatic nerve that quickly healed. Dr. Steinmetz opined that following the healing of Claimant's sciatic nerve bruise, all

ongoing complaints of back pain have been caused by degenerative changes on the MRI. As such, he did not assign an impairment rating for the lower back. However, he testified that if the ongoing back complaints were caused by the July 9, 2013 injury, an impairment rating for the lower back could be warranted.

25. The ALJ finds that the following factors reduced Dr. Steinmetz's credibility and persuasiveness: On cross examination by Claimant's counsel, Dr. Steinmetz was non cooperative. When a simple answer could have been provided, he choose to answer, "I clarified that multiple times in my report and today . . . ." And when a yes or no answer would have been sufficient, he responded, "It's on the written report." He often began answering questions while they were still being asked. And his testimony often was not stated medically. For example, when asked about the degree of Claimant's hip arthritis, he stated, "It wasn't like there were – like, things sticking out or anything like that." And when discussing Claimant's congenital stenosis, he testified, "And one thing to not – interestingly enough, I thought that I recall some other people referring to it. Oh, yeah, congenital – some congenital stenosis too. Some of that was because of the congenital structure being kind of small spaces." Finally, contrary to Dr. Steinmetz's opinion that the DIME clearly addressed Claimant's back, the ALJ found that that issue was actually not addressed.

26. Chad J. Prusmack, M.D., a specialist in neurosurgery, testified by deposition dated January25, 2016.[3] He evaluated Claimant on March 19, 2014 for low back pain and right lower extremity symptoms. His notes reflect that Claimant complained of "significant pain in the right hip, buttock, and interior groin" beginning in July of 2013, and caused by a fall at work. Based on his exam and other data that he had, including her hip MRI and her lumbar MRI, he felt she had an issue with her hip. "I did not feel that it was primarily her back or her nerve, but that it was her hip that needed to be evaluated." Dr. Prusmack acknowledged that stenosis could predispose one to having an acute neural injury. Dr. Prusmack explained that radiculopathy meant symptoms from nerve impingement which could include weakness, sensory loss or alteration, or pain. He further explained that treatment for symptomatic chronic degenerative disc disease could include decompression surgery. When Dr. Prusmack saw Claimant in March, 2013, he was unable to make a treatment recommendation because he felt that her problem was orthopedic and related to her hip.

27. Dr. Prusmack testified that the information in a chart note dated November 17, 2015, was most likely from a phone call or an email, and was not the result of another evaluation of Claimant. The note mentions that Claimant had a successful repair of her hip but had persistent symptoms which seemed to be nerve related and needed to be further evaluated. The note also attributed both injuries to relate back to her work injury. Dr. Prusmack testified that that information "would have . . . come directly from the patient."

[3] Although Claimant expressed a friendship with Dr. Prusmack, his conduct and involvement in the case reflected only a professional relationship.

28. Dr. Prusmack reviewed Dr. Steinmetz's November 17, 2015 IME report.

- He commented that Dr. Steinmetz's description of Claimant's back symptoms being caused by a bruise of her sciatic nerve "just doesn't make sense" and that he would not use that terminology in a discussion with another neurosurgeon "because it has no real meaning."

- He was critical of Dr. Steinmetz for concluding that the lumbar MRI showed an acute back injury, because MRIs are not used to determine acuteness or chronicity.

- Dr. Steinmetz's discussion of the EMG being normal was not helpful because it is irrelevant in identifying pain and it could not determine whether Claimant's pain could be attributed to her work injury.

- Dr. Prusmack stated that Dr. Steinmetz was wrong in stating that a back injury would need to be at a lower lumbar level than L4-L5 to correspond to Claimant's leg symptoms.

29. When asked about causation and the need for any additional medical treatment, Dr. Prusmack answered that he did not have enough information to make a determination, and that he would need "a clinic history and physical and personal opinion, medical professional opinion." He acknowledged that aggravation of a chronic degenerative disc disease and stenosis could cause symptoms in the legs, including pain, numbness, and tingling. He acknowledged that it was possible to have symptoms in both lower extremities.

30. When asked specifically about Claimant's case, Dr. Prusmack did not give an opinion about whether Claimant's lower extremity symptoms were caused by her chronic degenerative disc disease and stenosis or aggravation of those two issues. Rather, he explained that he had not had the opportunity to make his own assessment of Claimant and her current complaints. When Claimant's counsel pressed on the issue, Dr. Prusmack stated that he thought Claimant's degenerative disc disease had "absolutely nothing to do with it." He explained that he thought Claimant's stenosis predisposed her to having a nerve syndrome and a back syndrome which, in part, was caused by the fall. The context of his testimony makes clear that Dr. Prusmack was speaking in terms of possibility and not expressing opinions to a reasonable degree of medical certainty.

31. Dr. Prusmack opined that Claimant's positive response to Dr. Chan's first epidural injection supported a conclusion that Claimant's back pain and/or radiculopathy stemmed from her L4-L5 area. He was not asked about epidural steroid injections to which Claimant did not have a positive response. When asked if additional treatment could improve her condition, Dr. Prusmack stated it was possible, but that he could not say it was probable without seeing her for evaluation.

32. Based on the totality of the evidence, the ALJ finds that Dr. Fillmore's DIME report does not comply with the AMA Guides, and thus does not credit it. The ALJ also finds that Dr. Steinmetz's opinions were not particularly credible or persuasive. The ALJ also finds that although credible, the opinions of Dr. Prusmack are limited because he evaluated Claimant only once and early in the course of her treatment.

33. The ALJ finds the Dr. Smith's report, establishing MMI on November 24, 2014, is credible and persuasive. Although Claimant complains of current symptoms, they are more likely than not, not related to her work injury.

34. The ALJ finds that Dr. Smith's impairment ratings of 14% whole person impairment for the lumbar system and 18% lower extremity rating are credible and persuasive and most accurately reflect her impairment at the time she was placed at MMI.

35. The ALJ finds Claimant failed to produce sufficient evidence to meet her burden of converting her lower extremity rating into a whole person rating.

36. The ALJ finds that Dr. Smith's recommendations for maintenance care are credible and persuasive and finds that Claimant is entitled to such benefits. These include: follow up with Dr. Prusmack in regards to her lumbo sacral region three to four times a year for two years; follow up with Dr. Arthur in regards to her hip three to four times a year for two years; follow up with Dr. Chan for psiatry treatments three to four times a year for one year; and follow up with Dr. Smith for medication refills and pain management three to four times a year for one year; all periods of time running from the date of MMI.

CONCLUSIONS OF LAW

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

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).

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

The DIME procedure is the "only way for an injured worker to challenge the treating physician's findings – including MMI, the availability of post-MMI treatment, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury . . ." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). The courts

have long held that the DIME process contemplates that the DIME physician will evaluate *all* components of the claimant's condition and determine the cause and impairment created by each of those conditions. *See Gray v. Dunning Construction*, W. C. No. 4-516-629 (Feb. 14, 2005); *Oldenberg v. First Group America*, W.C. No. 4-640-886 (Sept. 3, 2008); see also *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

The opinion of a DIME examiner is given special weight over the opinions of other physicians in a workers' compensation claim. *Askew v. Sears Roebuck & Co.*, 914 P.2d 416 (Colo. App. 1995). In fact, a medical impairment rating assigned by a DIME examiner is binding unless it is overcome by a showing of clear and convincing evidence. § 8-42-107(8)(c); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). "Clear and convincing evidence" is an evidentiary standard of proof higher than "preponderance of the evidence," yet not as high a standard of proof as "beyond a reasonable doubt." Clear and convincing evidence is established by showing that the truth of a contention is highly probable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980). Put more simply, in order to overcome a DIME examiner's opinion regarding permanent impairment a party must prove that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co.* at 411. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indus. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for an administrative law judge. *McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999). In determining whether the DIME examiner's opinion has been overcome, one factor for consideration is whether the DIME physician complied with the AMA Guides. *Kirschenman v. Eastman Kodak*, E.C. No. 4-361-035 (July 31, 2000); *Rivale v. Beta Metals, Inc.*, W.C. No. 4-265-360 (April 16, 1998).

However, if the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North and Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), affd, *Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication).

Insofar as the ALJ finds that the DIME physician made one error with respect to his or her opinions regarding impairment, the ALJ is not required to dissect the overall opinion into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence. *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (November 16, 2006), *citing Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). Where the ALJ determines that any part of the DIME physician's rating has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). Thus, once the ALJ

determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (March 19, 2004). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols.

Considering all of the evidence, the ALJ concludes that the opinions of the DIME physician are ambiguous and has determined that they do not comply with the AMA Guides. It is the duty of the DIME examiner to evaluate all components of the claimant's condition and determine the cause of each of those conditions as well as any impairment created by them. Dr. Fillmore failed to do so in this case. Dr. Fillmore's DIME report clearly indicates that he was aware of the back complaints and treatment, and he even lists "lumbar radiculitis" as a diagnosis in the impression section of his report. However, after referencing the symptoms and diagnosis, he failed to discuss whether those symptoms and diagnoses relate to the July 9, 2013 injury and/or whether they entitle Claimant to an impairment rating. This frustrates the purpose of a DIME examination, and constitutes substantial error on the part of Dr. Fillmore. Dr. Fillmore's opinions have been overcome by Claimant, and as such the question of Claimant's correct medical impairment rating is now a question of fact for this ALJ.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 491 P.2d 106 (Colo. App. 1971). Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

The mere existence of a pre-existing condition does not prevent an injury from "arising out of" an injured worker's employment. An injury is compensable if work causes, aggravates, accelerates or combines with nonindustrial factors to result in disability or the need for medical treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. App. 1990).

There is a great deal of evidence in this case to suggest that Claimant either suffered from a new injury or an aggravation of a preexisting injury/condition involving her lower back as a part of the July 9, 2013 incident, and that Claimant's ongoing symptoms in the lower back and left lower extremity are a result of that injury or aggravation. Claimant's primary authorized treating physician, Dr. Smith, believed that Claimant's back symptoms and radicular pain were caused by her July 9, 2013 fall, and the medical records submitted into evidence indicate that every other treating physician agreed. Dr. Prusmack, Claimant's neurosurgeon, stated that Claimant's back problems are a result of the work-related accident, and that while she may have had degenerative

changes in her lower back prior to the injury, those degenerative changes only increased the likelihood of a pain-generating injury to the back following a fall. Likewise, Dr. Chan believed that Claimant suffered from an injury to her lower back, and treated that injury with epidural steroid injections. The ALJ credits the opinions of Claimant's authorized treating physicians in this case.

While the defense medical examiner, Dr. Steinmetz, opined that Claimant did not suffer from anything more than a transient bruise of the sciatic nerve that quickly healed and left no ongoing symptoms, his opinion is inconsistent with the opinions of other physicians in this case. Dr. Steinmetz credits his opinion to be in accordance with that of the DIME examiner, but this ALJ is not persuaded of that. The DIME examiner failed to discuss whether Claimant's back injury was caused by her July 9, 2013 injury and/or whether that injury caused permanent impairment. His failure to discuss the issue does not constitute a corroboration of Dr. Steinmetz's opinion. In fact, The DIME examiner's report notes a diagnosis of "lumbar radiculitis" in the impressions section, which indicates that he believes that Claimant did suffer from more than a short-lived bruise to the sciatic nerve, as asserted by Dr. Steinmetz. The opinions of Dr. Steinmetz regarding relatedness of Claimant's back symptoms are found unpersuasive and are not credited.

Medical impairment ratings are the basis for permanent partial disability awards. Ratings must be made pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (revised). § 8-42-101 (3.7), C.R.S.

Permanent impairment is determined at the time of MMI. *Dziewior v. Michigan General Corporation*, 672 P.2d 1026, 1030 (Colo. App. 1983).

As stated above, the DIME examiner erred in his failure to evaluate Claimant's lower back and her accompanying radicular symptoms. As such, this ALJ reverts back to the opinions of Claimant's primary authorized treating physician, Greg Smith, D.O., and adopts the impairment ratings assigned by him at the time of maximum medical improvement. Claimant is entitled to a 14% whole person impairment rating for her lumbar spine. For the hip and lower extremity, she is entitled to a 10% rating for a lateral femoral cutaneous nerve sensory dysfunction, and a 9% rating for limited range of motion, which combines to an 18% extremity rating. These impairment ratings were assigned at the time of MMI and were made pursuant to the AMA Guides.

Section 8-42-107(1)(a), C.R.S. limits a claimant to a scheduled disability award if the claimant suffers an injury or injuries described in section 8-42-107(2), C.R.S.; *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The term "injury," as used in § 8-42-107(1)(a), refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997). The term "injury" refers to the manifestation in a part or parts of the body that have been functionally impaired or disabled as a result of the industrial accident. *Warthen v. Indus. Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004). It is not the

location of physical injury or the medical explanation for the "ultimate loss" which determines the issue. *Blei v. Tuscorora,* W.C. No. 4-588-628 (June 17, 2005).

Whether a claimant has suffered an impairment that can be fully compensated under the schedule of disabilities is a factual question for the ALJ. *Walker v. Jim Fuoco Motor Co.,* supra. In determining whether an impairment can be fully compensated under the schedule of disabilities, the ALJ is not limited to the medical evidence. A claimant's testimony, if credited, may be utilized to support a finding on the nature and extent of the claimant's functional impairment. *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983).

Claimant credibly testified at hearing that she continues to suffer from pain that radiates from her hip into her right lower extremity, which is consistent with Dr. Smith's diagnosis of lateral femoral cutaneous nerve sensory dysfunction. Although Claimant's hip injury has caused an issue with the nervous system, the situs of Claimant's impairment is restricted to the lower extremity. Given that Claimant's functional impairment does not extend beyond her lower extremity, her injury can be fully compensated under the schedule of disabilities.

ORDER

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

1. Respondents shall pay Claimant permanent partial disability benefits based on the impairment ratings assigned by Dr. Smith on November 24, 2014, the date Claimant reached MMI, of 14% whole person impairment for the lumbar system and 18% lower extremity rating. Any permanent partial disability benefit payments previously made to Claimant by Respondents in this case may be credited against the amount of permanent partial disability benefits owed pursuant to this Order.

2. Claimant is entitled to maintenance care as follows: follow up with Dr. Prusmack in regards to her lumbo sacral region three to four times a year for two years; follow up with Dr. Arthur in regards to her hip three to four times a year for two years; follow up with Dr. Chan for psiatry treatments three to four times a year for one year; and follow up with Dr. Smith for medication refills and pain management three to four times a year for one year; all periods of time running from the date of MMI, acknowledging that some have expired by the date of this order.

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

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

5. 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 11, 2016

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

ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical care following maximum medical improvement (MMI).

FINDINGS OF FACT

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

1. Claimant, is a 20 year old female who was hired as a certified nursing assistant ("CNA") by Employer on September 16, 2013.

2. Claimant sustained a low back injury on May 17, 2014, when, as she was assisting a patient from her bed to a bedside commode, the patient lost her balance and began to fall. Claimant caught the patient and supported the patient's weight to get her to the commode.

3. Liability for the injury was admitted and Claimant was referred to Michael Dallenbach, M.D. for treatment.

4. Claimant's initial appointment with Dr. Dallenbach occurred on May 19, 2014. Thereafter, Dr. Dallenbach reevaluated/reexamined Claimant numerous times between May 19, 2014 and November 24, 2014, when he placed her at MMI.

5. During the aforementioned treatment period, Dr. Dallenbach referred Claimant or various diagnostic tests, including lumbar x-rays, cervical x-rays, two lumbar MRIs, a cervical MRI, a thoracic MRI, a lower extremity EMG/NCV test, and a contrast enhanced CT scan of the abdomen and pelvis. He consistently prescribed and monitored medications, including Ibuprofen and Cymbalta. He also referred Claimant for two different courses of physical therapy and referred her to several specialists, including Dr. Scott Bainbridge for pain management and injections, Dr. D.K. Caughfield for an EMG/NCV testing and evaluation, Dr. David Hopkins for a psychological evaluation and therapy, Dr. William Beaver for biofeedback therapy, and Dr. Ali Murad for a neurosurgical evaluation. Finally, throughout this time period, Dr. Dallenbach outlined and adjusted Claimant's work restrictions and conducted a job site analysis, all in an effort to effectuate Claimant's safe return to work.

6. As noted, Claimant was referred for multiple MRIs of the spine. She underwent a

lumbar MRI on May 30, 2014 which revealed mild intervertebral disc dissection at L4-L5 and L5-S1, a mild disc bulge without significant central canal stenosis or neural foraminal narrowing noted at L4-L5 and a broad based disc bulge and minimal anterolisthesis at L5-S1 without significant central canal stenosis or neural foraminal narrowing. The MRI was interpreted by Dr. Robert Abbott on May 31, 2014.

7. Claimant returned to Dr. Dallenbach on June 2, 2014 complaining of constant neck pain, headaches, upper extremity pain, and numbness and tingling, along with similar symptoms in her low back and legs. She quantified her pain as a 9/10 in severity. She continued with physical therapy and remained out of work.

8. On June 4, 2014,Claimant was referred to Dr. D.K. Caughfield for an electrodiagnostic study (EMG/NCV) because of her continued complaints of bilateral upper and lower extremity numbness, tingling and weakness.

9. On June 9, 2014, Claimant was returned to modified duty work. Her shifts were limited to four hours and she was to perform 100% seated work, moving about only as needed for comfort.

10. Claimant returned to Dr. Dallenbach on June 17, 2014 complaining of increased back pain. She no longer complained of symptoms' in her arms or legs. Consequently, her EMG study with Dr. Caughfield was cancelled. Because of the deterioration of her condition, Claimant's restrictions were modified. Her shifts were limited to 2 hours and she was limited further to 3 days of work. Dr. Dallenbach referred Claimant to J. Scott Bainbridge, M.D. for evaluation and treatment recommendations.

11. Claimant was evaluated by Dr. Bainbridge on July 7, 2014. Dr. Bainbridge reviewed Claimant's lumbar MRI after which he noted: "There is some question of a small disc fragment in the L5-S1 disc with caudal migration and right S1 impingement." Contrary to Claimant's suggestion, the ALJ finds that Dr. Bainbridge did not actually diagnose Claimant's with an extruded disc fragment at L5-S1. Rather he noted his suspicions for the same based upon his review of the May 30, 2014 MRI of the lumbar spine. Dr. Bainbridge recommended injection therapy and reconsideration of an EMG. Claimant underwent bilateral SI joint injections on July 18, 2014. Dr. Bainbridge noted improvement in Claimant's pain following injections.

12. On July 24, 2014, Claimant presented to Dr. Dallenbach's office complaining of increased back pain despite having undergone bilateral SI joint injections only 6 days previously. Claimant reported her belief that the injections increased her low back pain and that as a consequence; she was more dysfunctional, could sleep and was becoming depressed. She was tearful and exhibited a "somewhat flat affect." Psychological referral was discussed, but Claimant "respectfully declined." Claimant did report a remote history of depression which was successfully treated with Citalopram. Consequently, Dr. Dallenbach added this anti-depressant to Claimant's medication regimen.

13. On July 30, 2014, Claimant underwent a EMG/NCV study performed by Dr. Caughfield. The study demonstrated findings consistent with a S1 radiculopathy with an absent gastroc-H reflex, but with no axonal loss noted on needle exam. Additionally, there were no findings consistent with peripheral nerve entrapment in the right lower limb.

14. On August 6, 2014, Dr. Dallenbach attended a "Parkview Case Review" meeting regarding Claimant. The meeting was also attended by Tisha DeNiro, RN the Head of Employee Health Services, Coordination of safe and therapeutic return of the injured worker to the work environment and optimal patient care. Following that meeting Dr. Dallenbach noted that a job site analysis would be scheduled. Claimant suggests that Dr. Dallenbach was unduly influenced by Employer during this meeting to terminate Claimant's care and that as a result of his effort to "curry favor" with Employer, he would later intentionally misrepresent the results of Claimant's diagnostic testing and her treatment progress to Dr. Bainbridge so that future care through his office, including injection therapy would be cancelled.

15. On August 7, 2014 the job site analysis was conducted with Claimant present. Following the job site analysis, Ms. DeNiro forwarded to Dr. Dallenbach a modified duty position for his consideration. The modified job duty offer is dated August 11, 2014.

16. Claimant returned to Dr. Dallenbach's office on August 11, 2014 at which time she appeared tearful and angry. Based upon the content of Dr. Dallenbach's August 11, 2014 medical report, the ALJ finds that Claimant was upset by the outcome/results of the job site analysis and Dr. Dallenbach's opinion that she was capable of returning to modified work. In discussing the job site analysis, Claimant repeatedly told Dr. Dallenbach that she felt he cornered her, lied to her and stabbed her in the back. Claimant was able to sit without shifting in her chair or supporting herself with her arms for the duration of the appointment which occurred over the period of approximately one hour. She did not demonstrate difficulty standing or sitting down. Because of Claimant's depression and disability self labeling combined with her fear and anxiety regarding returning to work, Dr. Dallenbach removed her from work from a psychiatric standpoint. He also made a referral to David Hopkins, PhD. for evaluation and treatment.

17. After additional consideration, Dr. Dallenbach felt that a change in Claimant's treatment plan would best meet her therapeutic needs. Consequently, he cleared Claimant to return to modified duty on August 13, 2014. Claimant was to start her modified duty position on August 15, 2014; however, scheduling conflicts precluded Claimant's scheduled return until August 18, 2014. Prior to reporting for her scheduled shift on August 18, 2014, Claimant presented to Dr. Dallenbach's office on an urgent basis. She was accompanied to the appointment by her mother and father. She complained of worsening back pain and "a dead sensation all through [her] right leg." Regarding the cause of her pain, Claimant reportedly went to the mall with her parents on August 16, 2014, where she walked around for about a half an hour. According to Claimant, about four hours after getting home she experienced pain so intense that she had to present to the emergency room.

18. Claimant was treated with 4 mg of Morphine IM, 5 mg of diazepam and two 5/325 tablets of Narco and discharged home with a diagnosis of "lumbar spasms." While Dr. Dallenbach was able to state with reasonable medical certainty that Claimant sustained an injury on May 17, 2014, he was unable to explain the precipitous increase in her back pain and corresponding decrease in her function. Dr. Dallenbach ordered a repeat MRI.

19. Claimant's repeat lumbar MRI was preformed August 19, 2014. The images were interpreted by Scott Smiley. The impression reached by Dr. Smiley was: "No significant abnormality. Very minimal disc bulge at L5-S1. No change from May 30, 2014." X-rays of the lumbar spine, also read by Dr. Smiley, failed to reveal "significant abnormality."

20. On August 20, 2014, during a follow-up appointment with Dr. Dallenbach, Claimant reported that her medication regimen was not helping her. It is noted that by this date, Claimant was taking: Citalpram, Hydromorphone (Dilaudid), diazepam (Valium) and Ibuprofen. While Claimant reported that these medications were not helping her, Dr. Dallenbach chose to keep the medication regimen in place. He also added Lidoderm. Dr. Dallenbach also noted that Claimant was scheduled to see Dr. Bainbridge on August 22, 2014 for bilateral SI transforaminal epidural steroid injections (TFESIs). Dr. Dallenbach placed a call to Dr. Bainbridge's office to discuss Claimant's condition.

21. On August 21, 2014, Dr. Bainbridge's documented that he spoken with Dr. Dallenbach[1] noting that Dr. Dallenbach had "another MRI done which was read as normal by three radiologists and there are concerns about Rebecca's psychological status, her motivation to return to work, and her recent EMG shows only old findings of S1 radiculopathy." Based upon the discussion with Dr. Dallenbach, further pain management and injection care was discontinued by agreement of Dr. Bainbridge and Dr. Dallenbach.

22. Claimant also presented to the offices of David Hopkins, PhD. on August 20, 2014 for her psychological evaluation. After examination and testing, Dr. Hopkins noted that patients with the type of diagnostic profile demonstrated by Claimant's Millon Behavioral Diagnostic testing results:

> [G]enerally seek to appear proper, conventionally and socially conforming with a calm, controlled, and low-key exterior. However, ambivalent feelings are often under the surface and can emerge quickly in stressful circumstances. At times the underlying ambivalence with prolonged illness may give way to blaming others, although with any open acting out, there is often followed a period of guilt and constriction. Psychophysiological ailments are frequent with this type of vacillating and constrained emotional expression. Patient with this profile are

[1] It is difficult to discern from this note when the discussion took place as the note contains both dates of August 20th and 21st on it. Regardless, the note reflects that the physicians in question spoke about Claimant's condition.

> often somewhat preoccupied with bodily functions and symptoms and tend to overreact to changes and to respond with catastrophic thinking. Exhaustion and apathy are not unusual with low energy, lassitude and malaise . . . There is also a high level of pain sensitivity. Anticipatory anxiety is also a part of the pain sensitivity and can lead to guarding and avoidance. Patient with this profile also have a high fear of complications from illness.

Dr. Hopkins recommended 4-6 sessions of verbal counseling in addition to 6-8 sessions of biofeedback. Dr. Hopkins referred Claimant to William Beaver for biofeedback.

23. On August 28, 2014, Claimant returned to Dr. Dallenbach office for follow-up. Claimant was accompanied by her mother and sister. Claimant's reply to how she was doing was simply noted as "pain" which she reported had gotten "worse." In the report generated from this date of visit, Dr. Dallenbach addresses Dr. Bainbridge's indication that three radiologists had read Claimant's recent MRI as normal. Concerning this note, Dr. Dallenbach documented the following:

> It should be noted that the follow-up MRI was read by three radiologists but by one only, however, the initial MRI obtained 05/30/2014 demonstrated, as per the interpreting radiologist, no evidence for disk migration. After Rebecca's sudden inexplicable deterioration, I placed a call to a different radiologist who inspected the MRI performed 05/30/2014 and he too was unable to find any evidence of any caudal disk migration. I then spoke in depth with Dr. Smiley, the interpreting radiologist of the MRI performed 08/19/2014 who found, "there is no evidence of significant disk protrusion or extruded fragment.

24. Based upon the content of his August 28, 2014 report, the ALJ finds that Dr. Dallenbach spoke to two radiologists regarding the findings on Claimant's May 30 and August 19, 2014 lumbar MRIs and that the reason he did so was to clear up whether there was evidence of caudal migration of disk material causing right S1 nerve impingement given Claimant's sudden worsening of symptoms in the absence of a precipitating mechanism of injury around August 16, 2014. The ALJ finds Dr. Dallenbach's decision to discuss the findings of the MRIs with Dr. Bainbridge reasonable in light of Dr. Bainbridge's initial concern from July 8, 2014 that there was "some question of a small disk fragment from the L5-S1 disk with caudal migration and right S1 nerve impingement" on the May 30, 2014 MRI. Based upon a totality of the evidence presented, the ALJ is convinced that Dr. Bainbridge, more probably than not, misunderstood Dr. Dallenbach when he, that is Dr. Bainbridge documented that the repeat MRI had been read by three radiologists. Consequently, the ALJ dismisses, as unpursuasive, Claimant's suggestion that in order to curry favor with Employer and to rid himself of further responsibility for Claimant's care, Dr. Dallenbach intentionally misrepresented that Claimant's August 19, 2014 MRI had been read as normal by three radiologists. The ALJ is also not convinced that Dr. Dallenbach told Dr. Bainbridge that Claimant's EMG study only demonstrated "old" findings of an S1 radiculopathy for similar reasons since the evidentiary record supports that Dr. Dallenbach continued to treat Claimant for approximately three additional months to November 24, 2014 when he placed her at MMI.

25. On September 5, 2015, William Beaver authored a report outlining Claimant's progress with biofeedback therapy. In his report, Mr. Beaver reported Claimant's continued complaints of 9/10 back pain she attrreibuted to sleeping in a new bed and with a pillow between her legs. Claimant also reported a fist fight with her sister over her sisters concern that Claimant was attempting to commit suicide by abusing pain medication. Claimant denied abusing pain medication and/or suicidal ideation.

26. Dr. Dallenbach spoke to Claimant's physical therapist following her PT session on September 8, 2014. In a September 10, 2014 follow-up treatment note, Dr. Dallenbach outlined the substance of the conversation as follows:

I spoke with Mr. Brown after his evaluation of Rebecca, and he stated, "I really do not think that she is going to buy into this. She complained of pain without provocation and she really did not put forth any effort. It is interesting to note when she was leaving she seemed to be walking better than when she came in and one of the assistants verbalized this to Rebecca, and right after that, she started walking in a more abnormal fashion. I went to the door and watched her leave, and at first as she was leaving, she had a really abnormal gait, but as she and her mom got closer to the car, she was moving, using her hands and talking with her mom, laughing, and did not seem to have any pain at all. She got into the car without any apparent difficulty and then must have dropped something because she had to get out and had no problem whatsoever."

27. In response to Mr. Brown's comments, Claimant simply noted: "I really do not think he believes me and he did not seem to have any interest in what was going on with me." Claimant reported continued pain and substantial dysfunction. According to Dr. Dallenbach's treatment note from September 10, 2014, Claimant reported that she was "almost able to take a shower by [herself] and wash my hair, but everything I do causes the pain to get worse." Nonetheless, Claimant also reported the following regarding participation in additional physical therapy: "I will do anything you tell me to. You can throw a brick at me, but I really do not think I'm going to get anything out of it." Due to Claimant's persistent complaints of back pain and dysfunction, Dr. Dallenbach referred her to Dr. Ali Murad for a neurosurgical evaluation.

28. On September 24, 2014, Claimant's second course of physical therapy course was discontinued because Claimant "exhibited no capacity for advancement of therapeutic activity during treatment."

29. Claimant proceeded with neurosurgical evaluation with Dr. Murad per Dr. Dallenbach's referral on October 1, 2014. In a report dated October 1, 2014, Dr. Murad opined that Claimant was not a surgical candidate and that there was "no contraindication to increasing activity, doing physical therapy etc." Claimant then sought a second surgical opinion from Dr. Joseph Illig on a self referred basis. In a report dated October 27, 2014, Dr. Illig noted that "except for subtle sensory abnormalities the neurological examination [was] benign and that Claimant's diminished right Achilles reflex was consistent with a negative Hoffmann reflex on EMG. According to Dr. Illig, Claimant had no evidence of compressive radiculopathy

and no evidence of myelopathy. Dr. Illig agreed that there was no indication for neurosurgical intervention. 30.

30. Based upon the content of Dr. Illig's report, the ALJ finds any suggestion that Claimant needs additional low back treatment because of a diminished/absent right Achilles reflex unpursuasive.

31. Claimant was discharged from biofeedback therapy on October 23, 2014. No further biofeedback has been recommended.

32. Claimant was returned to modified duty work on November 3, 2014 by Dr. Dallenbach.

33. Claimant was discharged from psychotherapy on November 12, 2014. No further psychotherapy has been recommended.

34. Although Claimant received continuous medical care under this claim between May 19, 2014 and November 24, 2014, she also went to the emergency room ("ER") at Parkview Medical Center on at least six occasions during that period, including five visits between August 16, 2014 and September 10, 2014. On the majority of these visits Claimant sought additional pain medications, including additional Dilaudid and Valium. When Claimant was seen at the ER on August 30, 2014, the ER physician raised concern for secondary gain and narcotic dependence. On September 6, 2014, after appearing at the main ER of Parkview on 9/5/2014 and deciding not to wait, Claimant presented to the ER department of Parkview in Pueblo West during the early morning hours. During this visit for a gradual onset of throbbing lower back pain, Claimant reported that she was getting no relief from over the counter medications and that her doctor had stopped her pain meds. Claimant was provided with injection of 2 mg of Dilaudid for her pain. Four days later, September 10, 2014, Claimant returned to the ER for ongoing back pain. During this visit, Claimant reported having gone through "multiple rounds of physical therapy and SI joint injections. Claimant reported severe, i.e. 10/10 pain. Physical examination of the back revealed aiming other things, normal range of motion, no scoliosis and no pain with straight leg raise testing. Claimant reported tenderness anywhere on her back distal to her scapulas bilaterally and proximal to her hips. Minimal palpation (fingertip pressure) caused pain in the musculature of the back in the region described above, i.e. distal to the scapulas and proximal to the hip. Claimant was noted to be sitting in a severely kyphotic position with her legs crossed and rocking back and forth without additional pain. She had a negative straight leg raise test, but reported could not stand because it was too painful. The ER physician noted Claimant's complaints were not consistent with her examination findings. Nonetheless, Claimant requested that she be given "Dilaudid to make it through the night."

35. In a report entitled "Follow-up Evaluation", dated November 24, 2014, Dr. Dallenbach noted that Claimant continued to complain of low back pain, and she now claimed it had become worse since returning to modified work. That day, Dr. Dallenbach reviewed Claimant's modified duty tasks, and the nominal hours she had

worked since last being seen. Dr. Dallenbach noted that Claimant was able to move without objective signs of discomfort or limitations. Dr. Dallenbach explained to Claimant that it was not only safe, but important to become more aggressive in the rehabilitation process, which included lightening her restrictions allowing her to work more hours. During the discussion centered around increasing her hour hours, Claimant became angry questioning Dr. Dallenbach on how he expected her to do that when she continued to have severe pain. Claimant confronted Dr. Dallenbach, was profane and rose from her chair without difficulty. She exited the exam room with a normal gait, followed by her sister who accompanied her to the appointment. Dr. Dallenbach placed Claimant at MMI noting that permanent impairment would be assessed, and that an impairment rating report forthcoming. Dr. Dallenbach noted Claimant had been given a six month gym membership, but he recommended against post MMI maintenance care under this claim.

36. Between November 24, 2014 and December 8, 2015, Claimant returned to the ER on one occasion, again seeking medications, and she also obtained medications from her PCP at Southern Colorado Clinic on numerous other occasions. Claimant complained that medications prescribed by her PCP did not help, often requesting stronger medications.

37. On February 10, 2015, Claimant presented to the ER requested that a prescription for Cymbalta be refilled. During this visit, Claimant reported "no change to her baseline back pain."

38. On March 4, 2015, Dr. Dallenbach faxed Insurer a second November 24, 2014 report, but this report was entitled "REPORT OF MAXIMUM MEDICAL IMPROVEMENT AND IMPAIRMENT RATING IN ACCORDANCE WITH AMA GUIDES OF THE EVALUATION OF PERMANENT IMPAIRMENT, THIRD EDITION, REVISED." Within this report, Dr. Dallenbach specifically detailed the entire history of medical care and work-up Claimant received under this claim. This history includes numerous examples of Claimant's inconsistent clinical presentation, when compared to observations by medical professionals outside of the clinical setting. Dr. Dallenbach's final diagnosis was low back pain, not work related. With regard to maintenance care, Dr. Dallenbach opined:

> "Medical maintenance is defined as that post MMI treatment and/or care which is considered reasonable and necessary which a patient may require in order for them to maintain the functional status that they demonstrate at the time they are placed at MMI. In [Claimant's] case, because there is no work related diagnosis, there are no specific post MMI treatment recommendations which would be considered reasonable and necessary regarding her work injury of 05/17/2014. Regarding her usage of Cymbalta, at the time that she was placed at MMI, she was utilizing Cymbalta 60 mg q. day. In order to facilitate a safe transition off of the medication, she will be issued one additional prescription for Cymbalta 30 mg to be taken 1 q day with #30 to be dispensed with no authorized refills."

39. On March 6, 2015, Insurer filed a final admission of liability (FAL) consistent with Dr. Dallenbach's opinions. Maintenance care was denied.

40. Based upon the evidence presented, the ALJ finds that Dr. Dallenbach is the physician most familiar with Claimant's condition and the care she has received related to this claim. He is in the best position to determine if post MMI medical care is reasonably necessary. Dr. Dallenbach's opinion that post MMI care is not reasonable and necessary is based upon his treatment of Claimant over the course of months and a thorough consideration of Claimant's entire medical record. Consequently the ALJ finds his opinions credible and persuasive.

41. Claimant objected to the FAL, and requested a Division Independent Medical Examination ("DIME"). Dr. Anjum Sharma was selected as the DIME physician.

42. On August 6, 2015, Dr. Anjum Sharma evaluated Claimant for her DIME. As part of the DIME, Dr. Sharma obtained a detailed history from Claimant. He examined Claimant and thoroughly reviewed her medical records. Following his examination, Dr. Sharma documented that Claimant's physical examination was "completely benign", i.e. it was a normal physical examination. He also documented an absence of pain behaviors, noting that Claimant was not shifting her weight while sitting nor did she have an antalgic gait, despite Claimant's report of having 10/10 pain that day. With regard to maintenance care, Dr. Sharma opined that "nothing can be supported from the medical record to sustain the patient's ongoing need for care." Dr. Sharma's opinion that Claimant did not require maintenance care was based upon a thorough review of the medical records and his own clinical examination. Based upon the evidence presented, the ALJ finds Dr. Sharma's opinion concerning post MMI maintence treatment consistent with Dr. Dallenbach's opinion. The ALJ finds Dr. Sharma's opinion concerning Claimant's need for post MMI medical care supported by the record evidence. For these reasons, the ALJ finds Dr. Sharma's opinions concerning Claimant's need for post MMI medical care credible and convincing.

43. On August 25, 2015, Insurer filed a Final Admission of Liability consistent with Dr. Sharma's DIME opinions regarding MMI and impairment. Insurer denied maintenance care under this claim, consistent with the opinions of Dr. Sharma and Dr. Dallenbach. Claimant challenged this denial of maintenance care seeking resolution of the issue by hearing.

44. Claimant testified that she believed that she required ongoing medications to function, but she admitted that as of the date of hearing, there were no physicians recommending maintenance care under this claim.

45. Claimant has failed to prove, by a preponderance of the evidence, the requisite causal connection, and reasonableness and necessity, between her claim of need for maintenance treatment and her May 17, 2014 work injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. 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 litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. 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); CJI, Civil 3:16 (2007). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found here, the opinions of Drs. Dallenbach and Sharma regarding Claimant's need for post MMI medical benefits are credible and more persuasive than Claimant's contrary testimony.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or

unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000).

Maintence Medical Benefits

D. Once a claimant has established the compensable nature of his/her work injury, as in this case, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was 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*, *supra*.

E. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

F. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit and respondents remain free to contest the reasonable necessity of any future treatment, a claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact for resolution by the ALJ. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

G. In this case, Claimant is not seeking particular medical treatment; rather, she requested a general order awarding maintenance care. As found, there is insufficient evidence in the record to establish, by a preponderance of the

evidence, that Claimant is in need of post-MMI, *Grover*-type treatment. Undeniably, no physicians have recommended maintenance care under this claim. The only physicians to fully consider Claimant's clinical course through MMI and address Claimant's need for maintenance care are Dr. Dallenbach and Dr. Sharma. Both of these physicians have provided detailed reports, and thorough opinions, concluding that maintenance care under the circumstances of this claim is not reasonable and necessary. As found, Dr. Dallenbach's opinion on this matter is particularly credible given that Dr. Dallenbach is the physician most familiar with Claimant's course of care. Here, he followed Claimant's progress from two days after her injury through her date of MMI, and he constantly evaluated and re-evaluated Claimant's condition, her diagnostic results, her response to care, and her need for additional and different care. Accordingly, Dr. Dallenbach's opinion that Claimant does not require maintenance care is credible and persuasive.

H. Claimant's contrary assertion that she needs medications, including pain medication or neurolyptics (Cymbalta), to function is not convincing. Careful review of the medical records submitted fails to establish that even when Claimant was provided with prescription medication and/or sought additional potent pain medicine through the ER there was no lasting improvement in her pain or ability to function. Indeed, the record evidence establishes that even when Claimant was provided with such medications she was never able to increase her ability to work beyond 2 hours/shift and that she continued to have, what she described was debilitating pain with activity despite access to and use of such medications. The record evidence presented persuades the ALJ that it is not reasonable to continue to provide medications under this claim, especially narcotics, given Claimant's failure to demonstrate functional improvement with their use. Based on the evidence presented, the ALJ is persuaded that no additional medical care is reasonable, necessary or related to Claimant's May 17, 2014 work-related injury.

ORDER

It is therefore ordered that:

1. Claimant's request for a general order of maintenance care is denied and dismissed.

2. All maters 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 7, 2016

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-963-545-02

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the microdecompression and laminoplasty recommended by Dr. David A. Wong, M.D. is reasonable, necessary, and casually related to the treatment of Claimant's admitted industrial injury.

FINDINGS OF FACT

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

General

1. Claimant was employed with Employer as a supervisor of fresh bread. On September 22, 2014, Claimant sustained an admitted injury while moving a stack of prepared baking trays. His movement involved lifting and twisting. Claimant felt a "pop" in his back and was unable to straighten his back. He immediately experienced pain in both lower extremities and developed numbness in his right thigh.

Prior Back Injury

2. Claimant had a previous episode of back pain for which her received treatment at the University of Colorado Emergency Department on September 1 and 9, 2013. On September 1, 2013, Claimant reported to the emergency department complaining of left lower back pain radiating into the front of both of his legs to below his knees for several days with back stiffness that had worsened. Claimant was unable to stand up straight because of pain. He complained of having experienced similar symptoms in the past. Claimant denied any numbness or weakness, but was positive for tingling. An x-ray of Claimant's lumbar spine revealed "Mild degenerative disc disease and facet arthrosis of L5-S1." There was no evidence of radiculopathy. Claimant was given Valium and Oxycodone and discharged.

3. On September 9, 2013, Claimant returned to the emergency department complaining of continued left lower back pain radiating to his left lower extremity, left testicle, and down his left hip. Claimant was given Dilaudid for pain and discharged.

4. Prior to September 22, 2014, Claimant's only treatment for the lower back was confined to two trips to an emergency room on September 1, 2013, and September 9, 2013. No persuasive evidence supports a finding that Claimant's

symptoms continued or that he sought any treatment after the September 9, 2013 episode.

Course of Treatment

5. Claimant first sought treatment for his work injury on September 22, 2014, from Richard Shouse, PA-C at Arbor Occupational Medicine. Mr. Shouse noted some radicular symptoms down both legs. Claimant reported no previous back injury. Claimant is six feet five inches tall and weighs approximately 360 pounds with an approximate BMI of 42. By the next day, Claimant reported pain in his bilateral groin region and that NORCO was not strong enough to control his pain. He had limited flexion and extension.

6. Claimant's initial reports of radicular symptoms primarily to the back part of the right leg and also to the front part of the left leg into the groin caused PA Shouse to suspect disc involvement.

7. Claimant began physical therapy in October 2014 and an MRI was ordered.

8. Dr. Lloyd Thurston, D.O., examined Claimant on October 3, 2014. By that date, Claimant stood with his lumbosacral spine flexed at approximately 10 degrees, his deep tendon reflexes at his knees and ankles were trace, and standing on his heels caused low back pain and was asymmetric.

9. On October 10, 2014, Claimant showed marked improvement in his left leg, with continued numbness on the back and side of his right thigh which Dr. Thurston thought was either maraligia paresthesia or lateral femoral cutaneous nerve compression. Claimant was able to stand up straight, and to stand on his toes and heels. Claimant's MRI was reviewed to show degenerative changes, borderline central stenosis which is congenital shortness of the pedicles, and a small leftward protrusion at the L5-S1 and L4-L5 junction which was thought to be the likely cause of Claimant's resolving left leg pain.

10. On October 15, 2014, Claimant had a recurrence of severe pain and numbness down his entire right leg, left lower extremity symptoms which had been resolving flared, and Claimant resumed his forward flexed posture. Dr. Thurston increased his pain medications, continued physical therapy, and semi-urgently referred Claimant to Dr. Sorensen. Dr. Thurston noted that the MRI did not correspond with Claimant's severe symptoms, specified that he believed Claimant's symptoms were "absolutely legitimate," and wondered if Claimant had a sequestered disc that was not visible on MRI.

11. On November 4, 2014, Dr. Wernick performed a lumbar epidural steroid injection and assumed Claimant's pain management care. Claimant was able to stand straighter and had less pain. The following day Dr. Thurston noted continued numbness over the back and side of Claimant's right thigh and radicular symptoms back and side of the left thigh to the calf. Claimant's deep tendon reflexes were ¼ bilaterally, and he was able to toe/heel stand.

12. On November 19, 2014, Claimant presented at University Hospital because after returning home from physical therapy, he tried to get up off of his couch but felt a pop in his back, was unable to extend his spine, and experienced severe pain. On November 21, 2014, Dr. Sander Orent examined Claimant and opined that Claimant had experienced an acute disc herniation and was reporting new radicular symptomology. Dr. Orent requested an urgent MRI.

13. A second MRI was performed on November 24, 2014. The radiologist who read the MRI concluded:

    - Small central rightward disc protrusion at the L3-4 level with mild central canal stenosis;
    - Central left shallow protrusion at the L4-5 level;
    - Small central protrusion at the L5-S1 level; and
    - Compared to the October 7, 2014 MRI, the L4-5 protrusion was reduced in size and mass effect in the left lateral recess was read to be improved.

    In a report dated November 24, 2014, Dr, Orent suspected Claimant might have a severe facet syndrome which could benefit from chiropractic treatment.

14. On December 8, 2014, Claimant's symptoms remained unchanged. Mr. Shouse noted that Claimant was referred to Dr. Bryan Castro by Dr. Orent for a surgical consultation, and had declined chiropractic treatment.

15. On February 11, 2015, Dr. Castro evaluated Claimant. Dr. Castro reviewed the November, 2014 MRI which he noted to have minimal findings. Dr. Castro recommended an EMG, noting that a negative EMG would confirm that no surgical intervention was required.

16. On February 24, 2015, Claimant underwent an EMG with Justin D. Green, M.D. The study showed "borderline electrodiagnostic evidence for the presence of a possible, early, left L5 radiculopathy with minimal ongoing denervation." The findings did not meet definitive electrodiagnostic criteria because there were no other muscles in the myotomes which contained abnormal spontaneous activity.

17. On March 17, 2015, Claimant returned to Mr. Shouse reporting that his back had popped the day before when he turned over in bed to get his cell phone card. After his back popped, he felt sharp pain shooting down both legs. Claimant sought pain medication refills and was scheduled to see Dr. Orgel the next day.

18. On March 18, 2015, Claimant reported increased pain in his left leg extending into his lateral thigh and knee. A closed MRI is discussed that showed a shallow right paracentral disc protrusion unchanged but with persistence described as mild bilateral foraminal stenosis. Dr. Orgel "suspect[s] that there is a change in his disc bulge or other anatomic changes that occur when [Claimant] stands

which explains why his symptoms are dramatically increased by standing." Dr. Orgel wrote, "In my mind this is a pretty clear bilateral L3 radiculopathy although the MRI is not showing a substantial impingement." Dr. Orgel referred Claimant back to Dr. Castro.

19. On March 30, 2015, Claimant returned to Dr. Castro for further evaluation. Dr. Castro reviewed the second MRI and noted a lateral protrusion at the L3-4 level of the spine, but that there was no indication that any nerve roots were being displaced. Because Dr. Castro considered Claimant to be slowly improving with intermittent setbacks with increasing pain, he opined that Claimant would not benefit from surgical intervention. Dr. Castro deferred to Dr. Sorensen regarding the possibility of additional epidural injections – Claimant had already received three.

20. Dr. Orgel referred Claimant for a second surgical opinion with David Wong, M.D., who first evaluated Claimant on May 1, 2015. Dr. Orgel referred Claimant because he had continued complaints of low back pain and right leg pain with leg and foot numbness and tingling, and right quadricep weakness. Dr. Wong noted that "the patient denies significant back or lower extremity symptoms prior to his present difficulties." Among other things, Dr. Wong concluded Claimant had a "possibly multifactorial symptom complex, mechanical back pain secondary to degenerative changes at the lower three lumbar levels but no instability on flexion/extension, and likely having radicular irritation." Dr. Wong agreed with Dr. Castro and felt it was too early to conclude Claimant was a surgical candidate. He recommended that Claimant

    - lose weight;
    - Consider a selective nerve root block at L3-4 on the right side;
    - If that did not provide significant relief, to consider an injection of the lateral femoral cutaneous nerve; and
    - Identified Claimant as a potential candidate for facet blocks at the lower three lumbar levels.

21. Claimant proceeded to receive additional injection treatments. Joshua Ward, M.D., provided Claimant with a facet joint injection on June 26, 2015. Dr. Ward noted "I do note that the L5-S1 facets may be involved as well and is worth consideration pending the outcome of this injection trial." After receiving relief from the facet joint injection, Dr. Ward recommended and proceeded with medial branch block injections for facet joint dysfunction. After Claimant received moderate benefit from the medial branch blocks, Dr. Ward recommended and performed a radiofrequency ablation on September 4, 2015. However, that provided no relief. Dr. Ward also performed a L3 epidural steroid injection on September 29, 2015.

22. On October 7, 2015, Dr. Wong noted that Claimant continued to have persistent buttock and predominantly right thigh pain with numbness, tingling, and weakness. Facet blocks had provided temporary relief, but rhizotomies had not helped. An L3-4 epidural had provided a temporary 50% reduction in Claimant's pain symptoms. Dr. Wong assessed Claimant with radicular irritation to the right thigh with stenosis at L3-4 and L4-5 more on the right, and mild right quads weakness which suggested right L3 and/or L4 radicular changes. Dr. Wong concluded that Claimant was at the point where he was a candidate for a microdecompression of the L3/4 and L4/5 discs on the right side, less likely with laminoplasty to the left. Dr. Wong did not address whether the need for the recommended surgery was caused by or related to the September 22, 2014 work injury. Dr. Wong requested authorization from Insurer to proceed with the back surgery on October 15, 2015. Insurer denied that request.

23. On November 16, 2015, Douglas Scott, M.D., performed a Respondents' sponsored independent medical examination. Dr. Scott had previously examined Claimant at Respondents' request pursuant to Rule 8 and reviewed the claim, issuing reports on February 6, 2015 and April 19, 2015. At the November 16, 2015 IME, Claimant complained of bilateral leg pain, greater on the right than left. Claimant reported pain in and weakness in the back of his right thigh, with pain radiating into his right groin and right anterior leg. Claimant was working for Employer in a sedentary job with restrictions on lifting more than ten pounds. Dr. Scott concluded that Dr. Wong's October 15, 2015 request for surgery authorization satisfied the Colorado Medical Treatment Guidelines. However, he testified that the admitted September 22, 2014 work injury was to Claimant's facet joints, based on Claimant's inability to stand up straight after the September 22, 2014 incident, which Dr. Scott thought was "very suggestive of" a facet subluxation. He discussed that Claimant's facet joint injections, medial branch blocks, and rhizotomies were specifically for facet generated pain. Thus, the surgery recommended Dr. Wong was not needed to treat the effects of the work related injury. Rather, the recommended surgery would be an effort to treat Claimant's preexisting structural problems of L3 discopathy and foraminal stenosis at the L3-4 and L4-5 levels. Dr. Scott qualified his opinion by stating that it "wasn't clear to [him]" what surgery Dr. Wong was recommending, and that he based his testimony at least in part on Claimant's testimony about what surgery Claimant understood was being recommended.

24. Dr. Scott testified at hearing as an expert in occupational medicine. Dr. Scott testified that in his opinion, Claimant's work related diagnosis is facet joint dysfunction based on Claimant's inability to stand up straight immediately after the September 22, 2014 injury and the resulting pain relief Claimant received following facet joint injections and medical branch blocks.

25. Dr. Scott testified stenosis is a term used for an anatomical condition of narrowing – narrowing of the central canal which protects the spinal cord is central canal stenosis, and narrowing of the outlet where nerves come out of the back is neuro foraminal stenosis. Dr. Scott described Dr. Wong's recommended

surgery as one to relieve Claimant's back pain caused by neuro foraminal stenosis and that symptoms relating to shooting pain down the leg are connected to spinal canal stenosis, not the facet joints. Radiculopathy can be caused by a disc bulge if there is compression on the nerve root.

26. Dr. Scott explained what an annular tear is and that he did not think Dr. Wong's recommended surgery was intended to relieve Claimant's symptoms related to his annular tear. Rather, he explained that the recommended surgery was "to relieve symptoms of compression on nerve roots that might be causing [Claimant's] right leg pain [and] also the weakness in his right thigh." He opined that Claimant's annular tear diagnosis was irrelevant to whether the recommended surgery was needed. He further opined that the recommended surgery could provide Claimant some relief for what he identified as congenitally short pedicles.

27. Dr. Scott initially testified that the three MRIs of Claimant's lumbar spine showed a progressive protrusion of the L3-L4 disc, most recently to the right of center. Later in his testimony he acknowledged that he did not see the actual MRI scans and, based on the MRI reports, he could not really tell whether the disc protrusion had actually progressed.

28. Dr. Scott testified based on the University of Colorado Hospital's records that Claimant had a history of chronic low back pain with pain extending into both lower extremities, and that "most people always have some type of prior low back pain." Dr. Scott confirmed that Claimant's symptoms as reported on September 1 and 9, 2013 to the physicians at the University of Colorado Hospital were consistent with bilateral foraminal stenosis at L3-L4. He defined chronic back pain as six months of sustained back pain and that he assumed from what Claimant reported at the emergency room that he probably had six months of back pain even before he went to the emergency room in 2013. Because Claimant received no treatment and reported no symptoms between September 9, 2013 and the September 22, 2014 date of injury, the ALJ does not credit Dr. Scott's opinion that Claimant suffered from chronic back pain. Further, at the time of the injury on September 22, 2014, Mr. Hayes was working full duty, and there is no indication in the personnel records or insurance company file that his work performance or daily activities were in any way affected by the emergency room visits in 2013. Dr. Scott opined that the narrowing of the central canal or foramen existed prior to September 22, 2014. And that it was common for patients with a canal stenosis condition to experience flare-ups of pain, including pain radiating into both legs, with certain bending and twisting movements. Dr. Scott testified that flare-ups of pain with bending and twisting are to be expected, and that flare ups could be caused by simple acts such as walking, standing, and sitting. Dr. Scott testified that did not mean that the activity engaged in at the time of the flare necessarily caused the condition.

29. Dr. Scott testified there were two incidents subsequent to the September 22, 2014 work injury that required Claimant to seek medical treatment, and where

additional medical treatment was prescribed. Apparently these two factors – seeking and receiving medical treatment – take simple acts which would otherwise not be causative, such as getting up from a couch and rolling over in bed, and make them causative of separate injuries. Except that rule apparently would not apply to Claimant's work injury. First, Dr. Scott opined that the November 19, 2014 incident where Claimant felt a "pop" in his lower back while getting up from his couch at home constituted a new acute injury that could possibly be considered a permanent aggravation that required medical treatment. Second, Dr. Scott opined that the March 16, 2015 incident where Claimant felt a "crack" and a "pop" while turning over in bed at home to reach for a cell phone cord constituted a new injury. Dr. Scott also testified that the March 16, 2015 incident constituted a permanent aggravation of Claimant's underlying condition.

30. Dr. Scott acknowledged that a paracentral disc bulge at L3-L4 could compress that nerve root, and that leg weakness and numbness were nerve root type problems. He also acknowledged that radiculopathy, which is pathology of a nerve root, causes leg pain, tingling, and numbness and that Dr. Orgel diagnosed Claimant with L3-L4 radiculopathy. Dr. Scott also acknowledged that he did not know what level facet Claimant injured, and that he did not know where the compression was coming from. Dr. Scott could not tell whether Claimant's disc protrusion at L3-L4 preexisted his work injury. Dr. Scott also acknowledged that Claimant's symptoms "seem to be what they call radicular symptoms" and suggested irritation of the L3 or L4 nerve roots on the right side, although Dr. Green's EMG did not find evidence of a specific radiculopathy. Dr. Scott also acknowledged that the epidural steroid injections were not done for facet problems or for spinal stenosis. He acknowledged that Claimant's positive response to the epidural steroid injection at L4-L5 indicated that Claimant probably had nerve root irritation at that level. Dr. Scott thought that Claimant's degenerative disc disease caused him to develop stenosis. Claimant had not presented with right leg symptoms that required surgery prior to his work injury.

31. On February 3, 2016, the parties took the evidentiary deposition of Claimant's authorized treating physician, David Orgel, M.D. Dr. Orgel is board certified in internal medicine and occupational medicine. Dr. Orgel discussed that Claimant presented with certain classic indications of spinal stenosis, including walking in a bent forward posture and weakness with standing. Dr. Orgel was concerned with Claimant's right side thigh numbness; complaints of weakness in his quadriceps, and objective atrophy and weakness on extension which he thought were caused by radiculopathy with denervation at L3-L4. Dr. Orgel also testified that Claimant's March 13, 2015 MRI showed persistent mild bilateral foraminal stenosis at L3-4. Dr. Orgel opined that the reasons for performing the requested surgery would be to reduce Claimant's progressive symptoms by decompressing the nerve root. Dr. Orgel noted that Claimant's symptoms and weakness had been worsening and that if they were not timely addressed, there would be long-term consequences and delayed recovery. Dr. Orgel explained that he attributed Dr. Castro's opinion that Claimant was not a surgical candidate to his being very conservative and to the early timing of that opinion before additional testing and

symptom progression had occurred. Dr. Orgel testified that the surgery recommended by Dr. Wong, whom he also described as a conservative surgeon, would improve Claimant's right thigh weakness. Dr. Orgel ultimately opined that the surgery recommended by Dr. Wong was reasonable.

32. With respect to relatedness, Dr. Orgel testified that Claimant's symptoms were not the result of his "congenital issue," and that his injury was work related. He persuasively explained that backs are not strong against compression with a twist which causes an acute annular tear as seen on the October 7, 2014 MRI at L4-L5. The disc weakens and becomes flatter and then bulges. Dr. Orgel testified that Claimant had an acute annular tear at L4-5 consistent with his mechanism of injury and objectively noted on MRI. Dr. Orgel testified that Claimant's need for surgery was related to the September 24, 2014 work injury. "I think there was an acute event that caused this problem and that the event led to a permanent exacerbation of an underlying probably somewhat chronic condition, which could be a disease."

33. On cross examination by Respondents' counsel, Dr. Orgel testified
    - Claimant's anatomy and weight contribute to putting him at risk for his work related injury;
    - Findings on the three MRIs were "fairly mild";
    - EMG findings objectively demonstrated radiculopathy only on the left; and
    - Claimant received some pain relief as a result of the epidural steroid injection at L3-L4.

34. Dr. Orgel was not aware of Claimant's treatment at the University of Colorado emergency department on September 1 and 9, 2013, at which Claimant reported pain in his left low back with pain radiating into his left testicle and into the front of both legs without evidence of radiculopathy. Dr. Orgel expressed that such previous symptoms were not unexpected, and that Claimant had been relatively asymptomatic from September of 2013 until his work injury a year later. Dr. Orgel opined that Claimant's work injury was an acute event that caused a permanent exacerbation of his condition, and that the records from September 2013 did not change his causation opinion. However, Dr. Orgel also made clear that he would be reluctant to change his causation opinion because he did not think it was "fair or reasonable to start questioning causality" and that he thought "fairness should be part of the process."

35. Dr. Orgel was also not aware of Claimant's November 16, 2014 visit to the University Hospital emergency department after getting up from his couch. He testified that Claimant's symptoms can flare up or be aggravated by standing up from a seated position or rolling over. He also testified that the November 16 incident could possibly have been a new acute injury or an aggravation of a previous underlying condition. Dr. Orgel clarified that facet joint dysfunction typically results in pain in the back; spinal stenosis typically results in pain that shoots down the legs with activity.

36. Dr. Orgel clarified that the surgery recommended by Dr. Wong is for Claimant's radiculopathy and associated thigh abnormalities at the L3 and possibly L4 levels, and is not intended to fix Claimant's facet joints. The micro-decompression at L3/L4 and L4/L5 level, and potential laminoplasty on the left, recommended by Dr. David A. Wong, M.D., are not intended to treat facet joint dysfunction. The procedure consists of decompressing the nerve roots at L3/L4 and L4/L5 levels to decompress the discs and open the canals on both sides of the discs, particularly on the right side. The purpose of the procedure is to relieve right leg pain and address the numbness and weakness in Mr. Hayes's right thigh.

37. Dr. Orgel and Dr. Wong opined that Claimant's back problems are multifactorial.

38. Dr. Orgel opined that if a follow up EMG were performed, he would expect to see greater findings because Claimant's symptoms have worsened. He also explained that EMGs were often read as normal when there was a pinched nerve in the back. In addition, progressive weakness is of even greater concern, because strength may not return.

39. Respondents' counsel asked whether Claimant's March 16, 2015 incident could possibly be a new acute injury to Claimant's back, and whether it could possibly be an aggravation of a preexisting underlying condition in Claimant's spine. While Dr. Orgel answered yes to these questions, the ALJ finds he was expressing agreement with a possibility – not offering an opinion to a reasonable degree of medical certainty.

40. Claimant testified at hearing. The ALJ finds his testimony to be credible and generally consistent with his medical records. Significantly, he testified that:

    - His symptoms were relieved when he was in traction which took the compression off of his back.

    - His right thigh symptoms of weakness pre-dated subsequent incidents on November 19, 2014, and March 17, 2015; and his right thigh weakness has gotten increasingly worsened since the date of his work injury.

    - He received significant relief from a lumbar transforaminal epidural steroid injection done on September 29, 2014.

    - He did not experience any relief in thigh numbness and weakness after the facet joint injections.

    - He only experienced twelve-hour relief on the right side after medial branch blocks.

- On November 16, 2014 when he was at home after physical therapy he experienced what "felt like the same thing that happened on September 22."

- He received multiple injections at different levels in his back to try to relieve the symptoms in his right leg.

- Claimant understood that the surgery recommended by Dr. Wong was to take care of whatever was compressing the nerve root that went to his right thigh and was causing the weakness and numbness in his thigh.

41. Based on the totality of the evidence, the ALJ finds that Dr. Scott's credibility and the persuasiveness of his testimony are limited by the following factors:

    - His causation analysis is superficial and based primarily on the single factor of Claimant's inability to stand following the work injury;

    - His acknowledgement that he did not have a clear understanding of Dr. Wong's recommended surgery;

    - His assumption that Claimant ad chronic back pain from an emergency room record which only indicate a prior history of symptoms but do not mention the duration of symptoms;

    - The conflict between his testimony that it was common for patients with a canal stenosis condition to experience flare-ups of pain, including pain radiating into both legs, with certain bending and twisting movements, yet concluding that such flares were new acute injuries or otherwise intervening events when Claimant experienced same on March 16, 2015 and November 19, 2015.

42. Based on the totality of the evidence the ALJ finds that Dr. Orgel's testimony was more credible and persuasive than that of Dr. Scott. Dr. Orgel was more familiar with Claimant's condition as a treating provider, was more thorough and comprehensive in his causation analysis, showed a better understanding of the recommended surgery and why it was related to Claimant's work injury, and his opinions were more consistent with Claimant's medical course and other medical providers' opinions.

43. Based on the totality of the evidence, the ALJ finds that Claimant met his burden of establishing by a preponderance of the evidence that the microdecompression and laminoplasty recommended by Dr. David A. Wong, M.D. is reasonable, necessary, and casually related to the treatment of Claimant's admitted industrial injury.

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. §8-43-201 C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). 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.

Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury. Respondents are liable for authorized medical treatment that is reasonable, related and necessary to cure the effects of the industrial injury. CRS 8-42-101(I)(a); *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Employers also are liable for their employees' medical treatment for work related injuries that aggravate, accelerate, or combine with a pre-existing condition. C.R.S. § 8-42-101(1)(a); *see also Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Respondents argue that while all results flowing proximately and naturally from an industrial injury are compensable, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002)(citing *Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934)). Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. *Id.* at 1189. "An efficient intervening injury may sever the causal relationship between the claimant's work injury and resulting disability." *Lancaster v. Arapahoe County Sheriff*, W.C. Nos. 4-744-646 and 4-746-515 (ICAO, May 12, 2010) (citing to *Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934)).

The ALJ weighs the evidence and determines the credibility of expert witnesses based on the expert's special knowledge, training, experience or research, and other factors, such as the consistency and the reasonableness of a witness' testimony, motives, bias, prejudice or interest. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 973 (Colo. App. 2012); *see also Young v. Burke*, 338 P.2d 284 (1959).

The ALJ concludes that it was common for patients with a canal stenosis condition to experience flare-ups of pain, including pain radiating into both legs, with certain bending and twisting movements. This conclusion is likewise supported by Dr. Orgel's testimony that Claimant's symptoms can flare up or be aggravated by standing up from a seated position or rolling over. The ALJ finds and concludes that it is more likely true than not that Claimant's experiences on March 16, 2015 and November 19, 2015 constituted flare ups and not new injuries or intervening aggravating events.

Respondents also argue that Claimant's condition is preexisting. The ALJ finds and concludes otherwise.

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether an industrial injury is the cause of a subsequent need for medical treatment is largely one of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 497 (Colo. App. 1997).

Respondents argue that Claimant's work related injury was a facet injury, and that the recommended surgery is not treatment for a facet problem. The ALJ disagrees.

The ALJ concludes that Dr. Scott's opinion that Claimant's work related diagnosis is facet joint dysfunction based on Claimant's inability to stand up straight immediately after the September 22, 2014 injury and the resulting pain relief Claimant received following facet joint injections and medical branch blocks is not persuasive. Dr. Scott's opinion on causation is found to be based on a fairly superficial analysis and his testimony that Claimant responded well to medial branch blocks which was contradicted by more persuasive testimony by Claimant and medical records. Further, although objective testing was not as compelling as expected, several doctors diagnosed work related diagnoses which Dr. Wong's surgery would correct. For example: (1) on the date of injury Mr. Shouse noted some radicular symptoms down both legs; (2) on November 4, 2014, Dr. Wernick performed a lumbar epidural steroid injection and the following day Dr. Thurston noted continued radicular symptoms; (3) Claimant's EMG showed "borderline electrodiagnostic evidence for the presence of a possible, early, left L5 radiculopathy with minimal ongoing denervation"; (4) on March 14, 2015, Dr. Orgel wrote, "In my mind this is a pretty clear bilateral L3 radiculopathy although the MRI is not showing a substantial impingement"; (5) on May 1, 2015, Dr. Wong concluded Claimant likely had radicular irritation at the lower three lumbar levels; (6) Dr. Scott acknowledged that Claimant's symptoms "seem to be what they call radicular symptoms"; (7) Dr. Orgel testified he was concerned with Claimant's right side thigh numbness; complaints of weakness in his quadriceps, and objective atrophy and weakness on extension which he thought were caused by radiculopathy with denervation at L3-L4; and (8) Dr. Orgel testified that the surgery recommended by Dr. Wong is for Claimant's radiculopathy.

Finally, Respondents argue that the surgery recommended by Dr. Wong is for Claimant's spinal canal stenosis which they argue is degenerative and not work related.

The ALJ has found persuasive Dr. Orgel's testimony that Claimant's symptoms were not the result of his "congenital issue," and that his injury was work related. He persuasively explained that backs are not strong against compression with a twist which causes an acute annular tear as seen on the October 7, 2014 MRI at L4-L5. The disc weakens and becomes flatter and then bulges. Dr. Orgel testified that Claimant had an acute annular tear at L4-5 consistent with his mechanism of injury and objectively noted on MRI. Dr. Orgel testified that Claimant's need for surgery was related to the September 24, 2014 work injury. "I think there was an acute event that caused this problem and that the event led to a permanent exacerbation of an underlying probably somewhat chronic condition, which could be a disease." Therefore, the ALJ concludes that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Wong is related to her September 22, 2014 work injury.

ORDER

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

1. The surgery recommended by Dr. David Wong is necessary, reasonable and related to the industrial injury, sustained by Claimant Christian Hayes on September 22, 2014. Therefore, Respondents are liable for the recommended surgery.

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

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 27, 2016

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

ISSUES

- Whether Respondents proved by a preponderance of the evidence that they are entitled to withdraw the General Admission of Liability.

- Whether the hip surgery proposed by Raymond Kim, M.D. is reasonable, necessary and related to Claimant's injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a territory manager, starting on June 16, 2008. In that capacity, she worked with commercial accounts, making sure their trash pick-up, recycle services and other programs were going smoothly. Her job required her to be in the field and meet with customers.

2. Claimant's medical history was significant in that she had multiple prior injuries, including an injury to her lumbar spine, cervical spine and left shoulder. Her left shoulder injury required surgery and Claimant also underwent two (2) prior left knee surgeries. Claimant testified she had very bad scoliosis and when she was injured, this caused her to be "off kilter" and she would experience spasms in her back. *However, this condition did not limit her activities, which included back-country skiing, hiking, rafting, and biking.

3. On December 16, 2004, Claimant suffered an industrial injury when she fell on the ice, falling first to the right, then falling to the left and hitting a car. As part of that claim, Claimant underwent an open subacromial decompression, open distal clavicle resection on her right shoulder on September 15, 2015. An MRI was done on Claimant's lumbar spine on November 16, 2005 and the films were read by Margaret Montana, M.D. Dr. Montana's impression was mild rotolumbar scoliosis with convexity to the right; minimal left paracentral disc protrusion T12-L1; and multilevel small bulges and disc degeneration and dehydration, but without canal stenosis or other focal disc herniation confirmed. On July 18, 2006, Claimant underwent a DIME that was performed by Darrel Quick, M.D. for the 12/16/04 injury, who referred to a record from a Dr. Chisholm noting Claimant had a contusion on her right hip after her fall. Dr. Quick diagnosed left shoulder contusion/sprain, right shoulder contusion/sprain, cervical strain, left sacroiliac sprain with chronic left sacroiliac pain; left knee sprain.

4. Claimant received treatment for left sacroiliac pain on December 19, 2008 at High Country Health Care and returned to that facility for back pain on February 15, 2009. She was evaluated by Genevieve Syed, M.D. on December 3, 2010, after experiencing pain in her groin, right quad, and right knee after cross country skiing. Dr. Syed noted tenderness and muscle spasm over right SI joint and mild tenderness of

right hip. She received a prescription for massage therapy and medications. Claimant was injured in a bike accident and was seen on August 17, 2011 by Tanja Britton, M.D. at High Country Health Care. Claimant indicated that she had fallen off her bike landing on her left elbow. Claimant stated she felt better, received some chiropractic treatment, then went dancing and experienced right SI joint pain. She had radiating pain into the right posterior thigh. The examination revealed Claimant's right sided SI joint was tender, causing discomfort with side bending. Dr. Britton's assessment was sacroiliac pain and she prescribed medication.

5. Claimant returned to High Country Health Care on August 10, 2012 for complaints of back pain following a hiking accident. Claimant stated that she tripped over a root while hiking. Claimant complained of a low back strain and some pain in her right leg related to strain. Claimant also treated for low back pain and symptoms on March 30, 2014. She was diagnosed with scoliosis and chronic back pain by Randall Nations, M.D. That treatment continued through June 2014.

6. After a review of the medical records admitted at hearing, the ALJ finds Claimant suffered from chronic low back pain and right SI joint pain/dysfunction prior to November 5, 2014. The ALJ also finds Claimant had symptoms in her right lower extremity, including the right hip, thigh and groin prior to November, 2014. She required treatment for these conditions.

7. Both Claimant and Respondents' witnesses testified the incident which is the subject of the instant claim occurred on November 5, 2014 at Employer's office, located in Silverthorne, Colorado. Present at the office was Claimant, Amy Thompson, Richard Clemens, Peter Sims and Ms. Thompson's dog.

8. Claimant testified she was injured on November 5, 2014 in the afternoon when Ms. Thompson's dog, Louie, ran into her. Claimant heard the dog bark periodically throughout the day. She estimated his weight to be between eighty-five (85) and eighty-eight (88) pounds. That afternoon, she was walking to her office from the copier when a customer appeared at the doorway to the main office area[1]. She heard Louie barking and growling; then saw him run down the hallway. The dog ran down the hallway and "launched", hitting her on the right side of her body from the knee up to the hip area. Claimant stated the dog hit her with his head and chest.

9. Claimant also testified the customer had to catch or brace her to keep her from falling. Ms. Thompson remained in her office. Claimant testified she went to Ms. Thompson's office and told Mr. Clemens she had just "taken one for Waste Management". Given the evidence that the dog weighed at least 80 lbs and Claimant weighed 124 pounds[2], the ALJ infers it is more likely Claimant would have been knocked over if the collision occurred as she described.

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[1] Depicted in Exhibit 53.

[2] Claimant's weight was listed in Dr. Nation's report-Exhibit 1, p. 97.

10. Claimant completed a statement in the form of an e-mail, which was sent to Brad Hansen on November 7, 2014. Significantly, in this document, Claimant stated the incident occurred on "Tuesday, November 4" when Ms. Thompson brought her dog to work. Claimant said the dog ran down the hall and collided with her right leg, at knee and thigh height. She said she "thought" Ms. Thompson remained in her office. Claimant did not offer any testimony to explain the discrepancy regarding the date of injury. The ALJ notes that Claimant's testimony was more definite than her statement with regard to whether Ms. Thompson remained in the office. The ALJ also notes Claimant did not reference falling back into the customer in her written statement. Claimant said she did not think she was hurt badly, but developed pain later that evening when her right side "seized" up.

11. Claimant testified she measured the dimensions of the office and hallway, which was the situs of the incident. The measurements were done in May on a Saturday morning. Claimant testified it was 99 inches from Ms. Thompson's chair to the door. The hallway was approximately 13 feet long and 40 inches wide. Claimant prepared a drawing, which documented her location in relation to Ms. Thompson's office, the hallway and the door where the customer was located[3].

12. Ms. Thompson testified on behalf of Employer and provided a different version of the incident. She is employed by the Employer as an operation specialist. In that capacity, she supports the route managers, and drivers, as well as working in the daily operations of the office. She has worked with Claimant for approximately two (2) years. Ms. Thompson, who is a massage therapist, said Claimant spoke to her on 2-3 occasions about massage therapy for hip and low back problems. She also observed Claimant limping on occasion.

13. On November 5, 2014, in the afternoon, Ms. Thompson was working in her office which is on the second floor of the building. It is also known as the dispatch office. Ms. Thompson was in the process of checking out Mr. Clemens and Mr. Sims (both of whom are drivers). They were in her office, as was her dog. Ms. Thompson was seated in her chair with her back to the door and the dog was positioned directly underneath the chair. Mr. Clemens was down on the floor next to the chair, petting the dog. Mr. Sims was sitting in a chair right next to the desk. Ms. Thompson confirmed Louie was a large dog, weighing eighty (80) lbs and described him as "very friendly". Claimant's office is located just to the left of Ms. Thompson's and there is a hallway which runs to both offices.

14. Ms. Thompson testified someone walked into the main part of the office on the first floor and she could hear that person walking up the stairs. The visitor said: "Hello, hello…" He came into the main office area at the other end of the hallway. There was a mirror in the corner of Ms. Thompson's office and she could see down the hallway. Ms. Thompson saw Claimant walk down the hallway to where the visitor was. Louie started barking and trotted down the hallway. Ms. Thompson said he was

[3] Exhibit 58.

moving at a “fast trot” and she ran after him, trying to grab his collar. Ms. Thompson said she was able to stop her dog before he made contact with the visitor or Claimant, although he was very close to Claimant. Claimant did not cry out, nor did she say she was hit by the dog. Ms. Thompson thought Claimant assisted the visitor, who left shortly afterward. Claimant did not tell Ms. Thompson she was injured that afternoon.

15. Ms. Thompson drafted a statement (in the form of an e-mail sent to Kevin Richards-District Manager) dated 11/6/14, in which she described her dog going down the hall and she went after him to make sure the customer was not scared. Ms. Thompson’s statement goes on: “As I reached for my dog’s collar; Jeannie Severson unexpectedly put her leg out to block my dog from the customer. I do not believe that my dog and her made contact, it did happen very fast though”. Her statement puts Claimant’s leg in close proximity to the dog, even though she testified that to her nothing happened. The ALJ infers Ms. Thompson tended to minimize the incident, as Louie was her dog. The ALJ also drew the inference that Ms. Thompson would have been unable to get out of her chair, turn, run down the hall and grab the dog by the collar before he reached Claimant. Accordingly, the ALJ did not find Ms. Thompson to be credible.

16. Mr. Clemens testified regarding his recollection of the events of November 5, 2014. He was in the dispatch office, standing in the doorway. He had a clear view down the hallway. Mr. Clemens testified that when a customer entered the main part of the office Louie started barking and trotted towards the customer. Mr. Clemens stated Louie made it out of the office and into the main room before Ms. Thompson was able to grab him. Mr. Clemens testified Louie never ran into the Claimant. Additionally, he never saw the Claimant lose her balance, nor did he see the visitor reach out to grab her. Claimant never made any comment that the dog had hit or run into her and Mr. Clemens did not refer to any comment about taking one for Waste Management. Mr. Clemens also signed Ms. Thompson’s written (e-mail) statement, which also related there was no contact between Claimant and the dog.

17. The ALJ notes there is a question where Mr. Clemens was located, as his testimony conflicted to a certain extent with Ms. Thompson. However, his testimony was consistent with Mr. Sims in that Claimant never said anything about the dog running into her or causing her to fall into the customer. Given Claimant’s description that the force of the impact caused her to fall into the customer, the ALJ infers she would have said something to Mr. Clemens.

18. Mr. Sims testified that he was also in Ms. Thompson’s office on November 5, 2014. Mr. Sims was sitting in a chair next to Ms. Thompson’s desk, where he could see out the door. Mr. Sims testified that a customer entered the main area of the building and was looking around for help. He saw when the customer turned the corner. Mr. Sims stated he saw Claimant go over to help the customer, as Louie realized there was someone in the office. Mr. Sims said Louie trotted over to the customer. Mr. Sims testified that Louie never made physical contact with the Claimant. Mr. Sims further testified Claimant did not say anything when Ms. Thompson grabbed

Louie. Mr. Sims also signed the written statement prepared by Ms. Thompson. The ALJ credited Mr. Sims testimony as he could see what transpired from his vantage point.

19. On November 7, 2014, an Employer's First Report of Injury was completed by Kevin Richards, the Employer's District Manager. It listed the date of injury as 11/5/14. Under "Tell us how the injury occurred" it states "EE SUFFERED ALLEGED INJURY AFTER TRYING TO STOP A CO-WORKER'S PET FROM GREETING A CUSTOMER, EE CLAIMS LEG PAIN". Under "Tell us the nature of the injury/illness", it states "STRUCK BY".

20. Claimant was initially examined on November 10, 2014 by Dr. Nations at High Country Healthcare. In the history section, Claimant stated that she had just walked into the office when a co-worker's dog launched at her. Claimant said she was hit by the dog and was struck on the right /hip/groin/knee. Claimant's chief complaint was of back pain. The examination revealed normal range of motion in her right hip and knee. No neurological abnormalities were found. Claimant's history of chronic low back pain was noted. Claimant was diagnosed with a lumbar strain, neck strain, and knee strain. Dr. Nations' impression was this was all likely just strain; neck strain; low suspicion for significant injury to knee. The M-64 he completed said the injury occurred when a co-worker's dog charged running at Claimant and slammed into right side. It listed the diagnoses as lumbar strain, neck strain and knee strain. The ALJ notes no bruising was noted on Claimant's right hip.

21. Claimant underwent an initial PT evaluation at AXIS Physical Therapy on November 11, 2014. She reported the injury occurred when an 80 lb dog ran into her upper thigh region and pain arose 7-8 hours later in the evening. Claimant reported pain in her right lateral thigh into her right knee joint, wrapping up and around the gluteal region; intermittent lower back pain and more right-sided lower back pain; right lower cervical pain with some associated stiffness. The referring diagnosis was lumbar strain, neck strain, and knee strain. She received various modalities of physical therapy including exercises, tissue and joint mobility and stretching, as well as a home exercise program. The note indicated Claimant was guarded and had an antalgic gait. Her presentation was consistent with the diagnoses, including a contusion to the thigh and hip joint. The treatment goal included increasing Claimant's range of motion. The ALJ notes it was significant that Claimant was not reporting right hip pain in the initial PT evaluation.

22. Claimant returned to High Country Health Care on November 25, 2014 and was examined by Elizabeth Winfield, M.D. In the history section, it was noted Claimant "was not sure how she landed-the guy behind her may have caught her a little, she didn't hit the floor". However, the M-164 notes: "struck by 85lb dog, fell". Dr. Winfield's assessment was neck strain, knee strain, lumbar strain, and sacroiliac joint dysfunction of right side. Claimant was referred for physical therapy ("PT") and chiropractic treatments. The ALJ notes this initial evaluation did not contain a diagnosis related to the hip.

23. Claimant received chiropractic treatment from John Asthalter, D.C. beginning on November 26, 2014. Dr. Asthalter noted by history Claimant's scoliosis seized up immediately after being struck by a large dog. Claimant complained of right-sided groin, hip, low back and knee pain. Claimant was reluctant to have any sort of leg manipulation and reported spasm. Dr. Asthalter assessment included possible labral involvement, or an interstitial tear that might be through the different angles of hip flexion and abduction, "given this seemingly inconsistent pattern of pain". Claimant was to receive chiropractic treatment and manipulation to the abductor, as well as low back.

24. Claimant received additional chiropractic treatments with Dr. Asthalter on December 2, 2014. In the subjective section, it was noted the treatment was for her hip and low back. Claimant's ability to move without spasm was incrementally better.

25. On December 4, 2014, a General Admission of Liability ("GAL") was filed for medical benefits only.

26. Claimant also received treatments from Dr. Asthalter on December 5, 2014. In the subjective section, it was noted the treatment was for her right hip and low back. Claimant returned to Dr. Asthalter on December, 12, 16, 19 and 30, 2014, as well as on January 2, 13, 26, 23, 28 and 30 and February 3 and 5, 2015. The balance of Dr. Asthalter's records documented subjective symptoms in the right hip, thigh and low back. In these records, Claimant reported muscle spasm and was guarded in her movements.

27. There is a chart note dated December 12, 2014[4] in which Dr. Winfield noted she discussed the right hip with Dr. Asthalter. Her assessment included right hip pain and sacroiliac joint dysfunction of the right side. Dr. Winfield recommended an MRI of the right hip.

28. On December 24, 2014 an MRI was performed on Claimant's right hip. The films were read by Kelly Lindauer, M.D., who noted a large right hip effusion and scarring of the capsule. There was scarring of the ligamentum teres and chronic fraying /tearing of the right acetabular labrum. Dr. Lindauer's impression was severe right hip osteoarthritis and chronic degenerative fraying/tearing of the right acetabular labrum. Dr. Lindauer also observed moderate osteoarthritic changes in the left hip. The ALJ infers the osteoarthritis in Claimant's right hip was a chronic degenerative condition.

29. On January 19, 2015, Andrew Kim (an orthopedic surgeon) examined Claimant, who was struck by a 80 lb dog on the posterolateral aspect of her hip. Claimant's chief complaint was right hip pain and she also had "severe" pain in her right groin, as well as right knee pain. Dr. Kim noted Claimant had an antalgic gait and full range of motion in the lumbar spine. X-rays were taken that day, which Dr. Kim reviewed. The films showed severe right hip end-stage arthritis with complete joint space narrowing and periarticular osteophytes, cystic changes about the acetabulum

[4] The record was unclear whether Dr. Winfield evaluated Claimant that day.

and femoral head, pelvis obliquity secondary to scoliosis. Dr. Kim opined Claimant would be a reasonable candidate for total hip arthroplasty. The ALJ notes Dr. Kim did not tie Claimant's injury to her need for surgery, nor did he provide an opinion whether the incident of 11-5-14, aggravated or accelerated the degenerative condition of Claimant's right hip.

30. A request for authorization of right arthroplasty was sent on January 19, 2015. Respondents filed an Application for Hearing on February 4, 2015, listing as issues the reasonableness and necessity of the surgery for Claimant's hip.

31. On April 9, 2015, Eric Ridings, M.D. performed an IME of Claimant on behalf of Respondents. Claimant complained of pain in her right hip and limitations in her ability to move. The area below her right hip to her knee sometimes "seizes" and she had pain near the patella with activity. She also had neck pain since the injury. On examination, Dr. Ridings noted a significant right convex lumbar scoliosis, with a milder left convex scoliosis. She had significant limitation in active right hip range of motion, with no catching or crepitus. Her knee range of motion was fluid, without catching or crepitus.

32. In his report, Dr. Ridings opined Claimant aggravated preexisting osteoarthritis in her right hip as a result of the 11/5/14 work injury. He concluded she sustained a sprain/strain of at the right knee and a cervical strain injury. Dr. Ridings believed the total hip arthroplasty was reasonable, necessary and related to this injury. Claimant was not at MMI. In Dr. Ridings' opinion, Claimant's low back complaints (except as related to the hip) were not worsened by the incident, as she had a long history of chronic low back pain going back to 2004.

33. Dr. Ridings testified at hearing. He has been in practice since 1989. Dr. Ridings was qualified as an expert in physical medicine and rehabilitation, a specialty in which he is also board-certified. He is Level II accredited, pursuant to the W.C.R.P. At the hearing, Dr. Ridings heard the testimony of the percipient witnesses to the incident of 11/5/14, including the statements there was little or no contact between Claimant and the dog. This altered his opinion, as it differed from the history given to him by Claimant. Dr. Ridings testified he had based his previous opinion based upon the history given to him by Claimant. Dr. Ridings stated he would have expected an immediate onset of symptoms, if an 85 lb dog would have struck Claimant in the leg, causing her to stumble. Dr. Ridings testified he now did not believe the incident aggravated or accelerated the condition of Claimant's right hip after he heard the description of the incident from various witnesses. The ALJ infers that Dr. Ridings believed that in addition to trauma, osteoarthritis and other conditions could be a cause of Claimant's hip effusion noted on the MRI. Dr. Ridings also did not believe Claimant, who had previously experienced chronic low back symptoms, would have woken up with new and dramatic symptoms.

34. Dr. Ridings offered his opinion that the dog did into come into contact with Claimant. This comported with the factual findings and inferences drawn by the ALJ.

Dr. Ridings explained he generally accepts what a patient tells him as true, unless it isn't medically reasonable or there is a direct contradiction in the medical records. The ALJ credited this explanation. Therefore, while Dr. Ridings' change in opinion hurt his credibility, his explanation that this change related to a change in his understanding of a crucial underlying fact was accepted by the ALJ. The ALJ was persuaded by Dr. Ridings' expert testimony, particularly his finding that Claimant would have had an immediate onset of symptoms in her right hip.

35. The ALJ finds the absence of medical records immediately following the incident significant.

36. The ALJ finds Claimant's testimony was not credible or persuasive, both in her description of the incident, as well as in her failure to explain the discrepancy regarding the date of injury.

37. Given the testimony of the witnesses, the physical layout of the offices and the conclusion Claimant would have been knocked over by the dog, the ALJ finds Claimant did not sustain a compensable injury arising out of and in the course and scope of her employment.

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

CONCLUSIONS OF LAW

Generally

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

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 has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The credibility of Claimant, as well as Employer's witnesses regarding what happened on November 5, 2014 was the overriding issue in this case.

Withdrawal of GAL

Respondents seek to withdraw the GAL filed on 12/4/14, which they argued was promptly filed after the injury was reported in order to provide medical treatment to Claimant and before all the facts were known. They now seek an order allowing withdrawal of the GAL based upon information developed after the claim was admitted. In this regard, Respondents argued Claimant did not suffer a compensable injury, disputing her version of the accident and relying upon the percipient witnesses who were present at the office on November 5, 2014. In addition Respondents argued Claimant's failure to fully provide the details of her injury and medical history affected her credibility.

Claimant asserted Respondents failed to meet their burden of proof for a withdrawal of the admission. In this regard, Claimant argued there were both minor inconsistencies and major discrepancies in Respondents' witnesses' testimony. Claimant argued the evidence led to the conclusion she suffered a compensable injury to her right hip. Further, Claimant argued that her description of the incident was the most credible, given the layout of the offices. She also contended that her need for a right hip arthroplasty was reasonable and necessary, as well as related to her injury.

Respondents' request to withdraw the GAL is governed by Section 8-43-201(1), C.R.S. and the recent holding by the Colorado Supreme Court in *City of Brighton v. Rodriquez*, 318 P.3d 496, 508 (Colo. 2014). Respondents have the burden of proving by a preponderance of the evidence that the modification to the GAL is warranted in this instance. *Id.*

In *City of Brighton,* the Court considered the withdrawal of an admission by Respondent where Claimant suffered an unexplained fall. More particularly, the Court addressed the issue of whether a truly unexplained fall was compensable under the Colorado Worker's Compensation Act. As a starting point, the Supreme Court noted there must be a causal connection between Claimant's employment and the injury. See also *Madden v. Mountain West Fabricators,* 977 P.2d 861, 863 (Colo. 1999). The Court then analyzed when a fall would arise out of Claimant's employment and reviewed the three categories of risk that caused injuries to employees. The first category encompassed risks inherent to the work environment itself (direct); the second category contained risks which are entirely personal or private (which included idiopathic injuries); and the third category included injuries caused by neutral risks (risks generally not associated with work or the Claimant). *City of Brighton v. Rodriquez*, 318 P.3d at 503-504.

The Court concluded Claimant's unexplained fall fell within the third category which contained neutral risks. Reversing the Court of Appeals, the Supreme Court held Claimant suffered a compensable injury because Claimant would not have been injured, "but for" her employment. The Court also held that Respondent City of Brighton had the burden to prove by a preponderance of the evidence that Claimant's injuries were not compensable in order to withdraw the GAL. Under the facts of the case, the Court found Claimant's injury was compensable; therefore, Respondents failed to meet their burden of proof and were not allowed to withdraw the admission.

Pursuant to the holding in *City of Brighton v. Rodriquez*, at the heart of the issue of whether Respondents should be allowed to withdraw their admission of liability in this case is whether Claimant suffered a compensable injury while working for Employer. Respondents have the burden of proof to show the injury was not compensable. The ALJ determined while an incident occurred involving Claimant and the dog, Louie, Claimant did not suffer a compensable injury. Therefore, based upon the totality of the evidence, Respondents satisfied their burden of proof. The ALJ's reasoning was two-fold. First, the evidence before the ALJ did not establish Claimant suffered a compensable injury. Claimant's description of how her injury occurred was exaggerated. (Findings of Fact 8-10, 37). Claimant's testimonial version of these events also diverged from her written statement given right after the incident. In this regard, there was confusion about the date of injury, as Claimant's testimony conflicted with the written e-mail statement sent two days after the incident. Claimant's failure to correct or explain this discrepancy hurt her credibility.

As found, Claimant's testimony regarding the actual contact between Louie and the right side of her body also was not credible. Her description of an 80 (plus) pound dog launching into her right knee/thigh and yet she did not fall to the floor was not credible. Her description of falling into the customer was not noted in her written statement, nor was it viewed by any other witness. Moreover, she never told any of the Respondents' witnesses, nor Dr. Nations that she fell into the customer who was nearby. Claimant did not talk to any of Employer's witnesses about what happened. Thus, although Respondents' witnesses have credibility issues, they were consistent about what was not said by the Claimant. Claimant's version of this incident was the least believable.

Second, the medical evidence supports the conclusion Claimant's right hip condition was not compensable, albeit for reasons different than what was suggested by Respondents. There is no question that Claimant had chronic low back pain and was treated for SI joint dysfunction prior to November 2014. Claimant did not always fully relate the details of her medical history to health care providers who evaluated and treated her. However, that standing alone, does not rule out the possibility she sustained a compensable injury. The MRI of Claimant's hip showed severe osteoarthritis and chronic degenerative fraying/tearing of the right acetabular labrum. As found, Claimant more probably than not would have had immediate pain and significant symptoms in the right hip had the events occurred as she alleged. In fact, there was a delay before Claimant sought treatment. Immediate pain and symptoms were not documented when she was first seen.

As determined in Findings of Fact 20-21, Claimant did not initially report symptoms in her right hip. This seems unlikely, given the specificity with which she reported low back (including SI joint), thigh and leg complaints. In this regard, Dr. Nations, who initially examined Claimant immediately after the incident found normal range of motion in the right hip. Dr. Nations made no diagnosis related to the right hip. (Finding of Fact 20). Claimant also did not report right hip symptoms in the initial PT evaluation. (Finding of Fact 21).

The physicians who treated Claimant after Dr. Nations, including Dr. Winfield and Dr. Kim based the treatment recommendations on their understanding of a significant contact between the dog and Claimant. Dr. Ridings also testified that he based his initial opinion on Claimant's version of events. As found, it is more likely than not Claimant would have had immediate pain or fallen to the floor, had the dog struck her leg with the force she described. While there was an incident involving Louie the dog, the ALJ was not persuaded this constituted a compensable injury. The ALJ was not persuaded the events occurred as alleged and therefore, there is a significant issue whether Claimant requires an arthroplasty because of this incident as opposed to the degenerative changes in her hip.

In short, the question before the ALJ was whether, given the circumstances of the incident, the medical evidence supported the conclusion that this incident caused, aggravated or accelerated the condition of Claimant's right hip. Since it was determined that Claimant's version of the events was not credible, it was more likely than not she was not struck by the dog as alleged. Claimant's lack of reporting of hip symptoms as shown in the record supports the conclusion this was not a compensable injury. Thus, Claimant's subjective symptoms were more probably the result of the degenerative condition in her hip, as opposed to what happened on November 4 or 5, 2014 at work.

Medical Benefits

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Kim is reasonable and necessary, as well as related to her industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ notes that in light of the finding Claimant did not suffer a compensable injury, the request for medical benefits, specifically the hip surgery, is moot.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw the 12/4/14 GAL is GRANTED.

2. Claimant's request for authorization of right hip arthroplasty is DENIED.

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 11, 2016

Digital signature

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

SSUES

The issues for adjudication at hearing were:

1. Whether the Claimant proved by a preponderance of the evidence that the left knee surgery proposed by Dr. Knackendoffel is reasonably necessary to cure and relieve the Claimant from effects of her November 6, 2014 work injury.

2. Whether the Claimant proved by a preponderance of the evidence that the left knee offloader brace and left shoe wedge orthotic recommended by Dr. Matsumura are reasonably necessary to cure and relieve the Claimant from effects of her November 6, 2014 work injury.

3. Whether the Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from April 1, 2015 ongoing.

4. If the Claimant establishes that she is entitled to temporary total disability benefits, whether the Respondents have established, by a preponderance of the evidence, that the Claimant is responsible for her termination of employment and, therefore, barred from recovering temporary disability benefits under the Act.

FINDINGS OF FACT

1. The Claimant's date of birth is October 27, 1961 and she is currently 54 years old. She was initially hired in September 2011 as a cashier at the Employer's Restore where the Employer sells donated products to help fund the Employer's mission of providing affordable housing to people in need.

2. The Claimant later became an administrator in the Employer's executive office working as a human resources professional and as an assistant to the Executive Director for the Employer. In this position, the Claimant's job duties were to help with the training of other employees, filing, computer work, letters, enterprise zone processing, mail, supplies, research, and HR work (employee packets, insurance, process workers' compensation paperwork).

3. The Claimant does have a medical history of prior left and right knee pain. On August 15, 2010, the Claimant was seen at St. Mary's Medical Center with a chief complaint of "left and right knee pain" after a slip that occurred the day prior. The

Claimant was diagnosed with acute bilateral knee sprain and the right knee, which was causing more discomfort, was placed in an Ace wrap (Respondents' Exhibit D, p. 23). She returned to St. Mary's Hospital and Medical Center on August 16, 2010 reporting that 2 days prior she had spilt some cooking oil accidentally while working for a client and she slipped on the oil and "started to twist her left knee. She felt a pop in the left knee." Her right foot then got caught on a drawer and she fell onto her right side (Respondents' Exhibit D, p. 26). On examination, there was left knee tenderness over the medial collateral ligament with no effusion. There was some swelling on the right knee with tenderness over the medial collateral ligament and medial joint line. She was assessed with "bilateral knee sprains, right greater than left" (Respondent's Exhibit D, pp. 27-28). The Claimant continued to treat for the August 14, 2010 slip for her right and left knees as well as for shoulder and lumbar back pain for a year. On July 21, 2011, Dr. Stagg noted that the Claimant had right knee surgery on July 7th and now her left knee was bothering her with grinding noises. On examination, Dr. Stagg noted the right knee had fairly good range of motion and the left knee had some crepitation (Respondents Exhibit D, p. 38). On August 17, 2011, the Claimant reported still having pain in her right and left knees and Dr. Stagg again noted slight crepitation for the left knee (Respondents' Exhibit D, p. 39).

4. At the hearing, the Claimant testified that on November 6, 2014 she was trying to close up the office for the day at approximately 5:00 PM when she tripped. She tried to catch herself and she didn't fall all the way down, but rather only fell partially and grabbed and held onto a small counter. She immediately felt a loud pop and her left leg hurt right away. Both Miriam Blozvich and Janet Brink were in nearby offices. They did not witness the incident but came over to her soon after. Ms. Blozvich got ice for the Claimant. The Claimant could not walk and went to the hospital that evening. The Claimant testified that Ms. Brink had advised her to get her leg checked. The Claimant testified that her daughter took her to Community Hospital in the evening of November 6, 2014.

5. The Claimant was examined by Nina West, PA-C at Community Hospital on November 6, 2014 complaining of left knee and ankle pain. She could not put any weight on the leg and reported severe shooting pain with any movement of the left side (Claimant's Exhibit 7, p. 166). On examination, the Claimant had limited range of motion due to pain, soft tissue tenderness and swelling (Claimant's Exhibit 7, p. 167). The Claimant was provided a brace and crutches and discharged with instructions to follow up with her primary care provider (Claimant's Exhibit 7, p. 168). An x-ray of the Claimant's left knee showed no fracture, dislocation, osseous lesion, foreign body or significant joint effusion (Claimant's Exhibit 7, p. 171; Respondents' Exhibit E, pp. 40).

6. On November 11, 2014, the Claimant was initially evaluated by Dr. Richard A. Knackendoffel who noted that the Claimant was transitioning from emergency care for her left knee. On examination he noted the Claimant was unable to tolerate flexion beyond 30 degrees. He assessed the Claimant with derangement of the medial meniscus, sprain of the medial collateral ligament of the knee, osteoarthritis of the knee, internal derangement of the knee and lateral meniscus tear. He

recommended an MRI of the left knee (Claimant's Exhibit 2, pp. 41-42; Respondents' Exhibit F, pp. 46-48).

7. The Claimant underwent an MRI of the left knee without contrast on November 14, 2014. The report noted the exam was limited to due to body habitus. The impression was: (1) horizontal cleavage tear of the medial meniscus; (2) moderate joint effusion; (3) chondromalacia of the patellar facets (Claimant's Exhibit 7, pp. 172-173; Respondents' Exhibit E, pp. 41-42).

8. The Claimant saw Dr. Knackendoffel again on November 19, 2014 reporting that her pain was improving. At this visit, Dr. Knackendoffel notes the Claimant described her specific injury as resulting following a twisting motion that occurred when she was walking in new shoes when she tripped on carpet and caught herself with her left leg. Dr. Knackendoffel reviewed the November 14, 2014 MRI with the Claimant and noted that the treatment options available "include physical therapy, injections, and possible knee arthroscopy to address the meniscus tear." However, Dr. Knackendoffel also opined that "at this time I think she is too stiff to consider surgery safely. Her morbid obesity also presents a significant risk for elective surgery" (Claimant's Exhibit 2, pp. 45-47; Respondents' Exhibit F, pp. 49-51). As of November 19, 2014, the Claimant was released to return to work with restrictions limiting her to 4 hours of work per day and the use of crutches as needed (Claimant's Exhibit 2, p. 51). As of December 3, 2014, the Claimant reported to Dr. Knackendoffel that her symptoms of pain and weakness occurred intermittently and were improving. Dr. Knackendoffel noted that the Claimant's treatment included physical therapy, crutches and a home exercise program. She discontinued the use of her knee immobilizer. In discussing treatment options, Dr. Knackendoffel noted that he offered a steroid injection or continuing with physical therapy. He noted that "surgery would be the last choice due to weight, increased risk of DVT, infection, or continued pain at this time." He noted that the Claimant's arthritis is a significant pain generator. He further noted that the Claimant decided to have the depo-medrol injection and that she tolerated the procedure well. He recommended the Claimant continue physical therapy and wean from crutches. He modified her work restrictions to allow for her to work up to 6 hours per day (Claimant's Exhibit 2, pp. 54-56; Respondents' Exhibit F, pp. 52-54).

9. On December 15, 2014, the Claimant received a written warning from her supervisor Janet Brink. The warning referenced a verbal counseling that the Claimant received in June 2014 for "aggressive and unfriendly interactions with office personnel at [Employer]. The written warning also referenced a change of policy to close the office from 12-1 every day that Ms. Brink instituted because the Claimant was working through lunch and did not have permission for overtime. The warning also noted that the Claimant had been argumentative with Ms. Brinks on November 10, 2014 when the Claimant was asked not to fill out paperwork on her workman's compensation claim but did it anyway and then on December 8, 2014 when the Claimant called in sick within one hour of her work start time. Finally a December 10, 2014 incident was noted when Ms. Brinks noted the Claimant became "combative" when she was told again that she could not work over 5 hours without taking a lunch break. Ms. Brink noted that this

discussion was done in public and was "a direct challenge to [her] authority" and put the Employer's reputation at risk. Under "Corrective Action," Ms. Brink stated that if the Claimant feels she "cannot or will not curb [her] argumentative and combative behavior and speak to me and all those you interact with while at work respectfully and professionally and follow rules that are presented to you then will need to separate your employment with [Employer]." She further noted that "since the lunch issue and the way you speak to staff has been discussed verbally & now in a written warning the next step for noncompliance will be termination of employment from [Employer]." The Claimant requested a chance to write a written response to the written warning that would also be placed in her file as she did not agree with what was written. She did sign the written warning, as did Ms. Brinks (Claimant's Exhibit 12, pp. 200-201; Respondents' Exhibit I, pp. 94-95).

10. On December 16, 2014 at 12:26 PM, Ms. Miffie Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there would definitely be a meeting of the committee on Monday, December 22 at 8 AM (Respondents' Exhibit K, p. 96).

11. On December 22, 2014 at 9:05 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, "I am SO sorry! I totally forgot that this morning was the meeting" (Claimant's Exhibit 12, p. 202).

12. On December 23, 2014, the Claimant received written notice of a Verbal Warning. The reason for the warning was due to the Claimant missing the Family Selection Committee meeting on Monday, December 21, 2014 (although the meeting was on December 22, 2014). The notice indicated the Claimant is responsible for taking minutes and it is the second one the Claimant had missed without notification. The Corrective Action listed was that "if you fail to make another meeting without an excused absence you will be removed from this committee and could result in less hours scheduled in your work week" (Claimant's Exhibit 12, p. 203; Respondents' Exhibit I, p. 99).

13. On January 14, 2015, the Claimant saw Dr. Knackendoffel for a recheck, reporting that after the injection she had at the last visit she had dizziness and rapid heart rate, but she got over it and the injection seemed to help. She reported that the injection seems to be wearing off as the pain returned. The Claimant further reported that her motion has improved and she is using one crutch, but she feels she has plateaued. Dr. Knackendoffel offered a Synvisc injection without anesthetic due to her previous reaction that he assumed was due to the anesthesia. He opined that "her arthritis was aggravated by her work related injury." However, he continued to note that he did "not think that she is a great surgical candidate for the meniscus due to her arthritis and body habitus" (Claimant's Exhibit 2, pp. 59-61; Respondents' Exhibit F, pp. 55-57).

14. On January 22, 2015 at 2:30 PM, Ms. Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there

would be a meeting of the committee on Monday, January 26 at 8 AM (Respondents' Exhibit I, p. 100).

15. On Monday, January 26, 2015 at 8:31 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, "I am so Sorry, I did not get my reminder for the meeting this morning. Usually I get it on Friday but since I was out sick, I totally forgot about the meeting today. Ms. Brink responded to the Claimant's e-mail at 10:55 AM stating, "this is something you need to personally address with me & not by an e-mail. You did get here @ 8:00 & could have come over? Also, does your cell phone have a calendar that you could put your regularly scheduled meetings on it? We will discuss this later today" (Claimant's Exhibit 12, p. 204).

16. On January 27, 2015, the Claimant submitted a written letter of resignation stating that, "I am terminating this full time employment to take the time needed to heal. I will be seeking part time employment that will accommodate a schedule that will allow me to pursue other avenues, once I have recovered." She indicated her resignation was effective February 24, 2015, but that if four weeks' notice was not necessary, she would leave that up to Employer (Claimant's Exhibit 12, p. 205).

17. On January 30, 2015, the Claimant sent Ms. Brink an e-mail to ask if she would have time to talk that day. The Claimant also suggested the idea of her working at the ReStore instead of her current position (Claimant's Exhibit 12, p. 206). Per testimony, apparently, the Claimant resumed working at the Employer's administrative office after some time off.

18. On February 11, 2015 the Respondents filed a General Admission of Liability for medical benefits and temporary partial disability (Claimant's Exhibit 12, pp. 209-210; Respondents' Exhibit A).

19. On February 16, 2015, the Claimant was released to return to work with no restrictions (Claimant's Exhibit 2, p. 64).

20. On February 23, 2015, the Claimant reported her intermittent symptoms were unchanged from her last visit with Dr. Knackendoffel. She proceeded with a Synvisc injection and the Claimant was counseled that she needs to give the injection up to 6 weeks to start feeling the benefits. The Claimant was continued on physical therapy. Dr. Knackendoffel again opined that the Claimant, "is a poor surgical candidate because of her morbid obesity" (Claimant's Exhibit 2, pp. 65-68; Respondents' Exhibit F, pp. 58-61).

21. The Claimant was initially evaluated by Dr. James McLaughlin on referral from Dr. Knackendoffel on March 11, 2015. The mechanism of injury reported to Dr. McLaughlin was that "there was an irregular surface to the floor and the carpet there and she tripped over that injuring her left knee." He noted the Claimant had an MRI that showed a degenerative tear and that her treatment to date included physical therapy and two injections. The Claimant reported that the physical therapy has been helpful but

she is still in pain. She was using one crutch for short amounts of walking and two crutches for long walks. She advised that she has no previous left knee disorder. On examination, Dr. McLaughlin noted that the Claimant was tender at the left knee medial joint line. Because of her prior gastric bypass surgery, the Claimant does not take NSAIDS, but Dr. McLaughlin suggested that she may do well with a topical NSAID such as Voltaren gel (Claimant's Exhibit 1, pp. 1-3; Respondents' Exhibit G, pp. 65-67+).

22. On March 31, 2015, Ms. Brink prepared a written notice of termination of employment. She indicated that the Claimant had missed three Family Selection Committee meetings on February 24, 2014, December 22, 2014 and January 26, 2015. The letter stated that the Claimant was "warned after missing the last meeting on Monday, January 26, 2015 to not miss another Family Selection Committee meeting." The notice goes on to state that, "on Monday, March 30, 2015 you did attend the meeting but you were tardy with no acceptable excuse" (Claimant's Exhibit 12, p. 211; Respondents' Exhibit I, p. 102).

23. On April 6, 2015, the Claimant saw Dr. Knackendoffel with no change in symptoms in spite of a previous steroid injection and Synvisc injection. The Claimant was ambulating with crutches again at this point. Dr. Knackendoffel opined that the Claimant has had persistent pain for the past 6 months and she has failed conservative treatment. He did note that "her medial collateral ligament has healed" and that updated weight bearing radiographs indicate that her "osteoarthritis does not appear to have progressed." Dr. Knackendoffel acknowledged that the only option remaining option he has to offer is arthroscopy of the left knee, but cautioned that it "is risky due to the patient's morbid obesity." He explained to the Claimant that she is "at increased risk for infection and deep vein thrombophlebitis, as well as continued left knee pain." The Claimant nonetheless advised Dr. Knackendoffel that she was willing to accept the risks and wanted to proceed with the left knee arthroscopy for arthroscopic chondroplasty and partial medial and lateral menisectomy (Claimant's Exhibit 2, pp. 70-72; Respondents' Exhibit F, 62-64).

24. On April 7, 2015, Dr. Knackendoffel submitted an authorization request for "left knee arthroscopy with chondroplasty and partial medial and lateral menisectomies due to osteoarthritis and medial and lateral meniscal tears of the left knee" (Claimant's Exhibit 2, p. 73).

25. The Claimant saw Dr. McLaughlin again on April 13, 2015. She reported that she was terminated from her employment at the end of March for being 5 minutes late for a meeting. She advised Dr. McLaughlin that Dr. Knackendoffel was recommending surgery and she was waiting for that to be authorized. She reported continued pain in the left knee but the Voltaren gel was helping. She was elevating the leg more now that she was not working and noted the swelling had gone down. Dr. McLaughlin noted that the Claimant's orthopedic surgeon initially preferred a non-surgical course of treatment due to the comorbid issues, but noted that since the Claimant's condition has not improved, he now recommends surgery. Dr. McLaughlin likewise recommends the surgery, stating that it was his opinion that "it is reasonable

and necessary and related directly to her work injury of 11/06/2014." Dr. McLaughlin also recommended that the Claimant see Dr. Bowen, a psychologist, to evaluate and treat her for chronic pain issues (Claimant's Exhibit 1, pp. 12-13).

26. On April 15, 2015, the Claimant sent a letter to Ms. Brink and Kevin Chesney, the Board President for the Employer. She disputed certain allegations contained in the March 31, 2015 termination letter. The Claimant registered a dispute with her termination for cause because she "did not perform an act that [she] knew or should have known would lead to [her] termination." She disputed that arriving five minutes late for the meeting is grounds for termination. The Claimant pointed out that she is on work restrictions and using crutches to ambulate which is the reason she was five minutes late (Claimant's Exhibit 12, pp. 212-213).

27. The Claimant met with Dr. Bowen for a psychological evaluation on April 30, 2015. The Claimant advised Dr. Bowen that she was injured and working with restrictions and was moving slower as she was ambulating with crutches. After missing a couple of meetings at work, she reported she was a few minutes late to a meeting and her employment was terminated. The Claimant expressed that she was discouraged and frustrated with both her physical limitations and about being terminated and feeling that she was targeted because she was injured. The Claimant advised Dr. Bowen that she has diminished appetite and trouble with sleep as well as feelings of frustration, helplessness and hopelessness with frequent crying spells and a sense of shame because of her fall and because she has never been fired before. Dr. Bowen diagnosed the Claimant with "adjustment disorder with depressed mood." Dr. Bowen opined that the Claimant "appears to be insightful and well-motivated" and he felt that the Claimant would respond well to treatment. Dr. Bowen recommended a course of cognitive behavioral therapy with about ten sessions focused on treating depression as well as presenting psychological tools to help with pain management (Claimant's Exhibit 4; Respondents' Exhibit H).

28. On May 4, 2015, the Claimant saw Dr. McLaughlin and cleared up issues raised about whether or not she was working. The Claimant reported that she is associated with Two Rivers Birth Cooperative as a midwife but was not currently working and she was let go from Employer so she is not working there either. The Claimant continued to report left knee pain and felt that her left knee is going to give way on her. She was using crutches to ambulate. Dr. McLaughlin recommended a repeat MRI to determine if there was any change in the medial meniscus. He also referred the Claimant to Dr. Duree for evaluation and acupuncture treatments (Claimant's Exhibit 1, pp. 20-21).

29. The Claimant saw Dr. Duree for an initial evaluation and treatment on May 6, 2015. The goal for the acupuncture treatments was to reduce swelling of the knee and to help with the pain (Claimant's Exhibit 5, p. 93).

30. On May 12, 2015, the Claimant underwent an MRI of the left lower knee. The MRI images were reported and also compared to the prior November 14, 2014 MRI

images. The radiologist, Dr. Randall Gehl, noted that the "degenerative medial meniscus unchanged from November 14, 2014. Multicompartment medial and patellofemoral DJD moderate." The ACL and PCL and collateral ligaments appeared intact and the severe medial compartment DJD and degenerative meniscus signal abnormality was unchanged. In the lateral compartment, a small joint effusion was noted with minimal DJD and a normal meniscus. Collateral ligaments were intact and there were no loose bodies noted (Claimant's Exhibit 8, p. 177; Respondents' Exhibit E, p. 45).

31. On May 12, 2015, after reviewing the MRI of the Claimant's knee (presumably the November 14, 2014 MRI and not the one performed on May 12, 2015, although his note does not indicate this), Dr. James Lindberg opined as to the reasonableness and necessity of the proposed left knee arthroscopy. He noted that his reading of the MRI disc showed, "a varus deformity of the knee with medial meniscal extrusion, loss of the medial edge of the cartilage, and the medial tibial plateau and medial femoral condyle with a horizontal cleavage tear, likely chronic, of the medial meniscus." He further noted significant chondromalacia of the patellofemoral joint with complete loss in the medial patella and medial trochlea. Based on this reading, Dr. Lindberg opined that "a scoped medial menisectomy and chondroplasty would be of no benefit." He also found "it is unlikely to a reasonable degree of medical certainty that the trip on the carpet caused the medial meniscal tear or the preexisting significant osteoarthritis." He recommended denial of the surgery due to lack of benefit and because it "would probably hasten the development of further arthritis" (Respondents' Exhibit B, p. 8).

32. On May 13, 2015, the Claimant reported to Dr. McLaughlin that seeing Dr. Duree has definitely helped with the pain and she felt less soreness. The Claimant also reported that her visit with Dr. Bowen was helpful and a follow up visit is scheduled for June. Dr. McLaughlin also reviewed the reports from Dr. Duree and Dr. Bowen. He also reviewed the MRI performed on May 12, 2015. Dr. McLaughlin noted that the Claimant was working on losing weight and had gone from 283 pounds to 276 pounds in the 2 months she had been treating with him. In discussing the MRI findings, Dr. McLaughlin did note that "the guidelines are somewhat against operating on a meniscus if the main issue is degenerative." He recommended the Claimant see Dr. Knackendoffel again to obtain his opinion on whether arthroscopy is an appropriate step at this point. Dr. McLaughlin recommended that the Claimant continue to treat with Dr. Duree for acupuncture and that she see Dr. Bowen for 10 visits (Claimant's Exhibit 1, pp. 24-27; Respondents' Exhibit G, pp. 69-72).

33. The Claimant saw Dr. Knackendoffel again on May 18, 2015 and she reported that her current symptoms included "pain, instability, swelling, weakness, decreased range of motion, stiffness and sleep disturbance due to pain. The Claimant reported that her pain was improving some with the acupuncture treatments that she had been receiving for 2-3 weeks and she continued to lose weight (note: the Claimant had weighed 291 pounds on November 19, 2014 and her current weight on May 18, 2015 was 276 pounds). Dr. Knackendoffel noted that the Claimant was still waiting

approval for left knee arthroscopy. He again opined that "arthroscopy of the left knee remains an option but is a risky surgical procedure for the patient. She should continue her weight loss efforts. She will follow up with Dr. McLaughlin, unless arthroscopy of the left knee is preapproved through workers comp" (Claimant's Exhibit 2, pp. 74-76).

34. On May 21, 2015, the Claimant saw Dr. Duree for her fifth visit and the Claimant reported that she was very happy with the results of the acupuncture and that it has really helped her (Claimant's Exhibit 5, p. 97). She continued to see Dr. Duree through June of 2015 and reported benefit from the acupuncture. On June 22, 2015, the Claimant reported that the swelling in her leg had gone down by an inch and that the reduced swelling also reduces her pain (Claimant's Exhibit 5, p. 103).

35. On June 3, 2015, the Claimant saw Dr. Mark Failinger for an independent medical examination. She described her mechanism of injury to Dr. Failinger as follows: "she was trying to close up the office one afternoon and she had a pair of shoes on that she states got stuck on a carpet. She tripped with her right foot and she tried to grab an object to stabilize herself and she put her left leg, she states, at 'an odd angle.' She did not fall. She did feel a loud pop. She thinks her left knee was twisted, but, she does not recall exactly what position it was in." The Claimant reported to Dr. Failinger that the pain was severe right away and she felt her knee swell (Respondents' Exhibit C, p. 9). On physical examination, Dr. Failinger notes that the Claimant uses crutches to ambulate and does not appear to straighten the knee fully with ambulation. He noted it was difficult to appreciate any effusion due to the size of the knee. He noted tenderness to touch even slightly on the skin on the medial aspect, with pain he found to be significantly out of proportion to anything demonstrated on examination and the reported MRI. He noted very limited range of motion but found that pain behaviors limited his examination (Respondents' Exhibit C, p. 12). Dr. Failinger opined that the Claimant's presentation was unusual and the Claimant's reported pain "appears to be significantly out of proportion to any pathology created by the incident." He stated that he had not seen the Claimant's MRI and that this would be most helpful. Nevertheless, he opined that the Claimant appeared to have "an exacerbation of preexisting degenerative joint disease without an obvious new acute injury." He felt that all of Dr. Knackendoffel's treatments were directed toward treatment of an arthritic flare up and there was a low probability that the proposed arthroscopy would help. He further opined that based on the Claimant's pain behaviors, it reduced the probability that the arthroscopy would help and the Claimant's knee function would be improved (Respondents' Exhibit C, pp. 13-14).

36. On June 8, 2015, Dr. Failinger prepared an addendum to his IME report. He had reviewed additional medical records. On June 16, 2015 he reviewed still further additional medical records, including the November 14, 2014 MRI report. After reviewing these additional records, he opined that the Claimant's symptoms are "significantly out of proportion to the MRI, which is not definitive for a meniscus tear, but, does in fact show high-grade chondromalacia (degenerative joint disease) of the patella." He noted that his opinion did not change and still maintained that "there is a lower than medical probability given her presentation and this MRI that arthroscopy

would be of help with her symptomatology and it is likely that the incident created an exacerbation of preexisting patellofemoral disease, although either extension of a previous meniscus tear or creation of a possible new meniscus tear is not entirely excluded (Respondents' Exhibit C, pp. 16-18).

37. On June 24, 2015, the Claimant saw Dr. McLaughlin, reporting that the acupuncture with Dr. Duree has been helpful for pain and increased function. Dr. McLaughlin recommended 6 more visits with Dr. Duree which brought the total to 18 visits, which he felt was within the guidelines as the Claimant reported increased function and decreased pain. Dr. McLaughlin also recommended that the Claimant see Dr. Matsumura, a physical medicine rehab specialist as he was not certain if much more acupuncture would be authorized given the guidelines. Dr. McLaughlin continued the Claimant's activity restrictions to standing and walking 1 hour at a time (Claimant's Exhibit 1, pp. 34-35).

38. The Claimant continued to treat with Dr. Duree for acupuncture through July of 2015. As of July 20, 2015, the Claimant was having problems with left leg swelling. She had been showing improvement until the prior week when the leg gave out on her and she almost fell. The Claimant stated that the acupuncture helps keep the swelling down (Claimant's Exhibit 5, p. 109a).

39. At an initial evaluation with Dr. Matsumura on July 21, 2015, Dr. Matsumura noted that the Claimant has undergone conservative management which has not improved her pain and surgery had been recommended but not authorized and is in litigation. After review of records and examination, Dr. Matsumura recommended a medial offloading knee brace or a lateral wedge in the Claimant's shoe to try to offload the medial knee. She recommended an aquatic exercise program to assist with weight reduction and due to difficulty with exercise because of knee pain. Dr. Matsumura also recommended a home TENS unit and a prescription for Duloxetine for both chronic pain and depression (Claimant's Exhibit 3, pp. 77-81).

40. The Claimant saw Dr. McLaughlin again on August 24, 2015 and he noted marked tenderness of the medial and lateral joint line of the left knee with no extension and limited flexion. Dr. McLaughlin also reviewed Dr. Failinger's IME report with the Claimant. In response he opined that "based on degenerative issues alone, arthroscopy would be low probability to improve her condition, but she is in such pain with so much limitation, it changes the risk/benefit ratio (Claimant's 1, pp. 40a-40b).

41. The Claimant saw Dr. Matsumura again on September 1, 2015 reporting that the request for the left offloading brace and/or wedging was denied by insurance. The claimant also reported that the aquatic physical therapy was helpful in working on range of motion and she was ready to transition to an independent program. Dr. Matsumura continued to recommend the medial offloading knee brace to help prevent further buckling and falls and to allow the Claimant to transition away from crutch use (Claimant's Exhibit 3, pp. 89c-89g).

42. On September 15, 2015, the Claimant saw Dr. Matsumura again reporting that she obtained a left medial offloading knee brace on her own as it was not approved through Workers' Compensation. She reported a significant overall improvement in walking with the brace and she feels more secure and has less knee buckling. The Claimant reported continued knee pain, but improved with the brace use. The Claimant reported that she has continued her home exercise and aquatic program and feels that her leg is getting stronger. Dr. Matsumura continued to recommend left knee surgery and while the surgery issue remains pending due to litigation, continue use of the knee brace to prevent falls. She noted that the Claimant "has been through several months of conservative management treatment and I really have nothing else to add other than continuing in her exercise programs. Again, I do think that the best treatment option for her given her goals to return to work ambulating without assistive devices and orthotics would be surgical management" (Claimant's Exhibit 3, pp. 89m – 89p).

43. The Claimant saw Dr. McLaughlin on October 16, 2015, reporting that her knee was doing better functionally with the brace, her TENS unit, her home program and a pool program. She still reported a lot of pain and expressed continued interest in surgery. Dr. McLaughlin reviewed options for proceeding with surgery with the Claimant, including proceeding under Medicaid and possibly with Dr. Copeland as the surgeon as he did her right knee surgery (Claimant's Exhibit 1, pp. 40j-40k; Respondents' Exhibit G, pp. 74-75).

44. The Claimant testified at the hearing that since her injury, she can't do full weight-bearing, she has gait issues and she can't support her own weight or any other weight. She testified that prior to her November 6, 2014 injury, she was not having these issues. The Claimant testified that her expectation from surgery is to clean up her meniscus, relieve her of pain and relieve her of instability. She testified that she understands that her weight presents a risk, but feels that the overall benefits of the proposed surgery outweigh the risks.

45. The Claimant testified that she was terminated from employment due to issues related to attendance at meetings. The Claimant testified that Employer terminated her on March 31, 2015. In the weeks leading up to her termination, she was on work restrictions issued by Dr. McLaughlin, including mostly sit down duty, and was using at least one crutch to ambulate. The Claimant testified that as part of her work, she was required to attend meetings held by various committees affiliated with Employer. According to Employer's "roster" of committees dated November 13, 2014 (created by the Claimant herself), the Claimant was required to attend four different meetings for the following committees: Board of Directors, Re-Store Advisory, Safety, and Family Selection (Respondents' Exhibits, p. 90). The Claimant testified that the schedules for the Board of Directors, Re-Store Advisory, and Safety Committee meetings were set at one meeting per month on a standing date. She testified that these meetings' times and dates were firm, and did not change. She testified that she was never late or absent for any of those meetings. Ms. Brink confirmed in her testimony that the Claimant was required to attend all of those meetings, and was never late or absent (without prior notice) for any of those meetings. She testified that she was

five minutes late to a Family Selection Committee meeting. Although a March 31, 2015 letter states she missed 3 meetings, the Claimant disputes this. With respect to a February 24, 2014 family selection committee meeting, the Claimant testified that she was not initially part of the Family Selection Committee and she doesn't remember that her attendance was required at this meeting. With respect to a December 22, 2014 meeting, the Claimant testified that she was not aware of the meeting due to confusion on her part as to whether or not the meeting was definitely going to occur. The Claimant testified that she stopped to retrieve mail on the way in to the office, and when she arrived, the office was empty, but this was not unusual. Later on December 22, 2014 when she checked her e-mails, she saw the meeting confirmation. By this time the meeting was about half over and she did not want to interrupt. With regard to a January 26, 2015 meeting, the Claimant testified that the meeting confirmation was sent at 2:30 PM on January 22, 2015 and she was sick and left work early that day, so she did not see the confirmation e-mail in time. Then on March 30, 2015, the Claimant testified that she was five minutes late for the meeting because she stopped at the post office to get mail but was on 2 crutches at the time and it took her longer to get to the meeting because of this. On cross-examination, the Claimant testified that her role at the Family Selection Committee meetings, which were generally held on the 4th Monday of the month, was to record the proceedings. If she did not attend the meeting, then another participant would be required to record the meeting. The meetings were held in the conference room around the corner from the Claimant's desk. On redirect examination, the Claimant further testified that the Family Selection Committee meetings did not actually take place every 4th Monday. Sometimes the meeting would not occur and whether or not there would be a meeting was up in the air until the Friday before at times. The Claimant testified about a conversation in front of her desk between Ms. Brink and Ms. Blozvich where they discussed whether there an upcoming FSC meeting would take place. The Claimant testified that Ms. Brink told Ms. Blozvich that "this had to stop" because "the confusion was too much." The Claimant testified she asked both Ms. Brink and Ms. Blozvich whether there was a meeting, because she was confused. The Claimant testified Ms. Brink told her to "not pay attention to our conversation," and that the Claimant would be told whether there would be a meeting or not.

46. The Claimant also discussed a prior written warning from Ms. Brink dated December 15, 2014 regarding a lunch hour policy (Claimant's Exhibit 12, p. 200). The Claimant testified that when she first began working at the executive office, there was not a set lunch hour. The Claimant testified that she would customarily take her lunch break around other employees' schedules so that there was appropriate coverage at the office. The Claimant testified that at some point Ms. Brink changed the lunch break policy and set a defined lunch hour from 12:00 to 1:00 p.m. The Claimant testified that Ms. Brink disciplined her because, at times, she would work into the defined lunch hour due to longer than anticipated phone calls or the press of other business, including meeting with Employer's clients. The Claimant disagreed with Ms. Brink's written statement that Claimant was "argumentative and combative." The Claimant testified that when she would ask a question for clarification of Ms. Brink, then Ms. Brink would often become "very upset," and that Ms. Brink would not understand why Claimant would need to ask questions. That written warning also referenced conduct surrounding a claim form relating to this workers' compensation claim: "[Y]ou were asked not to fill out

paperwork concerning your workman's comp claim and did it anyway. I asked you not to do your own paperwork…and deleting the file in front of me does not correct your insubordinate action." The Claimant testified that she requested a copy of Employer's First Report of Injury regarding the November 6, 2014 injury, but did not receive a copy, and so was filling out her own copy of the report with her recollection of how the injury happened for her own records, and not for filing with Employer or Insurer.

47. The Claimant also discussed a letter of resignation she had previously submitted. The Claimant testified that she submitted her written resignation to Ms. Brink on January 27, 2015 (Claimant's Exhibit 12, p. 205). The Claimant testified that she told Ms. Brink that she could not imagine working for anyone but Employer because she believed in its mission, but she needed to resign because she needed time to rest and heal her knee. The Claimant testified that Ms. Brink offered concessions regarding scheduling so that the Claimant could continue working, including taking sick leave first before leaving Employer. The Claimant testified that she took leave time, but then returned to her normal job. She testified she returned to work because after speaking with supervisors, including Ms. Brink, she felt as if she was a valued employee.

48. Dr. Failinger testified at the hearing as an expert in the areas of orthopedic surgery, sports medicine and Level II accreditation matters. In addition to meeting with the Claimant, Dr. Failinger reviewed medical records dating back to an August 2010 injury through 2011 when that case was closed. He also reviewed records from November 2014 to the present. In reviewing the Claimant's left knee MRI dated November 14, 2014, Dr. Failinger opined that there were no acute findings and the pathology was the result of degenerative joint disease. In reviewing the Claimant's May 12, 2015 MRI of the left knee, Dr. Failinger again opines that the pathology seen in the imaging is degenerative changes with no evidence of acute injury. Specifically, Dr. Failinger opined that a "horizontal cleavage tear" is not really a "tear." Rather, especially in overweight patients, this is the nature of the meniscus, it is a sign that the meniscus has disintegrated, crumbling over time until it collapsed. This is a degenerative process. Going back to the November 14, 2014 MRI and the reference to chondromalacia of the patellar facets, Dr. Failinger notes that this indicates the facet has lost it surface cover of cartilage, this is an arthritic process and is almost always a degenerative process. In terms of the reference to "moderate joint effusion," Dr. Failinger explained that in the synovial fluid there are components that dissolve particles. If particles are present, fluid will occur. Per the imaging, Dr. Failinger opines that the Claimant has a preexisting left knee condition including both degenerative joint disease and a degenerative meniscus. He opines that genetics is one factor, and obesity and age are other contributing factors in this case. In looking at the Claimant's age, body habitus and the pathology, Dr. Failinger opined that it is medically probable that the Claimant had symptoms in her left knee regardless of whether she sought medical treatment or not. With the description of a "pop," the physicians would look for evidence of acute or new pathology, but in the Claimant's case there is none, the pathology is all degenerative. Dr. Failinger opined that the surgery proposed by Dr. Knackendoffell is to address pre-existing degenerative pathology. Further, Dr. Failinger opined that there are other concerns about the reasonableness of surgery in this case as well. Dr. Failinger testified that there are a number of factors to indicate that the Claimant is likely to have a poor result from this

proposed surgery. Dr. Failinger opined that arthroscopy in the face of arthritis doesn't improve the condition better than conservative treatment. He also opined that in the face of morbid obesity, outcome is poor as this is a mechanical problem. Dr. Failinger also opined that poor range of motion already exists in this case and surgery could make this worse. Dr. Failinger also finds the diffuse nature of the Claimant's pain problematic for the proposed surgery as this is an indicator that the pain may not even be caused by the pathology that is present. Additionally, Dr. Failinger has concerns that the Claimant's mood disorder / depression is another contraindication for surgery. Finally, Dr. Failinger points to the Medical Treatment Guidelines for lower extremity surgical indications/considerations (Respondents' Exhibit J, p. 108 - MTG Rule 17, Exhibit G, p. 61) and notes that the guidelines specifically state that it is not clear that a partial menisectomy for a chronic degenerative meniscal tear is beneficial. Ultimately, Dr. Failinger opined that the proposed surgery is not intended to address a condition related to the Claimant's work injury, but rather a preexisting condition. The brace and shoe wedge, likewise, are intended to address the preexisting condition and not any acute injury that happened on November 6, 2014.

49. On cross-examination at the hearing, Dr. Failinger testified that, not only was there no sign of an acute injury, there is no aggravation as there were no new signs of pathology created in the November 6, 2014 event. In terms of exacerbation, Dr. Failinger agreed there was an increase in symptoms after the Claimant felt a "pop" on November 6, 2014 and she had not received any medical treatment between 2011 and 2014 for her lower extremity. He agreed that the Claimant did not undergo any MRIs and had received no recommendations for knee surgery prior to the November 6, 2014 event. In terms of whether the recommended surgery is reasonable and necessary, Dr. Failinger continued to testify that he did not believe the Claimant was a good candidate. Dr. Failinger agreed that the Claimant had undergone prior right knee surgery with a good result. He also conceded that the Claimant was over a year out from the incident and she cannot ambulate without a brace and crutches which means that she is not doing well without the surgery. However, Dr. Failinger continued to opine that proceeding with the proposed surgery may make her condition worse.

50. On redirect examination at the hearing, Dr. Failinger was asked whether the high level of the Claimant's pain changes the risk/benefit ratio in this case and he responded that he does not believe it changes the risk/benefit ratio, rather it changes the Claimant's tolerance for risk. Further, Dr. Failinger opines that the failure of conservative treatment in this case does not bode well for successful surgery because if the therapy did not help with range of motion, the surgery is also not likely to help an arthritic patient. Unless there is an acute problem such as a loose body in the joint that can be removed, an arthroscopy is not likely to help. In readdressing the issue of "exacerbation," Dr. Failinger clarified that any exacerbation that the Claimant experienced due to her November 6, 2014 event was not permanent, it was a temporary "flare up." He noted that as to this issue, the April 6, 2015 medical note of Dr. Knackendoffel (Respondents' Exhibit F, p. 64) indicates that the Claimant's "medial collateral ligament has healed" and that this could be an explanation for the pain from the temporary exacerbation. In any event, on re-cross examination, Dr. Failinger

reiterated that his recommendation is that the Claimant should not proceed with the arthroscopy as he has strong concerns.

51. The Executive Director for the Employer and the Claimant's supervisor, Janet Brink, testified at the hearing. She testified that she has held this position for 2 years and 7 months and she is familiar with the Claimant. The Employer is a non-profit, Christian-based group that provides housing to people in need who perform work as a prerequisite. The Claimant's normal work hours up through November 6, 2014 were 8:00 am – 5:00 pm. Sometime after this, the policy changed and on Fridays the hours were changed to 8:00 am – 12:00 pm. Ms. Brink testified that the Claimant's employment was terminated on March 31, 2015 because she missed three family selection meetings and was late to a fourth one. The family selection meetings are scheduled from 8:00 am – 9:00 am and are where applications from families seeking housing are brought to the meeting and decisions are made to approve, deny, or request more information. The meetings are also for updates on families that are already selected to discuss their progress towards "sweat equity" in the program. Ms. Brink testified that the Claimant was 15 minutes late to the March 30, 2015 meeting. She testified that she knew the time because she had to take notes of the meeting since the Claimant was not there. The Claimant is the recording secretary for the family selection meeting and it is her duty to take minutes, type them and then turn them in to Ms. Brink and to Miffie Blozvich, the chairwoman of the family selection committee. The family selection committee meetings are held the 4th Monday of the month and participants are notified about the meetings by e-mails from Ms. Blozvich. Ms. Brink testified that for each of the 3 meetings that the Claimant missed and the one when she was late, there were notification e-mails sent and the Claimant was listed as a recipient of these e-mails. Ms. Brink testified that whether the e-mail was addressed to the Claimant individually or to "Admin," the Claimant would have received the e-mail. During the relevant time period, Ms. Brink testified that she was not aware of any problems with the e-mail system. Ms. Brink testified that, in addition to the e-mail notification, the Claimant would have access to the Google calendars for Ms. Brink and Ms. Blozvich at home and at work, and these calendars would also have shown the meetings. Ms. Brink testified that the Claimant's desk is located at the front door of the office and is down a hall from the conference room where the meetings are held, about 25 yards away. The meetings are always held in this lower level conference room. Ms. Brink testified that if the Claimant does not attend the meetings, Ms. Brink has to take notes and this limits her participation in the meetings. She testified that this is problematic because, as the Executive Director for Employer, it is important for her to be able to interject in the meetings. Ms. Brink testified that after the Claimant missed the third meeting, she was counseled about her poor planning and she was told to put the meetings into her phone calendar and that missing the meetings could affect her continue employment with Employer. Ms. Brink testified that when the Claimant was counseled about missing the first three meetings, her response was that she "forgot." Ms. Brink testified that the Claimant did not say that she didn't receive notice of the meetings or that she was confused about whether or not the meetings were proceeding. Ms. Brink also testified that when she counseled the Claimant that if she continued to miss meetings, she might be terminated, that the Claimant agreed that she understood this. Ms. Brink testified that

the letter terminating the Claimant's employment was provided to the Claimant in Ms. Brink's office on March 31, 2015 and was discussed with the Claimant. Ms. Brink testified that the Claimant was angry but not surprised about the termination and the Claimant stated that she suspected it. In looking at the Claimant's mileage reports (Respondents' Exhibit K), Ms. Brink noted that they indicate that between November 6, 2014 and the beginning of January of 2014, there were no mileage reports as the Claimant did not do post office runs. Ms. Brink testified that during that time period, she did the post office runs. Ms. Brink also testified that she had recollection of the Claimant walking slowly and gingerly in the office before November 6, 2014 and that she was in obvious pain.

52. On cross examination during the hearing, Ms. Brink initially testified that she had no recollection of indicating to Insurer that Claimant's claim should be denied, or that Claimant had preexisting knee problems. She initially testified she did not recall having any conversations with Insurer about whether the claim should be admitted or denied. She testified that she did recall that Claimant's claim was denied for several months. However, in a First Report of Injury completed by Ms. Brink, she noted that Employer was questioning liability. Ms. Brink specifically noted that Claimant's left leg "had non work related problems" (Claimant's Exhibit 12, p. 197). Ms. Brink testified that she had in fact given the Claimant a copy of the First Report. However, when asked why the Claimant would be filling out her own copy if she had a copy of the First Report filed by Ms. Brink, Ms. Brink testified that she did not have an answer. Ms. Brink testified that she did not recall whether Claimant told her she was filling out the report for her own records, but testified that she would have had a problem with a duplicate First Report because there might have been a conflict. When asked why there would be a conflict if Ms. Brink had indeed given the Claimant a copy of the original First Report, Ms. Brink testified that she did not know. Although Ms. Brink initially testified that she was aware that the Claimant's claim was denied for a period of months, Ms. Brink testified that she "didn't know" whether the claim was denied when she issued the written warning on December 15, 2014. The ALJ notes that Ms. Brink warned the Claimant to not fill out a First Report of Injury for Claimant's own records at approximately the same time when Ms. Brink filled out her First Report of Injury, noting: "Employer Questioning Liability" (Claimant's Exhibit 12, p. 197). Ms. Brink also testified that the mileage records showed that the Claimant did post office runs on 9/22/2014, 8/25/2014, 7/28/2014and 6/23/2014. She testified that there would have been a family selection meeting on at least one of those days, but she is not sure if there were meetings on all of those days. If there were not enough applications, then the meeting might not happen. Ms. Brink testified that the Claimant never missed a Board of Director meeting, a ReStore Advisory Committee meeting or a Safety meeting with the exception of one Board meeting that was an excused absence. After reconsideration, Ms. Brink testified that it was possible that she was not at the March 30, 2015 family selection meeting and may not have personal recollection of the exact time the Claimant arrived. Instead, Ms. Brink testified it is possible she was at the ReStore and that Ms. Blozvich told Ms. Brink that the Claimant was late to the meeting. On redirect testimony, Ms. Brink elaborated that she had just returned from a week-long conference trip to Atlanta

at the time of the March 30, 2015 meeting and she may have relied on the report of Ms. Blozvich that the Claimant was late to the meeting.

53. In rebuttal testimony at the hearing, the Claimant testified again and stated that the testimony of Brink was not accurate about the Claimant having knee symptoms prior to November 6, 2014. The Claimant testified that she was having right knee problems before November 6, 2014 and not left knee problems. The Claimant also testified that Ms. Brink did not ever tell her that if she missed another meeting, the Claimant would be fired. Rather, Ms. Brink just counseled her that it was important to be there. As for the March 30, 2015 family selection meeting, the Claimant testified that Ms. Brink was not present at that meeting and her earlier testimony that she was there taking notes was not true. The Claimant testified that Ms. Blozvich approached her at the meeting and asked if Ms. Brink had reminded her about the meeting, and the Claimant told Ms. Blozvich that she had not. The Claimant further testified that she was not 15 minutes late but only 5 minutes late and the meeting participants were still going over the minutes of the last meeting when she arrived.

54. In sur-rebuttal testimony, Miriam Blozvich was asked to testify. She stated that she has worked for Employer for 2 years and her position is Development Director. She is the Chairwoman of the family selection committee. She testified that the Claimant did attend the March 30, 2015 meeting which began at 8:00 am, but that the Claimant arrived approximately 15 minutes late. Ms. Blozvich testified that Ms. Brink was also present at the meeting and was taking minutes for the meeting until the Claimant arrived. On cross-examination, Ms. Blozvich testified that she did not tell Ms. Brink the Claimant arrived late after the meeting. Rather, Ms. Blozvich recalls that it was part of the meeting. Ms. Blozvich testified that it was possible that the Claimant was only 10 minutes late and not 15 minutes late, but it was not likely that she was only 5 minutes late.

55. There was a considerable amount of conflicting testimony surrounding the issues relate to the reason for the Claimant's termination. In taking all of the testimony into account and in considering the related documentary evidence, the ALJ finds that the Claimant's testimony is more credible and persuasive than that of Ms. Brink and Ms. Blozvich with regard to the Claimant's attendance at the March 30, 2015 Family Selection Committee meeting. Specifically, the ALJ finds that the Claimant was, more likely than not, approximately five minutes late for the meeting. The ALJ also finds that while the Claimant had received warnings in the past that conduct such as missing a meeting or failing to comply with company policy regarding taking lunch at the correct time or refraining from improper communication with staff could result in discipline, up to the termination of employment, the Claimant was not ever advised that arriving late to a meeting would result in termination. Moreover, on December 23, 2014, the Claimant received notification of a verbal warning that indicated that failing to attend another Family Selection Committee without an excused absence would result in the Claimant being removed from the committee and "could result in less hours scheduled in your work week." This is a considerably lesser discipline than termination of employment. Further, even this discipline was not imposed when the Claimant missed the scheduled

January 2015 meeting, which was the next meeting after the missed December meeting. Thus, the ALJ finds that, more likely than not, neither the Claimant nor any reasonable person would have understood that arriving late for a committee meeting was a violation of company policy that would result in termination of employment.

CONCLUSIONS OF LAW

Generally

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

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*, 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); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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 - Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury in a compensable case, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. § 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

The Claimant's testimony and the medical records establish that prior to her November 6, 2014 work injury, to the extent that the Claimant had a preexisting arthritic condition in her left knee, it was largely asymptomatic. There was a prior incident in August of 2010 when Claimant worked for a different employer where she was diagnosed with acute bilateral knee sprain. However, after 2011, the Claimant did not receive any treatment for the left knee. The Claimant underwent surgery in July 2011 for the right knee, but not the left. In August of 2011, the Claimant was still reporting pain in her right and left knees and her physician did not slight crepitation in her left knee. Nevertheless, there was no further active treatment per the medical records in evidence.

Since November 6, 2014, the Claimant has treated at Community Hospital, and with Dr. Knackendoffel, Dr. McLaughlin, Dr. Duree and Dr. Matsumura. She also received evaluation and treatment with Dr. Bowen for psychological matters. The Claimant's medical records were evaluated by Dr. Lindberg and the Claimant underwent an IME with Dr. Failinger. Each of these treaters and evaluators were presented with a consistent mechanism of injury of a trip on carpet in the office that did not result in the Claimant falling to the ground, but resulted in a pop of her left knee as the Claimant

caught herself. There were MRIs of the left knee performed on November 14, 2014 and May 12, 2015.

On the one hand, Dr. Knackendoffel, McLauglin and Matsumura specifically attribute the pain, swelling and other symptoms the Claimant is currently experiencing to an exacerbation or aggravation of the Claimant's preexisting degenerative joint disease and significant osteoarthritis. On the other, Dr. Lindberg finds no acute injury whatsoever and Dr. Failinger, to the extent he finds an exacerbation of the preexisting condition, also finds that the exacerbation was temporary and has resolved and current treatment is now being directed solely to the preexisting condition. Both Dr. Lindberg and Dr. Failinger opine that the MRI of the Claimant's left knee shows no overt pathology providing evidence that the Claimant's current knee pain was caused, aggravated or accelerated by her work injury.

Nevertheless, due to persistent pain, swelling, lack of range of motion, and the Claimant's difficulty with ambulation, the Claimant's treating physicians Dr. Knackendoffel, Dr. McLaughlin and Dr. Matsumura recommend that the Claimant recommend that the Claimant proceed with left knee arthroscopy. Initially, Dr. Knackendoffel was not in favor of the surgery, stating that the Claimant was not a good candidate for surgery and that it would be the last choice due to the Claimant's morbid obesity, increased risk of DVT, infection and continued pain. Later, on April 7, 2015, Dr. Knackendoffel submitted the request for left knee arthroscopy with chondroplasty and partial medial and lateral menisectomies. He continued to acknowledge that the procedure would be risky but opined that due to failed conservative treatment, it was the only remaining option. Dr. McLaughlin and Dr. Matsumura agreed that the best remaining treatment option for the Claimant was the proposed surgery as they had little more to add to the conservative management treatment for the goal of returning the Claimant to ambulation without assistive devices and orthotics. With respect to the medial offloading knee brace and lateral wedge in the Claimant's shoe recommended by Dr. Matsumura, this was denied by insurance. The Claimant obtained the left medial offloading knee brace on her own as it was not approved through Workers' Compensation. She reported a significant overall improvement in walking with the brace and she feels more secure and has less knee buckling. The Claimant reported continued knee pain, but improved with the brace use. The Claimant reported that she has continued her home exercise and aquatic program and feels that her leg is getting stronger. Dr. Matsumura continued to recommend left knee surgery and while the surgery issue remains pending due to litigation, continue use of the knee brace to prevent falls.

In contrast, Dr. Failinger opines that the lack of acute or traumatically induced pathology on the MRI means that the chronic degenerative pathology is the more likely source of the Claimant's current pain. If the Claimant's treating physicians are treating the arthritis, then they are not treating the Claimant for the effects of her work injury. In his medical record review, Dr. Lindberg provided an opinion consistent with Dr. Failinger.

In addition to the issue of relatedness of the proposed surgery to the medical condition resulting from the work injury, Dr. Failinger presented very strong opinions as to the reasonableness of the proposed surgery. In referring the Medical Treatment Guidelines, Dr. Failinger points out that there are a number of factors to indicate that the Claimant is likely to have a poor result from this proposed surgery. Dr. Failinger opined that arthroscopy in the face of arthritis doesn't improve the condition better than conservative treatment. He also opined that in the face of morbid obesity, outcome is poor as this is a mechanical problem. Dr. Failinger also opined that poor range of motion already exists in this case and surgery could make this worse. Dr. Failinger also finds the diffuse nature of the Claimant's pain problematic for the proposed surgery as this is an indicator that the pain may not even be caused by the pathology that is present. Additionally, Dr. Failinger has concerns that the Claimant's mood disorder / depression is another contraindication for surgery. In referencing the Medical Treatment Guidelines for lower extremity surgical indications/considerations (Respondents' Exhibit J, p. 108 - MTG Rule 17, Exhibit G, p. 61) he notes that the guidelines specifically state that it is not clear that a partial menisectomy for a chronic degenerative meniscal tear is beneficial. Ultimately, Dr. Failinger opined that the proposed surgery is not intended to address a condition related to the Claimant's work injury, but rather a preexisting condition. The brace and shoe wedge, likewise, are intended to address the preexisting condition and not any acute injury that happened on November 6, 2014.

In considering the conflicting medical opinions, on the issue of causation and whether or not the Claimant's work injury exacerbated or aggravated her preexisting condition, the opinions of the Claimant's treating doctors are more persuasive than that of Dr. Failinger and Dr. Lindberg. The medial offloading knee brace and orthotics recommended by Dr. Matsumura are successfully relieving the Claimant from the effects of the aggravation of her preexisting condition, and are reasonably necessary medical treatment in this case.

With respect to the proposed surgery, crediting the persuasive opinion of Dr. Failinger, it is more likely than not that the surgery is treatment directed solely to the preexisting osteoarthritic condition and degenerative joint disease, and not to any exacerbation or aggravation caused by the Claimant's November 6, 2014 work injury. In addition, crediting the opinion of Dr. Failinger and with reference to the Medical Treatment Guidelines, more likely than not, the proposed surgical intervention is not likely to be beneficial. In light of the numerous and serious risks posed by this surgery for the Claimant in this case, the proposed surgery is not reasonably necessary to cure and relieve the Claimant of the effects of her work injury.

In sum, the Claimant has proved by a preponderance of the evidence that the left knee medial offloading brace and shoe wedge orthotic are reasonably necessary to cure and relieve the Claimant of the effects of her November 6, work injury. However, the Claimant has failed to establish that the proposed left knee arthroscopy is reasonably necessary to cure and relieve the Claimant of the effects of her November 6, work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that she has missed work and suffered a wage loss effective April 1, 2015. The issue is whether or not the loss of income is causally related to her work injury. Here, the Claimant had submitted a letter of resignation on January 27, 2015 to Employer stating that she needed to terminate her full time employment there in order to seek part time employment that would give her time to heal. Within a few days, the Claimant's letter of resignation was withdrawn and per the credible testimony of the Claimant, the Claimant was offered some scheduling concessions and the ability to take some sick leave time. After this, the Claimant did return to her full time position with the Employer. On February 16, 2016, the Claimant was released to return to work with no restrictions by Dr. Knackendoffel. However, subsequent to that, the Claimant has remained on crutches and later obtained a medial offloading brace due to instability of the knee and buckling of the knee which put her at risk for falls and further injury.

The Claimant testified at the hearing that since her injury, she can't do full weight-bearing, she has gait issues and she can't support her own weight or any other weight. She testified that prior to her November 6, 2014 injury, she was not having these issues. Her treating physician Dr. Knackendoffel, who was originally not in favor of the Claimant pursuing surgery, changed his mind due to the Claimant's failure to improve in spite of considerable conservative treatment. Per medical records and testimony, the Claimant now requires a medial offloading brace to help prevent instability and buckling of her knee. Her symptoms have become worse since February 16, 2016 and she requires assistive devices to ambulate.

As found, on Monday, March 30, 2015, the Claimant was approximately five minutes late for a required committee meeting. Crediting the Claimant's testimony, the Claimant was five minutes late due to difficulty ambulating with a crutch while retrieving mail prior to the meeting. The Claimant's position required her to manage the

Employer's mail and, although the Claimant's supervisor Ms. Brink had performed the post office runs for the Claimant for a time, as of March 30, 2015, the Claimant was back to doing these. Additionally, while there is some confusion about whether Ms. Brink did or did not attend the March 30, 2015 committee meeting, in looking at the testimony as a whole, it would appear that Ms. Brink was not at the meeting, but was at a different location that morning. So, the post office duties would have been the Claimant's that day (and the prior week while Ms. Brink was out of town at a conference). Thus, while the Claimant is no longer under medical restrictions from her treating physician, the medical records and the Claimant's testimony establish that she is still ambulating with difficulty and with crutches due to effects of her work injury and this requires that the Claimant have additional time to perform her work duties. As a result of being five minutes late for the committee meeting after retrieving mail from the post office, the Claimant's employment was terminated. Therefore, there is a causal relationship between the work-related injury and the Claimant's subsequent wage loss because she was unable to perform her work duties sufficiently due to the effects of her work injury.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for her termination.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries

regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

Alternatively, for the purposes of this claim, the totality of the circumstances must be considered in determining whether the Claimant committed a volitional act warranting termination. The fact that an employer discharged an employee, even in accordance with the employer's policy, does not establish that the Claimant acted volitionally, or exercised control over the circumstances of termination for the purpose of barring the Claimant from receiving TTD benefits pursuant to the Workers' Compensation statutes. See *Gonzalez v. Industrial Commission,* 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994*)(*cited with approval in *Kneffer v. Kenton Manor,* W.C. 4-557-781 (ICAO 3/17/04); *Bookout v. Safeway, Inc.,* W.C. 4-798-629 (ICAO 12/15/2010)(claimant not at fault for termination for violating "no call – no show" policy when wrongly incarcerated); *Hall v. Wal-Mart Stores, Inc.,* W.C. 4-601-953 (ICAO 3/18/04)(The respondents cannot adopt a strict liability personnel policy which usurps the statutory definition of "responsibility" for termination where the claimant engaged in a fight it at work but did not provoke assault); *Bonney v. Pueblo Youth Service Bureau,* W.C. 4-485-720 (ICAO April 24, 2002)(Claimant was not responsible for failure to comply with the employer's absence policy if the claimant was not physically able to notify the employer); *see e.g., Bell v. Industrial Claim Appeals Office, 93 P .3d 584,* (Colo. App. 2004)(The claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights).

The Claimant's employment file with Employer is rife with inconsistent messages and treatment with respect to several employment transgressions and the resulting discipline. In reviewing the employment record as a whole, there is nothing to clearly indicate that arriving late, whether it be five minutes or fifteen, would be a policy violation that the Claimant, or a reasonable person, would expect to lead to termination of employment.

On December 15, 2014, the Claimant received a written warning from her supervisor Janet Brink. The warning referenced several transgressions: (1) a verbal counseling that the Claimant received in June 2014 for aggressive and unfriendly interactions with office personnel; (2) a change of policy to close the office from 12-1 every day that Ms. Brink instituted because the Claimant was working through lunch and did not have permission for overtime; (3) an incident in which Claimant was allegedly argumentative with Ms. Brinks on November 10, 2014 when the Claimant was asked not to fill out paperwork on her workman's compensation claim but did it anyway; (4) an incident on December 8, 2014 when the Claimant called in sick within one hour of her work start time; and (5) a December 10, 2014 incident when Ms. Brinks noted the Claimant became "combative" when she was told again that she could not work over 5 hours without taking a lunch break. Under "Corrective Action," Ms. Brink stated that if

the Claimant feels she "cannot or will not curb [her] argumentative and combative behavior and speak to me and all those you interact with while at work respectfully and professionally and follow rules that are presented to you then will need to separate your employment with [Employer]." She further noted that "since the lunch issue and the way you speak to staff has been discussed verbally & now in a written warning the next step for noncompliance will be termination of employment from [Employer]." The Claimant requested a chance to write a written response to the written warning that would also be placed in her file as she did not agree with what was written. She did sign the written warning, as did Ms. Brinks. At the hearing, the Claimant testified that when she first began working at the executive office, there was not a set lunch hour. The Claimant testified that she would customarily take her lunch break around other employees' schedules so that there was appropriate coverage at the office. The Claimant testified that at some point Ms. Brink changed the lunch break policy and set a defined lunch hour from 12:00 to 1:00 p.m. The Claimant testified that Ms. Brink disciplined her because, at times, she would work into the defined lunch hour due to longer than anticipated phone calls or the press of other business, including meeting with Employer's clients. The Claimant disagreed with Ms. Brink's written statement that Claimant was "argumentative and combative." The Claimant testified that when she would ask a question for clarification of Ms. Brink, then Ms. Brink would often become "very upset," and that Ms. Brink would not understand why Claimant would need to ask questions. With respect to the conduct surrounding a claim form relating to this workers' compensation claim, the Claimant testified that she requested a copy of Employer's First Report of Injury regarding the November 6, 2014 injury, but did not receive a copy, and so was filling out her own copy of the report with her recollection of how the injury happened for her own records, and not for filing with Employer or Insurer. In any event, while the Claimant may have disagreed with the allegations in the December 15, 2014 written warning, the warning did put the Claimant on notice that certain types of activity could result in termination of employment. However, being late for a meeting was not one of the transgressions listed.

On December 16, 2014 at 12:26 PM, Ms. Miffie Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there would definitely be a meeting of the committee on Monday, December 22 at 8 AM. The Claimant missed this meeting and on December 22, 2014 at 9:05 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, "I am SO sorry! I totally forgot that this morning was the meeting." On December 23, 2014, the Claimant received written notice of a Verbal Warning. The reason for the warning was due to the Claimant missing the Family Selection Committee meeting on Monday, December 21, 2014 (although the meeting was on December 22, 2014). The notice indicated the Claimant is responsible for taking minutes and it is the second one the Claimant had missed without notification. The Corrective Action listed was that "if you fail to make another meeting without an excused absence you will be removed from this committee and could result in less hours scheduled in your work week." Based on this notice, the expected discipline for missing a meeting was that the Claimant would be removed from the committee and as a result would be scheduled to work fewer hours. There is no mention that missing a

meeting could result in termination of employment. Nor is there mention of the potential for discipline for being late for a meeting.

On January 22, 2015 at 2:30 PM, Ms. Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there would be a meeting of the committee on Monday, January 26 at 8 AM. The Claimant missed this meeting. On Monday, January 26, 2015 at 8:31 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, "I am so Sorry, I did not get my reminder for the meeting this morning. Usually I get it on Friday but since I was out sick, I totally forgot about the meeting today." The Claimant was not removed from the committee nor were her hours reduced, nor was she terminated for missing the January 22, 2015 meeting.

Rather, on January 27, 2015, the Claimant submitted a written letter of resignation stating that, "I am terminating this full time employment to take the time needed to heal. I will be seeking part time employment that will accommodate a schedule that will allow me to pursue other avenues, once I have recovered." She indicated her resignation was effective February 24, 2015, but that if four weeks' notice was not necessary, she would leave that up to Employer. At the hearing the Claimant testified credibly and persuasively that when she submitted her written resignation to Ms. Brink on January 27, 2015 she told Ms. Brink that she could not imagine working for anyone but Employer because she believed in its mission, but she needed to resign because she needed time to rest and heal her knee. The Claimant testified that Ms. Brink offered concessions regarding scheduling so that the Claimant could continue working, including taking sick leave first before leaving Employer. The Claimant testified that she took leave time, but then returned to her normal job. She testified she returned to work because after speaking with supervisors, including Ms. Brink, she felt as if she was a valued employee. Per testimony, apparently, the Claimant resumed working at the Employer's administrative office after some time off.

On February 16, 2015, the Claimant was released to return to work with no restrictions. However, the Claimant testified that she was terminated from employment due to issues related to attendance at meetings. The Claimant testified that Employer terminated her on March 31, 2015. In the weeks leading up to her termination, she was on work restrictions issued by Dr. McLaughlin, including mostly sit down duty, and was using at least one crutch to ambulate. The Claimant testified that she was five minutes late to a Family Selection Committee meeting. The Claimant testified that the reason she was five minutes late for the meeting was because she stopped at the post office to get mail but was on crutches at the time and it took her longer to get to the meeting because of this.

The written notice of termination prepared by Ms. Brink dated March 31, 2015, states that the Claimant had missed three Family Selection Committee meetings on February 24, 2014, December 22, 2014 and January 26, 2015. The letter stated that the Claimant was "warned after missing the last meeting on Monday, January 26, 2015 to not miss another Family Selection Committee meeting." The notice goes on to state that, "on Monday, March 30, 2015 you did attend the meeting but you were tardy with no acceptable excuse." Looking at the employment records in evidence in this case in

conjunction with the testimony, there is no persuasive evidence to establish that the reason for termination stated in the March 31, 2015 notice is a actually violation of company policy that would result in termination for cause.

In the alternative, there is also an issue as to whether or not the Claimant committed a *volitional act* resulting in termination. There was also considerable amount of conflicting testimony surrounding the issues relate to the reason for the Claimant's termination. In taking all of the testimony into account and in considering the related documentary evidence, the ALJ found that the Claimant's testimony is more credible and persuasive than that of Ms. Brink and Ms. Blozvich with regard to the Claimant's attendance at the March 30, 2015 Family Selection Committee meeting. Specifically, the ALJ finds that the Claimant was, more likely than not, approximately five minutes late for the meeting. The ALJ also finds that while the Claimant had received warnings in the past that conduct such as missing a meeting or failing to comply with company policy regarding taking lunch at the correct time or refraining from improper communication with staff could result in discipline, up to the termination of employment, the Claimant was not ever advised that arriving late to a meeting would result in termination. Moreover, on December 23, 2014, the Claimant received notification of a verbal warning that indicated that failing to attend another Family Selection Committee without an excused absence would result in the Claimant being removed from the committee and "could result in less hours scheduled in your work week." This is a considerably lesser discipline than termination of employment. Further, even this discipline was not imposed when the Claimant missed the scheduled January 2015 meeting, which was the next meeting after the missed December meeting. Thus, the ALJ finds that there was no persuasive evidence that the Claimant, nor any reasonable person, would have understood that arriving late for a committee meeting was a violation of company policy that would result in termination of employment.

For the alternative reasons stated above, the Respondents have not established that the Claimant was responsible for her termination and she is not barred from receiving temporary disability benefits.

ORDER

It is, therefore, ordered that:

1. The Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing April 1, 2015 and ongoing until terminated by law.

2. The Respondents shall pay for the medical treatment reasonably necessary to cure and relieve the Claimant from the effects of her work injury, including, but not limited to, the left knee offloading brace and left shoe wedge orthotic recommended by Dr. Matsumura. Medical benefits shall be paid in accordance with the Division medical fee schedule.

3. The left knee surgery recommended by Dr. Knackendoffel is not reasonably necessary to cure and relieve the Claimant from the effects of her work injury and this specific claim for a medical benefit is denied and dismissed.

4. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

5. Any issues not determined in this decision 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, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 6, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue presented for determination is whether the Claimant failed to use a safety device provided by her employer thereby subjecting her to a 50 percent reduction in her benefits.

FINDINGS OF FACT

1. The Claimant worked as a self-employed taxi cab driver. She entered into a lease purchase agreement with Yellow Cab to purchase a vehicle, and is considered an independent contractor. The vehicle is equipped with safety belts.

2. On November 23, 2014, while driving the taxi cab, the Claimant was involved in a motor vehicle accident (MVA). The Respondents admitted liability.

3. The Claimant was wearing a safety belt prior to the MVA. She admittedly removed the safety belt just prior to the impact with the other vehicle leaving her unrestrained although the passenger side airbags deployed.

4. Claimant advised the paramedics that she had not been wearing a safety belt. As a result, she was thrown forward into the front passenger seat. She denied loss of consciousness, and stated her right lower leg was most painful. She later admitted to pain in the left thigh and right upper posterior flank.

5. At the emergency room, Claimant complained of right knee pain with swelling, right shoulder pain, left hip pain, right posterior upper rib pain, and chest pain.

6. Since being injured, Claimant has treated with a variety of health care providers including Dr. Shimon Blau. On January 19, 2015, Claimant told Dr. Blau that she had been wearing a safety belt but disengaged it as she lost control of her vehicle because she had previously been trapped in a car. Claimant was thrown around the passenger compartment and hit her head on the interior roof.

7. According to the most recent medical records in evidence, the Claimant's chief complaints include neck and shoulder pain. The other pain complaints appear to have either improved or resolved.

8. It is unknown from the medical records which injuries may have been sustained due to Claimant's failure to wear a safety belt, and the Claimant did not testify at the hearing. In the testimony Claimant gave at a prior hearing held on May 19, 2015, the Claimant did not admit that her injuries would have been different or minimized had she kept her safety belt on prior to impact. In actuality, there was little testimony provided concerning the nature of her injuries at the prior hearing.

9. The ALJ finds that no credible or persuasive evidence, medical or otherwise, proves that Claimant's injuries are due to her failure to wear a safety belt.

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. Pursuant to §8-42-112(1)(a), C.R.S., compensation provided by the Workers' Compensation Act shall be reduced by 50 percent, "Where injury is caused by the willful failure of the employee to use safety devices provided by the employer."

5. In this case, the Respondents have not proven that Claimant's failure to use a safety belt caused her injuries. While it is true that Claimant willfully removed her safety belt prior to the MVA, the Respondents offered no persuasive evidence that Claimant would not have sustained the same injuries had she kept her safety belt on throughout the accident.

ORDER

It is therefore ordered that:

1. Respondents failed to meet their burden of proof that Claimant's will failure to use her seat belt caused her injuries. As such, Respondents are not entitled to reduce Claimant's compensation by 50 percent.

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 15, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury to her right hip and temporomandibular joint ("TMJ") on October 16, 2014.

- If compensable, is Claimant entitled to reasonable and necessary medical treatment to cure and relieve the effects of injuries to the TMJ and hip?

FINDINGS OF FACT

1. Claimant was employed as a manager for Employer, which is a residential cleaning company. She was required to drive to various locations in this job.

2. Claimant's medical history was significant in that she was involved in a motor vehicle accident in 1996[1], in which she injured her cervical, thoracic and lumbar spine, as well as her temporomandibular joints. Claimant testified she dislocated her jaw in this accident, which was not discovered for a period of time. Records from Kaiser Permanente (California) were admitted into evidence, which documented treatment from 2008-2011. In particular, Claimant was evaluated by Lam Hoang, M.D. on October 6, 2008, who noted Claimant received conservative treatments for TMD and myofascial pain, but had continued pain complaints. Claimant was complaining of frequent headaches, nighttime clenching, as well as tenderness in the bilateral TMJ. Dr. Hoang's impression was myofascial pain and internal derangement of TMJ, bilaterally. Claimant underwent a Botox injection at that appointment.

3. On September 23, 2010, Claimant underwent an arthrocentesis (bilateral), which was performed by Dr. Hoang. The pre-op diagnosis was TMJ arthralgia, as was the post-op diagnosis. Dr. Hoang noted Claimant was able to open her jaw and complete range of motion exercises, during which she reported no pain.

4. Claimant was evaluated by Dr. Hoang on January 21, 2011. At that time, severe tenderness at the TMJ (bilateral) was noted, along with moderate pain at the muscles of mastication. The occlusion was stable without splint. Dr. Hoang's impression was TMJ derangement with arthralgia, myofascial pain. A bilateral modified condylotomy was discussed.

5. Claimant underwent a mandible osteotomy (modified condylotomy) on February 25, 2011. She was seen by Dr. Hoang for a follow-up on March 7, 2011.

[1] Claimant testified the accident was in 1997, but other documents admitted into evidence indicated it occurred in 1996.

Claimant reported her TMJ area felt better, but the incision areas were tender bilaterally. Claimant was also seen by Dr. Hoang on March 18, 2011, whose diagnoses were TMJ arthralgia-primary; TMJ disorder. At that time, Claimant's pain symptoms were much improved, but she felt like the arch bar on the upper left was pulling her canine out.

6. Claimant testified her TMJ symptoms improved after the surgery; in fact, her jaw felt “perfect”. For the period of 2011-14, she would feel intermittent pain in her jaw muscles, however, Claimant testified she did not experience popping or clicking. Claimant testified she held stress in her jaw, which she described as muscle pain. She estimated this occurred once per week.

7. Claimant received massage therapy at Elephant Moon Massage starting on February 4, 2013. She sought treatment for TMJ pain and neck pain. Claimant received massage therapy on February 4, 2013 (for TMJ and neck pain); March 1, 2013 (for neck pain at spine, rib); March 22, 2013 (mid-back, jaw, neck); May 10, 2013 (jaw, neck); October 8, 2013 (jaw, sitting); July 2, 2014 (jaw up into ear); and October 15, 2014 (starting to feel sick/coughing, some jaw, left shoulder). Each of the sessions was 90 minutes. The ALJ infers Claimant continued to have TMJ pain from 2011- 2014 for which she required treatment.

8. On October 28, 2013, Claimant was evaluated by Philip Rhoades, M.D. for a physical. At that time, she complained of neck pain, as well as left hip pain occurring over the past 1.5 months. She had chronic low back problems and was noted to be seeing a chiropractor. Dr. Rhoades' examination was positive for dizziness and headaches, as well as joint pain.

9. Claimant returned to Dr. Rhoades on November 25, 2013, at which time it was noted she had consistent pain in the left hip for the past three months. On examination, Dr. Rhoades noted pain in the left lateral hip, distal to the iliac crest, deep on palpation. He discussed topical treatment, as well as physical therapy.

10. Claimant returned to Dr. Rhoades on February 3, 2014, after she had seen a rheumatologist. Claimant was noted to have significant muscle and joint pain (constant), which affected her sleep. Dr. Rhoades prescribed amitriptyline. The ALJ notes Claimant's musculoskeletal and joint pain was significant before the subject accident and infers that this was a chronic condition.

11. Mr. Macchia was the owner of the Employer and supervised Claimant. He saw Claimant at the office at least once a week. Prior to the accident, Mr. Macchia testified Claimant complained of jaw pain and observed her with jaw pain, as she would put her hand on her jaw and move it back and forth. He was aware that she had been receiving massage treatments for her jaw before the accident and Claimant told him she was glad to find someone who could perform massage on her jaw.

12. Claimant testified she went to the dentist approximately ten (10) days

before the accident. She thought her appointment was at Comfort Dental[2]. She said her jaw was aligned at that time.

13. Claimant suffered an admitted[3] industrial injury on October 16, 2014 when she was involved in a motor vehicle accident while working for Employer. The accident occurred at Martin Luther King Blvd. and Colorado Blvd. when she was rear-ended while waiting for a red light. No police responded to the scene, however, Claimant testified she went to the police station and completed a report.

14. In the accident report, Claimant specified she was driving a 2006 Scion and the other vehicle was a 2000 Honda CRV. Both vehicles were stopped at the light, when the other vehicle behind Claimant started going forward, which caused the impact. The Honda had no damage other than a bent license plate. Claimant estimated the Honda's speed to be 5-10 mph and testified she felt immediate pain in her jaw. Since this report was completed immediately after the accident, the ALJ infers Claimant's estimate of the speed of the vehicle which struck her was more accurate than estimates she made later. The ALJ was not persuaded that it was her treating physicians who concluded the accident occurred at a higher speed.

15. Claimant testified she had no experience estimating vehicle speeds. Photographs of Claimant's vehicle were admitted at hearing, which documented minor damage to the rear of the vehicle[4].

16. On the day of the accident, Claimant sought treatment at the Emergency Department of Presbyterian/Saint Luke's Medical Center. She was complaining of neck, low back, left shoulder, and jaw pain. The spinal x-rays were reviewed by Garret Ganuch, M.D., who characterized these as normal. A CT of the cervical spine revealed no fractures, but degenerative changes were noted. No acute signs of trauma were noted on examination. Stephen MacDade, M.D. did not believe a serious injury resulted from the MVA.

17. Claimant returned to Presbyterian/St. Luke's Medical Center on October 20, 2014. At that time, she reported her pain had not improved and she now had tingling in the top of her feet and leg when she crossed her legs. She also had left shoulder pain radiating down her arm. No swelling of extremities was noted and Claimant had good range of motion in the shoulders. She had mild soft tissue tenderness in the left upper back around scapula. Normal range of motion of both hips and knees was noted. The primary clinical impression was lumbar strain, with a secondary impression of strain of thoracic spine. Cynthia Kelmenson, M.D. did not feel Claimant needed an MRI.

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[2] These records were not admitted at hearing.

[3] Although the General Admission of Liability was not admitted into evidence, both Claimant and Respondents' Position Statements referred to this as an admitted claim.

[4] Exhibit E.

18. Claimant was examined by Deidre Dietz, M.D. on November 4, 2014. Dr. Dietz noted Claimant had been seen by a PA the week before, but the PA felt it was too complicated and felt best for M.D. to see her. Claimant's main concern was fibromyalgia pain, not controlled by medications. She also complained of sharp, severe, shooting pain along the entire spine from the sacrum to the neck. No lower extremity numbness or weakness was noted. Dr. Dietz' assessment/plan was: fibromyalgia for which the Gabapentin prescription was increased; back pain-MRI spine pending; GERD-prescription.

19. Claimant returned to Dr. Dietz on November 25, 2014. Her fibromyalgia pain was improved with increased Gabapentin, but she still had low back pain with radiculopathy. She complained of pain and numbness in the right lower extremity, with constant pain radiating from low back to right buttocks. The results of the MRI were reviewed, which showed mild DJD and moderate spinal stenosis in the lumbar spine. Dr. Dietz' assessment included fibromyalgia-improved; spinal stenosis stable, but pain not controlled; right lower quadrant pain-intermittent, for which an ultrasound evaluation of the ovaries was ordered.

20. Mr. Macchia testified he did not see a change in Claimant's symptoms after the MVA. Mr. Macchia testified Claimant told him the accident was not that bad and her car did not have much damage. He also stated Claimant told him she was going to pursue a recovery against the at-fault driver and when asked about her preexisting TMJ condition, she said: "they don't know that." Mr. Macchia admitted he could pay premium costs if the claim was found compensable. The ALJ did not conclude that this fact made him less credible as to whether this statement was made by Claimant. Likewise, the fact Claimant made this statement does not lead to the inference that she was not credible with regard to her TMJ symptoms.

21. Claimant filed a Worker's Claim for Compensation on December 3, 2014. Claimant stated she was injured in a motor vehicle accident. She reported the injury to Pat Bullard and Greg Macchia. She specified the parts of her body affected included lower back, jaw, left shoulder.

22. Claimant was evaluated by Greg Hare, PA-C at Concentra on December 5, 2014. She complained of pain in the left posterior shoulder, low back bilaterally and pain in the jaw. She reported treatment from her PCP for back and jaw pain after the accident. PA Hare's assessment was lumbar strain, lumbago, jaw pain, left shoulder pain and motor vehicle accident. Claimant had full ROM of the cervical and thoracic spine, as well as the left shoulder. Bilateral muscle spasms were noted in the lumbosacral spine. A referral to an orthopedic specialist and for physical therapy ("PT") was given, as well as work restrictions.

23. Claimant was next seen on December 19, 2014 by Valerie Maes, PA-C and she was complaining of pain in the left anterior shoulder, which was described as moderate. She also had mid and low back stiffness (bilateral) and decreased spine range of motion. PA Maes' assessment was left shoulder pain and lumbar strain. An acupuncture referral was made.

24. Following the accident, Claimant returned to Elephant Moon Massage on December 23, 2014 at which time it was noted she was involved in a car accident on 10/16 and "everything aggravated". Claimant also received massage therapy on January 7, 2015, at which time it was noted she was still having pain from the accident.

25. Claimant testified the pain in her jaw continued to worsen. She did not see the results of the accident until approximately January 2015. Claimant testified that she has pain when she eats, laughs, talks; almost any activity causes her pain. The ALJ notes Claimant was very specific when describing her pain complaints. Claimant said she experienced pain in her low back and hip immediately after the accident. She initially denied having any hip pain before the accident, but then amplified her answer to say the pain she felt in her right hip was different, “very, very deep in the ball and joint area”. This hurt her credibility.

26. Claimant was evaluated at Concentra by Ron Rasis, PA-C on January 2, 2015. She reported ongoing lower back pain, gluteal spasm, left shoulder pain, neck and TMJ pain. On examination, tenderness was noted on her left shoulder, as well as left paraspinal muscle. PA Rasis' assessment was motor vehicle accident, jaw pain, left shoulder pain, lumbar strain, back pain, temporomandibular joint-pain-dysfunction syndrome, and bilateral temporomandibular joint pain. A referral to a physiatrist was ordered, as well as PT.

27. Claimant returned to PA Rasis on January 12, 2015 for a reevaluation. She had seen a chiropractor, received manipulation of the left shoulder without relief and was complaining of pain, soreness in her scapular region. She had ongoing lower back pain, including a sensation of numbness on the tops of her feet. On examination, tenderness was noted in the rhomboid and scapula, but no crepitus. Claimant had decreased sensation to light touch on the left lower leg. PA Rasis' assessment was the same as the 1/2/15 appointment, with the addition of lumbago. Pending Claimant's relocation to Fort Collins, her care was being transferred. She was to be evaluated by Dr. Sacha and to undergo a TMJ evaluation.

28. On January 16, 2015, Claimant was examined by Robert Nystrom, D.O. She had pain in her neck, left shoulder, jaw and low back, as well as reporting a loss of feeling in both legs, numbness and tingling on top of both feet. No prior neck or back injury was reported. Dr. Nystrom noted her MRI showed some bilateral foraminal stenosis. He noted bilateral jaw tenderness on examination. Claimant had a normal gait, as well as ROM within normal limits. Dr. Nystrom's assessment was lumbar strain, temporomandibular joint-pain-dysfunction syndrome, left shoulder pain, bilateral temporomandibular joint pain, motor vehicle accident, back pain and neck pain. He prescribed Cyclobenzaprine and made a physical medicine and rehab referral. Claimant was noted to be working and no work restrictions were issued.

29. Claimant was evaluated by Richard Keller, D.D.S., M.P.S. on February 1, 2015 for her TMJ discomfort. He noted Claimant said she was rear-ended by a vehicle traveling at 35-40 mph. The ALJ also notes that this is the first estimate of speed at this

range provided by Claimant. Claimant noted the following symptoms since the MVA: headaches, pain in temples, neck and bilateral shoulder pain, ringing in the ears, dizziness hot/cold sensitivity in molars. Dr. Keller found a class 1 occlusion, as her teeth not longer had contact, except on the back molars. Dr. Keller opined a trauma as the one described could cause Claimant‘s TMJ injury. Dr. Keller diagnosed late effect MVA, trauma to TM joint, myalgia, capsulitis, cervicalgia, cervical lordosis, synovitis, tinnitus, TMJ sounds open/close, degenerative joint disease, headaches. He recommended manipulation of the right TMJ joint with an appliance, neural therapies, and ozone therapy.

30. Claimant returned to Dr. Nystrom on February 2, 2015. At that time, Claimant was reporting joint pain, as well as muscle, back, neck and jaw pain. Range of motion was noted to be within normal limits, although her left shoulder was diffusely tender with decreased ROM. Increased muscle tightness and tenderness was noted in the lumbar spine. Dr. Nystrom's assessment was the same as the prior appointment and Claimant was given a prescription for Odansetron.

31. Claimant was evaluated by Alicia Feldman, M.D. at Colorado Rehabilitation & Occupational Medicine on February 11, 2015. She documented that Claimant reported being a seat-belted driver when she was rear-ended by another vehicle going approximately 35-45 miles per hour. Claimant complained of jaw pain, back pain and neck pain, but not hip pain. On examination, Dr. Feldman noted Claimant had pain free full range of motion of her bilateral hips. Dr. Feldman recommended an injection for Claimant’s lumbar spine, as well as consideration of an MRI for the cervical spine. The ALJ notes this record documented an absence of pain complaints in the hip, as well as pain free objective evaluation four months after the accident.

32. On February 17, 2015, Dr. Keller wrote to Pinnacol stating the MVA contributed 80% to her diagnosis, 20% because she was predisposed to such an injury. Dr. Keller opined 100% need for treatment was due to the MVA, and he noted in support of same that based upon her dental records, Claimant had been clinically functional and without pain prior to the accident.

33. On March 2, 2015, Claimant was examined by Dr. Nystrom for a follow up on her neck, jaw and back. Claimant reported treatment had not been approved and she was worsening. Dr. Nystrom noted no tenderness or swelling of extremities and her ROM was within normal limits. Dr. Nystrom's assessment was the same as in February, with the addition of left shoulder pain. He referred Claimant for chiropractic treatment and massage therapy.

34. Claimant was evaluated by Matthew Pouliot, D.O. (physiatrist) on April 1, 2015. At that time, her chief complaints were neck, back and right hip pain. The ALJ notes this is the first specific reference to right hip pain. Claimant reported she was a seatbelted driver when she was rear-ended by another vehicle going 35-45 mph.

35. Dr. Pouliot observed Claimant walked with asymmetric non-antalgic gait and her cervical range of motion was within normal limits. She had evidence of a subluxed rib at the left medial scapular border and mid thoracic spine and her back was nontender. Manual muscle testing was 5/5, bilateral hip flexion, knee extension, dorsiflexion, and plantar flexion. She had reproducible pain with active and passive internal rotation of the hip. Dr. Pouliot's assessment was a 35-year-old female, post MVA with neck, back, and bilateral leg pain; paresthesias and mostly right hip pain, which he felt was most probably caused by impingement as opposed to a labral tear. Dr. Pouliot gave her a prescription for Hydrocodone and ordered a right hip injection.

36. A request for authorization for right hip joint injection was made on April 1, 2015 by Dr. Pouliot.

37. On April 2, 2015, Claimant was seen by Dr. Nystrom and stated her right hip pain was her worst complaint. Acupuncture provided temporary relief. Dr. Nystrom noted Claimant's left shoulder was diffusely tender on examination, with decreased ROM. Decreased ROM of the lumbar spine was also found, with some increased muscle tightness in the neck. Dr. Nystrom's assessment was back pain, cervical strain, bilateral temporomandibular joint pain, jaw pain, lumbar strain, temporomandibular joint-pain-dysfunction syndrome, and hip pain. He made an acupuncture referral.

38. An MRI was done on Claimant's TMJ on April 10, 2015. The films were read by Gregory Beyer, M.D. Dr. Beyer's impression was: near complete absence of the right mandibular condyle with a disc fragment, anterior to the condyle on both closed and open mouth views; mild degenerative change about the left temporomandibular joint disc, but the disc was in proper position with normal anterior translocation along with the condyle on open mouth views.

39. Claimant was evaluated by Keith Meier, FNP on April 24, 2015. She reported her joint pain and back pain were still present. She stated that her jaw doctor (Keller) wanted her to see a surgical specialist for a disc tear in her TMJ. Two names were given to FNP Meijer, whose assessment was jaw, hip and back pain; cervical strain, temporomandibular joint-pain-dysfunction syndrome, left shoulder pain. A referral to an oral surgeon was given.

40. On April 29, 2015, Dr. Pouliot saw Claimant for a follow-up evaluation. Dr. Pouliot noted he received a report from the claims representative in which Claimant indicated she was rear-ended by a car traveling 5-10 mph, but she now maintained the car was traveling at 40 mph. Claimant had an orthotic applied to the mouth, which Dr Pouliot noted she was able to open her jaw within functional limits. No audible or palpable clicking or popping was noted at the TMJ bilaterally. She was tender at the lumbosacral junction and sacroiliac joint. Dr. Pouliot's assessment was: 35-year-old female with continued low back and right hip pain, with occasional paresthesias post MVA; disc herniation at L3-4; jaw pain bilaterally with reported "disc rupture" of TMJ on the right side, with surgical appointment pending.

41. Claimant received treatment at Dr. Keller's office from March 17 through

May 6, 2015. The treatments included heat, ultrasound, TM injection and shoulder trap injection.

42. Anjmun Sharma, M.D. performed an independent medical examination ("IME") of Claimant on May 12, 2015 at the request of Respondents. Dr. Sharma noted Claimant originally reported a low speed collision, which then changed to a 35-45 mph collision. He stated he concurred it was likely a low impact collision based upon the nature of her injuries and with his understanding that the vehicle she was driving required very little repairs. Dr. Sharma noted Claimant reported having "no symptoms" to her jaw up until the accident. Dr. Sharma stated that her jaw appeared to be a chronic, stable myofascial condition without the need for surgical repair. He also noted that a 5-10 mph accident could cause some mild symptoms, but he was perplexed by the length of her symptoms resulting from an accident that was so minor. Dr. Sharma also stated that he did not find any evidence to suggest her hip complaints were related to the accident as well. Dr. Sharma opined the left shoulder, cervical spine and the lumbar spine were conditions injured in the accident and subject to an impairment rating. He opined that Claimant was at MMI with respect to her compensable injuries. She did not require surgery for her cervical spine, lumbar spine or left shoulder. Dr. Sharma did not believe Claimant required maintenance medical care.

43. Dr. Nystrom evaluated Claimant on May 14, 2015 for follow-up on her neck, back, jaw, shoulder and hip. Claimant had been going to acupuncture, massage and chiro with improvement noted. Dr. Nystrom's assessment was TMJ pain-dysfunction syndrome, neck pain, left shoulder pain, lumbar strain, cervical strain, hip pain. Dr. Nystrom referred Claimant for a second opinion concerning her neck and back and ordered additional chiropractic treatment.

44. On June 18, 2015, Claimant returned to Dr. Nystrom, who noted the insurance was denying most treatment based upon the recent IME. That IME was based on an accident occurring at the speed of 5-10 mph, but Claimant insisted the speed was in the 35-45 mph range. Dr. Nystrom agreed that a speed of 5-10 mph was not likely, based upon her injuries and thought 35-45 was more reasonable based on her injuries. Dr. Nystrom's assessment was the same as the 5/14/15 appointment, excluding left shoulder pain. After reviewing the IME report, Dr. Nystrom opined that this evaluation was based on a slower speed collision and he was in agreement with the other physicians, recommending further evaluation and treatment of Claimant's spine. Claimant was given a prescription for Norco.

45. Dr. Nystrom also saw Claimant on July 16, 2016, at which time she reported she received no treatment for nine months. Her back and hip were doing better, but jaw and neck were getting worse. Dr. Nystrom did not make any referrals pending further investigation of the case.

46. On August 5, 2015, Claimant was evaluated by Rosalinda Pinero, M.D. for a recheck of her back. Dr. Pinero's assessment was back pain, bilateral TMJ pain, cervical strain, hip pain, and motor vehicle accident. She referred Claimant for a physical medicine and rehab evaluation.

47. Claimant was seen by Dr. Nystrom on August 27, 2015 for a recheck. Claimant reported joint pain and stiffness; headaches, back (sciatic) and neck pain, as well as numbness in all extremities. Dr. Nystrom's assessment was back pain, bilateral TMJ pain, cervical strain, hip pain, and left shoulder pain. He referred Claimant for chiropractic and massage therapy.

48. On September 2, 2015, Claimant returned to Dr. Pouliot, who had not examined her since April. She was complaining of left shoulder and low back pain; diffuse lower extremity pain and paresthesias. Dr. Pouliot found normal, nontender ROM in Claimant's cervical spine, normal ROM in the shoulders, with no tenderness to palpation or crepitus in the left shoulder and normal ROM in her hips. Claimant's lumbar spine had reduced ROM with diffuse parasthesias. Dr. Pouliot's assessment was: 35-year-old female with ongoing pain in the left shoulder, which he thought was myofascial; multilevel disk herniations at L3-4, L4-5 and L5--S1. Dr. Pouliot ordered dry needling and core evaluation at Alliance Physical Therapy. Treatment records for that facility were introduced at hearing, which documented nine (9) treatments as of November 9, 2015.

49. Dr. Nystrom evaluated Claimant on September 17 and October 8, 2015, noting with the same assessment and Claimant was to continue chiropractic and massage. On November 2, 2015, Claimant returned to Dr. Nystrom after receiving an ESI by Dr. Pouliot. She reported two (2) days of relief, but her pain had returned. Claimant said she was having a lot of headaches. Dr. Nystrom prescribed Hydrocodone and Tizanidine.

50. Claimant returned to Dr. Pouliot on November 4, 2015, complaining of pain in the shoulder girdle causing daily headaches and migraines. Dr. Pouliot's assessment was ongoing muscle spasms, myofascial pain primarily in the threats again cervical spine; TMJ joint pain; multilevel disc herniations. He ordered Botox injections and an Atenolol prescription.

51. On November 25, 2015, Claimant was evaluated by Jeffrey Winkler, PA at which time she was complaining of neck pain and headaches at a level 10/10 after returning from a vacation cruise. The assessment was cervical strain, headache. Claimant was to follow-up with Dr. Nystrom.

52. Claimant was evaluated by Dr. Nystrom on December 1, 2015, who recorded she had a major flare-up of pain over the weekend which caused her to go to the ER twice. Dr. Nystrom assessment was: back, bilateral TMJ, jaw, and neck pain; headache and cervical strain. He made a referral for massage therapy.

53. On December 9, 2015, Claimant was seen by Dr. Pouliot. A repeat MRI was performed on 11/25/2015, which Dr. Pouliot said showed changes, including worsening at C5-6. Dr. Pouliot's assessment was acute ongoing, chronic cervicalgia, with radiating pain likely causing discogenic pain, with evidence of disc protrusion

versus bulge at C5-6 and failure of oral steroids to treat the pain; chronic stable lumbar pain with multiple level disc herniations L3-4, L4-5 and L5-S1; motor vehicle accident on 10/16/14.

54. Claimant was examined by Aaron Liddell, D.M.D., M.D., F.A.C.S., on September 9, 2015 and a TMJ surgical evaluation was done. Claimant told Dr. Liddell she had a near complete resolution of her symptoms after her last TMJ surgery, until she was involved in another MVA on 10/16/2014. No popping or clicking of either joint was found by Dr. Liddell. His assessment was progressive osteoarthritis of the right TMJ with disc maceration and likely perforation, in addition to arthralgia associated with the left TMJ. He recommended a sleep study, right sided joint replacement, possibly left sided joint replacement, and Lefort 1 advancement, as well as decompensating orthotics to level, align, and upright her dentition. The ALJ notes Dr. Liddell did not comment on the cause of the degenerative changes in the TMJ seen on the MRI. There was nothing introduced at hearing which indicated Dr. Liddell requested authorization for the specific treatments outlined in his report.

55. Dr. Liddell responded to questions posed by counsel for Respondents in a letter dated November 13, 2015. Dr Liddell noted it was difficult to comment on the condition of Claimant's discs without having the imaging done before the MVA, however, he frequently saw discs like Claimant's resulting from a degenerative process. Likewise, in order to assess the nature and extent of Claimant's degenerative joint changes prior to the accident the imaging from before the accident needed to be reviewed. Dr. Liddell stated condylar resorption was poorly understood and was idiopathic. Trauma and surgery can aggravate it. Dr. Lidell opined Claimant would require decompensating orthodontics if she had surgery, but did not offer an opinion whether she would have required surgery even if the accident had not occurred. Dr. Liddell said he can't comment on any variation in severity (of injuries) related to speed at the time of impact, except a higher speed would correlate to more severe trauma. Dr. Liddell noted it was not uncommon for patients with TMD to have massage therapy even without overt joint symptoms. Regardless of the etiology of Claimant's malocclusion, Dr. Lidell's surgical recommendations would remain the same.

56. Dr. Keller testified as an expert at hearing. The focus of his practice is TMJ and sleep issues, as well. Dr. Keller testified the dental records shortly before the 2014 motor vehicle accident documented Claimant had a fully functioning jaw with significant degenerative features likely stemming from the motor vehicle accident in 1996. Dr. Keller stated he reviewed dental records from a few days prior to the motor vehicle accident in 2014 which showed Claimant's jaw was completely in alignment and the subjective section of the records did not indicate any complaints of jaw pain. The x-rays taken at that time were normal. Dr. Keller agreed that sometimes general dentists did not record malocclusion in their records. However, Dr. Keller opined there was a structural change in Claimant's jaw after the MVA. Dr. Keller testified the degenerative changes noted on MRI, which were from the prior surgery, predisposed Claimant to suffer a more serious injury from the MVA of 10/16/14. Dr. Keller opined the motor vehicle accident caused Claimant's jaw to change quickly from asymptomatic and high

functioning to no functioning.

57. Dr. Sharma testified at hearing as an expert in the fields of occupational and family medicine. He is Level II accredited pursuant to the W.C.R.P. Dr. Sharma testified he did not believe there was sufficient evidence to find the motor vehicle accident caused or aggravated Claimant's symptoms in her TMJ or right hip. He based his findings on the premise the vehicle accident occurred at 5-10 mph and the fact Claimant's soft tissue injuries appeared mild. He also noted it did not appear plausible to him that a vehicle which had been stopped behind Claimant at a light could accelerate to 35-45 mph before striking her, and then only having damage limited to a bent license plate from such a collision. Dr. Sharma believed Claimant would have had pain in her hip immediately after the accident if it had been injured, as it is a weight bearing joint. Dr. Sharma would have expected movement to cause pain in the hip joint, if there had been an injury to the hip. The ALJ credited this opinion of Dr. Sharma on whether Claimant sustained a right hip injury.

58. Dr. Sharma testified he had experience in his practice evaluating and treating TMJ complaints. Dr. Sharma did not examine Claimant's mouth, nor did he make any measurements at the time of the IME. Dr. Sharma noted he would refer a case like this to an oral maxillofacial surgeon. He testified his report noted that Claimant had not been provided a surgical option for treatment and since then she had since been provided a surgical option by Dr. Liddell. However the change in her treatment recommendations did not change his causation analysis. Dr. Sharma testified he believed Claimant had a chronic pre-existing TMJ condition after having the opportunity to review the Elephant Moon Massage records, listening to the testimony of Mr. Macchia, and reviewing the other evidence developed since his IME. He noted Claimant's reports to the treating physicians that she had no pain after her last surgery did not appear accurate. He also testified Claimant did not inform him at the IME that she had jaw or TMJ massage treatments prior to the accident; that information would have been relevant and responsive to the questions he had asked her at the IME. Dr. Sharma heard Dr. Keller's testimony at hearing. He discussed the presence of a malocclusion, which he described as a "snapshot" in time and could be the result of degenerative changes. Dr. Sharma testified the amount of degeneration shown on the MRI indicated she had a chronic condition which had been ongoing for some time and predisposed her to her current condition without an acute trauma. However, the ALJ notes the MRI was done in April, 2015 (almost six months post-accident), so he is unable to draw the inference that the MRI would have shown evidence of acute trauma. Dr. Sharma agreed Claimant's jaw had been fairly static since the accident.

59. The ALJ notes the physicians at Concentra treating Claimant for her musculoskeletal complaints made no reference to her prior treatment with Dr. Dietz, Dr. Rhoades and Elephant Moon Massage. The ALJ infers the ATP-s at Concentra did not have those treatment records.

60. Claimant has had extensive conservative treatment for her musculoskeletal complaints including multiple courses of PT, massage therapy, an ESI, along with multiple courses of chiropractic treatments and acupuncture.

61. The ALJ concludes it is more probable than not the MVA on 10/16/14 was a low speed accident.

62. Claimant failed to prove by a preponderance of the evidence she suffered a hip injury in the 10/16/14 MVA.

63. The ALJ credited the opinion of Dr. Keller that a low speed collision could cause an aggravation of Claimant's TMJ condition, as Claimant was predisposed to such an aggravation.

64. The ALJ found Dr. Liddell, as an oral surgeon, had the expertise to evaluate Claimant's TMJ condition and provide an opinion on her need for treatment. The ALJ credited his opinion regarding what treatment Claimant required for this condition.

65. There was insufficient evidence adduced to establish Claimant was entitled to treatment for condylar resorption.

66. There was insufficient evidence adduced to establish that Claimant's Obstructive Sleep Apnea was related to her industrial injury and thus, she was not entitled to testing in the form of polysomnography.

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

CONCLUSIONS OF LAW

Generally

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

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 has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility determination, not only of the Claimant, but also the medical experts.

Compensability-Hip

Claimant alleges she sustained an injury to her hip as a result of the motor vehicle accident. Claimant relies primarily on her own testimony to establish she sustained a hip injury. She also argued that she reported pain complaints to her treating physicians.

Respondents focus primarily on the fact that Claimant did not report hip pain in the immediate aftermath of the MVA. Respondents also relied on the findings of IME physician, Dr. Sharma to support their contention no compensable hip injury occurred.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he or she was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. An injury occurs "in the course" req uires Claimant to demonstrate the injury occurred within the time and place limits of his/her employment and during the activity that had some connection with his/her work-related functions. *Triad Painting Co. v. Blair* 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires Claimant to show the causal connection between the employment in 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. *Id.*

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). Lay testimony alone may be sufficient to prove causation. However, where medical evidence is presented on the issue of causation it is for the ALJ to determine the weight and credibility of such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182. The ALJ determined Claimant failed to meet her burden of proof to show a causal connection between the MVA and her claim of a hip injury.

In concluding Claimant failed to adduce sufficient evidence that her hip was injured, the ALJ's reasoning was two-fold. First, Claimant did not report an injury to her

hip immediately after the accident. In fact, there was a delay of almost 5 1/2 months before she started complaining of hip pain. The absence of hip symptoms was significant. The lack of hip pain/complaints was seen in the following medical records:

10/16/14: Presbyterian St. Luke's Med. Ctr.-no reference to hip pain.

10/20/14: Presbyterian St. Luke's Med. Ctr.-no reference to hip pain.

11/4/14: Dr. Dietz- Fibromyalgia evaluation,complaints of spinal pain, no reference to hip.

11/25/14: Dr. Dietz –Fibromyalgia, no reference to hip pain.

12/3/14: Worker's Claim for Compensation-no reference to hip injury.

12/5/14: Concentra (PA Hare)-no reference to hip pain.

12/19/14: Concentra (PA Maes)-no reference to hip pain.

1/2/15: Concentra (PA Rasis)-no reference to hip pain.

1/12/15: Concentra (PA Rasis)-no reference to hip pain.

1/16/15: Concentra (Dr. Nystrom)-no reference to hip pain or injury.

2/2/15: Concentra (Dr. Nystrom)-no reference to hip pain.

2/11/15: Dr. Feldman-no hip complaints and pain-free ROM.

3/2/15: Concentra (Dr. Nystrom)-no reference to hip pain.

In addition, Claimant testified she did not have hip pain before the subject accident and then distinguished between the type of hip pain she experienced before and after the accident. This was not persuasive to the ALJ. (Finding of Fact 24). The ALJ also credited Dr. Sharma's opinion that he would have expected Claimant to report hip pain immediately, as it is a weight bearing joint. (Finding of Fact).

In this regard, the ALJ considered whether Claimant's complaint of low back pain also included pain in the hip, which Dr. Sharma felt was possible. As found, Claimant was very specific about the locations on her body where she had pain. The ALJ concluded it was more probable than not Claimant would have been specific as to the existence of hip pain and reported this pain immediately after the accident.

Second, based upon the inferences drawn from the evidence, the ALJ considered it unlikely Claimant would have suffered a hip injury as a result of what was a minor accident. As found, Claimant was wearing a seatbelt at the time and it is more probable than not that this was an accident which occurred at speeds lower than 20 mph. The facts of the accident, coupled with the initial lack of reporting the hip injury to

health care providers led the ALJ to conclude Claimant did not suffer a compensable injury to her hip. Therefore, the claim for medical benefits (including the request for authorization of hip injection) for the hip injury is denied and dismissed.

TMJ

The question of whether the TMJ condition is compensable is a much closer one. As found, there is a question whether a low-speed impact would be sufficient to cause an aggravation of Claimant's preexisting condition. More particularly, the issue with regard to Claimant's TMJ condition is whether the MVA aggravated or accelerated the condition to the extent that treatment was required.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A Claimant may be compensated if the work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought". *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990).

Respondents disputed the Claimant's need for treatment resulted from the accident, arguing she would have required the treatment because of the degenerative process in her temporomandibular joints. Respondents also averred Claimant failed to provide accurate information to healthcare providers by not advising of the TMJ treatment she received immediately before the accident and by exaggerating the seriousness of the collision.

Claimant contended that she was symptom-free immediately prior to the accident; she had what she described as muscular pain for which she received periodic treatments. As found, the ALJ did not find Claimant to be credible on this point, as the treatment records from Elephant Moon Massage documented TMJ treatment. Claimant asserted that her TMJ pain caused headaches and other symptoms after the accident. Finally, Claimant argued the MVA caused her TMJ condition to deteriorate and become symptomatic. Once again, this represents a close question because the evidence in the record showed the degenerative changes in the temporomandibular joints that was not the result of this subject automobile collision.

On balance, the ALJ was persuaded by Dr. Keller's opinion that even a low-speed MVA could cause the mandible to dislocate and the disk to be displaced. (Findings of Fact 55 and 61). Dr. Keller noted this was confirmed by the MRI and Claimant's pre-existing condition predisposed her to suffer such an injury or aggravation. Dr. Keller opined Claimant's need for treatment was caused by the subject accident. (Finding of Fact 31). In addition, Dr. Keller noted Claimant's jaw was in alignment immediately before the accident and although these records were not admitted at hearing, his testimony was both credible and persuasive on this point. As found, Claimant reported pain in her jaw after the accident and she consistently reported those symptoms to various treatment providers. (Findings of Fact 15, 19, 20).

In this regard, Respondents' expert, Dr. Sharma is not a dentist and had no specific dental expertise, although he has treated patients with TMJ dysfunction. (Finding of Fact 57). Dr. Sharma confirmed the degenerative nature of Claimant's condition, however, his testimony did not refute Claimant's expert's opinion regarding the exacerbation of her underlying TMJ condition.

The ALJ concluded that Claimant's TMJ condition was aggravated by the subject accident. In particular, what was variously described as TMJ dysfunction, including the misalignment of Claimant's jaw or TMD symptoms were aggravated as a result of the MVA.

Medical Benefits

In the instant case, Claimant has the burden of proof to establish that the treatment proposed by Dr. Keller is reasonable and necessary, as well as related to her industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant failed to meet her burden of proof with regard to her hip injury and is therefore not entitled to medical benefits. (Finding of Fact 62).

As found, Dr. Liddell made several recommendations for treatment. Dr. Keller testified these treatment recommendations were reasonable. Claimant testified she wishes to receive treatment for her TMJ dysfunction. However, the ALJ notes there was not a specific treatment authorization request before the Court. As found, some of the testing and treatment proposed by Dr. Liddell were not related to the subject accident. (Findings of Fact 63 and 64). However the Claimant proved she is entitled to treatment for TMJ dysfunction, including the proposed surgery and decompensating orthodontics.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits for an injury to her hip, including injections, is denied.

2. Respondents shall provide medical/dental benefits to cure and relieve the effects of Claimant's injury to her temporomandibular joints, including the proposed surgery and decompensating orthodontics.

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 28, 2016

Digital signature

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

ISSUES

1. Did the claimant's condition worsen subsequent to being placed at maximum medical improvement (MMI)?

2. If so, whether the medical benefits for the claimant should be approved as reasonable and necessary?

3. At hearing the parties stipulated to an average weekly wage of $972.00.

FINDINGS OF FACT

1. The claimant worked as an auto mechanic for the respondent-employer beginning in August 2013.

2. The claimant was injured in a work-related industrial accident on December 17, 2014, when he was in the process of removing a starter and using a high powered pneumatic tool and the tool jammed the claimant's hand. The claimant injured the front and back of his right index finger as well as the palm of his right hand. The immediate accident caused the claimant to experience excruciating pain.

3. The claimant was treated at Memorial Hospital and was referred to Dr. Devanny.

4. On December 23, 2014 Dr. Devanny diagnosed an acquired trigger finger and provided an injection to the claimant's right index finger and long finger. The claimant had a follow-up visit with Dr. Devanny on January 22, 2015 and was diagnosed with acquired trigger finger and carpal tunnel syndrome and again received an injection in the index finger. Also on January 22, 2015 the claimant had an injection of the carpal tunnel.

5. These injections provided the claimant with some relief but it was not long lasting. The claimant's right index finger was locked up to 80% of the time and his hand would get numb.

6. On February 20, 2015 the claimant was released from Dr. Devanny's care with the proviso that if the symptoms return he would like to see the claimant again.

7. During the third week of March 2015 the claimant left the employ of the respondent-employer to start his own automotive shop business. This business began operations on April 1, 2015.

8. On April 2, 2015 Dr. Jones placed the claimant at maximum medical improvement for his industrial injury with no permanent impairment and no maintenance medical care.

9. The respondent-insurer filed a final admission of liability (FAL) on April 8, 2015 in conformance with Dr. Jones' report. The claim closed on May 8, 2015 when the claimant did not object.

10. At the time of MMI the claimant felt his condition was tolerable. The claimant's condition remained tolerable until mid-June 2015 when he began dropping things and his finger locked up. The claimant believed he could return for treatment if needed, not realizing that the claim had been closed through the FAL.

11. The claimant attempted to get treatment when he learned the claim was closed, but insurer's adjustor Darren Carlsen indicated that the claimant must have injured his hand in his new employment. The claimant indicated that the symptoms returned because the injections wore off.

12. The adjustor did not authorize a one-time evaluation or any other treatment.

13. The claimant sought treatment on his own with Dr. Devanny.

14. On August 11, 2015 Dr. Devanny reported he last saw claimant on February 20, 2015 with a diagnosis of carpal tunnel syndrome and trigger finger. The doctor noted, "…He was released for full duty at that time. He has had continued recurrence of problems of numbness and tingling as well as locking, catching of the index finger." Dr. Devanny opined that the claimant's continued recurrence of his symptoms was work related and due to his job duties when he worked in his previous employment setting in December (with respondent-employer) and that the treatment should be covered by workers' compensation. Dr. Devanny then referred the claimant to Dr. Finn for further evaluation.

15. On September 17, 2015 Dr. Finn diagnosed the claimant with moderately severe right carpal tunnel syndrome.

16. The ALJ finds the claimant is credible.

17. The ALJ finds that the claimant did not suffer any new injury to his right upper extremity subsequent to his December 17, 2014 industrial injury and that the claimant's condition has worsened since being placed at MMI on April 2, 2015.

18. The ALJ finds claimant has established that it is more likely than not that his conditioned has worsened.

19. The ALJ finds that the claimant has established that it is more likely than not that the respondent-insurer is responsible for payment of the claimant's medical costs for his treatment of his industrial injury.

20. The ALJ finds that the claimant has established that it is more likely than not that the treatment specifically received by the claimant from Dr. Devanny and Dr. Finn was reasonable, necessary, and related to his 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 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 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 thee witness; whether the testimony has been contradicted; and bi-as, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P .2d 1205 (1936); CJI, Civil 3:16 (2007)

REOPENING

4. C.R.S. §8-43-303 provides in pertinent part that;

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased.

5. C.R.S. §8-43-303(1) C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985); accord *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004).

6. The reopening authority granted ALJs by §8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Industrial Claim Appeals Office*, 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issues sought to be reopened." §8-43-303(4).

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that his condition caused by his work injury of December 17, 2014 has materially worsened and that he is entitled to have his claim reopened.

Medical Benefits

8. The Claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; see *Valley Tree Service v. Jimenez*, 787 P. 2d 658 (Colo. App. 1990). 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).

9. The ALJ concludes that the claimant has established by a preponderance of the evidence that he requires further medical treatment to cure or relieve him from the effects of his industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim under the Workers' Compensation Act of Colorado is reopened.

2. The respondent-insurer is liable for the additional medical treatment necessary to cure or relieve claimant of the effects of the industrial injury, including the treatment the claimant received from Dr. Devanny and Dr. Finn.

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, 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 15, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Timothy O. Hall, M.D. that Claimant sustained a 15% whole person impairment rating as a result of her September 3, 2013 lower back injury.

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

FINDINGS OF FACT

1. Claimant works for Employer as a Certified Nursing Assistant (CNA). Claimant's job duties involve caring for patients and helping them with their activities of daily living.

2. Claimant worked on a part-time basis from October 2012 until she took maternity leave in March 2013. She returned to work as a CNA for Employer on a full-time basis in August 2013. Claimant .earned $12.69 per hour while working for Employer.

3. On September 3, 2013 Claimant was transferring a patient to the bathroom when the patient began falling. Claimant caught the patient with a gait belt but suffered lower back pain.

4. Employer directed Claimant to Workwell Occupational Medicine for treatment. She visited Authorized Treating Physician (ATP) Lloyd Thurston, D.O. Dr. Thurston diagnosed Claimant with myofascial syndrome of the lumbar spine. He determined that Claimant's lower back symptoms were caused by her work activities for Employer on September 3, 2013. Dr. Thurston assigned Claimant work restrictions and referred her for physical therapy.

5. After several physical therapy sessions Claimant returned to Dr. Thurston for an evaluation on October 1, 2013. She reported that her lower back was about "80% recovered." Dr. Thurston remarked that Claimant was comfortable working without restrictions and discontinuing physical therapy. He thus concluded that Claimant had reached Maximum Medical Improvement (MMI) with no impairment or restrictions. Dr. Thurston recommended up to four weeks of medical maintenance treatment.

6. From October 2, 2013 to the week of November 23, 2014 Claimant worked as a full-time CNA for Employer. She explained that the pain from her September 3, 2013 injury never completely resolved. Claimant reported that her lower

back pain flare-ups waxed and waned but never reached the point where she sought medical treatment

7. On November 30, 2014 Claimant was performing her regular job duties when she experienced the sudden onset of lower back and left leg pain. She did not report a specific event that caused her symptoms but had spent an active morning lifting at work. Claimant's continuing back pain increased and she developed left leg pain.

8. On December 11, 2014 Claimant returned to Workwell and sought medical treatment for her latest onset of lower back pain. Thomas Dickey, PA-LVD, noted Claimant's left-sided lower back and left leg pain. He ordered an MRI to rule out a disc herniation and/or nerve impingement at L4. PA-LVD Dickey also assigned a 15-pound lifting/pushing/pulling restriction.

9. On December 27, 2014 Claimant underwent an MRI of her lower back. The MRI revealed serial left paracentral subarticular disc extrusions at L4-L5 and L5-S1 that resulted in moderate foraminal stenosis.

10. On December 29, 2014 Claimant visited Robert Dupper, M.D. at Workwell for an examination. She reported that she continued to suffer from lower back and left leg pain. Dr. Dupper concluded that Claimant's symptoms appeared to be at least partially related to her work activities for Employer. He assigned work restrictions and referred Claimant to a back surgeon.

11. On January 13, 2015 Claimant visited William D. Biggs, M.D. for a surgical consultation. After considering Claimant's medical history and reviewing her lower back MRI, Dr. Biggs diagnosed Claimant with disc degeneration and disc herniation. He recommended physical therapy and an epidural steroid injection.

12. On March 23, 2015 Dr. Dupper examined Claimant to determine whether her current lower back and left leg symptoms and diagnoses were related to her work incident on September 3, 2013 or some other activity. He explained that he asked Claimant about the time period from when she reached MMI on October 1, 2013 until December 11, 2014. She responded that she continued to intermittently experience lower back pain. Starting on approximately November 23, 2014 the pain worsened and began to radiate down her left leg. Dr. Dupper concluded that "[t]he objective findings are consistent with the history of a work-related etiology." He also limited Claimant to working no more than six hours each day.

13. On April 13, 2015 Claimant underwent a left L4-L5 transforaminal epidural steroid injection. Claimant remarked that within two days of the injection she achieved 100% improvement. She noted full resolution of her radicular symptoms and lower back pain.

14. On June 2, 2015 Claimant returned to Dr. Dupper for an evaluation. Claimant reported that she had been working within her restrictions and her lower back symptoms had resolved. Dr. Dupper determined that Claimant reached MMI on June 2,

2015 with no impairment or restrictions. He also noted that Claimant could return to regular employment.

15. On June 11, 2015 Claimant underwent an independent medical examination with Nicholas K. Olsen, D.O. Claimant reported that she initially injured her lower back while transferring a patient on September 3, 2013. She underwent physical therapy and reached MMI on October 1, 2013. Claimant returned to full-duty employment and did not suffer any additional back injuries. Nevertheless, she occasionally experienced lower back pain after working for several days. On November 30, 2014 Claimant suffered significant lower back pain and acute radicular symptoms in her left leg at work in the absence of a specific traumatic event. After performing a physical examination and reviewing Claimant's medical records, Dr. Olsen determined that Claimant suffered lower back myofascial syndrome on September 3, 2013. Dr. Olsen explained that Claimant developed radicular symptoms on November 30, 2014 that were consistent with the L4-L5 and L5-S1 disc extrusions revealed in a lumbar MRI.

16. Reasoning that Claimant did not have disc extrusions on September 3, 2013, Dr. Olsen determined that "[t]here are no objective findings to relate the diagnoses of the disc extrusions or lumbar radiculopathy" from November 30, 2014 with the initial onset of back pain on September 3, 2013. He attributed Claimant's disc extrusions to "the natural aging process and degenerative disc disease with associated risk factors rather than any specific injury or event that occurred" during her work activities for Employer. Dr. Olsen summarized that Claimant's September 3, 2013 symptoms were "independent and separate from the symptoms that acutely developed" on November 30, 2014. He commented that the "markedly different physiologic process can be attributed to an idiopathic onset of left lower extremity radiculopathy." There was thus no evidence of any permanent impairment or disability caused by the November 30, 2014 lumbar radiculopathy. Accordingly, Dr. Olsen agreed with Dr. Thurston that Claimant reached MMI on October 1, 2013 with no impairment or restrictions.

17. On June 26, 2015 Respondents filed a Final Admission of Liability (FAL) for Claimant's September 3, 2013 injury. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

18. On October 26, 2015 Claimant underwent a DIME with Timothy O. Hall, M.D. Claimant reported that she initially injured her lower back on September 3, 2013 while transferring a patient at work. She noted that the pain never completely resolved and she developed the sudden onset of lower back and left leg pain without an acute incident while at work on November 30, 2014. Dr. Hall explained that the development of radicular symptoms was simply the progression of her September 3, 2013 injury as opposed to the natural degenerative process. He reasoned that, because Claimant's lower back pain had persisted since September 3, 2013 and there was no specific inciting event on November 30, 2014, her radicular symptoms constituted a progression of her original lower back injury. However, Dr. Hall agreed that Claimant reached MMI on October 1, 2013. Relying on sections 2C and 2F of Table 53 in the *AMA Guides for the Evaluation of Permanent Impairment Third Edition* (*Revised*) (*AMA Guides*), Dr. Hall assigned Claimant an 8% whole person impairment rating for a specific disorder of the

lumbar spine. He also assigned Claimant an 8% whole person impairment rating for range of motion deficits. Combining the preceding impairments yields a 15% whole person rating for Claimant's September 3, 2013 industrial injury. Dr. Hall also noted that, because there was no clinical evidence of a radiculopathy, no additional impairment rating was warranted. He recommended medical maintenance treatment in the form of 2-3 epidural steroid injections per year, medication management and maintenance follow-up visits for two years.

19. Dr Olsen testified at the hearing in this matter. He agreed with Dr. Hall that Claimant reached MMI on October 1, 2013. However, Dr. Olsen determined that Dr. Hall's 15% whole person impairment rating was erroneous. He commented that Dr. Hall failed to comply with the *AMA Guides* and DOWC *Impairment Rating Tips*. Pursuant to the General Principles of the *Impairment Rating Tips*, impairment ratings should only be given "when a specific work related diagnosis and objective pathology can be identified." Dr. Hall failed to identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. A rating was thus not consistent with the *AMA Guides* or the *Impairment Rating Tips*.

20. Dr. Olsen specifically addressed Dr. Hall's determination that Claimant reached MMI on October 1, 2013. On the date of MMI Claimant had only been diagnosed with myofascial pain syndrome and there were no signs of discogenic pathology or a radiculopathy. More succinctly, Claimant had not suffered a specific disorder of the lumbar spine at the time she reached MMI. Although Claimant may have suffered a radiculopathy by November 30, 2014, it was not related to her September 3, 2013 work activities.

21. Dr. Olsen explained that Dr. Hall violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Table 53 II B requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity." Dr. Olsen testified that Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. Claimant simply did not exhibit any evidence of a disc protrusion on October 1, 2013. She also did not have six months of pain and rigidity between her September 3, 2013 industrial injury and when she reached MMI on October 1, 2013. Consequently, Claimant did not have a Table 53 II B diagnosis for her lumbar spine. Dr. Olsen explained that, without any impairment for a Table 53 specific disorder of the lumbar spine, Claimant could not receive an impairment rating for range of motion deficits. Accordingly, Dr. Olsen concluded that Dr. Hall's lumbar spine and range of motion impairments were erroneous and did not comply with the *AMA Guides*.

22. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Hall that Claimant sustained a 15% whole person impairment rating as a result of her admitted September 3, 2013 lower back injury. Dr. Hall explained that, because Claimant's lower back pain has persisted since September 3, 2013 and there was no specific inciting event on November 30, 2014, her radicular symptoms constituted a progression of her original lower back injury. Relying on

sections 2C and 2F of Table 53 in the *AMA Guides*, Dr. Hall assigned Claimant an 8% whole person impairment rating for a specific disorder of the lumbar spine. He also assigned Claimant an 8% whole person impairment rating for range of motion deficits. Combining the preceding impairments yields a 15% whole person rating for Claimant's September 3, 2013 industrial injury.

23. However, Dr. Olsen determined that Dr. Hall's 15% whole person impairment rating was erroneous. He commented that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips*. Pursuant to the *Impairment Rating Tips*, impairment ratings should only be given "when a specific work related diagnosis and objective pathology can be identified." Dr. Hall failed to identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. A rating was thus not consistent with the *AMA Guides* or the *Impairment Rating Tips*. Moreover, Dr. Olsen explained that Dr. Hall violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Table 53 II B requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity." Dr. Olsen testified that Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. Claimant simply did not exhibit any evidence of a disc protrusion on October 1, 2013. She also did not demonstrate six months of medically-documented pain and rigidity between her September 3, 2013 industrial injury and when she reached MMI. Consequently, Claimant did not have a Table 53 II B diagnosis for her lumbar spine. Dr. Olsen explained that, without any impairment for a Table 53 specific disorder of the lumbar spine, Claimant could not receive an impairment rating for range of motion deficits. Accordingly, Dr. Olsen concluded that Dr. Hall's lumbar spine and range of motion impairments were erroneous and did not comply with the *AMA Guides*.

24. The persuasive reports and testimony of Dr. Olsen reflect that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips* in assigning Claimant a 15% whole person impairment rating. Dr. Hall did not identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. He specifically violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. She simply did not exhibit any evidence of a disc protrusion on October 1, 2013. Finally, Claimant also did not demonstrate six months of medically-documented pain and rigidity as specified in Table 53 II B. Accordingly, Respondents have provided unmistakable evidence that it is highly probable the Dr. Hall's 15% whole person impairment rating was incorrect.

25. On October 1, 2013 Dr. Thurston concluded that Claimant reached MMI with no impairment or restrictions. Dr. Olsen agreed with Dr. Thurston that Claimant reached MMI on October 1, 2013 with no impairment or restrictions. Because Respondents have overcome Dr. Hall's 15% whole person impairment rating, the

persuasive evidence reveals that Claimant suffered a 0% permanent impairment rating as a result of her September 3, 2013 industrial injury.

26. In ascertaining Claimant's Average Weekly Wage (AWW) Respondents contend that relying on the six pay periods or 12 weeks from January 5, 2013 through August 27, 2013.is most appropriate. Excluding the short pay period ending March 2, 2013 when Claimant began her maternity leave, Claimant worked 256.25 hours during the 12 weeks. Multiplying her hourly wage of $12.69 by 256.25 hours yields gross wages of $3,251.81 for the 12 week period. Dividing $3,251.81 by 12 yields an AWW of $270.98. However, the preceding calculations do not properly account for Claimant's wage loss and diminished earning capacity.

27. For the period August 17, 2014 until November 22, 2014, or prior to Claimant's subsequent lower back flare-up and date of disability for lost time from work, Claimant's gross earnings totaled $8,488.16. Dividing $8,488.16 by the time period from August 17, 2014 until November 22, 2014 or 14 weeks yields an AWW of $606.30. An AWW of $606.30 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

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).

Overcoming the DIME

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." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002); *In Re Clickner* W.C. No. 4-798-331 (ICAP, Apr. 30, 2015). 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. *In Re Clickner* W.C. No. 4-798-331 (ICAP, Apr. 30, 2015). 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. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co.*, W.C. No. 4-432-104 (ICAP, Sept. 16, 2002);

8. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Hall that Claimant sustained a 15% whole person impairment rating as a result of her admitted September 3, 2013 lower back injury. Dr.

Hall explained that, because Claimant's lower back pain has persisted since September 3, 2013 and there was no specific inciting event on November 30, 2014, her radicular symptoms constituted a progression of her original lower back injury. Relying on sections 2C and 2F of Table 53 in the *AMA Guides*, Dr. Hall assigned Claimant an 8% whole person impairment rating for a specific disorder of the lumbar spine. He also assigned Claimant an 8% whole person impairment rating for range of motion deficits. Combining the preceding impairments yields a 15% whole person rating for Claimant's September 3, 2013 industrial injury.

9. As found, however, Dr. Olsen determined that Dr. Hall's 15% whole person impairment rating was erroneous. He commented that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips*. Pursuant to the *Impairment Rating Tips*, impairment ratings should only be given "when a specific work related diagnosis and objective pathology can be identified." Dr. Hall failed to identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. A rating was thus not consistent with the *AMA Guides* or the *Impairment Rating Tips*. Moreover, Dr. Olsen explained that Dr. Hall violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Table 53 II B requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity." Dr. Olsen testified that Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. Claimant simply did not exhibit any evidence of a disc protrusion on October 1, 2013. She also did not demonstrate six months of medically-documented pain and rigidity between her September 3, 2013 industrial injury and when she reached MMI. Consequently, Claimant did not have a Table 53 II B diagnosis for her lumbar spine. Dr. Olsen explained that, without any impairment for a Table 53 specific disorder of the lumbar spine, Claimant could not receive an impairment rating for range of motion deficits. Accordingly, Dr. Olsen concluded that Dr. Hall's lumbar spine and range of motion impairments were erroneous and did not comply with the *AMA Guides*.

10. As found, the persuasive reports and testimony of Dr. Olsen reflect that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips* in assigning Claimant a 15% whole person impairment rating. Dr. Hall did not identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. He specifically violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. She simply did not exhibit any evidence of a disc protrusion on October 1, 2013. Finally, Claimant also did not demonstrate six months of medically-documented pain and rigidity as specified in Table 53 II B. Accordingly, Respondents have provided unmistakable evidence that it is highly probable the Dr. Hall's 15% whole person impairment rating was incorrect.

11. As found, on October 1, 2013 Dr. Thurston concluded that Claimant reached MMI with no impairment or restrictions. Dr. Olsen agreed with Dr. Thurston

that Claimant reached MMI on October 1, 2013 with no impairment or restrictions. Because Respondents have overcome Dr. Hall's 15% whole person impairment rating, the persuasive evidence reveals that Claimant suffered a 0% permanent impairment rating as a result of her September 3, 2013 industrial injury.

Average Weekly Wage

12. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a 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). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

13. As found, in ascertaining Claimant's AWW Respondents contend that relying on the six pay periods or 12 weeks from January 5, 2013 through August 27, 2013.is most appropriate. Excluding the short pay period ending March 2, 2013 when Claimant began her maternity leave, Claimant worked 256.25 hours during the 12 weeks. Multiplying her hourly wage of $12.69 by 256.25 hours yields gross wages of $3,251.81 for the 12 week period. Dividing $3,251.81 by 12 yields an AWW of $270.98. However, the preceding calculations do not properly account for Claimant's wage loss and diminished earning capacity.

14. As found, for the period August 17, 2014 until November 22, 2014, or prior to Claimant's subsequent lower back flare-up and date of disability for lost time from work, Claimant's gross earnings totaled $8,488.16. Dividing $8,488.16 by the time period from August 17, 2014 until November 22, 2014 or 14 weeks yields an AWW of $606.30. An AWW of $606.30 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Respondents have overcome the DIME opinion of Dr. Hall that Claimant sustained a 15% whole person impairment rating. Based on the persuasive medical reports and testimony of Drs. Thurston and Olsen, Claimant suffered no permanent impairment as a result of her September 3, 2013 lower back injury.

2. Claimant earned an AWW of $606.30.

3. 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 6, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Determination of Claimant's Average Weekly Wage (AWW)

2. Whether any temporary total disability benefits (TTD) admitted shall be updated to reflect a new AWW.

3. Whether statutory interest of 8% is due on any potential additional benefits.

STIPULATIONS

After the ALJ determines Claimant's base AWW, the base AWW shall be increased by $117.12 to reflect an agreed upon COBRA rate.

FINDINGS OF FACT

1. Claimant began working for Employer in November of 2010 as a volunteer. Claimant volunteered for Employer approximately 15 hours per week from 2010-2014.

2. In June of 2014 Claimant learned through the volunteer coordinator that Employer would be hiring certified nursing assistant (CNA) positions.

3. On June 20, 2014 Claimant submitted an Application for Employment to Employer. Claimant indicated she desired either full time or part time work for the CNA position. Claimant listed only two prior employers: Amadisys Healthcare from February of 2014 through May of 2014; and Manor Villa Care Home from 1983 to 1988. *See* Exhibit E.

4. On July 1, 2014 Claimant was offered the position of Full Time CNA for Employer at a rate of $14.00 per hour plus a mileage stipend. This offer was made by email from Kelly Bastian, Employer's Managing Director. Claimant was advised she would be offered a full benefits package including medical, dental, vision, and disability coverage. The offer indicated that Claimant would accrue paid time off to equate to 3 weeks of paid time off by the end of the first year of her employment, that Claimant would be paid for 6 holidays, and that Claimant would have 3 floating holidays to utilize per year. *See* Exhibit E.

5. On July 2, 2014 Claimant replied to Ms. Bastian's email. Claimant thanked Ms. Bastian for the email regarding the float CNA position. Claimant asked if there was flexibility to increase the hourly rate to $16.00 per hour, asked if the float

schedule was considered full time or part time and whether it included the benefit package (medical, etc), and advised Ms. Bastian that she would be out of town with her sons the week of August 2-8 but that she could start on July 14. *See* Exhibit E.

6. On July 3, 2014 Ms. Bastian emailed Claimant. Ms. Bastian offered Claimant $15.00 per hour and verified that the position would be considered full time and would entail benefits including health insurance. Ms. Bastian stated "the float is primarily covering vacations and filling holes so as with all positions there has to be the census to support 40 hrs a week but generally nt a problem to get." *See* Exhibit E.

7. On July 3, 2014 Claimant emailed Ms. Bastian accepting the CNA position at $15.00 per hour with a scheduled start date of July 14, 2014. *See* Exhibit E.

8. Ms. Bastian's email advised Claimant that they had to have enough census (patient count) to support 40 hours a week, that Claimant would be covering other CNA's who were on vacation, and that although it generally was not a problem to have enough work to make 40 hours a week, it sometimes was a problem to get to 40 hours a week. Ms. Bastian did not guarantee Claimant 40 hours per week nor did Claimant bargain for a guaranteed 40 hour per week position. Claimant was advised that the hours depended on census and accepted the position knowing that it sometimes, although not generally, was a problem to get 40 hours per week.

9. Claimant began employment with Employer as a full time float CNA on July 15, 2014. Employer has multiple CNAs working for them. Employer does not guarantee any CNA 40 hours of work per week and the number of hours worked per week varies based on the number of patients that Employer has. Employer considers employees to be full time and eligible for benefits when an employee works a minimum of 30 hours per week.

10. From July 15, 2014 through July 25, 2014 Claimant primarily was attending orientation and completing administrative duties for Employer. Claimant worked a total of 58 hours these two weeks completing the orientation and administrative tasks. These two weeks are not representative of the job duties Claimant was hired to perform as these two weeks involved mainly administrative and orientation tasks. Therefore, these two weeks and the number of hours worked are not representative of Claimant's regular work schedule or earnings.

11. The week beginning Saturday July 26, 2014 Claimant began performing her regular float CNA job duties of providing patient care. When hired, Claimant had advised Employer that she already had a week where she would be unavailable. Claimant did not work the following week beginning Saturday, August 2, 2014 and Employer allowed her to have that week off without pay due to her previously scheduled vacation. Claimant returned to work the week beginning Saturday, August 9, 2014. Employer's wage record time sheets indicate that Claimant worked the following number of hours in the following work weeks:

7/26/14 – 8/1/14 **31 hours**

8/9/14 – 8/15/14	**40 hours**	
8/16/14 – 8/22/14	**21 hours**	
8/23/14 – 8/29/14	**48 hours**	
8/30/14 – 9/5/14	**38.5 hours**	(30.5 hours actually worked plus an additional 8 hours paid on 9/1/14 for Labor Day)
9/6/14 – 9/12/14	**40 hours**	
9/13/14 – 9/19/14	**14.5 hours**	

12. On September 19, 2014 Claimant worked 11.5 hours. This day was the highest number of hours Claimant had worked for Employer since starting her Employment. This was also the last day of the time period for that week.

13. On September 19, 2014 Claimant suffered an injury when she hyper flexed her ring and middle finger on a hospital bed frame in a patient's home. Claimant testified that her injury occurred on that morning and that she returned to work after her injury on Monday. However, Employer records show that Claimant had patient visits that day at 9:30 a.m., 2:00 p.m., 5:00 p.m., 7:00 p.m., and at 8:00 p.m. and show that Claimant continued to work that day despite her injury and that she worked a larger number of hours that day than she had in her entire time employed by Employer. Employer records also show that Claimant worked the next day on September 20, 2014.

14. Following her injury, Claimant was paid for the following number of hours in the following work weeks:

09/20/14 – 09/26/14	**39 hours**	
09/27/14 – 10/03/14	**33.5 hours**	
10/04/14 – 10/10/14	**34 hours**	
10/11/14 – 10/17/14	**31.75 hours**	
10/18/14 – 10/24/14	**33.5 hours**	
10/25/14 – 10/31/14	**32.5 hours**	
11/01/14 – 11/07/14	**37.5 hours**	(21.5 hours actually worked plus an additional 16 hours paid for paid time off)
11/08/14 – 11/14/14	**40.5 hours**	
11/15/14 – 11/21/14	**47 hours**	
11/22/14 - 11/28/14	**39 hours**	(31 hours actually worked plus an additional 8 hours paid on 11/27/14 for Thanksgiving)
11/29/14 – 12/05/14	**37.5 hours**	
12/06/14 – 12/12/14	**43 hours**	
12/13/14 – 12/19/14	**40 hours**	

15. Claimant's employment with Employer was terminated on December 19, 2014.

16. From the start of her employment through September 19, 2014, excluding the first two weeks of orientation/administrative tasks, Claimant was paid for a total of 233 work hours. This was over a period of 7 work weeks and averages out to 33.29 hours of paid work hours per week.

17. From the day following her injury through her termination, Claimant was paid for a total of 488.75 work hours. This was over a period of 13 weeks and averages out to 37.6 hours of paid work per week.

18. When combined, Claimant's average number of paid work hours per week during her 20 weeks of employment (excluding the two weeks of orientation/administrative tasks) averages out to be 36.09. This multiplied by her hourly pay rate of $15.00 per hour comes out to an average weekly wage of $541.35.

19. Claimant testified at hearing. Claimant testified that she expected that the CNA job offered to her was for 40 hours per week, that she needed 40 hours per week, and that after orientation she understood the average number of hours per week would be 40. Claimant testified that she was injured on Friday, September 19, 2014 in the morning and returned to work on Monday in the same position but with restrictions. Claimant testified that 40 hours per week was not promised to her but was alluded to when she was told the position was full time.

20. Claimant's testimony, overall, is not found credible or persuasive. Claimant was never guaranteed nor did she bargain for a guaranteed 40 hours per week of work. Claimant worked several weeks well under 40 hours with no clear explanation as to why. Claimant sought either full time or part time employment when filling out her employment application. Claimant was aware of the position, that sometimes due to census numbers she would not get 40 hours per week, and accepted the position.

21. Kelly Bastian, Employer's Managing Director, testified at hearing. Ms. Bastian testified that Employer provides home hospice care and that Claimant was hired as a float CNA to cover for other CNAs who were on vacation, sick, etc and that the number of hours worked would depend on the census and number of patients that Employer had per week. Ms. Bastian testified that full time means 30-40 hours per week and makes an employee eligible for benefits. Ms. Bastian testified that none of Employer's CNAs are guaranteed 40 hours of work per week because the work hours depend on the patient census. The testimony of Ms. Bastian is found credible and persuasive.

22. Lisa Woods, Employer's Human Resources Coordinator, testified at hearing. Ms. Woods testified that full time employment is 30 hours of work per week or more and makes an employee eligible for benefits. Ms. Woods testified that no one is guaranteed 40 hours per week of work at Employer and that all employees are hourly and that their hours depend on patients' needs and patient census. Ms. Woods explained to Claimant at Claimant's orientation that Claimant was eligible for benefits

and was expected to work 30-40 hours per week as a full time employee. The testimony of Ms. Woods is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, 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. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. 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 shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *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).

Average Weekly Wage

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 certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 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 the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The ALJ concludes that the best way to reach a fair approximation of Claimant's wage loss in this matter is to use the discretionary authority granted by § 8-42-103(3), C.R.S. (2014) and to use the total gross wages earned by Claimant in the 20 weeks that she performed CNA duties. This excludes the first two weeks of her employment where she was engaged in orientation/administrative tasks. This also excludes one week for which she earned zero wages as she had a pre-planned vacation that Employer accommodated when she was hired.

For the 20 weeks worked as a CNA for Employer, Claimant was paid for a total of 721.75 work hours. Divided by 20 weeks she worked, it equals 36.09 hours of paid work on average per week. With her hourly paid rate of $15.00 per hour, Claimant's average weekly wage over the 20 weeks that she worked was $541.35. Claimant's argument that certain weeks should be excluded from the calculation as "anomalies" where she worked a lower number of total hours is rejected. Claimant's position was noted to be a float position where the hours worked would vary based on patient census. There were weeks where Claimant's hours were less and weeks where her hours were more. This was the nature of the position and Claimant has not offered any persuasive justification for excluding certain work weeks from the AWW calculation. Additionally, it is noted that the day of her injury was the final day of the week of work and Claimant did not establish that she suffered any lost hours or wages due to her injury or that any reason exists to exclude the week that included her injury, the day of her injury, or the week following her injury. Employer's wage records show that the injury did not cause a reduction in the hours worked by her.

Claimant's argument that she should be paid a base AWW of $600 as she bargained for and had a contract for 40 hours per week at $15.00 per hour is rejected. Claimant did not have such an agreement. Although Claimant mistakenly may have assumed she would be working 40 hours per week, Claimant did not have a contract for 40 hours per week nor was she reasonable in her assumption that she would get 40 hours per week. Claimant was advised at orientation that full time employment meant a minimum of 30 hours per week, and Claimant was aware that her position of "float CNA" was covering for regular CNAs who were out and that her hours would be based on both that and the overall patient census. Claimant was specifically advised in email communications from Ms. Bastian that it generally wasn't a problem to get 40 hours a week. This directly told her that it was sometimes a problem to get 40 hours per week. Claimant was aware of the position, accepted it, and did not bargain for a guaranteed number of hours per week nor was she guaranteed a certain number of hours per week.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wage is $658.47. This includes a base Average Weekly Wage of $541.35 plus a stipulated increase to reflect COBRA costs of $117.12.

2. The Average Weekly Wage previously admitted to shall be modified to reflect this wage and any TTD benefits owed shall be adjusted accordingly.

3. 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 26, 2016

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right rotator cuff and right biceps on August 26, 2014.

2. Whether Claimant has established by a preponderance of the evidence that the right rotator cuff repair surgery and the biceps re-tensioning surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to an August 26, 2014 injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a sales associate in the paint department and has been so employed for approximately 15 years. Claimant's job duties include taking care of customers, stocking paint on shelves, and moving paint and displays from shelves.

2. As a part of his job duties, Claimant regularly lifts and moves quarts, gallons, and 5-gallon buckets of paint. The larger paint buckets can weigh on average 50-75 pounds depending on the type of paint contained in the bucket.

3. On August 26, 2014 Claimant was asked by the assistant store manager to remove a display on an end aisle and to move it to the back of a different aisle. Claimant moved the display and began re-building it in the new location.

4. While lifting a high solvent 5 gallon bucket of paint that weighed approximately 75 pounds, Claimant heard a pop and felt pain shoot in his right shoulder. Claimant had been standing over the paint bucket and lifting it with both hands when he heard the popping sound.

5. Prior to this incident, Claimant regularly moved 5 gallon buckets of pain with no problem and had no pain or functional limitations with his job or outside job activities.

6. Since this incident, Claimant has had a constant low level pain in his right shoulder that is aggravated and shoots to a high level of pain with certain movements. Claimant also now has pain and spasm in his right biceps with use and has developed a bunched "popeye" appearance in his biceps. Since the incident, Claimant has a diminished capacity to use his right arm.

7. Claimant reported the injury to the assistant store manager and was referred to Concentra Medical Center for evaluation.

8. On August 26, 2014 Claimant was evaluated by Craig Hare, PA-C. PA Hare assessed shoulder sprain and recommended physical therapy. *See* Exhibit 1.

9. On August 29, 2014 Claimant was evaluated by Casey McKinney, PA-C. PA McKinney assessed shoulder sprain and biceps tendon rupture. PA McKinney noted that Claimant reported not as much pain in the day but that he felt it when agitated. PA McKinney referred Claimant for consultation with an orthopedic surgeon. *See* Exhibit 1.

10. On September 11, 2014 Claimant was evaluated by orthopedic surgeon Mark Failinger, M.D. Claimant reported lifting a 5 gallon bucket of paint when he had a pop, pain, and discomfort in his right shoulder. Claimant reported minimal pain. Dr. Failinger noted a "popeye muscle" and what appeared to be a ruptured long head of the biceps. Dr. Failinger provided an impression of rupture of the long head of the biceps and right shoulder probable rotator cuff tear. Dr. Failinger noted he was not worried with the rupture of the long head of the biceps but was concerned with the possible rotator cuff tear. Dr. Failinger noted that in most all cases with ruptured long head of the biceps, they are not fixed and that in most cases it is just a cosmetic deformity. Dr. Failinger planned to get an MRI on Claimant's right shoulder to determine if there was a rotator cuff tear or tendinosis. *See* Exhibit 3.

11. On September 24, 2014 Claimant underwent an MRI of his right shoulder that was interpreted by Cameron Bahr, M.D. Dr. Bahr's impression was: large full thickness tear of the entire supraspinatus and the anterior most portion of the infraspinatus tendon with retraction of the tendon to the level of the glenoid and mild volume loss in the associated muscles; non-visualization of the long head of the biceps tendon that was likely torn and retracted and may be a chronic abnormality as there is no edema around the tendon sheath; small joint effusion and narrowing of the acromiohumeral distance with slight remodeling of the undersurface of the acromion; mild to moderate degenerative changes in the acromioclavicular joint; and mild to moderate tendinosis of the distal subscapularis tendon. *See* Exhibit 7.

12. On September 25, 2014 Claimant was evaluated by Dr. Failinger. Dr. Failinger noted that the MRI showed a massive retracted supraspinatus and anterior infraspinatus tears, long of the biceps tear, and degenerative labrum. Dr. Failinger noted that Claimant still had some pain and discomfort. Dr. Failinger opined that he did not believe the tears were fixable and that Claimant may need a reverse total shoulder replacement. Dr. Failinger opined that the rotator cuff tear was not fixable because of the retraction that was all the way to the glenoid. Dr. Failinger recommended Claimant get more opinions to see what he wanted to do and provided a request for a second opinion. *See* Exhibit 3.

13. On October 10, 2014 Claimant was evaluated by Alireza Alijani, M.D. Dr. Alijani noted that Claimant had minimal strength in the right arm with mild tenderness and pain. Claimant reported that without use of his right arm/shoulder he had pain at a level of 1-2/10 and that with use he had a pain level of 9-10/10. Dr. Alijani opined that Claimant had a massive cuff tear of the right shoulder with associated right long head of the biceps tendon rupture. Dr. Alijani went over the possibility of a surgical repair of the massive cuff tear and the uncertain nature of a repair with a higher risk of re-tear or inability to repair the tendon at the time of surgery as well as the higher risk of infection with massive tears. Dr. Alijani also discussed with Claimant that there was no reason to address the biceps tendon rupture which he opined was a stable issue. Dr. Alijani noted that Claimant wished to proceed with an attempted repair and Dr. Alijani opined that he did not think that was unreasonable. Dr. Alijani requested approval for a right scope open rotator cuff repair surgery. *See* Exhibit 4.

14. On October 16, 2014 Allison Fall, M.D. conducted a Rule 16 Medical Records Review. Dr. Fall opined that based upon her review of the medical records, it appeared that Claimant injured his right shoulder while lifting at work with a tear described as large, full thickness, and massive. Dr. Fall noted that Dr. Failinger did not believe that the tear was fixable. Dr. Fall opined that although surgery would be related to the work injury, the surgery to repair the rotator cuff was not medically reasonable and necessary and was unlikely to lead to any functional benefit. Dr. Fall opined that Claimant's current subjective symptoms and examinations noted good range of motion and that Claimant would not have any gain from the proposed surgery. Dr. Fall noted Dr. Alijani's request for surgery and opined that if an orthopedic surgeon from a different group felt there was at least a moderately good chance of fixing the tear, then the surgery may be medically reasonable and necessary but that at the time she did not consider it so. Dr. Fall opined that consideration could be given for another orthopedic evaluation. *See* Exhibit B.

15. On November 11, 2014 Claimant was evaluated by Theodore Villavicencio, M.D. Dr. Villavicencio noted that Dr. Failinger and Dr. Alijani opined that Claimant needed surgery. Dr. Villavicencio noted that Claimant had minimal pain while at rest but that Claimant was unable to do any overhead reaching or lifting more than 10 pounds without significant pain. Dr. Villavicencio opined that Claimant had persisting pain with activities and limited functional status due to pain and weakness and opined that Claimant would likely benefit from a surgical procedure. Dr. Villavicencio noted he would send Claimant for a second opinion. *See* Exhibit 1.

16. On December 11, 2014 Claimant was evaluated by Armodios Hatzidakis, M.D. Claimant reported lifting a heavy bucket at work which resulted in some shoulder pain. Dr. Hatzidakis noted that Claimant had seen Dr. Alijani and Dr. Failinger who had discussed trying to do arthroscopic repair versus a reverse shoulder arthroplasty. Dr. Hatzidakis assessed traumatic work-related right shoulder injury with a full-thickness large rotator cuff tear of the supraspinatus and infraspinatus, subacromial impingement, and biceps tendon rupture. Dr. Hatzidakis opined that at this point, Claimant did not need a reverse shoulder arthroplasty. Dr. Hatzidakis discussed with Claimant the

possibility of doing an arthroscopic debridement and at least a partial repair of the rotator cuff along with possible re-tensioning of the biceps tendon. Dr. Hatzidakis opined that Claimant was a good candidate for arthroscopic surgery and opined that even a partial rotator cuff repair can provide some benefit. Dr. Hatzidakis noted that Claimant had pain in his biceps area with biceps type activities and that an open re-tensioning biceps tenodesis could be of benefit. Dr. Hatzidakis opined that Claimant's supraspinatus was probably not fully repairable but that there was a good chance that at least a partial repair of the infraspinatus could be possible and opined that Claimant could have significant benefit with arthroscopic surgical management. Dr. Hatzidakis opined that the surgery would give Claimant the best chance to return to his previous level of activity even if the rotator cuff was not fully repairable. Dr. Hatzidakis noted that an order would be placed in the chart. *See* Exhibit 5.

17. On January 5, 2015 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that Claimant had recently seen Dr. Hatzidakis who was recommending an attempt at rotator cuff and bicep repair and that he had reviewed Dr. Hatzidakis' notes. Dr. Villavicencio opined that he agreed with Dr. Hatzidakis' plan of right shoulder surgery. *See* Exhibit 1.

18. On February 9, 2015 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that the surgery was not approved for unclear reasons. Dr. Villavicencio opined that Claimant had a specific workplace injury lifting a bucket on August 26, 2014 and that Claimant remained unable to advance his modified duty status. *See* Exhibit 1.

19. On March 11, 2015 Claimant was evaluated by Sharon Walker, M.D. Dr. Walker opined that Claimant's complaints were a result of his work. She assessed acute sprain of the right rotator cuff and acute traumatic rupture of the biceps tendon. *See* Exhibit 6.

20. On March 17, 2015 Claimant was evaluated by Dr. Walker. Dr. Walker had reviewed all of Claimant's medical records relating to this injury on March 13, 2015. Dr. Walker discussed her medical records review with Claimant. Dr. Walker noted that at the time of the denial of Dr. Hatzidakis' requested surgery, Claimant was already 4.5 months out from injury with an MRI demonstrating a very large rotator cuff tear and that Claimant had undergone physical therapy without substantial improvement. DR. Walker opined that Claimant had functional deficits which interfered with his activities of daily living and/or job duties after 6-12 weeks of non-operative therapy. Dr. Walker, after reviewing all the records, opined that the surgery requested by Dr. Hatzidakis should be approved. She opined that Claimant was unable to perform his prior job duties and activities of daily living comfortably including washing his hair and putting on his seatbelt. She recommended referral to Dr. Hatzidakis. *See* Exhibit 6.

21. On March 31, 2015 Claimant underwent an independent medical evaluation performed by Lawrence Lesnak, D.O. Dr. Lesnak provided an impression of: probable right shoulder strain/sprain injury that occurred during work hours; post-injury

MRI that reported chronic findings of a large full thickness rotator cuff tear involving the supraspinatus tendon and the anterior portion of the infraspinatus tendon with an associated mild to moderate tendinosis of the subscapularis with a rupture of the long head of the proximal biceps brachia tendon; no current clinical evidence of right shoulder rotator cuff impingement signs; no evidence of neurogenic or vascular thoracic outlet syndrome; no evidence of cervical radiculitis, radiculopathy, or myelopathy; and no evidence of intrinsic symptomatic elbow or wrist joint pathology. *See* Exhibit A.

22. Dr. Lesnak opined that Claimant may have suffered a right shoulder strain/sprain injury and possibly a proximal right biceps brachia tendon rupture as a result of the August 26, 2014 injury but opined that there was no evidence to suggest that any of Claimant's reported right shoulder MRI findings of a large full thickness supraspinatus tendon tear and partial thickness infraspinatus tendon tear, and tendinosis of the subscapularis tendon were in any way related to the August 26, 2014 incident. Dr. Lesnak opined that lifting a 60 pound bucket from floor to waist level was not a force sufficient to cause significant rotator cuff tears or to aggravate pre-existing pathology. Dr. Lesnak opined that the sudden pop Claimant felt in his right anterior shoulder likely correlated with Claimant's proximal long head biceps tendon rupture. Dr. Lesnak opined that surgical intervention for the right proximal biceps tendon rupture was not indicated and would merely be performed for cosmesis. Dr. Lesnak opined that regardless of causality, Claimant did not appear to be a good candidate for an extensive right shoulder surgery with attempted rotator cuff repairs. *See* Exhibit A.

23. On June 4, 2015 Claimant was evaluated by Dr. Hatzidakis. Dr. Hatzidakis noted that Claimant had two distinct areas of pain: one directly in his shoulder and radiating to the lateral deltoid, and one in the biceps where Claimant routinely had severe spasm with supination/screw driving type activity. Dr. Hatzidakis opined that arthroscopic surgery was a reasonable option for Claimant and disagreed with Dr. Lesnak. Dr. Hatzidakis opined that Claimant's right shoulder pain had a reasonable chance of being well addressed with an arthroscopic procedure for debridement, possible partial versus full rotator cuff repair depending on the tissue that was found, and possible smoothing subacromial decompression. Dr. Hatzidakis agreed with Dr. Lesnak that if a long head of the biceps rupture was asymptomatic then there would clearly not be a need for surgery. However, Dr. Hatzidakis opined that Claimant's biceps rupture was clearly symptomatic and therefore opined that it would be helpful to perform open re-tensioning of the long head of the biceps. Dr. Hatzidakis re-submitted a request to proceed with surgery. *See* Exhibit 5.

24. Claimant's testimony at hearing is found credible and persuasive. Claimant reported the mechanism of injury and symptoms consistently throughout his first report of injury and his ongoing treatment. Claimant is credible that he doesn't use his right arm much so has low pain but that when he uses his right arm, his pain level shoots up. Claimant did not have the current daily symptoms he has now prior to August 26, 2014. Claimant is credible explaining that in October of 2013 he had tightness in his right shoulder and trouble sleeping but that the symptoms resolved after he began sleeping on his back and he had no ongoing symptoms leading up to his

injury and leading up to his injury was able to move 5 gallon buckets of pain at work on a daily basis without problem.

25. Dr. Lesnak testified at hearing consistent with his written report. Dr. Lesnak opined that Claimant's MRI showed that his rotator cuff pathology was not acute or sub-acute. Dr. Lesnak opined that the retraction seen in the rotator cuff takes 6 months to 1 year to develop and that the fatty infiltrate takes 1 to 2 years to develop. Dr. Lesnak opined that Claimant's symptoms in 2013 would be explained by his current shoulder pathology. Dr. Lesnak opined that if someone has a normal shoulder, they would not have pain sleeping on their stomach or their side. Dr. Lesnak opined that if someone has a shoulder problem, then sleeping on their stomach or side will cause pain due to pressure put on the glenoid. Dr. Lesnak opined that Claimant's 2013 pain demonstrates that he likely had a problem then. Dr. Lesnak opined that the rotator cuff and supraspinatus tendon is usually injured when an arm is overhead or twisted and that lifting from the floor to the chest level doesn't cause a supraspinatus tear and that the supraspinatus muscle actually shuts down after 5-8 pounds and other muscles take over. Dr. Lesnak opined that lifting a 75 pound bucket with two arms does not engage the rotator cuff at all. Dr. Lesnak opined that Claimant tore his biceps at the time of injury and did not injure his supraspinatus. Dr. Lesnak opined that Claimant's pain and inability to function is due to Claimant's biceps that is not fixable with surgery.

26. Dr. Lesnak opined that the proposed surgery is to fix the rotator cuff, but opined that it is probably not fixable. Dr. Lesnak believed that Dr. Hatzidakis was arrogant in believing that he could fix the rotator cuff and opined that the proposed surgery was not reasonable or necessary. Dr. Lesnak noted that neither Dr. Walker nor Dr. Villavicencio had performed a causality assessment and that Dr. Hatzidakis did a poor causation analysis. Dr. Lesnak noted that if Claimant was lifting paint, it would make sense that he tore his biceps and the pain reported by Claimant makes sense but that the mechanism of injury does not support a rotator cuff tear.

27. The opinions of Dr. Lesnak differ from the majority of medical providers in this case and the opinions overall are not persuasive. Although Dr. Failinger's opinion that the rotator cuff is not repairable supports Dr. Lesnak's position, several physicians opine otherwise and recommend the proposed surgery. Further, Dr. Lesnak is not persuasive that the mechanism of injury does not support a right rotator cuff tear and his opinion is contradicted by several providers who opine that the injury is work related.

28. Dr. Hatzidakis testified by deposition consistent with his written reports and request for surgery. Dr. Hatzidakis opined that Claimant's injuries were consistent with the mechanism of injury and that moving the bucket at worked caused Claimant's right shoulder injury. Dr. Hatzidakis opined that Claimant has weakness lifting his right arm over head and has pain as well as painful spasms in his bicep muscle with activity and stress of the biceps. Dr. Hatzidakis opined that Claimant's good range of motion makes his prognosis improved for rotator cuff surgery. Dr. Hatzidakis opined that with the proposed procedure and Claimant's situation he would estimate an 80 percent chance of significant improvement and that Claimant had a high likelihood that he would

be improved following surgery. Dr. Hatzidakis noted that Claimant had a relatively well functioning shoulder and that it was logical to assume that the work injury had something to do with Claimant's symptoms. Dr. Hatzidakis disagreed with Dr. Lesnak's opinion that lifting a 60 pound bucket from the floor to the waist was not sufficient to cause significant rotator cuff tears or to aggravate pre-existing pathology. Dr. Hatzidakis opined that when you lift something from the ground, your shoulder is active and that when positioning you rotate the muscles in your shoulder to stabilize your shoulder and arm when you lift a bucket or something heavy. Dr. Hatzidakis opined that when you are lifting a bucket, it's awkward and requires lifting forward, lifting to the side, and rotating your arm and that the rotator cuff would be active with all of those motions. Dr. Hatzidakis opined that many patients have had that type of injury and that the mechanism of injury was plausible.

29. Dr. Hatzidakis opined that it is difficult to assess on MRI whether something is chronic or acute or what portion may be chronic or acute. Dr. Hatzidakis opined that it was plausible that Claimant had an element of a rotator cuff tear but that with this injury it was exacerbated or the tear worsened. Dr. Hatzidakis opined that one could have a smaller tear that becomes a bigger tear with an injury and that it was possible Claimant had a pre-existing tear. Dr. Hatzidakis noted that Claimant did not have signs of the tear being chronic and didn't demonstrate a clear chronic issue. Dr. Hatzidakis classified Claimant's injury as an acute injury. Dr. Hatzidakis noted that Dr. Failinger opined that the rotator cuff was not fixable because of the retraction and opined that it was more difficult to repair when retracted but that even if the rotator cuff was not completely repairable, it could be partially repairable giving Claimant a chance of improvement. Dr. Hatzidakis opined that the surgery would provide Claimant less pain and improved functionality and that the surgery was reasonable and necessary.

30. Dr. Hatzidakis' opinions overall are found credible and persuasive. His opinion that the proposed surgery is reasonable, necessary, and related to the work injury are consistent with similar opinions provided by Dr. Alijani, Dr. Walker, and Dr. Villavicencio. Additionally, the opinion of Dr. Fall that it might be reasonable and necessary if another physician recommended also supports the overall conclusion that the surgery is reasonable and necessary. Dr. Hatzidakis' opinion on the mechanism of injury supporting a work related injury is also credible and persuasive and supported by the opinions of the majority of the providers who opine similarly.

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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 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. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to

establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden of proof to establish that he suffered a compensable injury to his right rotator cuff and right biceps tendon on August 26, 2014 while lifting a 5 gallon bucket at work. Prior to August 26, 2014 Claimant had one period of time in October of 2013 where he had some pain/stiffness in his right shoulder while sleeping that went away after he started sleeping on his back. Claimant was able to, on a daily basis, lift buckets of paint including heavy 5 gallon buckets without problem. After August 26, 2014 Claimant was unable to lift heavy buckets at work and had limitations in using his right arm and shoulder that were not present prior to his injury. Claimant felt a pop and immediate pain on August 26, 2014 and has established with evidentiary medical support that he suffered an acute injury to both his right rotator cuff and his right biceps tendon on that date.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). 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. 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 his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Claimant has established that he sustained a work related injury to his right rotator cuff and his right biceps tendon. Claimant has established that the surgery recommended by Dr. Hatzidakis is both reasonable and necessary to cure and relieve the effects of his injury. The opinions of Dr. Hatzidakis, Dr. Walker, and Dr. Villavicencio support the recommended surgery. Further, Dr. Fall's opinion provides that if another orthopedic surgeon thought the surgery might work, then it may be reasonable and necessary. After reviewing the subsequent opinion that the requested the surgery, her opinion ultimately is that the surgery may be reasonable and necessary. Dr. Alijani, although he had concerns, also requested an arthroscopic rotator cuff repair surgery and found it to be a reasonable treatment option for Claimant. Although Dr. Lesnak and Dr. Failinger opine that they believe the surgery will be unsuccessful, Claimant has established with multiple providers providing contrary opinions, that the surgery will more likely than not provide him relief from the effects of his industrial injury. Further, the opinion of Dr. Hatzidakis is found credible and persuasive that the biceps repair surgery is also reasonable and necessary as Claimant

has ongoing symptoms and spasms in that area. Although typically thought to be a cosmetic procedure, Claimant has symptoms that he has established are more likely than not capable of being improved with this procedure. Therefore, the surgery recommended by Dr. Hatzidakis to repair both the right rotator cuff and the right biceps tendon is found to be reasonable and necessary and supported by a majority of the medical evidence.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right rotator cuff and his right biceps tendon on August 26, 2014.

2. Claimant has established by a preponderance of the evidence that the right rotator cuff repair surgery and the biceps re-tensioning surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to his August 26, 2014 injury.

3. Any issues not determined 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 25, 2016

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the C5-C6 cervical spine disc arthroplasty requested by Dr. Rauzzino is reasonable, necessary, and causally related to her January 9, 2015 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a kitchen specialist.

2. On January 9, 2015 Claimant was exiting her vehicle in Employer's parking lot when she slipped and fell on ice.

3. Claimant completed a report of injury on that date that stated she slipped on ice in the parking lot and that her first foot was out of the car when she slipped on the ice and fell out of the car. Claimant reported that her left forearm, right elbow, and right knee were affected. *See* Exhibit A.

4. On January 9, 2015 Claimant was evaluated by Annu Ramaswamy, M.D. Claimant reported right forearm, right knee, left forearm, neck, and low back pain after slipping on ice getting out of her car that morning. Claimant reported that her right arm and right knee hurt the most. Dr. Ramaswamy noted on examination of Claimant's cervical spine that there was tenderness in the left trapezius musculature with mild trigger point activity and that the tenderness extended to the left rhomboid region. Dr. Ramaswamy noted range of motion of the cervical spine to be: flexion 70 degrees; extension 40 degrees; right rotation 40 degrees; and left rotation 30 degrees. Dr. Ramaswamy diagnosed right forearm strain, right knee strain/contusion, cervical/lumbar strains, and left ulna contusion. Dr. Ramaswamy recommended icing, stretching for the neck and low back, and braces for the right elbow and right knee. *See* Exhibit G.

5. On January 27, 2015 Claimant underwent cervical spine radiographs interpreted by Paul Hsieh, M.D. Dr. Hsieh provided the impression of mild degenerative disc disease at C5-C6 and noted that the radiographs were negative for acute abnormality in the cervical spine. Dr. Hsieh noted no fracture, dislocation, or acute bone lesion and that the mild degenerative disc disease at C5-C6 was chronic. *See* Exhibit J.

6. Claimant was evaluated by Thomas Vavrek, D.O. on February 18, 2015, February 23, 2015, February 26, 2015, March 2, 2015, and March 4, 2015. At each evaluation, Dr. Vavrek noted that Claimant had no numbness, tingling, or parasthesias and that she had no evidence of radiculopathy with her cervicothoracic pain. Dr. Vavrek opined that Claimant's paracervical and scapular tone and tenderness were associated

with soft tissue pain or myalgias post strain. Dr. Vavrek assessed myofascial pain and dysfunction and somatic dysfunction and also noted that Claimant's medical history was positive for reactive depression. *See* Exhibit K.

7. On March 10, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported continued neck and low back pain. Dr. Ramaswamy opined that Claimant was making slow progress. Claimant denied numbness and tingling in her upper and lower extremities. Dr. Ramaswamy anticipated maximum medical improvement within two months. *See* Exhibit L.

8. Claimant was evaluated by Dr. Vavrek on March 11, 2015, March 19, 2015, April 1, 2015, and April 6, 2015. Again, at each evaluation, Dr. Vavrek noted that Claimant had no numbness, tingling, or parasthesias and that she had no evidence of radiculopathy with her cervicothoracic pain. Dr. Vavrek opined that Claimant's paracervical and scapular tone and tenderness were associated with soft tissue pain or myalgias post strain. Dr. Vavrek noted that Claimant had no neurological signs or symptoms. *See* Exhibit M.

9. On April 9, 2015 Claimant underwent an MRI of her cervical spine interpreted by Charles Wennogle, M.D. Dr. Wennogle provided an impression of: C5-C6 disc degeneration, with mild left uncovertebral joint hypertrophy, left foraminal protrusion, and mild to moderate left foraminal stenosis; C6-C7 disc degeneration with broad-based disc bulge but no stenosis; and C7-T1 mild disc degeneration with focal central protrusion causing no stenosis. *See* Exhibit N.

10. On April 13, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported a sore neck and back. Dr. Ramaswamy reviewed Claimant's MRI reports and noted that Claimant had evidence of cervical and lumbar spondylosis. Dr. Ramaswamy referred Claimant to Dr. Ogin to see if facet inflammation was a consideration given Claimant's chronic pain. Dr. Ramaswamy noted that if Dr. Ogin felt Claimant's pain was myofascial, then Claimant would be at maximum medical improvement. Dr. Ramaswamy noted that if injections were recommended, then maximum medical improvement would be delayed. *See* Exhibit O.

11. On April 28, 2015 Claimant was evaluated by Dr. Ogin. Claimant reported a chief complaint of left sided back pain. Claimant reported pain worse on the left side with predominance in the left lower neck into her upper shoulder and her left lower back into her buttock. Claimant reported no radicular pain, numbness, or weakness into her arms or legs. On examination Dr. Ogin noted that Claimant had full cervical range of motion to the right and good flexion but that to the left, her motion was about 60% of the right side and that she had increased pain during left cervical rotation. Dr. Ogin reviewed the MRI of the cervical spine and noted a left-sided lateral disk bulge, C5-6 into the foramen and a central disk bulge at C6-C7 with mild neural foraminal and central stenosis at that level. Dr. Ogin provided the impression of cervicothoracic strain injury with myofascial dysfunction, possible left lower cervical facet syndrome, and left sided disk protrusion C5-6, query clinical significance. *See* Exhibit P.

12. On May 12, 2015 Claimant underwent left C4-C5, C5-C6, and C6-C7 intraarticular facet joint injections performed by Dr. Ogin. Dr. Ogin noted that given the persistence of Claimant's pain complaints and a failure to respond to conservative measures, Claimant was referred for the facet blocks for diagnostic and therapeutic purposes. Post injection, Claimant was monitored and reported that her pre-injection pain level of a 7/10 had been reduced to 6/10 post injection. Dr. Ogin opined this was a negative diagnostic response. *See* Exhibit Q.

13. On May 26, 2015 Claimant was evaluated by Dr. Ogin. Claimant's chief complaint was neck pain worse on the left side. Dr. Ogin opined that Claimant had a negative diagnostic response and negative therapeutic response to a left lower cervical facet joint injection. Dr. Ogin noted on examination that Claimant had tenderness along the left lower cervical paraspinal muscles with increased pain with extension more than flexion and left rotation more than right rotation. Dr. Ogin noted that the Spurling maneuver on the left reproduces pain into Claimant's parascapular region but not down her arm. Dr. Ogin noted that given the disk protrusions present on MRI, coupled with a negative diagnostic response to facet blocks, the pain refractory to treatments including PT, OMT, acupuncture, and medication management, and the fact that Claimant has a parascapular referred component, Claimant was a candidate for a one-time trial of an epidural steroid injection. Dr. Ogin noted that it would be performed at the C7-T1 level to the left which should address the lower disk bulges at C5-6, and C6-7. Dr. Ogin opined that if Claimant failed to get relief, she would not be a candidate for any further cervical injections. *See* Exhibit T.

14. On June 2, 2015 Dr. Ogin performed a C7-T1 interlaminer epidural steroid injection. Dr. Ogin noted that pre-injection Claimant had a pain level of 5-6/10 and that her pain was aggravated by flexion, extension, and rotation. Post-injection Dr. Ogin noted that Claimant's pain level was 5/10 with continued pain in flexion and extension. Dr. Ogin opined that Claimant had a negative diagnostic response to the epidural injection. *See* Exhibit T.

15. On June 18, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported continued neck discomfort. Claimant reported developing a migraine headache after the epidural steroid injection, then the next day she felt great all over, then her neck pain went back to baseline state. Dr. Ramaswamy noted that Dr. Ogin recommended a consultation with Dr. Rauzzino based on the C5-C6 disc bulging. *See* Exhibit V.

16. On July 6, 2015 Claimant was evaluated by Michael Rauzzino, M.D. Claimant reported neck pain that radiated from the back of her neck and down her shoulders, occasionally into her left arm and hand greater than the right arm and hand. Claimant reported weakness in her forearms, hands, and fingers bilaterally as well as intermittent numbness in her hands. Claimant reported temporary relief from an epidural steroid injection but that her symptoms quickly returned and Claimant reported no relief from the facet injections. Dr. Rauzzino noted the disc herniation at C5-6 more

off to the left which was the side of Claimant's worse arm symptoms. Dr. Rauzzino noted that Claimant had completed conservative therapy and that Claimant should either be placed at MMI and be given a rating, or that Claimant could consider surgery. Dr. Rauzzino opined that the best surgical option would be a C5-C6 disc replacement with removal of the disc herniation and decompression of the spinal cord. He opined that this would not place stress on the C6-C7 level which showed some chronic degenerative changes. *See* Exhibit X.

17. On July 10, 2015 Claimant was evaluated by Dr. Ogin. Dr. Ogin opined that given Claimant's clinical exam findings and her MRI results, he suspected her pain was discogenic and that she would benefit from a disc replacement. He noted that he would set her up for a left C5-6 selective nerve root block and that if it took away her pain it would be a good prognosticator that she would do well with a disc replacement. *See* Exhibit 4.

18. On July 27, 2015 Claimant was evaluated by Dr. Ramaswamy. Dr. Ramaswamy noted that Claimant had been evaluated by Dr. Ogin who did not recommend an EMG since Claimant's left arm symptoms were minimal, but that he did recommend a selective nerve root block. Dr. Ramaswamy opined that if the nerve block was non-diagnostic, it was likely that Claimant would have exhausted treatment and MMI would follow. If the nerve block was diagnostic, then Claimant would need to be followed to determine if the block was therapeutic. *See* Exhibit Y.

19. On August 4, 2015 Claimant underwent a left C6 selective nerve root block/transforaminal epidural steroid injection performed by Dr. Ogin. Dr. Ogin noted that Claimant's motion turning her head left and right was improved after the nerve block and that Claimant reported her prior pain level of 8/10 had been decreased to 5/10 following the nerve block injection. Dr. Ogin noted that when asked separately, Claimant estimated 50% pain relief. Dr. Ogin opined that Claimant had an equivocal pain response. *See* Exhibit Z.

20. On August 17, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported that after the selective nerve root block she had improved range of motion by 50% and better with pain for a few days before the pain returned. Dr. Ramaswamy noted that it appeared Claimant had a partial response but no significant relief after the block. Dr. Ramaswamy noted that Dr. Ogin recommended the cervical disc replacement based on the nerve root block and given that Claimant had exhausted treatment options. Dr. Ramaswamy also noted that a second opinion on surgery would be reasonable based on Claimant's clinical course. *See* Exhibit 8.

21. On September 3, 2015 Claimant was evaluated by Michael Janssen, D.O. Claimant reported falling onto her buttocks, and smashing her head in a violent fall on January 9, 2015. Dr. Janssen noted full and unrestricted range of motion in Claimant's cervical spine, no sensory deficits in the right or left upper extremity, and positive lhermitte sign with pain radiating into the left upper extremity. Dr. Janssen assessed: C6 radiculopathy; failure to respond with a conservative program for the last 9 months;

and C5-C6 cervical pathology with C6 radicular findings. Dr. Janssen opined that to treat the problem, Claimant required surgical reconstruction at the C5-C6 level either with fusion or a total disc replacement. He opined that total disc arthroplasty was a reasonable option. *See* Exhibit 16.

22. On September 21, 2015 George Schakaraschwili, M.D. performed a Rule 16 Record Review. Dr. Schakaraschwili noted that Dr. Rauzzino had requested authorization on September 10, 2015 for C5-6 disc replacement surgery. Dr. Schakaraschwili opined that Claimant was a poor surgical candidate and opined that the proposed surgery was unlikely to alleviate Claimant's symptoms. Dr. Schakaraschwili also opined that it was unlikely that the disc protrusion at C5-6 was caused by the fall. Dr. Schakaraschwili opined that Claimant had a tendency to multiply symptoms as her treatment progressed and that the symptoms Claimant reported of arm numbness, tingling, and weakness were severely out of proportion to the symptoms she reported to all other providers throughout her treatment. Dr. Schakaraschwili opined that Claimant failed to respond to an intralaminer cervical epidural injection and that her response to a selective nerve root block on the left at C6 was non-diagnostic and that her level of responses indicate a poor prognosis for relief of her symptoms following the proposed surgery. *See* Exhibit BB.

23. On October 2, 2015 Claimant was evaluated by Dr. Ramaswamy. Dr. Ramaswamy reviewed Dr. Schakaraschwili's recommendation for denial. Dr. Ramaswamy agreed that Claimant did not respond significantly to epidural steroid injections. Dr. Ramaswamy noted that the Colorado Medical Treatment Guidelines indicate that an individual meets the criteria for a cervical disc arthroplasty procedure if a clinical radiculopathy was noted at one level and if an individual was symptomatic for a prolonged period of time. Dr. Ramaswamy noted that some of the physicians who had treated Claimant believed that a cervical radiculopathy was present based on Claimant's objective examination findings. *See* Exhibit CC.

24. On December 16, 2015 Brian Reiss, M.D. completed an independent medical evaluation. Dr. Reiss opined that Claimant had a totally negative response to the epidural steroid injection, and that Claimant did not have radicular symptomatology. Dr. Reiss opined that Claimant had myofascial pain unlikely to respond to a single level cervical disc replacement and opined that Claimant had at least two levels of significant disc degeneration and that the procedure would be quite unlikely to resolve Claimant's symptoms. Dr. Reiss opined that Claimant did not have true radiculopathy and that Claimant did not meet the criteria for surgical intervention for radiculopathy. Dr. Reiss opined that for her myofascial neck pain, she should resume physical therapy, consider isometric exercise, and pain management with potential medications and other modalities. Dr. Reiss opined that based on surveillance and examination, Claimant appeared quite functional. *See* Exhibit EE.

25. Dr. Reiss opined that even assuming Claimant's pain was discogenic rather than myofascial, Claimant still had as much abnormality at C5-6 as she had at C6-7and opined that there was no evidence indicating one level versus the other as the

source of her pain. Dr. Reiss noted that the guidelines require identification of the pain generator prior to surgical intervention. *See* Exhibit EE.

26. On January 14, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported a pain level of 9.5/10. Claimant denied numbness and tingling in her upper extremities. Dr. Ramaswamy noted that Claimant's discomfort may represent some nerve irritation along the left C5/C6 nerve roots and that electrical studies may be helpful to evaluation the possibility. Dr. Ramaswamy noted that given that Claimant did not complain of absolute radicular symptoms in the left upper extremity, Dr. Reiss may opine that surgical intervention would not be beneficial. *See* Exhibit FF.

27. On February 4, 2016 Claimant was evaluated by Dr. Ramaswamy. Dr. Ramaswamy opined that Claimant did not have true radicular symptoms and Dr. Ramaswamy noted that Dr. Ogin also indicated that electrical studies would not be helpful as Claimant had not presented with distal symptomatology. Dr. Ramaswamy recommended additional visits to work on Claimant's myofascial pain. Dr. Ramaswamy opined that the risk of surgical intervention likely would outweigh the benefit. *See* Exhibit HH.

28. Claimant testified at hearing that she did not report the numbness or tingling in her upper extremities to her providers because she didn't have symptoms on a daily basis and only had them 1-2 days per week for approximately one hour. Claimant testified that the symptoms went down her arm and into her fingers and thumb and that she was not sure when the numbness and tingling started.

29. Claimant's testimony, overall, is not found credible or persuasive. Claimant failed to report to multiple providers over a significant treatment period that she had symptoms of radiculopathy in her left arm. Only when evaluated by Dr. Rauzzino did she first report these symptoms. Dr. Ramaswamy, Dr. Reiss, Dr. Schwakaschwili, and Dr. Vavrek noted no symptoms of radiculopathy.

30. Dr. Reiss testified at hearing consistent with his written report. Dr. Reiss opined that Claimant did not have signs or symptoms of radiculopathy at the C6 nerve root. Dr. Reiss opined that Claimant has myofascial pain and that surgery was not appropriate. Dr. Reiss opined that you could not identify one disc as being the probable cause of Claimant's pain and that C5-6, C6-7, or C7-T1 could all equally as likely be sources of pain. Dr. Reiss disagreed with Dr. Rauzzino's assessment that his examination of Claimant was incomplete and explained that he did not perform a Spurling's maneuver because Claimant reported she had no numbness or tingling into her arms. Dr. Reiss noted that Dr. Ogin agreed that there were no upper extremity symptoms warranting an EMG study. Dr. Reiss opined that Claimant's neck pain was unlikely to get better with the surgery and that the nerve root block confirmed that the C6 nerve root was not the cause of Claimant's pain. Dr. Reiss opined that the surgery requested by Dr. Rauzzino was not reasonable or necessary and that Claimant's pain was myofascial and should not be treated with surgery. Dr. Reiss opined that the

proposed surgery would only fix the occasional numbness/tingling that Claimant reported.

31. Dr. Reiss is found credible and persuasive.

32. Dr. Rauzzino testified by deposition. Dr. Rauzzino opined that Claimant had a left foraminal protrusion producing foraminal stenosis compromising the exiting nerve root at the C5-C6 level. Dr. Rauzzino opined that Claimant had pre-existing degenerative disease at that level with some bony foraminal stenosis but that he believed she had a newer injury with the disc protrusion, both of which combined to irritate the nerve root as it exited the spine on the left. Dr. Rauzzino opined that Claimant had cervical radiculopathy at C5-6 on the left related to her January 2015 work injury. Dr. Rauzzino opined that Claimant had radiculopathy since he could produce symptoms with a Spurling's maneuver on the left and because of Claimant's report of neck pain radiating down her arm and into her thumb. Dr. Rauzzino opined that given Claimant's radiographic findings pointing to the C5-6 level, her physical exam, and the diagnostic relief Claimant had with injection, they all combined to suggest that Claimant would have good relief with the recommended surgery.

33. The opinions of Dr. Rauzzino are not found as credible or 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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned

expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). 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. 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 his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S.

Claimant has failed to establish by a preponderance of the evidence that the C5-C6 cervical spine disc arthroplasty recommended by Dr. Rauzzino is reasonable, necessary, and causally related treatment for her January 9, 2015 industrial injury. The opinions of Dr. Reiss, Dr. Ramaswamy, and Dr. Schakaraschwili that Claimant is not an appropriate candidate for the disc arthroplasty procedure are found credible and persuasive and are supported by the Colorado Workers' Compensation Medical Treatment Guidelines and the majority of the Claimant's medical records and evidence. Claimant's reports of radiculopathy in her left arm are not credible and not consistent with the overwhelming medical evidence establishing multiple visits where findings of radiculopathy were specifically noted to not exist. Dr. Rauzzino's opinion that Claimant is a surgical candidate is based, in part, on her report during the evaluation performed by Dr. Rauzzino that she has symptoms into her left arm. Despite this report to Dr. Rauzzino, Claimant reported the exact opposite to multiple providers over her course of treatment prior to being seen by Dr. Rauzzino. Further, his recommendation is also

based, in part, on his finding that Claimant had a positive Spurling's on the left side. However, Dr. Ogin also performed a Spurling's maneuver when evaluating Claimant and Dr. Ogin noted no radiating symptoms into Claimant's left arm with the maneuver. Three physicians in this case have recommended surgery and three have recommended against surgery. Of the three physicians recommending the surgery, Dr. Ogin recommended surgery despite noting that Claimant has no radiculopathy. Dr. Rauzzino recommended surgery, in part, based on Claimant's reported pain and radiculopathy although Dr. Rauzzino is the first physician that Claimant reported symptoms of radiculopathy to and Claimant was evaluated by Dr. Rauzzino 2-3 times. Dr. Janssen also recommended surgery opining that Claimant had radiculopathy. Dr. Janssen evaluated Claimant one time.

The more persuasive evidence shows that Claimant does not have true radiculopathy. Claimant was evaluated at numerous appointments by multiple providers where she did not report any symptoms of radiculopathy and where radiculopathy was not found on examination. Dr. Ramaswamy, Dr. Reiss, Dr. Schwakaschwili, Dr. Vavrek, and Dr. Ogin all opined that she does not have radiculopathy. Further, Dr. Ramaswamy, Dr. Reiss, and Dr. Schwakaschwili all opined that surgery is not reasonable or necessary in this case. Their opinions are consistent with the overwhelming medical evidence that shows at multiple evaluations Claimant had no concern with, reports of, or objective evidence of radiculopathy. The opinion of Dr. Reiss is persuasive that Claimant has myofascial pain that should be treated without surgical intervention. Further, objective testing by nerve block also established persuasively that Claimant received at best an equivocal response that was not diagnostic for the C6 level being her pain generator making the requested surgery an unreasonable and unnecessary option. The opinion of Dr. Vavrek, who saw Claimant multiple times early in her treatment, is persuasive that Claimant has myofascial pain and dysfunction as well as somatic dysfunction and a noted history positive for reactive depression. Similarly, Dr. Schakaraschwili's opinion is credible and persuasive that Claimant's reported symptoms to Dr. Rauzzino of arm numbness, tingling, and weakness were severely out of proportion to the symptoms she reported to all other providers throughout her treatment. Although differences of medical opinion exist in this case, Claimant has failed to establish more likely than not that surgery is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden of proof to establish that the C5-C6 cervical spine disc arthroplasty is reasonable, necessary, and causally related to her January 9, 2015 industrial injury.

2. All other issues 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 12, 2016

/s/ Michelle E. Jones

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

ISSUES

1. Whether the Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right eye on December 28, 2014 while performing services arising out of and in the course of his employment.

2. Whether the Claimant has proven that the requested right eye surgery recommended by Dr. Tim James is reasonable, necessary, and related to his work related injury of December 28, 2014.

3. Whether the Claimant has proven that Dr. Tim James is an Authorized Treating Physician for to his work related injury of December 28, 2014.

FINDINGS OF FACT

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

1. The Claimant works for Employer with the job title of Electrician A. His job duties include repair of electrical equipment at Employer's facility.

2. The Claimant was working in the course and scope of his employment on December 28, 2014. On that date, the Claimant testified that as he was descending on a scissor lift next to a fence, a coworker located below him was cutting/grinding bolts creating sparks. The Claimant testified that while he was stopped at a platform he was standing towards the front of the lift holding the control and he felt the sparks coming up from beneath his safety glasses into his right eye, as the lower part of the safety glasses did not provide a barrier. The Claimant's testimony regarding his mechanism of injury was credible and is found as fact.

3. Subsequent to the December 28, 2014 date of injury Respondents' facility was closed for the holiday break. The Claimant testified credibly that he believed he needed to first seek treatment at the Employer's onsite clinic so he waited until the Employer's facility reopened after the holiday break. The Claimant testified that he sought treatment at the Respondents' in-house clinic on January 6, 2015. The Claimant was evaluated by PA David Solis, who noted that the Claimant reported irritation in his right eye and noted redness. PA Solis states in his report that "another worker was grinding metal, and some debris went into his Right ocular conjunctive" (Respondents' Exhibit C, p. 8). PA Solis provided Claimant treatment in the form an eye flush and Tylenol.

4. Following the injury, on January 15, 2015 the Claimant was suspended from employment without pay, pending investigation into the Claimant engaging in inappropriate behavior towards the individual responsible for cutting the bolts that created sparks below the Claimant on the scissor lift. On January 27, 2015, it was determined that the Claimant had a confrontation with the coworker and engaged in behavior including inappropriate language and profanity (Respondents' Exhibit E).

5. The Claimant testified credibly that subsequent to being suspended he was not allowed to return to the onsite clinic. The Claimant testified that as a result of his suspension Respondents took away his badge, and denied access to the Waterton facility where the on-site medical clinic was located. There was no persuasive testimony or evidence presented to refute the Claimant's credible testimony on this issue.

6. Subsequent to denying the Claimant access to their on-site facility, Respondents failed to provide the Claimant with a choice of alternative physicians. The only physician offered to Claimant by Respondents had been the onsite facility. (Respondents' Exhibit E, p. 22).

7. Subsequent to being suspended and denied access to the onsite medical clinic, the Claimant sought evaluation with Dr. Tim James, his personal eye doctor. Dr. James' report of January 26, 2015 states that "a foreign body sensation is experienced" by the Claimant (Claimant's Exhibit 5, p. 26). Dr. James further states that the Claimant's eyes developed extreme redness, watered excessively, had a photophobic sensation, and his episodes were persistent and his discomfort was described as very bothersome (Claimant's Exhibit 5, p. 26). The Claimant advised Dr. James that he was working around someone who was grinding metal and he believes he may have gotten some debris in his eye. Dr. James initially provided Claimant conservative treatment in the form of artificial tears.

8. The Claimant returned to Dr. James due to persistent symptoms as the artificial tears did not resolve Claimant's condition.

9. Dr. James provided a diagram of Claimant's right eye with an arrow that indicates the presence of a foreign body debris that is "whiteish in color" (Claimant's Exhibit 4, p. 22). In a letter that precedes the before mentioned diagram, Dr. James explains himself further and indicates that his opinion is that the Claimant suffered an injury at work when was next to a metal grinder and a foreign body struck his eye. Dr. James notes that the Claimant was seen by a Physicians' Assistant at the in-house clinic where he received an eye flush that did not resolve his symptoms.

10. In his report of January 26, 2015 Dr. James notes that the Claimant suffers from a significant epithelial abrasion (Claimant's Exhibits 4 & 5). As a result of the ongoing foreign body sensation and awareness of pain in the Claimant's right eye with significant epithelial abrasion with dots and lines of superficial punctate keratitis, Dr. James recommends an epithelial debridement procedure (Claimant's Exhibits 4 & 5). Dr. James states: "it is my opinion that the [Claimant] did suffer an injury at work when

he was next to a metal grinder and a foreign body struck his eye" (Claimant's Exhibit 4 pg 20).

11. In 1994 the Claimant suffered an industrial injury to his right eye. The record demonstrates that the Claimant's complaints related to his 1994 injury included blurring, glare sensation, and seeing halos around lights at night when he drives his car (Claimant's Exhibit 3). However, there is no indication of the Claimant reporting symptoms of pain, irritation, or the presence of a foreign body sensation in his right eye. Furthermore, the Claimant did not require the ongoing use of medication attributed to his 1994 injury.

12. There are no medical records submitted related to the right eye after the 1994 records until a 2011 eye exam with Dr. Daniel Hock. In his January 21, 2011 evaluation of the Claimant, Dr. Hock describes Claimant's symptoms in his right eye as sporadic blurriness. However there is no indication that there is irritation, or the presence of a foreign body sensation (Respondents' Exhibit B). The unresolved issues related to the Claimant's 1994 injury are that of blurriness.

13. In 2012, the Claimant was evaluated by Dr. James as part of a routine eye examination. In the corresponding report, the Claimant reports blurred vision at a distance; however, no headaches, no double vision, no visual floaters, and no visual flashes. There is nothing in Dr. James' 2012 report that indicates that the Claimant was complaining of irritation, redness or foreign body sensation (Claimant's Exhibit 5).

14. The ALJ finds that the current symptoms that the Claimant is experiencing, as outlined in Dr. James' appeal letter, are the direct consequence of his work related injury of December 28, 2014 (Claimant's Exhibit 4). Although Claimant did not receive treatment at the on-site clinic until January 6, 2015, the Claimant was credible in explaining the delay caused by Respondents' holiday closure.

15. The first report of injury does indicate that the Claimant notified Respondents on January 6, 2015 that he was "exposed to some debris, another worker was grinding metal and some debris went into his right eye" (Claimant's Exhibit 2, p. 5).

16. The ALJ finds Dr. James' opinions to be credible persuasive and the recommended corneal epithelial debridement procedure is reasonable, necessary, and related to the Claimant's December 28, 2014 industrial injury. Dr. James is the only optometrist to have evaluated the Claimant, and there was no evidence submitted that contradicts the recommendation of Dr. James. Therefore, the right eye corneal epithelial debridement procedure is reasonably necessary to cure and relieve the effects of Claimant's December 28, 2014 work injury.

17. The Claimant credibly testified that he was denied access to the Waterton on-site medical facility due to non-medical reasons. Respondents denied the Claimant access to the only medical provider they offered to the Claimant. Respondents failed to provide the Claimant a designated provider list with alternative physicians within 7 days.

18. Subsequent to denying the Claimant access to the on-site medical facility, Respondents again failed to designate a new authorized treating physician nor did Respondents provide Claimant a designated provider list that contained non-onsite providers. Nor did Respondents offer any persuasive testimony or evidence to establish that the Claimant could have continued to access the onsite provider. As a result, the Claimant sought treatment with Dr. James. As Claimant was denied medical treatment for non-medical reasons and Respondents effectively failed to designate a treatment provider that the Claimant could actually access for treatment, Dr. James is found to be the Claimant's authorized treating physician.

19. The Claimant testified credibly that he continues to have ongoing symptoms in his right eye including irritation and blurriness.

CONCLUSIONS OF LAW

Generally

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). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which

occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant's testimony is credible and persuasive regarding the mechanism of injury to his right eye incurred on December 28, 2014. The Claimant's testimony regarding the mechanism of injury is substantiated by the medical report from Employer's onsite heath clinic (Respondents' Exhibit C), the subsequent medical reports of Dr. Tim James (Claimant's Exhibits 4 & 5); and the disciplinary letter of January 27, 2015 (Respondent's Exhibit E, pg 21). As a result of December 28, 2014 injury, the Claimant continues to suffer from the effects thereof and his eye requires further medical treatment. Much was made of the fact that there was some delay in the Claimant seeking medical care. However, the Claimant provided a reasonable and adequate explanation for the delay in initial treatment. The evidence viewed as a whole, and set forth in greater detail above in the Findings of Fact, nevertheless, supports a finding that the Claimant's eye condition was work-related and that the Claimant sustained a compensable work injury on December 28, 2014.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on December 28, 2014 caused or permanently aggravated, accelerated or combined with a preexisting condition

producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits

Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

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Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

In this case, the Claimant first sought treatment at the Respondents' in-house clinic on January 6, 2015. The Claimant was evaluated by PA David Solis, who noted that the Claimant reported irritation in his right eye and noted redness. PA Solis states in his report that "another worker was grinding metal, and some debris went into his Right ocular conjunctive." PA Solis provided Claimant treatment in the form an eye flush and Tylenol.

Subsequent to being suspended and denied access to the onsite medical clinic, the Claimant sought evaluation with Dr. Tim James, his personal eye doctor. Dr. James' report of January 26, 2015 states that "a foreign body sensation is experienced" by the Claimant. Dr. James further states that the Claimant's eyes developed extreme redness, watered excessively, photophobic sensation, as his episodes were persistent and his discomfort was described as very bothersome. Dr. James initially provided Claimant conservative treatment in the form of artificial tears. The Claimant returned to Dr. James due to persistent symptoms as the artificial tears did not resolve Claimant's condition. Dr. James provided a diagram of Claimant's right eye with an arrow that indicates the presence of a foreign body debris that is "whiteish in color." In a letter that precedes the before mentioned diagram, Dr. James explains himself further and indicates that his opinion is that the Claimant suffered an injury at work when was next to a metal grinder and a foreign body struck his eye. In his report of January 26, 2015 Dr. James notes that the Claimant suffers from a significant epithelial abrasion. As a result of the ongoing foreign body sensation and awareness of pain in the Claimant's right eye with significant epithelial abrasion with dots and lines of superficial punctate keratitis, Dr. James recommended an epithelial debridement procedure.

The opinions of Dr. James are credible and persuasive regarding the recommendation of the right eye corneal epithelial debridement. In his medical reports and appeal letter Dr. James clearly outlines his opinions regarding the reasonableness

and necessity of the surgery. Dr. James opinion regarding the relatedness of the procedure to Claimant's injury of December 28, 2014 is persuasive. Furthermore, there are no medical opinions offered that contradict Dr. James' opinions regarding the reasonableness, necessity, or relatedness of the recommended procedure. However, the Claimant has not seen Dr. James or any other optometrist or ophthalmologist for a significant period of time prior to the hearing. As a result, the Claimant should first be reevaluated to determine that the surgery remains reasonably necessary to cure and relieve the Claimant of the effects of his December 28, 2014 work injury. The Claimant has established that he is entitled to further evaluation of his right eye condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act, including the surgery previously proposed by Dr. James, if, after further evaluation, Dr. James determines the surgery is still necessary.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43- 404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43- 404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

W.C.R.P. Rule 8-1 (C) states that if an employer has a qualified on-site health care facility, the employer may designate that facility as the authorized treating physician. W.C.R.P. Rule 8-1 (C)(2) states that If the employer designates an on-site health care facility, the employer must, within seven (7) business days following notice of an on the job injury, provide the injured worker with a designated provider list consistent with the provisions of rule 8-2.

The only medical provider offered by Respondents was that of the onsite clinic. (Respondents' Ex E, pg 22). Subsequent to his injury Claimant was suspended and denied access to the facility that housed the onsite clinic designated by Respondents. At no time did Respondents provide Claimant with another option for a treating physician or clinic. By denying Claimant access to the onsite medical clinic they denied

Claimant treatment for non-medical reasons. Respondents further violated Rule 8 by not providing Claimant any alternative authorized treating physician options and pursuant to W.C.R.P. Rule 8-2(E), the Claimant may select an authorized treating physician of his choosing. Therefore, Claimant's designation of Dr. James as the authorized treating physician is granted. Dr, James will remain as the authorized treating physician for Claimant's December 28, 2014 industrial injury.

ORDER

It is therefore ordered that:

1. The Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right eye on December 28, 2014 while performing services arising out of and in the course of his employment.

2. Claimant has proven that Dr. Tim James is an Authorized Treating Physician related to the Claimant's work related injury of December 28, 2014.

3. The Claimant has proven that he requires further medical treatment of his right eye condition and Respondents are liable for treatment that is reasonably necessary to relieve the Claimant from the effects of his December 28, 2014 injury, including the surgery previously proposed by Dr. James, if, after further evaluation, Dr. James determines the surgery is still necessary.

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

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

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

DATED: April 6, 2016

Kimberly A. Allegretti
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. 4-975-288-02

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable back injury arising out of and in the course of his employment with Employer on January 4, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD) and temporary total disability ("TTD") benefits in this claim from March 19, 2015 ongoing.

3. If Claimant has proven that he is entitled to temporary disability benefits, whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for his termination.

FINDINGS OF FACT

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

1. The Claimant was hired by Employer on June 18, 2014 as a lumber material specialist. His job duties involved sawing lumber for customers, loading up products including lumber, concrete, and mortar mixes, doing special cuts for plywood brought in by customers and handling the returns for the lumber department. The Claimant's supervisors included Joe and Victor who were managers and a lead named Reggie. The Claimant's starting pay rate was $10.50 per hour and that did not change over the course of his employment. The Claimant testified that when he was first hired he was working about 27 hours per week but then by late October or early November, he was working full time which continued until his employment was terminated. The Claimant's testimony regarding the above was uncontroverted, credible and is found as fact.

2. The Employer has an Attendance and Punctuality Policy. Hourly employees are expected to report for work at the assigned time, adhere to the work schedule, work through scheduled shifts, perform assigned duties and take meal periods as scheduled (Respondents' Exhibit D, p. 32). The Employer's Progressive Disciplinary Process policy is that "the discipline process will begin when an associate receives the third unexcused occurrence in a six-month period. Each absence or tardy is considered one occurrence. If there are 3 occurrences in a 6 month period, the managers are to provide a "coaching." After a "coaching" has occurred, if there are 3 additional occurrences, the managers are required to issue a "counseling." After an employee receives a "counseling," if there is 1 additional occurrence, the managers are

required to issue a “final warning.” After an active Final Counseling, and there is 1 additional occurrence, managers are required to administer a “termination” (Respondents’ Exhibit D, p. 33). There are certain absences and tardiness that is considered “excused.” These “excused” absences and tardies include “State-law protected time off.” In this section, the policy refers the reader to “State Exceptions” in the LOA HR SOP and Time-Off Benefits HR SOP for additional details, but this was not offered or admitted into evidence. In reference to the Employer’s disciplinary policy, the term “active” refers to a disciplinary action that is within six (6) months from the date when the action was administered. In tracking “active” disciplinary notices, “a notice remains visible for six months” and “at the end of the six-month period, the notice rolls off and is no longer “active” (Respondents’ Exhibit D, p. 36). When an employee has been employed for fewer than 120 days, then he or she should receive a “final warning” if there are 3 occurrences in the first 120 day period and then proceed to immediate termination for 1 additional occurrence that occurs in the first 120 days. However, if no further occurrence occurs in the first 120 days, then the “final warning” issued during that probationary period is treated as a “coaching” notice (Respondent’s Exhibit D, p. 35).

3. On September 20, 2014, the Claimant received a Progressive Disciplinary Notice for being unexcused absent on 8/24 and tardy on 7/4 and 9/16. He was advised that he should refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice was entitled a “final warning” in the records under the Employer’s Progressive Disciplinary Process as it occurred in the first 120 days of employment. As there were no further occurrences in the first 120 days of employment, this notice was treated as a “coaching” notice per the Employer’s policy.

4. On November 29, 2014, the Claimant received a Progressive Disciplinary Notice for arriving over 3 hours late on 10/6/2014, arriving 13 minutes late on 11/21/2014 and arriving 31 minutes late on 11/23/2014. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice would be a “counseling” under the Employer’s Progressive Disciplinary Process since the “final warning” issued in the Claimant’s first 120 probationary period had converted to a “coaching” notice. That “coaching” notice would have been less than 6 months prior to the November 29, 2014 notice, so the September 20, 2014 notice would still be “active.”

5. On December 23, 2014, the Claimant received a Progressive Disciplinary Notice for being absent on December 15, 2014 with insufficient sick time to cover his scheduled hours. The notice stated that this violation progressed the Claimant to “final warning. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action

up to and including termination. This attendance occurrence happened before the Claimant's injury and is unrelated to the work injury.

6. The Claimant testified that he was injured while at work for Employer when he was called to get his returns. He grabbed a bucket of mortar out of a regular shopping cart and was moving it to a lumber cart. The bucket of mortar weighed approximately 50-60 pounds. The Claimant testified that his arms were about chest high when he was lifting and he turned to place the mortar mix onto the lumber cart. The Claimant testified he felt the onset of pain immediately as he was bent over the cart. He testified that he turned to one of the other employees and stated that he thought he hurt his back. He pushed his cart of returns back to the lumber department and felt pain in his lower back and legs the whole way. After he returned to the department, he left the cart there and told his coworkers that he hurt his back and was going to take it easy with no more lifting for the rest of the day. He told them he would do tags, which involves using the scanner to scan lumber that has no price tags and print out and tag the lumber where the price tag should be. The Claimant testified he continued to experience low back pain while doing tags when he had to reach over his head and as he brought his arms back down he felt more pressure on his back. The Claimant testified that at this point he told his coworkers he was going to take his lunch break and rest his back. As he took a few steps, the Claimant coughed and felt more pain in his buttocks, back and legs. After this he went to the assistant store manager Richard and reported the injury and he clocked out of work. The Claimant was advised by the assistant store manager to fill out an incident report. The Claimant testified that after completing the incident report he was not offered medical treatment and he left work. The Claimant testified that he did not tell his manager that he "reinjured" his back and he did not write down in his incident report that he "reinjured" his back. The Claimant testified that he has not had prior low back injuries or low back pain.

7. On January 4, 2015, the Claimant completed an Incident Witness Statement. The Claimant stated as follows:

> I was picking up returns and I picked up a 5 gal. bucket of flooring mortar when I felt a tweek [sic] in by back. I was taking it easy making signs and I had to strech [sic] and I felt the pain increase. I took it easier but when I was walking to lunch I coughed and my back went out on me. And that's when I told Richard about it.
>
> (Respondents' Exhibit D, p. 24).

8. Also on January 4, 2014, the Claimant's supervisor, Richard Reyes, made an Incident Witness Statement. He stated as follows:

> [The Claimant] came to me around 12:30 saying that he reinjured his back. [The Claimant] had previously injured his back while working. He had been working since his last injury and never went to see a doctor other than a chiropractor. [The Claimant] reinjured his back while lifting a

5-gallon bucket of paint. He said that it was a slight tweak & kept working & the pain got progressively worse as the day went on.

(Respondents' Exhibit D, p. 26).

9. In spite of some conflicting evidence, the ALJ finds the Claimant's testimony regarding his mechanism of injury was credible and consistent with medical records in this case and is found as fact. It is further found that the Claimant did not tell his manager that he "reinjured" his back when he reported his injury.

10. The Claimant testified that on January 5, 2015, the day following his injury, he went to see Dr. Wilner for chiropractic treatment. Dr. Wilner's medical records indicate that the Claimant saw Dr. Wilner for treatment on January 5, 2015. The Claimant reported that he injured his back at work while lifting a 5 gallon bucket of mortar mix away from his body when he felt instant pain in his low back. The Claimant reported leaving work after lunch due to pain and stated he used a combination of ice and rest the remainder of the day. The Claimant reported a pain level of 8-9 out of 10 in the lumbar/lumbosacral region. The pain radiated to the gluteal region but did not travel into the hamstrings. The Claimant reported noticeable temporary relief after Dr. Wilner's treatment, taking the pain level report down to 4-5 out of 10 (Claimant's Exhibit 14).

11. Employer's First Report of Injury was completed by the Employer's Risk Manager, Richard Reyes, on January 6, 2016. The report noted the Claimant's injury occurred on January 4, 2016 and that Employer was notified that same day. The nature of the injury listed was a strain to the low back. The description of how the injury occurred states, "[Claimant] was assisting another associate and reinjured a previous injury. He is not seeking medical attention and was offer [sic]" (Claimant's Exhibit 1; Respondents' Exhibit D, p. 25). To the extent that this statement conflicts with the Claimant's testimony and other evidence, the ALJ finds that the Claimant's testimony is credible and the Claimant did not "reinjure" a previous injury.

12. The Claimant's next scheduled work day after his injury was on January 7, 2015. He called in to speak with his supervisor Victor and the Claimant told him he wanted to take the day off, but Victor asked him to come in. The Claimant attempted to come in to work on January 7, 2015 and had someone drive him, but getting out of the car the Claimant realized the pain was too much for him to be able to work. The Claimant told Victor that he would not be able to work and he went home. The Claimant testified that he told Victor the reason he couldn't work was due to back pain from the injury at work. The Claimant testified that after this he had more absences from work due to back pain from his work injury. He testified that he always told them when he called in to miss work that it was due to this. The Claimant testified that he never received any special instructions for calling off work after his work injury. He testified that he was told to give his managers a heads up about upcoming doctor or physical therapy appointments and he offered to provide the papers he received from the medical providers, but his supervisors never collected those papers. The Claimant testified that he missed work or was late to work or had to leave work early because of

his appointments. The Claimant testified that there were also occasions that he was late punching in to work because he had to speak with his managers about his work restrictions. With respect to the testimony related to absences or tardiness occurring after his work injury for the dates prior to March 17, 2015, the Claimant's testimony as to the reasons he was late or missed work or had to leave early subsequent to his work injury is credible and was not contradicted by the testimony of any other witnesses and is found as fact.

13. The Claimant saw Dr. Wilner again on January 8, 2015 for additional treatment. After adjustment, the Claimant reported that he was definitely better. The Claimant returned to see Dr. Wilner again on January 9, 2015 and he reported slight improvement. Dr. Wilner noted the Claimant still had to be driven to the appointment due to pain when sitting and hitting bumps. The Claimant reported his pain level as 6-7 out of 10 and Dr. Wilner noted that forward lumbar flexion increased his pain. At this visit, the pain was radiating into the upper hamstring region. On January 10, 2015, when the Claimant saw Dr. Wilner, he reported he was feeling better and rated his pain level at 5 out of 10. Dr. Wilner noted the Claimant was walking with greater ease. After treatment, the Claimant indicated that he planned on working the following day and he would continue with home care. Dr. Wilner noted that the Claimant called and cancelled his January 14, 2015 appointment and reported he was doing much better overall and the pain was mild. On January 17, 2015, the Claimant returned to treat with Dr. Wilner again reporting he had much more pain the previous 2 days. The Claimant reported he had been working and he exacerbated his condition by lifting materials. After treatment on that same day, the Claimant reported he felt better and his pain level decreased to 3-4 out of 10. The Claimant saw Dr. Wilner again on January 19, 2015 reporting that he hadn't been to work yet and his pain started that day at 2 out of 10 but the pain level was increased to 4 out of 10 after driving over to the appointment (Claimant's Exhibit 14).

14. On January 22, 2015, the Claimant saw Dr. Mark Foster for initial evaluation. The Claimant reported no prior low back pain but stated that he does see a chiropractor for chronic upper back and neck pain. The Claimant described a mechanism of injury to Dr. Foster generally consistent with his testimony at hearing and throughout the medical reports. Dr. Foster noted that the Claimant stated,

> On 1/4/15, [the Claimant] was lifting a bucket of mortar mix for a customer. He had his arms outstretched and twisted, and he felt a pull in his back. He continued to work, and within 15 minutes had severe tightening of the back. He went to tell his manager, and asked to go home for the day. No work comp claim was filed.

The Claimant expressed frustration to Dr. Foster at this visit with his Employer, namely, he stated that "they have discussed terminating him over this incident." He was also asked to mop at work which caused a worsening of his pain. The Claimant reported that he spoke with his manager again and they decided to file a work comp claim. The Claimant reported severe low back pain radiating down to both buttocks but not down to

his feet. Yet, Dr. Foster did note a calf cramp during the exam. Dr. Foster noted that the work relatedness of the injury was not yet determined and he wanted to see records from the Claimant's chiropractor. At this point, Dr. Foster felt that the Claimant experienced a lumbar strain that should resolve with conservative care. Dr. Foster provided temporary work restrictions of no lifting, repetitive lifting, carrying over 25 pounds and no reaching over the head or away from the body. The Claimant was scheduled for follow up visit in a week with Dr. Miller (Claimant's Exhibit 10, Respondents' Exhibit C, p. 15).

15. The Claimant saw Dr. William Miller for treatment on January 28, 2015. He reported the same mechanism of injury to Dr. Miller as he had to Dr. Foster. The Claimant reported that he began seeing his private chiropractor Dr. Wilner beginning on January 5, 2015 and was having a good response to the treatment. He had tried to work his next scheduled shift at work but left early secondary to increased symptoms. Dr. Miller noted he reviewed the chiropractic records from Dr. Wilner from January 5, 2015 to January 19, 2015. He noted that he requested prior records for the Claimant's chiropractic treatment. The Claimant was currently complaining of pain and tightness across the central lumbosacral spine that was worse with sitting or prolonged standing or walking. The prior shooting pain to his left gluteal region and posterior thigh was not present as of this visit. The Claimant reported that his sleep was improved with Flexeril. Dr. Miller continued the same temporary work restrictions as Dr. Foster and referred the Claimant for physical therapy (Claimant's Exhibit 11; Respondents' Exhibit C, p. 16).

16. The Claimant saw Dr. Wilner again on January 31, 2015 reporting that he was in a lot of pain and the pain had gradually increased over the previous 2 days. He reported a strong ache in the low back that radiated out to the sides (Claimant's Exhibit 14).

17. On February 4, 2015, the Claimant saw Dr. Miller out of cycle for his normally scheduled appointment for an interim evaluation. The Claimant now reported having pain shooting into both legs. He reported having conflict with his Employer over his work restrictions. The Claimant advised Dr. Miller that his supervisor told him to request "medical leave" and Dr. Miller advised the Claimant to follow up with HR to clarify roles and responsibilities. Dr. Miller advised that it is "ultimately his job to follow the restrictions provided. His employer should be attempting to accommodate him." On examination of the Claimant, Dr. Miller noted a "reduction of motion of the lumbar spine in all planes of movement with associated guarding" and noted "he is diffusely tender overlying the lumbosacral segment." The Claimant's same work restrictions from the prior visit were continued (Claimant's Exhibit 11; Respondents' Exhibit C, p. 17).

18. On February 5, 2015, the Claimant saw Dr. Graves for an initial evaluation. The Claimant's chief complaints were left greater than right lumbar spinal/lumbosacral junction pain, limited range of motion and muscle spasms. The Claimant reported that he did not initially identify this injury as a workers compensation injury and went to his private chiropractor for 7-8 times. The Claimant reported to Dr. Graves that the chiropractic treatment has helped reduce his pain and improve levels of

functions. Since filing a workers' compensation claim and being managed by Dr. Miller, the Claimant reported attending Select Physical Therapy which is helping him make some improvement functionally but he reported stabilization was difficult to obtain. On physical examination, Dr. Graves noted moderate limitations in all planes of motion with pain and stiffness present on end range. He also noted pain and muscle spasms on palpation. The Claimant exhibited a positive Patrick/FABRE test, positive Nachlas test , positive Gaenslen's test, positive Ely's test, positive Yeoman's test, positive Sulty test and positive Milram's test. Dr. Graves impression was a bilateral, left greater than right, lumbosacral sprain/strain, compensatory mechanical dysfunction in the lower lumbar spinal facets, primarily at L4/5 and L5/S1, pelvic unleveling and mild concerns of discogenic disease. Dr. Graves recommended chiropractic/myofascial release treatment, core strength rehabilitation, continued physical therapy and follow up treatment with Dr. Miller (Claimant's Exhibit 12).

19. The Claimant saw Dr. Miller again on February 13, 2015. The Claimant had attended physical therapy and 3 chiropractic sessions with Dr. Graves since his last visit with Dr. Miller. The Claimant reported feeling improved overall. Dr. Miller noted that an MRI of the Claimant's lumbar spine had been ordered but not yet approved. Dr. Miller noted that he personally spoke with Dr. Wilner about obtaining records of the Claimant's care prior to the work injury and Dr. Wilner assured him that the records would be received that day. The Claimant continued to report pain and tightness across the central lumbosacral spine, worse with sitting or prolonged standing/walking. The Claimant reported he was working within his restrictions with less conflict at work. He also reported he missed part of a shift on February 10, 2015 due to discomfort following a treatment session. Dr. Miller continued the Claimant on physical therapy and chiropractic with Dr. Graves. The Claimant was also continued on modified duty with temporary restrictions of no lifting, repetitive lifting, carrying over 25 pounds and change positions frequently (Claimant's Exhibit 11; Respondents' Exhibit C, p. 18).

20. On February 25, 2015, the Respondents filed a Notice of Contest. The reason given for the Notice of Contest was further investigation for prior medical records. There was no other reason checked on the Notice of Contest (Claimant's Exhibit 2).

21. On February 26, 2015, the Claimant saw Dr. Graves who noted he had treated the Claimant 5 times since the initial evaluation and the Claimant was minimally responding to treatment. Dr. Graves noted the Claimant experiences a significant reduction in pain following treatments, however upon returning to work and performing labor intensive activities, the Claimant's "symptom profile returns." Dr. Graves noted that the Claimant reported his job duties had recently changed and he was made a "store greeter" and since then he has not had any significant flare-ups with his symptoms. Dr. Graves continued to assess the Claimant with bilateral, left greater than right, lumbosacral junction strain/sprain, compensatory mechanical dysfunction, and pelvic unleveling, but noted that these conditions were responding to conservative treatment, but not stabilizing. Dr. Graves also noted a mild circumferential disc bulging at L3/L4

and L4/L5 without significant effect on the spinal canal (as evidenced on the February 20, 2015 MRI) (Claimant's Exhibit 12).

22. On February 27, 2015, the Claimant saw Dr. Miller again. The Claimant reported continued pain and tightness across the central lumbosacral spine and described his legs and hips as getting 'tired' easily and as 'dead weight.' As of this visit, Dr. Miller had reviewed the full medical records from Dr. Phil Wilner and he noted there were some visits for low back pain in March – April of 2014. Based on this, Dr. Miller determined that the injury was work related. On reviewing the MRI of the Claimant's lumbar spine, Dr. Miller noted mild disk bulging, but no significant pathology. In the treatment plan under no. 2, Dr. Miller noted to "continue work restrictions." However, on the form, the boxes listing the specific restrictions were not populated and the restrictions were not written out. However, Dr. Miller did indicate the Claimant was on modified duty and that restrictions were continued on the form. Consistent with Dr. Miller's testimony at the hearing and based on reasonable inferences from the form, the ALJ finds as fact that the Claimant's temporary work restrictions through March 18, 2015 were the same as they were at the Claimant's last visit with Dr. Miller, namely, no lifting, repetitive lifting, carrying over 25 pounds and change positions frequently (Claimant's Exhibit 11; Respondents' Exhibit C, p. 18).

23. The Claimant testified that he was about 10-25 minutes late on March 17, 2015 due to car trouble and his car would not start. He worked a full day on that date. Then, the Claimant testified, on March 18, 2015, he clocked in and he was asked if he would like to take the day off because it wasn't expected to be busy. The Claimant testified that he stated that he needed as many hours as possible. Before the Claimant clocked out at lunch time, he was told to go to the office and when he arrived, Victor and Richard advised the Claimant his employment was being terminated due to attendance.

24. On March 18, 2015, the Claimant received a Progressive Disciplinary Notice for tardiness on February 4, 2015, February 18, 2015, February 19, 2015, February 25, 2015, February 26, 2015, February 27, 2015, March 4, 2015 and March 17, 2015 and for work absences on January 7, 2015, January 17, 2015, January 31, 2015, February 3, 2015 and February 5, 2015. The Notice provided that these were violations of the Company's attendance and punctuality standards and the Claimant's employment was terminated (Respondents' Exhibit B, p. 11). The ALJ finds that for the dates prior to March 17, 2015, the reasons the Claimant was absent or tardy or otherwise had an attendance occurrence were related to the Claimant's work injury. However, per the Claimant's prior statements and his testimony at the hearing, the reason the Claimant had an attendance occurrence on March 17, 2015 was due to his car malfunctioning and not related to his work injury. As of March 17, 2015, the Claimant's previous "final warning" disciplinary notice administered on December 23, 2014 for a December 15, 2014 absence would have been considered an "active" notice as it was less than six (6) months prior to March 17, 2015. Per the Employer's policy (see Exhibit D and paragraph 2 above), if there is a one (1) additional attendance occurrence after an active final counseling/warning, then managers are required to administer a termination.

25. The Claimant saw Dr. Graves on March 19, 2015 and Dr. Graves noted the Claimant had seen him 2 times since February 26, 2015 and was making some additional improvement in functional levels but still had a degree of lumbosacral junction tightness/pain. Dr. Graves noted that the Claimant reported that he was fired from his job this week and he was upset about this and felt he was wrongfully terminated. Dr. Graves noted that "apparently, there [sic] some discrepancy with his work restrictions on his WC 164 form, which led towards his termination. Additionally, during the initial stages of his workers compensation injury, he missed work due to increased pain, which was apparently not documented through Exempla Occupational Medicine." The Claimant reported that he was compliant with his independent exercise routine and that it brought him temporary reductions in pain and increases in function, but that the benefit was not lasting. Dr. Graves recommended continued chiropractic care and structured physical therapy (Claimant's Exhibit 12).

26. The Claimant saw Dr. Miller on March 23, 2015 and reported that he was terminated by his employer for cause at the end of the prior week due to the fact his car wouldn't start and he was late for work. Dr. Miller continued to assess the Claimant with lumbar strain and the treatment plan was to continue the work restrictions, physical therapy, chiropractic with Dr. Graves and to consult with a physiatrist if the Claimant made no progress (Claimant's Exhibit 11).

27. The Claimant saw Dr. Miller on March 30, 2015 and he reported a flare of symptoms on March 28, 2015 "after fairly innocuous activity" which included spasm and pain down the left leg. Given the interim flare of symptoms and minimal progress in therapy, Dr. Miller referred the Claimant for a consult for physiatry (Claimant's Exhibit 11).

28. The Claimant saw Dr. Robert Kawasaki on April 20, 2015. Dr. Kawasaki noted that the Claimant's treatment was managed by Dr. Miller and the Claimant had undergone physical therapy two times a week, received chiropractic care from Dr. Graves, received acupuncture and has been engaged in an independent exercise program. The Claimant reported that he felt he was improving overall. The Claimant reported pain decreased when lying on his back and increased with walking, standing, sitting or driving more than 15-20 minutes and with forward flexion. The Claimant reported that he was terminated from his employment for poor attendance. Dr. Kawasaki noted the Claimant's effect was somewhat flattened and his mood appeared somewhat depressed. After examination, Dr. Kawasaki's impression was lumbar strain with primarily muscular strain and no significant disc pathology noted. Dr. Kawasaki noted that some facet arthropathy may be contributory to the Claimant's pain. Dr. Kawasaki discussed treatment options which included facet joint injections but the Claimant advised that he wanted to hold off on any type of injections. Dr. Kawasaki noted "some red flags for delayed recovery potential" and suggested a pain psychologist (Claimant's Exhibit 13).

29. The Claimant saw Dr. Kawasaki again on May 11, 2015 and the Claimant reported overall improvement with physical therapy, chiropractic treatments, and massage. The Claimant reported he had decreased his Flexeril use and felt he was 75-85% better. Dr. Kawasaki diagnosed lumbar strain and sacroiliac joint strain but noted that with the improvements made the Claimant would likely avoid interventional procedures such as facet joint injections and sacroiliac injections (Claimant's Exhibit 13).

30. The Claimant saw Dr. Miller on May 18, 2015. Dr. Miller noted that the Claimant reported improvement since the last visit with him and that Dr. Kawasaki was considering injections but that the Claimant preferred not to undergo injections at that time (Claimant's Exhibit 11).

31. The Claimant saw Dr. Kawasaki again on June 8, 2015 and reported "overall, he is doing much better and feels like he is almost back to normal." Dr. Kawasaki noted the Claimant was doing quite well at this point and was very close to maximum medical improvement. Dr. Kawasaki opined that he did not feel he needed to see the Claimant again, but would follow up if requested, per Dr. Miller's discretion (Claimant's Exhibit 13).

32. The Claimant saw Dr. Miller on June 12, 2015 reporting some improvement, but that physical therapy seems to be making him worse. Dr. Miller noted that the Claimant would finish with physical therapy and continue with chiropractic with Dr. Graves but be "weaning off" (Claimant's Exhibit 11).

33. The Claimant saw Dr. Graves on July 9, 2015. Dr. Graves reported that in addition to the previous chiropractic care, the Claimant was provided with trigger point dry needling and biomedical acupuncture and there was a greater focus on independent core strengthening/rehabilitative protocols. The Claimant reported that he has no significant flare-ups since May 14, 2015. Dr. Graves noted that the Claimant's physical examination changed minimally since that time as well. Dr. Graves recommended release from active chiropractic treatment but continuation of a prescribed TENS unit, the independent core strengthening/rehabilitative protocols and follow up with Dr. Kawasaki for pain management if necessary (Claimant's Exhibit 12).

34. The Claimant saw Dr. Miller on July 10, 2015. Dr. Miller noted that the Claimant finished up with his 30th session of physical therapy and continued maintenance chiropractic with Dr. Graves. Based on a review of the latest physical therapy notes, Dr. Miller recommended extending the physical therapy and he also continued maintenance chiropractic care with Dr. Graves (Claimant's Exhibit 11).

35. On July 30, 2015 the Claimant saw Dr. Lawrence Lesnack for an independent medical examination. Dr. Lesnack authored a written report also dated July 30, 2015. The Claimant described a mechanism of injury on January 4, 2015 to Dr. Lesnack as follows:

> As he was attempting to lift a five-gallon of mortar mix weighing approximately 50-60 pounds out of a shopping care, he developed acute low back /buttock pains. Approximately 20 minutes later, he states that while reaching overhead he 'stretched' to apply a tag onto a piece of lumber. His low back and buttock pains seemed to worsen significantly. He states that soon afterward, he was merely standing and suddenly coughed. He states that he then developed 'horrible pain' and could hardly move. (Respondents' Exhibit A, p. 2).

Dr. Lesnack reviewed the Claimant's course of conservative treatment with the Claimant. Dr. Lesnack notes that the Claimant advised him that as early as January 12, 2015, he was informed that he might be terminated from his employment because of excessive absences without accrued sick leave and that he saw his assistant manager and hr and demanded that a work injury claim be filed on his behalf. After this, the Claimant reported that he treated through the worker's compensation system including chiropractic treatment and massage per Dr. Graves and physiatry evaluation with Dr. Kawasaki (Respondents' Exhibit A, p. 2-3). The Claimant reported that on a pain scale rating of 0 to 100, his best pain level is 0 and he was currently at a 10. The Claimant advised Dr. Lesnack that he had received chiropractic care from Dr. Wilner prior to his January 4, 2015 injury for his upper back and neck as well as his low back. The Claimant's current medications when he met with Dr. Lesnack were 800 mg of ibuprofen and 10mg of Flexeril as needed for muscle spasms (Respondents' Exhibit A, p. 3). Dr. Lesnack reviewed and summarized medical records dating from January 22, 2015 to June 25, 2015. The report does not indicate that Dr. Lesnack reviewed the chiropractic records of Dr. Wilner from prior to the January 4, 2015 work injury at that point (Respondents' Exhibit A, pp. 4-7). On examination, Dr. Lesnack noted that the Claimant ambulated with no signs of an antalgic gait and was able to perform lumbar spine range of motion activities. Dr. Lesnack noted the Claimant was able to forward flex to 90 degrees with no symptoms but upon returning to an upright position, the Claimant complained of some mild low back aching sensations. The Claimant was able to perform sitting, supine and reversed straight leg raising maneuvers and Dr. Lesnack noted he had full range of motion in his thoracic spine in all planes without reproduction of symptoms. Dr. Lesnack noted that the Claimant reported, "minimal tenderness to palpation over his left greater than right superior sacrum at its midline" with no tenderness to palpation over either superior sacral sulcus or either greater trochanter or either sciatic notch. Dr. Lesnack found no evidence of specific trigger points or muscle spasm (Respondents' Exhibit A, pp. 7-8). Based on his review of medical records and the physical examination, Dr. Lesnack opined that, "the patient exhibits pain behaviors and nonphysiologic findings and is very dramatic at times" which Dr. Lesnack found "would suggest that his subjective complaints are unreliable at best." Based on this opinion, Dr. Lesnack went on to state that, "one must rely solely on reproducible objective findings rather than his subjective complaints." Because Dr. Lesnack opines that there were "no significant objective findings" to support any type of acute injury to his lumbar spine as a result of occupational activities on January 4, 2015, Dr. Lesnack concludes that the Claimant did not sustain any acute work related injury on that date (Respondents' Exhibit A, p.9). Dr. Lesnack further opined, that regardless of causality,

the Claimant continued to have frequent subjective complaints without objective findings to support them, so he required no further diagnostic testing or interventional treatments. Rather, the Claimant should continue to focus on lumbar spine stabilization and core strengthening. Finally, Dr. Lesnack opined that the Claimant required "no functional limitations or work restrictions whatsoever, regardless of the causality of his current subjective complaints" (Respondents' Exhibit A, pp. 9-10).

36. On August 5, 2015, the Claimant saw Dr. Miller who noted that the Claimant had 3 remaining physical therapy sessions, was discharged from chiropractic care effective earlier this same day and was previously advised to follow up "as needed" with the physiatrist Dr. Kawasaki. The Claimant reported that he is sore and stiff but has had no interim leg symptoms. The Claimant also reported his sleep was well controlled with medications but that he had a sense of anxiety and concerns about his ability to return to work. Dr. Miller referred the Claimant to Dr. Vandorsten for cognitive behavioral therapy regarding the chronicity of his symptoms and return to work issues (Claimant's Exhibit 11).

37. On September 11, 2015, the Claimant saw Dr. Miller reporting that he continued to improve with occasional flares such as a spasm in the middle of the night for which he takes cyclobenaprine. Dr. Miller noted that the Claimant had seen Dr. Vandorsten for psychology twice and that Dr. Vandorsten would like to continue to follow the Claimant. The Claimant reported that he was stiff but had no more leg symptoms. The Claimant reported that he was not comfortable lifting because he did not know his limits (Claimant's Exhibit 11). In the Physician's Report of Workman's Compensation Injury form dated September 11, 2015, Dr. Miller reported that the Claimant was still on modified duty with temporary restrictions of no lifting, carrying, pushing or pulling over 40 pound. He reported the Claimant was discharged from physical therapy after 36+ sessions and discharged from chiropractic with Dr. Graves effective August 5, 2015 and continuing to see Dr. Vandorsten for psychology (Claimant's Exhibit 11 and 12, last page of exhibit 12).

38. The Claimant saw Dr. Miller on October 7, 2015. Dr. Miller noted that the Claimant reported that he continued to improve with occasional flares in symptoms including one spasm episode in the middle of the night since the last visit. The Claimant reported that he was walking and stretching and he just started working at a local golf course. Dr. Miller noted that "MMI will follow on subsequent visits" pending the status of psychology visits with Dr. Vandorsten and the status of a requested gym pass with 6 personal trainer sessions. The Claimant's work restrictions were continued and Dr. Miller noted that he anticipated impairment (Claimant's Exhibit 11).

39. The Claimant testified at the hearing that he provided Dr. Miller's work restrictions to his managers but he often had to do work in his department that did not follow his working restrictions. The Claimant testified that his pain would worsen when he had to complete job duties outside of his work restrictions. The Claimant testified that when he would complain to his supervisors about having to perform work outside of his restrictions that they would just tell him to just do the best he could or to do what he

could. He also testified that he was verbally harassed by his supervisors and called lazy and a sissy and they laughed and said he couldn't do anything after he provided his work restrictions to them.

40. The Claimant testified that he was hired by Broken Tee golf course in late September of 2015 and he works between 10-15 hours per week at a pay rate of $8.50 per hour.

41. Dr. William Miller testified at the hearing. Dr. Miller was an authorized treating physician for the Claimant's worker's compensation injury. Dr. Miller testified that the Claimant was first seen by Dr. Foster in his office on January 22, 2015. Dr. Miller began treating the Claimant at the next visit to the same office on January 28, 2015. Dr. Miller testified that the Claimant told him that his mechanism of injury involved lifting a five gallon bucket of mortar that weighs approximately 50-60 pounds when he experienced the immediate onset of low back pain. The Claimant mentioned that he was leaning forward with his arms outstretched, with a twisting motion. Dr. Miller also testified that he was familiar with the Claimant stating that shortly after the lifting, he developed further pain reaching upward while tagging lumber and then still additional pain when he coughed afterward. Dr. Miller's assessment of the Claimant as of January 28, 2015 was that the Claimant had a lumbar strain and he referred him for physical therapy. Dr. Miller discussed some other considerations in the event the Claimant's condition didn't improve. Dr. Miller testified that the prior chiropractic care that the Claimant received was principally for his neck and upper back. Dr. Foster has initially imposed lifting restrictions of 25 pounds for lifting, carrying, pushing and pulling and Dr. Miller continued more or less the same restrictions and added the ability to change positions frequently. Dr. Mill also testified about the restriction on overhead lifting or reaching away from the body. Dr. Miller testified that by February 4, 2011, the Claimant had continued symptoms so he requested an MRI. At that point, the diagnosis was the same so there was no change to the Claimant's restrictions. As of February 27, 2015, Dr. Miller had the results of the MRI and the prior records from the Claimant's chiropractor. Dr. Miller testified that with respect to the chiropractic notes, the Claimant treated for about a month for his neck, upper back and lower back from March to April of 2014. Then after April 2014 onward, the Claimant had no additional lumbar treatments. Based on those notes, Dr. Miller testified that it was his opinion that the Claimant had no prior back pain problems that were independently disabling as of the date of his January 4, 2015 injury. Once Dr. Miller had those records, Dr. Miller was able to determine that the Claimant's condition resulted from his work-related mechanism of injury. Dr. Miller also testified that although there is some confusion in the February 27, 2015 report about the Claimant's work restrictions, this was an error and the Claimant should have had actual listed restrictions on the form, but the restrictions didn't populate into the form. However, he did check the box that the Claimant was under modified duty and he intended to keep the Claimant on the same restrictions that he had been on previously.

42. Dr. Miller further testified that between March 23, 2015 and October of 2015, the Claimant saw Dr. Miller on a roughly monthly basis. He was referred to Dr. Graves, a chiropractor and for physical therapy at Select PT. He was also referred to

Dr. Kawasaki who recommended some facet based injections. Over this time period, the Claimant reported variable symptoms, sometimes he would have leg symptoms and sometimes he wouldn't and the Claimant would improve for a time then have interim flares. In June, Dr. Kawasaki had discharged the Claimant from his care because the Claimant was not interested in injections and he had been improving. Later, Dr. Miller referred the Claimant to Dr. Van Dorston, a pain psychologist, for a couple of visits. By the Claimant's October 2015 visit with Dr. Miller, Dr. Miller felt that the Claimant was approaching MMI and he was planning on placing him at MMI with an impairment rating and possibly recommending a gym pass and one more visit with Dr. Van Dorston. Dr. Miller ultimately opined that the Claimant did suffer a work related injury on January 4, 2015 and he anticipated that the Claimant would have permanent impairment as a result. Dr. Miller testified that based on table 53 of the AMA Guidelines for Evaluation on Impairment, the Claimant would meet the criteria specific to low back pain with continuous symptoms for greater than six months even without significant findings on the MRI. On cross-examination, Dr. Miller did agree that there would need to be objective findings, but that these could be objective findings on examination such as variable lower extremity symptoms, reduction in motion snd a lack of progression with therapy interventions. Dr. Miller also agreed that the degenerative pathology noted on the MRI report would not be attributed to the Claimant's work injury, but he did attribute the development of symptoms to the work injury. Dr. Miller testified that due to legal proceedings, the Claimant's next visit after October 2015 was delayed, but that his plan had been to place the Claimant at MMI whenever the next visit occurred.

43. Dr. Lawrence Lesnack also testified at the hearing as an expert in the areas of physical medicine and as to Level II accreditation matters. Dr. Lesnack testified that he performed an IME of the Claimant on July 30, 2015. As part of his IME, he reviewed medical records after the evaluation, including the chiropractic records of Dr. Wilner and the Exempla records from Dr. Foster and Dr. Miller. Dr. Lesnack also testified that he was present for Dr. Miller's testimony at the hearing. Dr. Lesnack also obtained a history from the Claimant and conducted a physical examination. Based on all of this, Dr. Lesnack reached the medical opinions contained in his written IME report. Dr. Lesnack testified that for the most part he found the Claimant's physical examination to be normal. He testified that the Claimant complained of some aching sensations after bending forward and then returning to an upright position but found the Claimant's strength and sensation reflexes normal. Dr. Lesnack also found that maneuvers to look at the SI joints and hips were normal. Dr. Lesnack testified that he noted minimal tenderness with palpation. Dr. Lesnack disagreed, in part, with Dr. Miller's previous discussion of the Table 53 rating. Dr. Lesnack opined that Table 53 would require reproducible, objective findings to provide a diagnosis so that you could give a Table 53 rating. Dr. Lesnack opined that there were no objective findings on exam that would qualify for a diagnosis in this case as the Claimant had minimal structural abnormalities on an MRI which are normal findings in a man of the Claimant's age. Dr. Lesnack further testified that there is a section that requires six months of pain and rigidity which also requires objective findings on examination, such as a positive straight leg raise test, a reflex finding or a true neurologic strength deficit. Dr. Lesnack opined that none of this was found. Rather, Dr. Lesnack stated that Dr. Miller talked about subjective

complaints such as tenderness on palpation which Dr. Lesnack argues is not an objective finding. As for the MRI, Dr. Lesnack opines that the Claimant's mild degenerative disk changes are a normal finding for a 33 year old man. Dr. Lesnack testified that on examination, the Claimant was pleasant but "very dramatic" which is not an issue when taken alone, but when considered in the context of the medical records and non-physiologic findings, Dr. Lesnack opines that the reported mechanism of injury doesn't make sense. He opined that the described mechanism of lifting a 50-60 pond bucket of mortar from waist level, even with a twisting motion, doesn't load the lumbar spine. Dr. Lesnack opined that to load the lumbar spine you have to be bent forward at the waist at least 70-90 degrees and leaning over slightly would put the Claimant at 10-20 degrees. Dr. Lesnack further opined that twisting in an upright position, without having that lumbar flexion to it, is not going to load the lumbar spine. Dr. Lesnack also finds that reaching up and tagging something would not load the lumbar spine. The only action described by the Claimant that Dr. Lesnack opines could have possibly loaded the lumbar spine was a forceful cough and that is not work-related. Based on the dramatic presentation of symptoms combined with a normal MRI and non-physiologic findings initially, and a history of being treated for spine pain within the past year, Dr. Lesnack finds that there are no objective findings that the Claimant suffered a specific injury to his lumbar spine on January 4, 2015.

44. On cross-examination, Dr. Lesnack testified that even if the same place is palpated and the same result is reached every time, this is still subjective. Dr. Lesnack did agree that you can feel acute spasms, but a report of "tightness" still refers to subjective patient reporting. In Dr. Lesnack's report, he referred to "minimal tenderness" upon palpation. Dr. Lesnack testified that this means that the Claimant complained of the tenderness, not that Dr. Lesnack could feel the tenderness. Upon reviewing Dr. Wilner's chiropractic records at the hearing, Dr. Lesnack agreed that there was a reference in April 2014 which says that the Claimant's low back symptoms were under control. He further agreed that there were no further references in Dr. Wilner's records after April 2014 regarding low back complaints or treatment until after January 4, 2015 although Dr. Lesnack's written report referenced "frequent symptoms in his low back" just prior to January 4, 2015.

45. Having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, Dr. Miller and Dr. Lesnack at the hearing, the ALJ finds the opinions of the Claimant's treating physician, Dr. Miller, which are in part based on, and supported by, the medical records of Dr. Graves, Dr. Kawasaki, and Dr. Wilner, to be more credible and persuasive than the opinions of Dr. Lesnack. The opinions of Dr. Miller as to the work-relatedness of the Claimant's January 4, 2015 injury, the progression of the Claimant's symptoms during treatment and the Claimant's condition are found to be more reliable and persuasive than those of Dr. Lesnack and are found as fact.

CONCLUSIONS OF LAW

Generally

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), the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

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

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial*

Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to his lower back on January 4, 2015 and the Claimant's testimony regarding his mechanism of injury was credible and no persuasive evidence was presented to contradict his testimony. Although Respondents have argued that the condition was pre-existing, the medical reports in evidence do not support this theory. The Claimant had received some chiropractic treatment prior to the injury, but it was primarily focused on his upper back and neck. The last record of low back chiropractic treatment before the work injury was treatment that Dr. Miller noted had ended in April of 2014. Once the Claimant's authorized treating physician, Dr. Miller, had the opportunity to review the older chiropractic records predating the January 4, 2015 incident, Dr. Miller determined that the injury was work related and that any prior medical history was non-contributory. Dr. Graves and Dr. Kawasaki also provided continuing treatment for the Claimant and noted symptoms and diagnoses similar to Dr. Miller over the course of the Claimant's treatment for the January 4, 2015 work injury.

The ALJ, having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, Dr. Miller and Dr. Lesnack at the hearing, found the opinions of the Claimant's treating physician, Dr. Miller, which are in part based on, and supported by, the medical records of Dr. Graves, Dr. Kawasaki, and Dr. Wilner, to be more credible and persuasive than the opinions of Dr. Lesnack. The opinions of Dr. Miller as to the work-relatedness of the Claimant's January 4, 2015

injury, the progression of the Claimant's symptoms during treatment and the Claimant's condition were found to be more reliable and persuasive than those of Dr. Lesnack.

As of the date of the hearing, there was also evidence to establish that the Claimant continued to have symptoms, but that he was approaching MMI and Dr. Miller had anticipated putting the Claimant at MMI soon.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on January 5, 2015 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). 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).

Here the Claimant began treating with Dr. Miller and Kawasaki and was also referred to Dr. Graves for chiropractic care. As of the date of the hearing, his treating physicians continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury he suffered on January 4, 2015. Although, Dr. Miller opined that the Claimant was still actively treating for the January 4, 2015 work injury and was still subject to temporary work restrictions, as of the date of the hearing, the Claimant had not been placed at MMI. Thus, the conditions related to the initial injury were still present and may require treatment. To the extent that Dr. Miller has since placed the Claimant at MMI, that may affect medical benefits going forward from that point.

However, prior to being placed at MMI by Dr. Miller, the Respondents shall be liable for the continued medical treatment recommended by Dr. Miller and his authorized referrals that is reasonably necessary to cure and relieve the Claimant from the effects of his January 4, 2015 work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that he suffered a compensable work injury on January 4, 2015, but he failed to prove that he suffered a wage loss as a result of that injury prior to the termination of his employment. The Claimant was working under lifting, pushing and pulling restrictions imposed by Dr. Miller (and Dr. Foster prior to that) as of January 22, 2015. However, there was not substantial evidence that the Claimant suffered any wage loss until March 18, 2015, the day following the termination of the Claimant's employment with Employer.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for his termination on March 17, 2015.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The Employer has an Attendance and Punctuality Policy which was communicated to the Claimant and which the Claimant received in writing. Essentially, hourly employees are expected to report for work at the assigned time, adhere to the work schedule, work through scheduled shifts, perform assigned duties and take meal periods as scheduled. Failure to adhere to the attendance and punctuality policy will result in discipline. The Employer's Progressive Disciplinary Process policy is that "the discipline process will begin when an associate receives the third unexcused occurrence in a six-month period. Each absence or tardy is considered one occurrence.

If there are 3 occurrences in a 6 month period, the managers are to provide a "coaching." After a "coaching" has occurred, if there are 3 additional occurrences, the managers are required to issue a "counseling." After an employee receives a "counseling," if there is 1 additional occurrence, the managers are required to issue a "final warning." After an active Final Counseling, and there is 1 additional occurrence, managers are required to administer a "termination." There are certain absences and tardiness that is considered "excused." These "excused" absences and tardies include "State-law protected time off." In this section, the policy refers the reader to "State Exceptions" in the LOA HR SOP and Time-Off Benefits HR SOP for additional details, but this was not offered or admitted into evidence. In reference to the Employer's disciplinary policy, the term "active" refers to a disciplinary action that is within six (6) months from the date when the action was administered. In tracking "active" disciplinary notices, "a notice remains visible for six months" and "at the end of the six-month period, the notice rolls off and is no longer "active." When an employee has been employed for fewer than 120 days, then he or she should receive a "final warning" if there are 3 occurrences in the first 120 day period and then proceed to immediate termination for 1 additional occurrence that occurs in the first 120 days. However, if no further occurrence occurs in the first 120 days, then the "final warning" issued during that probationary period is treated as a "coaching" notice. 35).

On September 20, 2014, the Claimant received a Progressive Disciplinary Notice for being unexcused absent on 8/24 and tardy on 7/4 and 9/16. He was advised that he should refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant's injury and, thus, were unrelated to the Claimant's work injury. This notice was entitled a "final warning" in the records under the Employer's Progressive Disciplinary Process as it occurred in the first 120 days of employment. As there were no further occurrences in the first 120 days of employment, this notice was treated as a "coaching" notice per the Employer's policy.

On November 29, 2014, the Claimant received a Progressive Disciplinary Notice for arriving over 3 hours late on 10/6/2014, arriving 13 minutes late on 11/21/2014 and arriving 31 minutes late on 11/23/2014. The Claimant was advised to refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant's injury and, thus, were unrelated to the Claimant's work injury. This notice would be a "counseling" under the Employer's Progressive Disciplinary Process since the "final warning" issued in the Claimant's first 120 probationary period had converted to a "coaching" notice. That "coaching" notice would have been less than 6 months prior to the November 29, 2014 notice, so the September 20, 2014 notice would still be "active."

On December 23, 2014, the Claimant received a Progressive Disciplinary Notice for being absent on December 15, 2014 with insufficient sick time to cover his scheduled hours. The notice stated that this violation progressed the Claimant to "final

warning. The Claimant was advised to refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. This attendance occurrence happened before the Claimant's injury and is unrelated to the work injury.

The Claimant testified that he was about 10-25 minutes late on March 17, 2015 due to car trouble and his car would not start. He worked a full day on that date. Then, the Claimant testified, on March 18, 2015, he clocked in and he was asked if he would like to take the day off because it wasn't expected to be busy. The Claimant testified that he stated that he needed as many hours as possible. Before the Claimant clocked out at lunch time, he was told to go to the office and when he arrived, Victor and Richard advised the Claimant his employment was being terminated due to attendance.

On March 18, 2015, the Claimant received a Progressive Disciplinary Notice for tardiness on February 4, 2015, February 18, 2015, February 19, 2015, February 25, 2015, February 26, 2015, February 27, 2015, March 4, 2015 and March 17, 2015 and for work absences on January 7, 2015, January 17, 2015, January 31, 2015, February 3, 2015 and February 5, 2015. The Notice provided that these were violations of the Company's attendance and punctuality standards and the Claimant's employment was terminated. The ALJ found that for the dates prior to March 17, 2015, the reasons the Claimant was absent or tardy or otherwise had an attendance occurrence were related to the Claimant's work injury. However, per the Claimant's prior statements and his testimony at the hearing, the reason the Claimant had an attendance occurrence on March 17, 2015 was due to his car malfunctioning and not related to his work injury. As of March 17, 2015, the Claimant's previous "final warning" disciplinary notice administered on December 23, 2014 for a December 15, 2014 absence would have been considered an "active" notice as it was less than six (6) months prior to March 17, 2015. Per the Employer's policy, if there is a one (1) additional attendance occurrence after an active final counseling/warning, then managers are required to administer a termination.

While the Claimant's counsel argued that the Claimant's attendance issues were related to his injury-producing activity, the weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance policies for reasons other than his work injury. The Claimant's employment was terminated as a result of these violations and he is not entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on January 4, 2015.

2. The Respondents are liable for medical treatment recommended by Dr. Miller or by his referrals, that is reasonably necessary to cure and relieve the Claimant from the effects of his January 4, 2015 work injury.

3. The Claimant is responsible for termination and the Claimant's claim for total temporary disability benefits is denied and dismissed.

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

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

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

DATED: April 18, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether Claimant has established by a preponderance of the evidence that a weight loss program is reasonable, necessary, and causally related treatment for his February 19, 2015 industrial injury.

STIPULATIONS

The parties stipulated that Respondents would admit for temporary partial disability (TPD) benefits beginning July 24, 2015, with interest, in exchange for Claimant withdrawing the issue of penalties with prejudice.

FINDINGS OF FACT

1. Claimant works for Employer as a warehouse/forklift driver and has been so employed by Employer for approximately 15 years. Claimant is 52 years old.

2. On February 19, 2015 Claimant sustained a compensable right knee injury after slipping on ice while unloading products from his work truck.

3. On February 19, 2015 Claimant was evaluated by Matthew Miller, M.D. Claimant reported that he was unloading windshields when he slipped on ice and twisted his right knee. Claimant reported no prior right knee injuries. Claimant reported a pain level of 8/10, limping, popping sounds, stiffness, swelling, and tenderness in his right knee. Dr. Miller assessed knee strain and ordered a right knee MRI to rule out meniscus tear. *See* Exhibit C.

4. On February 26, 2015 Claimant underwent an MRI of his right knee interpreted by Eduardo Seda, M.D. Dr. Seda provided an impression of: complex tear of the body and posterior horn of the medial meniscus with the posterior meniscal root markedly attenuated; and degenerative cartilage changes in the patellofemoral compartment. *See* Exhibit F.

5. On March 5, 2015 Claimant was evaluated by Dr. Miller. Dr. Miller noted that an MRI performed one week prior showed a torn medial meniscus in the right knee. Dr. Miller noted Claimant was still in pain and couldn't walk very well without crutches. Dr. Miller assessed acute meniscal tear of the knee and referred Claimant to an orthopedic specialist for evaluation for meniscectomy. *See* Exhibit C.

6. On March 16, 2015 Claimant was evaluated by orthopedic surgeon Michael Hewitt, M.D. Claimant reported no prior history of knee injury. Claimant reported medial and lateral knee pain with catching and popping. Dr. Hewitt noted

Claimant was ambulating with crutches. Dr. Hewitt reviewed the MRI of Claimant's right knee as well as x-rays of Claimant's right knee. Dr. Hewitt noted that Claimant understood that he had degenerative change within the knee but that Claimant noted an acute onset of pain after the slip at work. Dr. Hewitt discussed treatment options that included knee arthroscopy. Dr. Hewitt explained to Claimant that the knee arthroscopy would not significantly alter the natural history of his arthritis. Claimant elected to proceed with surgery. *See* Exhibit I.

7. On April 7, 2015 Claimant underwent right knee surgery performed by Dr. Hewitt. The preoperative diagnoses included: right knee medial meniscal tear; and right knee arthritis. The postoperative diagnoses included: right knee medial meniscal tear; diffuse grade IV chondromalacia central patella; localized grade II chondromalacia medial femoral condyle; and localized grade III chondromalacia lateral femoral condyle. Dr. Hewitt also noted moderate sized peripheral osteophytes in the medial femoral condyle. *See* Exhibits 11, K.

8. On April 28, 2015 Claimant was evaluated by Dianne Adams, D.O. Dr. Adams noted that Claimant was there for a recheck of his right knee following his April 7 surgery. Claimant reported a pain level of 6/10. Dr. Adams noted that Claimant had functional improvement and was attending physical therapy. *See* Exhibit C.

9. On May 18, 2015 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt noted Claimant had a relatively non-antalgic gait, no significant knee effusion, and that his incisions were healing well. Dr. Hewitt noted Claimant was six weeks post knee arthroscopy where he was found to have moderate knee arthritis. Dr. Hewitt performed a cortisone injection into Claimant's right knee. *See* Exhibit D.

10. On May 26, 2015 Claimant was evaluated by Virginia Hrywnak, D.O. Claimant reported that he was not feeling better and that he had a lot of pain in his right knee. Claimant wanted to get a second opinion from orthopedics. Dr. Hrywnak referred Claimant to orthopedics for a second opinion per Claimant's request. *See* Exhibit C.

11. On June 2, 2015 Claimant was evaluated by William Ciccone, M.D. Claimant reported a work related injury in February for which he underwent a knee arthroscopy with partial meniscectomy. Claimant reported some persistent pain over the anterior aspect of the knee and somewhat medially as well. Claimant reported pain along the patellofemoral joint with grinding noted and that a recent steroid injection to his knee provided minimal relief. Dr. Ciccone opined that radiographs showed moderate degenerative changes in the right knee more significant in the patellofemoral joint. Dr. Ciccone assessed right knee degenerative joint disease. Dr. Ciccone noted that he discussed with Claimant that Claimant had pain in his knee prior to his workers' compensation injury and that continued physical therapy would be appropriate. Dr. Ciccone discussed that he felt Claimant was not doing any damage to his knee, but that Claimant had some exacerbation of his arthritic symptoms. *See* Exhibits 9, B.

12. On June 16, 2015 Claimant was evaluated by Dr. Ciccone. Claimant reported persistent pain in his right knee associated with locking. Dr. Ciccone noted diffuse pain about the knee mostly in the patellofemoral joint and significant pain with patellofemoral grinding. Dr. Ciccone assessed right knee pain with degenerative changes, and right knee degenerative joint disease. Dr. Ciccone opined that the majority of Claimant's symptoms were coming from the degenerative changes within Claimant's knee. Dr. Ciccone opined that given the significance of Claimant's disease from an operative perspective, the only reasonable procedure would be a total knee replacement. *See* Exhibits 9, B.

13. On August 3, 2015 Claimant was evaluated by Dr. Hewitt. Claimant reported no significant long term benefit from the May cortisone injection. Dr. Hewitt noted that Claimant had a mildly antalgic gait. Dr. Hewitt discussed treatment options with Claimant and noted that Claimant had a meniscus tear with underlying degenerative arthritis. Dr. Hewitt opined that the meniscal tear was addressed with the knee scope surgery, but that the natural history of arthritis was not significantly altered by the surgery. Dr. Hewitt noted that Claimant's future treatment options included optimizing body weight, a strengthening program, anti-inflammatories, repeat cortisone injection, and/or viscosupplementation injections. Claimant reported that he wanted to consider total knee replacement. Dr. Hewitt opined that Claimant's arthritis did not appear to be far enough advanced for a total knee replacement. Dr. Hewitt opined that Claimant would need to pursue a total knee replacement through Claimant's own insurance. *See* Exhibits 12, D.

14. On August 28, 2015 Claimant was evaluated by Caroline Gellrick, M.D. Claimant reported to Dr. Gellrick that prior to his February, 2015 work injury he was 100% able to do full duty work and had no problems before with his right knee. Dr. Gellrick opined that Claimant had failed conservative treatment postoperatively for a meniscectomy for a meniscus tear and that Claimant aggravated underlying preexistent chondromalacia with his fall. Dr. Gellrick opined that with Claimant feeling unstable with his knee, a repeat MRI was warranted. Dr. Gellrick also opined that Claimant had become severely depressed as a result of his knee condition and recommended a psychological evaluation to help with depression and pain management. *See* Exhibit 6.

15. On August 31, 2015 Claimant underwent a right knee MRI interpreted by Bridget Lauro, M.D. Dr. Lauro noted a history of right knee pain, swelling and instability status post meniscal surgery in April of 2015, and concern for recurrent meniscal tear. Dr. Lauro provided an impression of: evidence of interval partial medial meniscectomy without convincing evidence for a re-tear; re-demonstration of lateral patellar subluxation with advanced patellofemoral compartment arthrosis; and small joint effusion and small Baker's cyst. *See* Exhibit 6.

16. On September 9, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that Claimant underwent an MRI that showed evidence of partial medial meniscectomy without convincing evidence of a re-tear, re-demonstration of lateral patellar subluxation with advanced patellofemoral compartment arthrosis and small joint

effusion and a small Baker's cyst. Dr. Gellrick noted that there was probably not a re-tear of the meniscus. Dr. Gellrick referred Claimant to Dr. Schneider for an additional orthopedic opinion to consider the new MRI and further knee treatment. *See* Exhibit 6.

17. On September 22, 2015 Claimant was evaluated by Ron Carbaugh, Psy.D. Claimant reported a work injury in February and that he underwent meniscus repair on April 7, 2015 with no subjective benefit. Claimant reported that physical therapy provided no benefit, a TENS unit provided no benefit, a cortisone injection provided no benefit, and a home exercise program provided no benefit. Claimant reported that medications provided some benefit. Dr. Carbaugh opined that Claimant had several relevant cognitive/psychological issues including probable borderline cognitive functioning and probable chronic moderate depression that both likely impacted Claimant's understanding of his medical condition and Claimant's interpretation of his symptoms and responses to treatment. Dr. Carbaugh provided diagnostic impressions of somatic symptom disorder, probable persistent depressive disorder, and Axis II diagnosis deferred- but suspected avoidant personality traits/disorder. *See* Exhibit H.

18. On September 23, 2015 Claimant was evaluated by David Schneider, M.D. Claimant reported being involved in a slip on ice on February 19, 2015 while at work. Claimant reported that prior to his work injury he had no complaints in his right knee, had not sought medical care for his right knee, and never had surgery on his right knee. Claimant reported that following his injury he saw Dr. Hewitt and underwent knee arthroscopy and partial meniscectomy and that his knee pain had persisted. Dr. Schneider noted that x-rays showed severe patellar tilt and arthritis with evidence of medial compartment arthritis and that the MRI showed those issues with degenerative knee throughout. Dr. Schneider assessed pain in limb and symptomatic osteoarthritis of the right knee. Dr. Schneider opined that Claimant had an interesting presentation and that Claimant was symptom free before surgery and had never sought medical care for his right knee. Dr. Schneider noted that since the work injury, Claimant's knee had become very symptomatic and painful on a daily basis. Dr. Schneider recommended that Claimant undergo right total knee arthroplasty. Dr. Schneider opined that there was clearly a component of a pre-existing condition but that there was also clearly acute exacerbation of a pre-existing condition. *See* Exhibit 7.

19. On September 30, 2015 orthopedic surgeon Robert Mack, M.D. provided a medical record review report. Dr. Mack opined that Claimant was not a surgical candidate based on his obesity and Dr. Hewitt's note that Claimant's degenerative arthritis was not bad enough to require a total knee replacement. Dr. Mack also opined that Claimant's right knee arthritis was clearly pre-existing as manifested by objective findings of osteophytes in his knee at the time of his surgery and as noted by MRI which indicated a chronic situation predating the February 19, 2015 injury. Dr. Mack opined that the work injury did not cause the condition that is causing the recommendation for total knee joint replacement. *See* Exhibits 10, A.

20. On October 1, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that Claimant was seen by Dr. Schneider. Dr. Gellrick noted that both Dr. Ciccone and Schneider recommended a right total knee replacement. Dr. Gellrick noted that Claimant was symptom free before surgery and had never sought care for his right knee before his work accident and that now his knee was very symptomatic on a daily basis. Dr. Gellrick noted that Claimant's osteoarthritis was asymptomatic prior to the work injury and noted that Dr. Schneider felt there was clearly an acute exacerbation of a preexistent condition. *See* Exhibit 6.

21. On October 29, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick again noted that Claimant reported being symptom free before his right knee surgery and that he had never sought care for his right knee until he had this work related injury and that now he had pain on a daily basis. Dr. Gellrick noted that both Dr. Ciccone and Dr. Schneider had recommended total knee replacement. Dr. Gellrick opined that weight reduction would be beneficial to Claimant before proceeding with knee surgery. *See* Exhibit 6.

22. On November 4, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that she was in receipt of a review from orthopedic surgeon Dr. Mack. Dr. Gellrick noted that three orthopedic surgeons were recommending total knee replacement for end stage osteoarthritis that was previously asymptomatic. Dr. Gellrick disagreed with the opinions of Dr. Mack and opined that Claimant was asymptomatic prior to his slip and fall on the job and that Claimant did not have problems with his right knee. Dr. Gellrick opined that weight loss was necessary. *See* Exhibit 6.

23. Although Claimant reported to multiple providers that he had no right knee pain or issues prior to his February 19, 2015 work injury, the medical records demonstrate otherwise.

24. On July 11, 2011 Claimant was evaluated by James Weingart, M.D. Claimant reported that his right knee was popping out of place as well as catching and grinding. Claimant reported a two week history of popping in his right knee, that he saw a workers' compensation doctor for a laceration with a knife on his right knee, and that he was going to get an orthopedic referral. Claimant reported that an x-ray showed some rough under patella. Dr. Weingart noted tenderness in Claimant's patellar on examination and assessed patella-femoral syndrome. Dr. Weingart discussed lifestyle management and treatment options. Dr. Weingart prescribed diclofenac sodium. *See* Exhibit L.

25. On August 24, 2011 Claimant was evaluated by James Johnson, M.D. at Panorama Orthopedic & Spine Center. Claimant reported right knee pain with symptoms that began in July with walking. Claimant reported a dull ache with a pain level of 4/10 that was accompanied by popping and clicking. Claimant reported his pain was exacerbated by use/movement, walking, and ascending/descending stairs. Claimant reported that his pain was primarily located over the anterior aspect of his right knee. Dr. Johnson assessed osteoarthritis of the right knee and degenerative joint

disease, uncontrolled status. Dr. Johnson discussed treatment options with Claimant that included weight control, lower impact activities, use of glucosamine with MSM, occasional use of an anti-inflammatory, and occasional aristospan injection and/or visco supplementation injection to treat Claimant's arthritic symptoms. Dr. Johnson opined that ultimately, Claimant would likely need to have a total knee replacement as his symptoms warranted. Dr. Johnson noted that physical therapy would be initiated for a strengthening program and to use the anti-inflammatory and ice as needed for flare ups. Dr. Johnson injected Claimant's right knee with lidocaine, marcaine, and aristospan. *See* Exhibit G.

26. On March 30, 2012 Claimant was evaluated by Dr. Johnson. Dr. Johnson noted that Claimant was there for follow up of his right knee pain. Dr. Johnson noted that Claimant received an injection 9 months ago that provided Claimant with good relief but that the pain had slowly returned. Claimant reported pain primarily in the patellofemoral region with mild medial pain. Dr. Johnson provided an impression of right knee degenerative joint disease and osteoarthritis. Dr. Johnson performed another injection in Claimant's right knee. Dr. Johnson recommended continuing aggressive home physical therapy and opined that when Claimant's pain returned they would consider further treatment including possible arthroscopic debridement with tibial tubercle transfer or arthroplasty. *See* Exhibit G.

27. Claimant testified at hearing. Claimant reported that he had problems with his right knee popping in 2011 but that his problems resolved with icing and with injections. Claimant reported that before his work related injury he could walk and run without problems. Claimant reported that he did not tell his doctors about his prior right knee problems or injections because he had forgotten about them. Claimant testified he had already lost weight on his own and joined a weight loss program and that he was feeling better and felt a little less pressure on his right knee. Claimant testified that he didn't remember his prior right knee problems or doctors' appointments until his attorney told him. Claimant testified he did not remember being told that he would need a total knee replacement and did not remember having x-rays of his right knee.

28. Claimant's testimony is not credible or persuasive. It is not logically credible that Claimant went from complaining of daily right knee pain in 2011 and from a diagnosis of degenerative joint disease and osteoarthritis of the right knee with a recommendation that he would need a total knee replacement in the future as his symptoms warranted to being entirely asymptomatic until his work injury. It is also not credible that Claimant forgot about his prior right knee treatment that was only a few years prior. It is not logically credible that Claimant forgot undergoing right knee x-rays or that he did not remember being told that he would need a total knee replacement. Logically, undergoing x-rays and being told that you would need a total joint replacement are things that one would remember.

29. Dr. Mack testified at hearing. Dr. Mack opined that Claimant had pre-existing degenerative arthritis prior to his work injury clearly demonstrated by MRI. Dr. Mack opined that Claimant's current symptoms were due to Claimant's pre-existing

degenerative condition and that Claimant's current symptoms were typical of arthritis. Dr. Mack opined that Claimant's need for weight loss treatment was not work related and that Claimant's overall current knee condition was not related to the February 19, 2015 work injury but that the current condition is related to Claimant's pre-existing degenerative arthritis. Dr. Mack's opinions are found credible and persuasive.

30. The opinions of Dr. Schneider and Dr. Gellrick are not credible or persuasive. Both physicians opined that Claimant's current condition was related to the February 19, 2015 work injury and that the need for treatment, including a weight loss program, would be related treatment. However, both based their opinions on their incorrect belief that Claimant had no prior injuries or symptoms in his right knee and that he had never had prior right knee treatment. Dr. Schneider noted specifically that there was clearly a component of a pre-existing condition but an acute exacerbation of that pre-existing condition. The pre-existing condition of severe right knee arthritis, however, was not acutely exacerbated by the work injury. Claimant had been symptomatic dating back to 2011 when he underwent multiple right knee injections and was told he would ultimately need a total knee replacement.

31. The opinions of Dr. Mack, Dr. Hewitt, and Dr. Ciccone are found more credible and persuasive in this matter. Dr. Hewitt specifically explained to Claimant prior to surgery that the surgery would only fix the torn meniscus and that the surgery would not alter the Claimant's pre-existing arthritis. Dr. Ciccone's opinion that the majority of Claimant's symptoms following his surgery were coming from the degenerative changes in his knee is also persuasive and consistent with Dr. Hewitt's explanation to Claimant prior to surgery. Prior to surgery, Claimant could only ambulate with the use of crutches. Claimant then had surgery, the meniscus tear he suffered was repaired, and Claimant was able to ambulate without crutches again. Claimant continued to have right knee pain after surgery that was similar to the same right knee pain he had complained of in 2011 with both pain and grinding.

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. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment are proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Respondents have been required to provide ancillary “pre-operative treatment” for non-industrial conditions if the evidence establishes that such ancillary care is a reasonably necessary prerequisite to surgery and must be given to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999). The question of whether the claimant has established that the need for ancillary treatment is a reasonably necessary prerequisite

to achieve optimal treatment is one of fact for the ALJ. *Public Service Co. v. Industrial Claim Appeals Office, supra*.

Claimant has failed to establish by a preponderance of the evidence that his need for weight loss treatment is causally related to his February 19, 2015 work injury. Claimant has failed to establish that the injury he suffered on February 19, 2015 aggravated his underlying pre-existing arthritis. Rather, the ALJ credits the opinions of Dr. Mack and Dr. Hewitt. Claimant had symptoms of severe degenerative arthritis in his right knee at medical appointments in 2011 and 2012. Claimant underwent right knee injections then for the symptoms he reported. Claimant was told then that he would likely need a total knee replacement and was advised to lose weight. Claimant is not credible that he was asymptomatic leading up to his February 19, 2015 work injury. Rather, in 2011 and 2012 Claimant received significant treatment for his symptomatic right knee degenerative condition. Claimant had reported symptoms dating back to 2011, had right knee injections, was told to lose weight, and was told he would likely need a total knee replacement. Although Claimant suffered a meniscal tear in the work injury in 2015, that tear was repaired. Claimant showed functional gain following the 2015 surgery to repair his meniscus and is back to his baseline status with similar pain complaints and symptoms now as he had in 2011 and 2012. Claimant has failed to show that the February 19, 2015 injury aggravated or accelerated his underlying degenerative arthritis in any way.

Claimant was told several years ago that he likely needed a total knee replacement due to his severe arthritis. Claimant had symptoms of daily pain in his right knee with catching and locking and had been told to lose weight. Claimant still needs a total knee replacement due to his severe arthritis, still has daily pain with catching and locking, and still needs to lose weight. The February 19, 2015 work injury has not been shown, more likely than not, to have accelerated his need for a weight loss program as ancillary treatment for his right knee condition. Although multiple providers agree that a weight loss program is reasonable and necessary prior to undergoing a right total knee replacement, Claimant has failed to establish that a weight loss program is related to his February 19, 2015 work injury. Rather, Claimant's current right knee condition and need for weight loss treatment is causally related to the natural progression of his pre-existing degenerative condition and is not causally related to his work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show that a weight loss program is reasonable, necessary, and causally related to his February 19, 2015 work injury. His request for a weight loss program is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see 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 18, 2016

/s/ Michelle E. 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 are whether Claimant sustained a compensable industrial injury arising out of and in the course of his employment. If the claim is found compensable, whether Claimant is entitled to medical treatment to cure and relieve the effects of the industrial injury; whether Claimant was responsible for termination of his employment; whether Claimant willfully mislead Employer concerning his physical ability to perform his job; whether Claimant is entitled to temporary total disability (TTD) benefits; an determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant was born on April 17, 1986 and was 29 years of age at the time of the hearing.

2. On April 1, 2015, Claimant worked for the Employer as a stock supervisor. Claimant's job responsibilities included assisting in all areas of stock, shipping, receiving protocol/policies, procedures, and all shipping/receiving related paperwork and participating in inventories.

3. On March 25, 2015, Claimant went to the Walgreens Healthcare Clinic and was treated by Ann Ambrose, APN. Claimant complained of "right lower back pain after playing football 4 days ago". (Four days prior was Saturday, March 21, 2015.) Claimant said his back felt tight like a rock and he had "pain down back of right leg that is intermittent". Claimant was diagnosed with "sprain of lumbar". Ms. Ambrose prescribed Naprosyn 500 mg tablets and Flexeril 10 mg tablets. Ms. Ambrose also restricted Claimant from prolonged sitting and that "[o]nce pain has subsided, no lifting over 15 lbs for one week." She also advised ice and heat and provided back exercises for Claimant to do two times per day for a week.

4. Claimant testified that the pain that he had when he went to the Walgreens Healthcare Clinic on March 25, 2015 was in his upper buttocks right side, shooting down his right leg, consistent with his pain at the time of the hearing.

5. Claimant also testified that his ear symptoms prompted him to go to the Walgreen's Healthcare Clinic rather than any back pain. He also testified that he told Ms. Ambrose that he felt a muscle spasm and stiffness in his low back, and the he mentioned to her that he played college football. He denied that he injured his back playing football on March 21, 2015.

6. Claimant testified that he did not work the next three days (March 26, 27, and 28, 2015) because he took vacation time to attend a friend's wedding in Las Vegas,

Nevada.

7. Claimant testified that when he returned to work on April 1, 2015, he knowingly lifted more than 15 pounds and did not self-limit his physical activity despite his restrictions from Ms. Ambrose. Claimant testified he did not believe Ms. Ambrose had provided work restrictions, and that his impression was that he should "just take it easy for a couple of days."

8. On April 2, 2015, Claimant saw Kimberly Farber, CNP, at Himalaya Family Medicine Center and reported that his low back pain started "last Sunday." Claimant stated that the back pain worsened on "Monday."

9. Claimant testified that the Monday referenced by Ms. Farber was on March 30, 2016 and that on that day, he was in Las Vegas. Claimant testified that he flew home to Colorado on Tuesday, March 31, 2015, and he returned to work the following day, April 1, 2015.

10. Ms. Farber's April 2, 2015 report does not mention any injury to Claimant's back from lifting at work just one day prior.

11. On April 1, 2015 at approximately 11:00 a.m., Claimant testified that he picked up a 30-pound box of purses off of another box, turned to the right and felt a pop and extreme pain radiating down his legs, mostly the right leg. He continued to work the rest of the day.

12. Cami Reynolds, the assistant store manager for Employer and Claimant's direct supervisor, testified that she spoke with Claimant several times throughout the day on April 1, 2015. Ms. Reynolds recalled that Claimant complained of back pain and observed Brittany Wickard rubbing Claimant's low back on April 1, 2015, but that Claimant never reported hurting his low back at work.

13. As a retail business, Employer has a CCTV system in its stores, including the one in which Claimant worked, which records business activities. The recordings are made in the regular course of business, and the CCTV system recorded Claimant on April 1, 2015.

14. In particular, there are four videos taken on April 1, 2015 covering 10:55 a.m. to 11:15 a.m. showing Claimant at work in the stock room from four different camera angles. The videos depict the following:

> <u>Camera 8, video # 1</u>:
> Claimant walks toward the camera carrying a small sack that he puts into a small refrigerator. He walks a few feet away and begins looking at a small device in his hands with his back to the camera and then walks back and forth in front of the camera several times. Claimant then stands next to the desk bent forward at the waist forward with both wrists on desk top

while typing on the keyboard and looking at the computer screen.

Claimant then lifts/pushes a box from his chest height to his right onto the floor, bends over and opens a box with some type of cutting device. Claimant removes a piece of cardboard and places it on top of some boxes. Claimant then crouches down with his knees bent while bent at the waist and removes approximately five handbags from the box. Claimant stands, and carrying several handbags in each hand walks down the hallway out of camera view. Claimant exhibits a normal walk. A few minutes later, Claimant returns into view.

A female (Cami Reynolds) then appears and begins talking to Claimant during which time Claimant puts items in his back pocket. A second female appears and Ms. Reynolds moves towards the desk while still in view. The second female leaves and a third female (Brittany Wickard) arrives. At the time Ms. Wickard arrives, Claimant leans over with his hands on his thighs.

Claimant moves to a stack of boxes, flips the top box over and leans against it with his head on the box while Ms. Wickard rubs his low back.

Claimant then returns to opening a box when the Ms. Reynolds leaves. Claimant removes handbags from the box. Claimant then appears to be looking at a cell phone while Ms. Wickard hugs Claimant as they are face to face and Claimant continues to look at a cell phone while pressing various buttons. Ms. Wickard appears to be rubbing Claimant's back while hugging him. The hugging/rubbing continues for approximately a minute. Ms. Wickard and Claimant then walk together out of camera view.

Camera 5, video #1 shows the same interaction from a different angle.

<u>Camera 8, video # 2</u>
Claimant can be seen removing handbags from boxes and bending several times at the waist during this time in the distant background. Claimant then carries the handbags out of view. He then breaks down the empty boxes and is observed bending over at the waist picking up papers off of the ground. Claimant empties an additional box then walks out of view.

The video next shows Ms. Reynolds carrying nine boxes (one at a time) of the same type Claimant had been working with. She creates two stacks of boxes with the top of each stack reaching the top of her head. Ms. Reynolds is alone and stacks the boxes herself.

<u>Camera 10, video # 1</u>:
Claimant is shown carrying individual purses in each hand down a hallway

and returning several times during the interactions previously described. When the second female appears she and Claimant "high five" each other with Claimant using his right hand/arm. The video shows the interaction previously noted in the other security videos but from a different angle.

15. None of the videos show Claimant falling, almost falling, or with his knees buckling.

16. Claimant testified that his injury occurred prior to the video starting although it appears Claimant was just arriving to work or returning from a break. As the video starts at 10:55 a.m., the Claimant is observed carrying a sack into the backroom and putting into the refrigerator. He then filled up a cup with water as if he were starting his work day as Ms. Reynolds pointed out.

17. Beginning April 15, 2015, Claimant attended more than 20 physical therapy sessions, more than 20 Concentra visits, and more than 10 chiropractor visits, paid for by Respondents. Claimant also had the following treatment: massage therapy, a May 12, 2015 MRI, an EMG nerve conduction study, and SI joint injections. Claimant admitted that at all of those appointments, he denied having back pain before April 1, 2015. Thus, any opinions from the treating physicians that Claimant suffered a work injury are not persuasive. Those providers did not have an accurate history of Claimant's symptoms.

18. Claimant testified that the spasm he experienced on March 25, 2015 was not at all the same or relevant. He also felt it was not a "major problem" although he did have a little leg pain. He tried massaging it with a baseball but it did not improve.

19. Claimant testified that he felt fine when he traveled to Las Vegas from March 27-30, 2015, which is inconsistent with his reports to the nurse practitioner at Himalaya on April 2, 2015 that he felt worse on March 30, 2015.

20. At the request of Respondents, Claimant saw Tashof Bernton, MD, on November 2, 2015. Claimant said he was injured at work on April 1, 2015, when he lifted a box and felt a pop in his lower back, and his knees buckled, he fell to the ground. Claimant told Dr. Bernton that he had no back pain prior to this episode and no medical or chiropractic care for back pain. He had current pain in his mid and low back that he rated 4-7/10 over the last 4 weeks. Dr. Bernton noted Claimant took Norco 2 to 4 times a day, ibuprofen 800 mg 3 times a day and Tizanidine at bedtime. Claimant said he had a 20-pound lifting restriction. Dr. Bernton opined that he "would not regard the patient as having a work-related injury."

21. On December 29, 2015, Dr. Bernton issued a second report after review of additional medical records and the CCTV video. Dr. Bernton wrote that the "assessment made in my report indicating the history in total is not consistent with an occupational injury remains after reviewing the additional records." He also stated the "records submitted for review contain additional information consistent with the

assessment of the patient's lumbar complaints are not work-related." Dr. Bernton opined that Claimant does not require further medical care on a work-related basis.

22. During a post-hearing deposition, Dr. Bernton reiterated his opinion that Claimant did not suffer a work related injury. Dr. Bernton stated that Claimant's subjective history is the only thing that weighs in favor of him having suffered a work injury. Dr. Bernton, however, testified that Claimant's subjective history is inconsistent with the medical records. Dr. Bernton stated that Claimant's history was clearly not accurate given that Claimant specifically denied prior back problems but had just received treatment for back problems just before the date of the alleged occupational injury.

23. Dr. Bernton acknowledged that occasionally there may be minor inconsistencies in the medical records, but that in this case, the Claimant's denial of back pain prior to April 1, 2015, was simply not true.

24. Dr. Bernton also acknowledged that Claimant displayed some pain behaviors in the CCTV videos, but Claimant's behavior in the videos does not mean that Claimant suffered a work injury on that day.

25. On August 14, 2015, Claimant resigned from employment with Employer.

26. Based on the foregoing, Claimant has failed to prove he suffered a compensable work related injury to his low back on April 1, 2015. The Claimant had pre-existing low back pain just days prior to the alleged work-related incident, and Claimant was less than truthful concerning his symptom history when visiting with authorized treating providers. In addition, the CCTV videos do not show the incident Claimant alleged, and none of his co-workers corroborated his version of the events. The ALJ finds that Claimant's job duties did not cause his low back condition nor did they aggravate or accelerate any pre-existing condition.

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 Judge's factual findings concern only evidence that is dispositive of

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. The question of whether Claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. *See Faulkner v. I.C.A.O.*, 12 P. 3d 844 (Colo. App. 2000).

6. Merely feeling pain at work in and of itself is not "compensable." *See Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (I.C.A.O. April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the Claimant was sustained a compensable injury." *See also F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

7. Claimant has failed to meet his burden of proving that it is more probably true than not that he suffered an injury to his low back while in the course and scope of his employment on April 1, 2015. The Claimant has also failed to establish that he suffered an aggravation of a pre-existing injury on April 1, 2015. The persuasive and credible evidence shows that Claimant's low back symptoms arose several days prior to April 1, 2015. In fact, a note from Walgreen's Healthcare Clinic dated March 25, 2015 reflects that he had low back pain as a result of playing football four days earlier. Further, Employer's CCTV video also does not show the injury as Claimant described with a fall or near fall to the ground after lifting a box. Claimant also denied prior low back pain to all of the medical providers he has seen throughout this claim, but admitted he had been suffering back pain just a few days earlier than April 1, 2015. The Claimant's version of the events lacks credibility.

8. Because the Claimant has failed to prove that he suffered an injury in the course and scope of his employment, the Claimant's claim for benefits, including medical treatment and TTD, is denied and dismissed. The remaining issues are

rendered moot.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation benefits is hereby denied and dismissed. As such, any request for additional medical treatment or temporary disability benefits is also 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 19, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a traumatic injury to left and right foot arising out of and in the course and scope of her employment with employer on October 10, 2014;

II. Whether claimant, if she has proven she sustained a compensable injury, has proven by a preponderance of the evidence that the medical benefits requested for her left and right foot symptoms and diagnoses are causally related to her work injury on October 10, 2014;

III. Whether, if claimant has proven the she sustained a compensable injury, respondents have proven by a preponderance of the evidence that claimant's indemnity benefits should be reduced by 50% due to claimant's willful failure to obey a reasonable safety rule or willful failure to use safety devices pursuant to C.R.S. Section 8-42-112 (1) (a) and (b).

Because the ALJ concludes that Claimant failed to establish, by a preponderance of the evidence, that she sustained a compensable left and right foot/ankle injury on October 10, 2014, this decision does not address the remaining issues raised at hearing.

PROCEDURAL MATTERS

Prior to the commencement of hearing, the parties advised the ALJ of the following procedural matters which the ALJ finds and concludes constitutes stipulations reached concerning issues endorsed for hearing:

I. Claimant withdrew her request for TTD and TPD benefits, without prejudice. Claimant also withdrew the issue of average weekly wage without prejudice. Respondent voiced no objection.

II. Claimant withdrew, with prejudice, the issue of whether respondent had timely and appropriately designed the authorized medical providers for this claim. Respondent voiced no objection.

III. Claimant stipulated that the medical treatment she received before she reported this claim as a workers' compensation claim to respondent on March 17, 2015, was not authorized and therefore Respondent was not liable for the costs of this care should the claim be deemed compensable by the ALJ.

IV. Respondents requested that, if the claim is found compensable, any medical

benefits awarded be paid in accordance with the Division's medical fee schedule. Claimant voiced no objection to the request.

The parties' stipulations/agreements were approved by the ALJ.

FINDINGS OF FACT

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

1. Claimant is a general merchandise manager for Respondent-Employer. She has worked for Employer for approximately 23 years.

2. On October 10, 2014 Claimant was pulling an empty merchandise pallet onto a truck trailer for reclamation when she fell into the space between the loading dock and the bed of the trailer. Claimant did not notice that the docket plate, which covers the gap between the loading dock and the trailer, was not in place. Claimant's left leg slipped into the breach and she proceeded to fall onto her left side. Claimant's left ankle was pinned between the loading dock and the trailer. She required assistance to free her leg and get up.

3. Approximately 15 minutes later, Claimant completed an incident report with the assistance of Miles Smith, Claimant's direct supervisor. Claimant's written incident report indicates that she injured her "left hand, left knee & left ankle, left elbow and neck.

4. At hearing, Claimant testified that she felt bruised and sore following the incident. She testified that she injured her left side, including her foot, knee and elbow.

5. Miles Smith, testified that when he contacted Claimant in order to complete the incident report he asked Claimant a "couple of times" if she was injured to which Claimant reportedly responded that she thought she would be OK. Claimant refused medical treatment and returned to work.

6. Claimant testified that she returned to work and completed her shift. She reported she did not go to the doctor because she thought she would recover.

7. Claimant's work includes stocking merchandise and requires lifting (50-60 pounds), pushing/pulling, squatting, kneeling and reaching. Claimant testified that she is on her feet "99%" of the time while at work. Scott Anger, "Respondent-Employer's Assistant Store Manager agreed that Claimant's job requires substantial standing/walking estimating the time Claimant would be on her feet to be 90% of her shift.

8. Claimant testified that following the October 10, 2014 incident her left foot and

ankle was sore. It would swell. She would apply ice and heat at the end of her shift and work through the pain. Consequently, Claimant has not lost time from work secondary to the October 10, 2014 incident.

9. Miles Smith testified that in the days and weeks following the October 10,

2014 incident, Claimant never reported an injury nor did she request that she be allowed to see a doctor for any condition stemming from the October 10, 2014 incident.

10. Approximately five (5) months passed between the date of the October 10, 2014 incident and Claimant's first visit to a physician for a foot condition that she now asserts is related to her fall into the gap between the loading dock and the truck trailer.

11. On March 17, 2015, Claimant presented to the offices of her orthopedist, Dr. Kenneth Danylchuk where she was evaluated physician's assistant (PA) Franklin Sloan. Claimant has a long standing patient relationship with Dr. Danylchuk. She has been treating with Dr. Danylchuk since 2004, following the development of post surgical hip pain caused by complications from a major reconstructive jaw surgery. Claimant had bone harvested from both hips for grafting into her jaw and developed chronic hip pain as a consequence.

12. Claimant scheduled the March 17, 2015 appointment approximately two weeks before and she attended the appointment over her lunch hour at work. Claimant made Scott Anger aware she was going to the Doctor. During her March 17, 2015 appointment with PA Sloan, Claimant reported constant sharp pain in the left foot. PA Sloan summarized Claimant's history of present illness as follows:

> Approximately 6 weeks ago without any history [of] specific injury she began to notice a spontaneous gradual onset of intermittent pain about the left forefoot with weightbearing and range of motion a (sic) better in the morning and worse towards the end of the day with associated swelling towards the end of the day. This has been getting gradually and progressively worse. . . . She denies a past history of previous injury or problems with the foot.

13. PA Sloan documented that Claimant walked without a limp and that examination of the left foreleg and ankle was "unremarkable". He also noted that Claimant's left foot examination was "unremarkable except for mild tenderness over the mid dorsal aspect of the forefoot just proximal to the secondary fourth metatarsal heads". X-rays of the left foot were obtained which demonstrated "mild degenerative changes left first MTP joint. Left foot otherwise negative. No acute findings". The ALJ finds that reference to "MTP" likely means metatarsal-phalangeal.

14. As noted above Claimant's first visit for a condition that she asserts is related to the October 10, 2014 incident occurring at work was March 17, 2014; however, Claimant saw Dr. Danylchuk on January 22, 2015 during which appointment her "biggest concern is the fact that she is losing her balance and falling a little bit".

Claimant testified that she did not injure either her right or left foot as a consequence of falling.

15. While Claimant denied a past history of previous injury or problems with the

left foot as noted at ¶ 12 above, review of Dr. Danylchuk's medical records reveals that on April 22, 2008 Claimant presented to Dr. Danylchuk's office with complaints of left foot pain of two weeks duration. Similarly to PA Sloan's March 17, 2015 report, Dr. Danylchuk's April 22, 2008 report does not ascribe Claimant's foot pain to an injury. Rather, the April 22, 2008 note specifically states: "No known injury". Also similar to the Claimant's current complaints, the April 22, 2008 note documents that Claimant was having a lot of problems at the end of her day. Dr. Danylchuk was not clear about what was causing Claimant's left foot pain; however, the possibility of a stress fracture was raised. Dr. Danylchuk placed Claimant in a "postop" boot and excused her from work for two days. By May 6, 2008, Claimant's left foot pain was noted to be improving with use of a postop boot per Dr. Danylchuk's records.

16. Claimant could not recall the cause of her 2008 left foot pain, but testified that the nature of her pain was different and the pain in 2008 was in a different location on the foot. Dr. Danylchuk's April 2008 notes pain in the "midfoot." As noted, PA Sloan's March 17, 2015 note reflects complaints of pain/tenderness "over the mid dorsal aspect of the forefoot. Based upon the evidence presented, the ALJ is persuaded that the location of Claimant's left foot pain in April 2008 and March 2015 was very similar.

17. Claimant also has a history of prior right foot pain. On April 17, 2008 Dr. Christian Hulett documented that Claimant was reporting that the dorsum of her right foot was sore. According to Dr. Hulett, Claimant had a "very high instep", i.e. a prominent mid metatarsal region which was probably causing Claimant to develop "a little bit of tendonitis".

18. Claimant testified she was "leery" about saying anything concerning her October 10, 2014 slip and fall and did not ascribe any injuries to her foot to the October 10, 2014 incident, during her March 17, 2015 appointment because filing workers' compensation claims was highly discouraged by Respondent-Employer. According to Claimant, she felt she needed to do everything possible before turning in a claim. She suggested she was afraid to file a claim because of her employer's corporate culture.

19. Claimant returned to work after her March 17, 2015 appointment with PA Sloan. Upon her return, Claimant testified that Scott Anger asked her what she was going to do, i.e. whether she wanted to file a claim. Claimant indicated that she was not going to file a claim. Approximately 45 minutes later, Claimant changed her mind informing Mr. Anger that she wanted to file a claim and see a doctor. Claimant was referred to Centura Centers for Occupational Medicine (CCOM) where she was evaluated by Dr. Paul Merchant the same day.

20. Scott Anger testified that there is no company culture discouraging the filing

of workers compensation claims. Rather, safety is a "core value" for the company and as such injured workers' are treated fairly. Mr. Anger testified that he was aware that Claimant was going to the doctor on March17, 2015 and that he contacted her after the appointment to find out what was going on with her. According to Mr. Anger, Claimant reported that she had a "hairline fracture". Consequently, Mr. Anger testified that he asked if she wanted to see a workers' compensation doctor. Mr. Anger testified that Claimant seemed hesitant, stating that she didn't know. He then asked a second time if she wanted to see the work comp doctor to which she said "no". Mr. Anger testified that sometime later, Claimant returned indicating that she wanted to report an injury. Mr. Anger took the claim and referred her to the doctor. Mr. Anger testified he was never hostile to Claimant.

21. Claimant was evaluated by Dr. Merchant on March 17, 2015. He took a history from Claimant that included her report that he left foot became "trapped between a tractor-trailer and loading dock at her store" and that she needed "assistance from other workers to discharge (sic) her foot". According to this report, Claimant's "primary problem [was] pain located in the left foot", specifically pain located in the forefoot at the distal metatarsals.

22. Examination of the left foot/ankle revealed tenderness over the distal heads of the second, third and fourth metatarsals of the foot. Dr. Merchant appreciated no swelling or joint laxity of ankle and documented that Claimant was able to move without difficulty. Claimant's diagram from this date of visit is devoid of any depiction of pain in the left or right ankle.

23. Claimant returned to Dr. Merchant on March 31, 2015. By this visit the focus of Claimant's complaints is mixed between her foot and ankle. Physical examination is directed to the left ankle and no mention of any physical examination of the left foot appears in Dr. Merchant's March 31, 2015 medical report. While Claimant documents mid forefoot pain, she does not depict having pain in the left ankle on this visit.

24. On May 4, 2015, Claimant was re-evaluated by Dr. Merchant after a vacation during which she was able to rest her foot for "lengthy periods of time". During this appointment, Claimant report continued tenderness in the left foot. Physical examination was directed to the left foot and no mention is made regarding the condition of the left ankle. Claimant was referred to physical therapy (PT).

25. Claimant was seen for her initial PT evaluation on May 4, 2015. During this appointment, Claimant completed a pain diagram depicting 8/10 pain in the left ankle. No mention is made in the initial PT report regarding the status of Claimant's left ankle or injury thereto.

26. Claimant was evaluated by Dr. Danylchuk on July 30, 2015 for a chief complaint of ankle pain. The report from this date of visit indicates that Claimant was returning to discuss "right foot pain that has progressively worsened over the past month". Regarding a mechanism of injury (MOI), Dr. Danylchuk notes only that Claimant sustained an injury "several months ago involving the left lower extremity". He

documented that Claimant felt she was "overusing" the right side. Consequently her right ankle was examined after which revealed "severe pain over the heel lateral to the heel and at the insertion point of the Achilles tendon". Claimant was placed in a postop boot and an MRI of the right ankle, to specifically evaluate the "distal portions of the Achilles tendon" was ordered. Claimant was diagnosed with a right ankle sprain.

27. MRI of the right ankle performed August 4, 2015 revealed a minimally displaced calcaneus fracture, mild tendinosis of the Achilles tendon, mild tendinitis of the posterior tibialis, moderate tendinosis and strain of the peroneus longus tendon, partial tear of the anterior band of the tibiofibular ligament suggesting high ankle sprain, mild strain of the anterior band of the talofibular ligament and strain of the calcaneofibular ligament without wear.

28. On August 4, 2015, Dr. Danylchuk suggested that Claimant's right ankle condition may be a consequence of a work related injury due to overcompensating with the right leg. Due to Claimant's calcaneal fracture and left ankle symptoms, Dr. Danylchuk ordered a bone density study and an MRI of the left ankle.

29. MRI of the left ankle performed September 2015 revealed mild inflammation around the ankle as well as a partial posterior tibialis tendon tear, peroneal tendinopathy with partial tear of the peroneus brevis tendon, strain of the lateral ligaments without tear, plantar fasciitis and Achilles tendinitis without tearing.

30. Claimant's bone density study showed a T score of -2.2 resulting in a diagnosis of osteopenia for which Claimant was provided supplements including calcium and Vitamin D.

31. The ALJ finds the degree of pathology, i.e. fracture, ligament tears, tendinitis and tendinosis noted on MRI of the right and left ankle extensive and likely to produce symptoms of pain.

32. Claimant was evaluated by Dr. Henry Roth at Respondent-Employer's request on January 21, 2016. During his independent medical examination (IME), Dr. Roth inquired about the discrepancy between the history provided to PA Sloan and Dr. Merchant on March 17, 2015. Claimant reiterated that she felt intimidated by work and that she initially did not file a claim for this reason. However, Claimant went on to explain that she changed her mind after think about it, noting that after working for Respondent-Employer for 23 years there was no reason not to turn the claim in.

33. Claimant also explained that although she had right foot/ankle pain when she saw Dr. Merchant on March 17, 2015, she did not report it because she has a "high pain tolerance". Claimant's medical reports demonstrate that she routinely seeks refills of pain medication for chronic hip pain as a consequence of a surgery dating back to 2004. While the ALJ does not question Claimant's report of hip pain as a consequence of the bone harvested for grafting into the jaw, the extent of pathology noted on MRI of the right ankle and Claimant's persuades the ALJ that Claimant, more likely than not would

have reported at least some symptoms of right foot/ankle pain to PA Sloan and Dr. Merchant on March 17, 2015

34. Dr. Roth testified at hearing. He opined that Claimant's left and right foot/ankle problems were not related to the incident occurring on October 10, 2014. In reaching this conclusion, Dr. Roth noted that had Claimant sustained an injury in that incident, she would have experienced symptoms at that time. According to Dr. Roth, the natural healing process of a contusion is to resolve in a few days with the passage of time, and does not require medical treatment. There is, Dr. Roth explained, nothing to show any anatomic injury that is acute and occurring on October 10, 2014. Claimant's left foot has degenerative changes, and the symptoms arising around February 2015 (approximately 6 weeks prior to her March 17, 2015 appointment) are due instead to those degenerative changes, and Claimant's age and obesity. He found Claimant's physical exam did not correlate to any physiologic, anatomic findings or diagnoses. The existence of left foot pain in 2008, which occurred without injury, is, Dr. Roth explained, strong evidence that Claimant's left foot symptoms forming the basis of her March 17, 2015 appointment are not due to the October 10, 2014, incident but to degenerative causes, Claimant's obesity, and her age. Dr. Roth summarized these opinions in his IME report as follows:

> This is a most unusual medical history. It is not medically probable that the event as described to have occurred on 10/10/14 is the cause of nonspecific, LEFT forefoot pain without objective findings, first presenting for medical attention on 3/17/15.
>
> 1. Contusions and sprains do not have delayed onsets.
> 2. It is nonconforming for discomfort not to be most prominent immediately and in the subacute period.
> 3. There are no specific physical findings when medically evaluated 5 months post event nor now 14 months post event
> 4. Had there been discomfort related to contusion or strain, reasonable medical expectation is for rapid improvement and resolution over a period of 2 to 4 weeks.
> 5. The persistence of the same nonspecific pain and 14 months is additionally nonconforming with the notion of a sprain, strain or contusion having been sustained on 10/10/14
>
> The information presented at this point in the record is not sufficient for me to opine that her left foot symptoms are the result of a work-related traumatic injury on 10/10/14

35. Dr. Roth's opinions are credible and persuasive. He is the only physician to review the available medical record evidence and comment specifically as to the cause of Claimant's foot/ankle symptoms arising five months after the alleged mechanism of injury in this case. Dr. Danylchuk's contrary opinions regarding causality, to the extent that he opined as such, are not persuasive. The ALJ credits the testimony of Dr. Roth to find that Claimant's left foot/ankle conditions are idiopathic in nature and probably affected by personal factors such as her age and weight.

36. Claimant has failed to prove, by a preponderance of the evidence, that she sustained a compensable left foot/ankle injury on October 10, 2014. Consequently, her claim for a compensatory right foot/ankle injury is also denied and dismissed.

CONCLUSIONS OF LAW

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

General Legal Principals

A. 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 litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. 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); CJI, Civil 3:16 (2007). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). In this case, Claimant's testimony regarding her alleged left foot is patently inconsistent with what she reported to PA Sloan on March 17, 2014. Claimant, sought to explain this away, not by stating she did not provide these statements to PA Sloan, or that he had recorded them incorrectly, but by saying she fabricated this report to keep the details of the injury from Mr. Sloan so she did not have to report a workers' compensation claim and be the subject of retaliation by Respondent-Employer. As Mr. Anger and Mr. Smith credibly testified, there is no culture of discouraging injured workers not to report claims. To the contrary, the safety of the employer's work force is a core value to the company. The ALJ concludes it makes little sense to discourage employees claiming injuries not to report those injuries while continually subjecting them to potentially greater injury through continued work. This is especially true for Claimant as she performs a physically demanding job requiring her to lift, push/pull, squat, kneel, reach and be on her feet standing/walking at least 90% of her shift. Based upon the totality of the evidence presented, the ALJ

concludes that Claimant's report of March 17, 2015 and her testimony asserting that she injured her left foot/ankle during the October 10, 2014 incident at work is incredible and unconvincing.

C. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found here, the opinions of Dr. Roth are credible and persuasive. He is the only physician to review the available medical record and comment specifically on causation. Based upon that review Dr. Roth opined that the cause of Claimant's pain was idiopathic, i.e. arising without cause around early February 2015. Claimant's medical history supports that she has had episodes of foot pain in the absence of trauma previously. Moreover, that pain was located in an area similar to that which Claimant's reports is painful currently. Based upon the record evidence presented, the ALJ concludes that there is substantial record evidence to support Dr. Roth's opinions. Accordingly, his opinions are credible and persuasive.

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

Compensability

E. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment

relationship with Employer and during an activity, specifically pulling a empty pallet onto a trailer when her left leg slipped into the gap between the trailer and the loading dock. Nonetheless, the question of whether the alleged foot/ankle conditions, for which Claimant seeks benefits, "arose out of" her employment must be resolved before the injury is deemed compensable.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment duties and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

H. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

I. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 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, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between a claimant's work and his/her symptoms exists does not mean there is a

causal connection between the work duties and the injury.

J. As found, the ALJ conclues the expert opinions of Dr. Roth regarding the cause of Claimant's left foot/ankle are credible and more persuasive than the contrary testimony of Claimant and the opinions of Dr. Merchant and/or Dr. Danylchuk. As presented, the evidence does not support that Claimant sustained any injury to her left foot/ankle in this case. Rather, Claimant's prior episodes of left foot pain arising without cause, the delay in seeking treatment for five months post incident and Claimant's inconsistent report of injury persuades the ALJ that Claimant, more probably than not did not sustain an injury to her left foot/ankle on October 10, 2014 or a compensatory right foot/ankle injury as she now claims; her report of having a high pain threshold notwithstanding. As found, the persuasive medical evidence supports a conclusion that Claimant's foot/ankle symptoms are, more probably than not, idiopathic in nature and affected by personal factors such as her age, weight and unique anatomy, i.e. her very high instep. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between her employment and the resulting condition for which medical treatment and indemnity benefits are sought. §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). Because Claimant failed to establish she suffered a compensable "injury" as defined by the aforementioned legal opinions, her claim is denied and dismissed. Accordingly, the remaining claims for medical benefits and penalties need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for work related injuries to her left and right foot/ankle emanating from an incident occurring at work on October 10, 2014 is denied and dismissed.

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

DATED: April 1, 2016

/s/ Richard M. Lamphere

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

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

- Did Claimant suffer a compensable injury or cumulative trauma to her left upper extremity arising out of and in the course and scope of her employment?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of her industrial injury?
- If compensable, was the treatment provided by Davis Hurley, M.D. (and his referrals), including the left side carpal tunnel release surgery and post-surgical care, reasonable, necessary, and related to Claimant's compensable left upper extremity condition.

STIPULATION

The parties stipulated Claimant returned to work on December 2, 2015. However, Claimant has not worked full time since December 2, 2015[1]. The stipulation was accepted by the ALJ and incorporated in this order, *infra*.

FINDINGS OF FACT

1. On March 27, 2015, Claimant began working at Employer as an aesthetician. Her job duties consisted of laser body contouring, a procedure to smooth out imperfections in a client's skin. This was a full-time position.

2. Claimant testified her work with the laser required her to move both of her hands constantly while holding her elbows out at awkward angles. She held the laser head in her right (dominant) hand. She applied the laser to a client's desired area of skin (through a protective layer of gel), constantly moving the laser head around the area. Claimant testified she would work on one section of skin and then proceed to another, moving the laser head constantly. If one didn't keep the nozzle moving at all times, the laser would burn the patient's skin. Her left or non-dominant hand held the cord running from the laser head to the machine console. This was the only procedure Claimant performed for Employer.

3. Based upon Employer's timecard records admitted at hearing, from March 27-May 22, 2015, Claimant worked an average of 7.84 hours per shift, not including meal breaks for which she clocked out (219.65 hours divided by 28 days worked). The ALJ notes Claimant worked no hours from May 10th -14th. She worked 4.03 and 4.87 hours on May 20 and May 22, respectively.

[1] The issue of temporary partial disability benefits was reserved, as the parties were awaiting Claimant's wage records.

4. Claimant was also working at European Wax as an aesthetician. She started working there in February 2014 and worked approximately twenty-five (25) hours per week.

5. Claimant testified regarding her job duties at European Wax. She applied hot wax from a pot, which she stirred. Claimant said the wax was applied using her index finger and a stick. She then used her thumb to strip off the wax.

6. On May 11, 2015, Claimant was evaluated by Alexis Anthony, PA at Guardian Urgent Care. Her chief complaint was swelling, pain, tingling and weakness in her right upper extremity. Claimant reported this was the result of holding a laser for skin treatments, which was described as an overuse injury. Claimant said she had been at this job one month prior and did not have these symptoms before. Claimant's wrist was swollen and tender. She was diagnosed with carpal tunnel syndrome ("CTS") and tenosynovitis (de Quervain's) and given a short arm splint. She was told to follow up with an orthopedic surgeon.

7. Claimant was evaluated by Dr. Hurley of Advanced Orthopedic and Sports Medicine Specialists on May 12, 2105. The history of present illness was listed as right wrist pain. She complained of mild to moderate right wrist pain, which she said began one (1) month ago. Claimant's pain over the radial and dorsal aspect of her wrist had increased recently. Active painful range of motion ("ROM") was noted for the right wrist. Active pain free ROM was noted for the left wrist. X-rays of the right wrist were normal. Dr. Hurley's assessment was tenosynovitis (de Quervain's) and CTS-right wrist. Dr. Hurley discussed injections versus surgical intervention and Claimant did not want to pursue the former. An EMG was ordered. Dr. Hurley excused Claimant from work for two (2) days.

8. On May 15, 2015, Claimant returned to work. Claimant testified the pain in her right wrist was so intense, she switched her dominant and non-dominant hands for her laser procedures. By May 22, 2015, Claimant testified her left wrist symptoms increased such that she could no longer perform her work duties.

9. An Employee Incident Report was completed on May 19, 2015. Claimant was noted to have operated the Venus Legacy laser and her wrist became swollen and sore. Claimant's treatment with Dr. Hurley on May 12, 2015 was documented. Claimant's supervisor was listed as Suzanne Biersack, who commented Claimant mentioned she had a problem with her hand/wrist in the past.

10. On or about May 19, 2015, an Employer's First Report of Injury ("E-1") was filed by Caroline Burk, HR Manager for Employer. The E-1 stated Claimant's wrist and hand became swollen and sore after using the laser handpiece multiple times.

11. Steven Gulevich, M.D. authored a letter to Dr. Hurley, dated May 20, 2015, in which he stated the EMG/NCS confirmed the clinical diagnosis of right carpal tunnel syndrome. The test confirmed delays of the median motor distal latency and median sensory responses, as well as abnormal activity in the abductor pollicus brevis.

12. Dr. Hurley excused Claimant from work from May 22-26, 2015.

13. Sean Michael Gallagher testified on behalf of Employer. He was the Director of Human Resources for Sono Bello Contour Centers. He took over for Ms. Burk and in that capacity, he oversaw worker's compensation matters. Mr. Gallagher testified Claimant worked approximately thirty (30) hours per week. According to the company file, Claimant was not working, as she was under the care of a physician and unable to complete her duties and responsibilities. Mr. Gallagher confirmed Claimant's last day of work was May 22, 2015, although she was still employed with the company in an "on- leave" status. Mr. Gallagher testified Claimant worked a total of six (6) days from her initial date of injury.

14. Susan Steckler testified on behalf of Employer. She was employed as the front desk coordinator at the Sono Bello location where Claimant worked. She was previously employed as the aesthetician and trained Claimant. She was present at or near the time when Claimant returned to work after initially receiving treatment. Ms. Steckler did not see Claimant reverse her hands when providing treatment.

15. Claimant returned to Dr. Hurley on May 26, 2015. The history of present illness was right wrist pain. Claimant said her right hand symptoms were moderate to severe and she was experiencing persistent pain/numbness when working. Claimant was unable to sleep, because of numbness and tingling-right worse than left. Active, painful ROM was noted for the right wrist. Active pain-free ROM was noted for the left wrist. Right CTS was confirmed by EMG. Norco (5 mg.) was prescribed and Dr. Hurley recommended a right carpal tunnel and right first extensor compartment release. Claimant wanted to proceed with the surgery. Dr. Hurley's work restrictions were: no lifting more than 3 lbs.; no constant movement or continuous fine motor tasks for four (4) weeks.

16. Claimant underwent surgery on June 3, 2015. Dr. Hurley's pre- and post-operative diagnoses were: right CTS and right de Quervain's tenosynovitis. The right carpal tunnel and right first extensor compartment release was performed by Dr. Hurley.

17. On June 12, 2015, Ms. Burk (as Employer's Practice Manager) completed a physical Job Description and Analysis on Insurer's form. Claimant was noted to work four (4) ten (10) hour shifts per week. Her job included repetitive hand/finger motion-frequently (3-5 hours per day); bending/twisting-occasionally (0-3 hours per day); reaching and stretching-occasionally (0-3 hours per day); use of jarring/vibrating equipment-occasionally (0-3 hours per day); and work in awkward physical position-occasionally (0-3 hours per day).

18. Dr. Hurley examined Claimant on June 15, 2015, approximately two weeks post-surgery. The history of present illness was listed as right hand pain. Left hand symptoms were not documented. Her numbness had resolved after the surgery, but she had mild-moderate pain on the right side. In addition, she fell at a gas station, which increased the soreness in the wrist and forearm. No fracture was seen on x-ray. Her surgical wound was healing well and Dr. Hurley noted minimal pain with ROM. Claimant was to undergo the standard rehabilitation protocol. Claimant's left wrist strength was normal and no edema was noted. Dr. Hurley said Claimant needed a left carpal release and first extensor compartment release. The ALJ notes Dr. Hurley's

records did not provide detail/analysis as to whether Claimant's work activities caused symptoms or the need for the left carpal tunnel release.

19. Claimant returned to Dr. Hurley on July 2, 2015. The history of present illness was listed as right hand pain. Claimant presented with pain on the right side and numbness on the left side. Claimant's right wrist had some soreness, but had improved significantly. On examination, no echymosis was noted in the left wrist, however, there were positive Finkelstein's, Phalen's and median nerve compression tests. Dr. Hurley's assessment was left CTS and de Quervain's. He recommended surgical intervention and ordered an EMG.

20. The ALJ notes Claimant worked approximately one (1) week after May 15, 2015. She was then off for four (4) days per Dr. Hurley's orders. Based on her testimony and the GAL, Claimant did not work at Employer after May 22, 2015.

21. On July 9, 2015, Insurer filed a General Admission of Liability which admitted for wage and medical benefits. TTD was paid from May 12-14 and May 22, 2015 and continuing at the rate of $283.35 per week.

22. Dr. Hurley examined Claimant on July 13, 2015, at which time she was complaining of numbness on the left side, as well as pain on the right and left side equally. She had painful active ROM, but normal strength in left wrist. Dr. Hurley's assessment was the same as on 7/2/15 and Claimant was scheduled for an EMG. Claimant was limited to light duty work (20 lbs maximum); frequent lifting or carrying of objects that weigh up to 10 lbs; walking or standing to a significant degree, or sitting most of the time with pushing and pulling of arm/leg controls; and told to limit repetitive motion/flexion of the wrist.

23. Claimant underwent EMG/NCS studies of her left upper extremity on August 4, 2015. Dr. Gulevich's summary/ interpretation was normal median and ulnar motor study, monopolar electromyogram revealed abnormal spontaneous study. He diagnosed left carpal tunnel syndrome.

24. On September 12, 2015, Dr. Hurley performed a left carpal tunnel and first extensor compartment release.

25. Claimant returned to work at European Wax on December 2, 2015. She has not returned to work at Employer.

26. Dr. Hurley testified as an expert witness and his evidentiary deposition was admitted into evidence. Dr. Hurley is a board certified orthopedic surgeon, with a certificate of added qualification in hand surgery. He is Level II accredited pursuant to the W.C.R.P. in Colorado. Dr. Hurley testified that 95 percent of his clinical work was in hand, wrist, and elbow surgery.

27. Dr. Hurley testified that Claimant was diagnosed with bilateral carpal tunnel syndrome and bilateral de Quervain's (or radial syloid) tenosynovitis. The ALJ notes this diagnosis was different than what was listed Dr. Hurley's records, as his assessments were first focused on the right upper extremity and then on the left. Dr.

Hurley confirmed Claimant had a prior history of numbness and tingling. He testified Claimant's complaints were "mostly" on the right and these symptoms were not relieved by wearing a brace. He performed bilateral carpal tunnel release procedures on the Claimant, first on the right, then on the left. Dr. Hurley stated the carpal tunnel was less severe on the left side. He testified that surgery was recommended not just for pain relief, but also to prevent permanent loss of function due to denervation, resulting in deformity and weakness in the hands. Dr. Hurley described the surgeries were successful and he referred Claimant for physical therapy following the surgery on the left wrist.

28. Dr. Hurley testified that all of this treatment was reasonable and necessary to treat Claimant's hand and wrist pain, numbness, and tingling. Dr. Hurley noted Claimant reported her work activities included posturing and positioning of her wrist and hand. He opined these types of movements and overuse can cause carpal tunnel syndrome. The carpal tunnel diagnosis was confirmed by the EMG, which showed a decrease in the conduction velocity and latency of the nerve. Dr. Hurley testified there was a relationship between the type of work and Claimant's new symptoms, particularly when the symptoms arose. Therefore, he believed Claimant's carpal tunnel syndrome and tenosynovitis were related to her work as a laser therapy technician. Dr. Hurley stated that Claimant's carpal tunnel on the right was potentially caused by her work at Employer, depending on the intensity of the positioning or posturing; or it could have aggravated an underlying condition. Dr. Hurley was not aware of whether Claimant used the laser with one or both of her hands. The ALJ notes Dr. Hurley did not discuss Claimant's work at European Wax, nor did he provide an opinion whether work for less than ten days after May 15, 2015 could have caused an injury or cumulative trauma to Claimant's left upper extremity.

29. In his deposition, Dr. Hurley confirmed Claimant was returned to full duty in the summer of 2015 with regard to her right side. Dr. Hurley released Claimant to full duty work, without restrictions, as of January 4, 2016.

30. No ATP has issued a report stating Claimant is at MMI. However, Dr. Hurley testified Claimant was at MMI, with regard to both the left and right side. He has not done a rating for the right side.

31. Claimant worked an insufficient number of hours /days to cause an injury or cumulative trauma to her left wrist and hand.

32. There was no evidence in the record which showed Claimant received conservative treatment such as injections or PT to the left upper extremity before she underwent surgery.

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

CONCLUSIONS OF LAW

Generally

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

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 has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

Compensability

Claimant contends that she sustained a compensable repetitive use or cumulative trauma injury as a result of her job with Employer. More particularly, Claimant argued that she favored her left arm once she developed symptoms in her right arm. This overuse caused her left arm to become symptomatic and she required treatment for carpal tunnel syndrome and de Quervain's tenosynovitis. Claimant relied upon the testimony of Dr. Hurley to support her claim.

Respondents averred Claimant failed to prove that her left hand condition resulted from her work duties, citing the fact she only worked for five (5) days after she began treating for her right wrist symptoms. Respondents also disputed whether Claimant would have been able to use the laser with her non-dominant hand. The ALJ agrees Claimant failed to satisfy her burden of proof to establish a compensable injury or cumulative trauma.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he or she was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. 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).

In concluding Claimant failed to adduce sufficient evidence that her left upper extremity was injured, the ALJ's reasoning was two-fold. First, Claimant argued the employment activity of using the laser and then switching to her left or non-dominant hand caused her to develop symptoms in her left upper extremity. As found, even assuming Claimant made that switch, she worked a total of 5 days starting May 15, 2015 (the last 2 of which she worked approximately 4 hours), which was insufficient to cause the onset of symptoms. The ALJ was not persuaded Claimant's return to work for a short period of time caused CTS and de Quervain's tenosynovitis or led those conditions to become symptomatic. (Finding of Fact 31).

Second, the ALJ reviewed the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5-Cumulative Trauma Conditions [effective October 30 2010] ("Treatment Guidelines") when determining whether Claimant's work activities were sufficient to cause a cumulative trauma injury to the left upper extremity. The Treatment Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Treatment Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award or deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Treatment Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014). In this case, the ALJ evaluated the risk factors for CTS identified by the Treatment Guidelines as these related to Claimant's work for Employer. Specifically, those risk factors were:

<u>Force and Repetition/Duration</u>

Primary Risk Factor:

6 hrs of: >50% of individual max. force with task cycles of 30 seconds or less or force used for at least 50% of a task cycle-maximum force for most individuals of 3-5 kg. of force.

6 hrs of: lifting 10lbs > 60x per hour.

6 hrs of: use of hand-held tools weighing 2lbs. or greater [2].

Secondary Risk Factor:

4 hrs of: >50% of individual max. force with task cycles of 30 seconds or less or force used for at least 50% of a task cycle-maximum force for most individuals of 3-5 kg. of force.

4hrs. of: lifting 10 lbs. 60x per hour

4hrs. of: use of hand-held tools weighing 2lbs or greater

Awkward Posture and Repetition/Duration

Primary Risk Factor:

4 hrs of: Wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees.

6 hrs of: Elbow-flexion> 90 degrees.

6 hrs of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Secondary Risk Factor:

4hrs of Elbow-flexion > 90 degrees.

4hrs of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Use of handheld vibratory power tools[3] and Duration

Primary Risk Factor:

6 hrs. for more common types of vibration exposure.

Secondary Risk Factor:

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[2] The ALJ notes there was no evidence in the record as to the weight of the laser Claimant used.

[3]The evidence was unclear whether the laser used by Claimant constituted a “power tool”.

2 hrs. When accompanied by other risks.

As found, Dr. Hurley did not calculate Claimant's cumulative exposure as it related to either primary or secondary risk factors. He did not persuade the ALJ that Claimant's carpal tunnel syndrome diagnosis was related to a workplace exposure involving these risk factors. More particularly, although Dr. Hurley testified generally regarding the Treatment Guidelines, he did not specifically analyze whether her work activities presented primary or secondary risk factors for Claimant to develop CTS (or de Quervain's) in her left upper extremity. Stated another way, the ALJ was not persuaded by Dr. Hurley's testimony that Claimant's work exposure was the cause for her need for treatment in her left upper extremity.

Based upon the totality of evidence, the ALJ concluded Claimant's work for Employer was not of sufficient length or duration to cause a repetitive injury or cumulative trauma to the left upper extremity. (Findings of Fact 10, 13 and 31)[4]. Claimant only worked 5 or 6 days after May 15, 2015. Therefore, Claimant failed to satisfy her burden of proof that the CTS and de Quervain's tenosynovitis was compensable.

Finally, Claimant did not exhaust conservative treatment modalities, as recommended by the Treatment Guidelines. (Finding of Fact 32). This would generally be required before authorization of the surgery to Claimant's left upper extremity was approved.

In light of the ALJ's findings that Claimant did not suffer a compensable cumulative trauma injury, the medical benefits issues are moot. Claimant is not entitled to medical benefits to cure and relieve her left upper extremity condition.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits for her left upper extremity is denied and dismissed.

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

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

[4] There was a conflict in the record between Mr. Gallagher's testimony and the time cards whether Claimant worked a total of 5 or 6 days after she returned to work in May.

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: March 31, 2016

Digital signature

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained an occupational disease affecting his low back and right leg, arising out of and in the course and scope of his employment as a custom millworker.

II. Whether Claimant established by a preponderance of the evidence that the medical treatment he received in connection with his low back condition, including the care/surgery performed by Dr. Paul Stanton and his referrals was reasonable, necessary and causally related to his alleged occupational disease.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from June 5, 2015 to August 3, 2015.

IV. A determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

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

1. Claimant is a 61 year old custom millworker who has worked for Employer for more than 30 years. Claimant's position requires frequent handling, lifting and manipulation of heavy building materials, including sheets of ply wood, dimensional lumbar and solid surface countertops of various sizes. Additional job tasks include sanding, applying plastic laminate to flat and vertical surfaces without causing bubbles, cutting trim, fabricating cabinet sections, building die walls and using stationary shop tools and power hand tools. Based upon the evidence presented, including the pictures depicting some of Claimant's job duties, the ALJ finds Claimant's work physically demanding.

2. Claimant has a prior history of injury to his low back. In 1994, Claimant suffered an admitted work related injury diagnosed as a large left-sided herniated nucleus pulposus at the L5-S1 lumbar segmental level while performing in the same position he currently holds with Employer. The herniation caused severe canal compromise and left leg radiculopathy. Consequently, Claimant underwent an L5-S1 laminectomy and discectomy. Claimant reached MMI for this injury and was rated as having 8% whole person permanent impairment. He then returned to his position as a custom millworker.

3. Claimant testified that since his 1994 injury he has back pain "all the time." His

back pain has waxed and waned over the years; however, Claimant testified that his back pain worsened while working on a job which was referred to as the "Florida Mall Project." According to Claimant the Florida Mall Project was a very large job requiring fabrication of sections of custom cabinetry with Corian countertops for a coffee bar. Claimant's supervisor, Andrew Hamilton confirmed Claimant's testimony, testifying that the job involved building benches, eating tables and planters to be installed in a Florida mall food court. Per to Mr. Hamilton the job took 2-3 months to complete. The project required that the wooden sections be mocked up, countertops loosely fitted, measurements taken after which adjustments to the section, including the countertops were made. The tops were then replaced and once the section met specs the unit was disassembled for shipping to Florida. Consequently, Claimant testified that he frequently lifted materials weighing as much as 150 pounds while working the Florida Mall Project.[1]

4. Claimant testified that the physical demands, including the lifting associated with the Florida Mall Project increased his back pain in the 30 day period prior to him leaving for vacation on May 22, 2015. Claimant's testimony pinpoints his increased pain to the duties he was performing around April 22, 2015. According to Andrew Hamilton, the last day of the Florida Mall Project was April 29, 2015. Mr. Hamilton testified further that Claimant did not work on the Florida Mall Project at any time during the month of May 2015. Regardless, the evidence presented persuades the ALJ that Claimant continued to work his regular position in increasing pain. Indeed, Claimant worked his regular hours plus some overtime for the entire month of May. He did not report a work injury, or call in sick due to back pain, or otherwise miss time from work because of back pain. He did not seek a change in his job duties. Claimant testified that he did not see a doctor for his increased back pain or report his pain to his supervisor, because he had no disability and no need for treatment. Rather, Claimant testified that he managed his increased pain on his own by getting help on the job, relaxing when he could and taking hot showers after work. Given his prior experience with low back pain, the ALJ finds Claimant's testimony regarding his actions, despite his increasing pain, credible. Moreover, the ALJ finds Claimant's actions to manage his increased pain reasonable.

5. Claimant testified that he traveled to Florida by airplane on May 25, 2015 where he joined his family on vacation until May 31, 2015. Claimant testified that he considered not going on vacation because of his back pain. However, the vacation was already planned and he believed that time off resting his back might improve his pain. Consequently, Claimant decided to travel. He admitted that he was able to walk onto the airplane and then sit on the plane for the 4 to 5 hour flight each way between Colorado and Florida.

6. While on vacation, Claimant testified he felt "lousy." In addition to coping with his increased back pain, Claimant testified that he developed an upper respiratory infection and was suffering from cold symptoms. Claimant testified that as a consequence of his

[1] Steve Krueger, who is also employed as a millworker, testified that the lifting associated with the position can be heavy, noting that a 4 × 12 sheet of 1 ⅛ inch thick particle board weighs as much as 215 pounds, but help is available to lift and manipulate heavy materials.

back pain and cold he was unable to participate in activities with his family. Claimant testified that he spent his time lounging by the pool or the beach. Claimant's wife, Peggy Harris corroborated his testimony, adding that he watched movies and went to dinner, but did not participate in any walks/hikes and did not suffer any subsequent injuries on vacation.

7. Mrs. Harris also testified that Claimant began complaining of increased back pain about a month prior to leaving for vacation. According to Mrs. Harris, Claimant moved slowly during this time frame. He appeared tired and reluctant to "participate" in activities such as mowing and vacuuming, citing back pain. In spite of not feeling well, Mrs. Harris testified that Claimant decided to go on vacation anyway. Per Mrs. Harris, Claimant was sick the whole time while on vacation. Nonetheless, Claimant did not seek treatment for his back pain or cold while on vacation in Florida.

8. Claimant took an airplane from Florida back to Colorado, ending his vacation as planned, on Sunday, May 31, 2015.

9. On Monday, June 1, 2015, claimant saw his personal care physician, Sean O'Donnell, M.D., for his severe cold and acute sinusitis. Dr. O'Donnell reported that claimant presented with sinus symptoms which have been a problem for the "past 2 weeks," His symptoms included maxillary facial pressure, headache and nasal congestion. Claimant had no complaints of recent or chronic coughing. Dr. O'Donnell prescribed an antibiotic because an over-the-counter decongestant had not been working.

10. Claimant did not complain of back pain to Dr. O'Donnell during his June 1, 2015 visit. As documented in the June 1, 2015 note from Dr. O'Donnell, review of Claimant's musculoskeletal system was "negative for back pain." Claimant testified that he did not raise his increased back pain to Dr. O'Donnell during the June 1, 2015 appointment as he has suffered from chronic back pain in the past and he does not complain about it. The ALJ credits Claimant's testimony to find that because of the waxing and waning nature of his low back pain over the years, he felt no reason to report to report his pain to Dr. O'Donnell on June 1, 2015. Moreover, the primary purpose of Claimant's visit to Dr. O'Donnell's office was to obtain treatment for his cold rather than back pain.

11. Following his appointment with Dr. O'Donnell, Claimant called Employer and asked for two days off to recuperate from his cold. Claimant testified that on the evening of June 2, 2015, he developed severe back and leg pain. Based upon the evidence presented, the ALJ infers that while Claimant had increased back pain prior to June 2, 2015, his pain became much worse than it had been prior to and while he was on vacation.

12. Claimant woke up on June 3, 2015, hardly able to stand or walk. Claimant proceeded to work where he reported a back injury to Andrew Hamilton. Both Claimant and Mr. Hamilton agreed that Claimant could hardly stand or walk when he arrived at work to report his alleged injury. A first report of injury ("first report") was completed by Stephanie Robinson, Employer's Financial Controller on June 4, 2015. The first report

of injury documents the date of injury as May 29, 2015.[2] Regarding "how the injury or illness/abnormal health condition occurred," the fist report notes: "Not sure. Jim said it has been coming on for a few months but he has just been going home and resting and it seems to get a little better. Yesterday he came in and couldn't even walk."

13. Claimant was referred to and was evaluated by Employer's designated medical provider, Steve Caste, M.D., on June 3, 2015. This is the first time Claimant saw a medical provider for his alleged work-related back pain. When asked "why is your problem work-related" in paperwork, Claimant responded "back injury over time." Dr. Castle took a history that Claimant has had "discomfort" for about 6 months, which he had been able to manage on his own. He also noted that over the past week, Claimant had been off work on vacation and that Claimant saw his personal care physician due to cold symptoms. Regarding Claimant vacation and increasing back pain, Dr. Castle noted: "After he got home, he had sudden increased back pain radiating his right thigh with numbness past the knee into his foot. He was not engaged in any physical activity at the time. He has a history of previous work related *left*-sided HNP [herniated nucleus pulpous] in 1994 which required surgery, and which resolved. His current symptoms in his *right* leg are similar to previous left-sided HNP." Dr. Castle questioned the compensable nature of Claimant's increased back pain because it appeared to have occurred at home. Nonetheless, Dr. Castle excused Claimant from work on this date.

14. On the physician's report of WC injury which asks: "Are your objective findings consistent with history and/or work-related mechanism of illness, Dr. Castle marked the answer "no." Dr. Castle noted that he would "defer" the decision regarding compensability to the "carrier." He also referred Claimant for a lumbar MRI and a surgical consultation.

15. MRI of the lumbar spine was performed June 8, 2015 and demonstrated "evidence of a relatively large posterior right paracentral acute to subacute disc herniation at L5-S1 displaced cranially causing severe right-sided lateral recess effacement and proximal S1 nerve root compression" in addition to "severe neural canal stenosis with cauda equina compression," also at the L5-S1 level.

16. On June 10, 2015, Dr. Castle noted Claimant's large disc herniation, stenosis and cauda equina compression. He noted further that Claimant had been referred to a spine surgeon and was scheduled to be seen by that specialist on June 11, 2015. Regarding compensability, Dr. Castle noted: "Compensability decision is still pending-he's had pain at work but the radicular component and therefore HNP appears to have occurred while he was off" work. Claimant remained unable to work per Dr. Castle.

17. Insurer sought an opinion regarding the question of whether Claimant's acute disc herniation was causally related to his work duties. On June 10, 2015, Dr. Andrew Castro, an orthopedic spine surgeon completed a physician advisor opinion noting that

[2] In notarized discovery responses, Claimant listed his date of injury as May 29, 2015 (the same date noted on the Employer First Report of Injury. Claimant's date of injury on his application for hearing is May 22, 2015. At hearing, Claimant testified to a June 3, 2015 date of injury.

Claimant "was not actually working" when the symptoms came on. Dr. Castro stated: "While I believe this surgical referral and treatment for the disc herniation is appropriate, I do not feel it is appropriate with regards to the workers' compensation setting; specifically, this is not causally related to any injury in question. There is no intervening event and no specific event and no lifting injury; indeed the patient was on vacation and/on or off of work when these symptoms presented and he does have an acute disc herniation, which likely occurred when the patient was not at work. I do not think this fulfills the requirements of cumulative injury disorder and I do not believe this is causally related to the injury in question."

18. Insurer denied liability for the claimed injury and Claimant proceeded with additional care under his private medical insurance.

19. Claimant was evaluated by Dr. Stanton on June 11, 2015. Dr. Stanton noted that Claimant "[had] been having pain for about 8 days". While he noted that there was "no event/injury," Dr. Stanton did note that Claimant had a "several month history of increasing right lower extremity symptoms" which came to a "fever pitch" recently. He did not comment further upon whether Claimant's disc herniation and attendant symptoms, including his leg pain were related to his work as a millworker for Employer. Dr. Stanton diagnosed L5-S1 HNP right side, right-sided radiculopathy, L4-5 central stenosis and multilevel lumbar degenerative disc disease with congenital stenosis.

20. On June 29, 2015, Claimant underwent aL5-S1 laminotomy, partial facetectomy and discectomy performed by Dr. Stanton. Dr. Stanton's pre-operative diagnoses were lumbar spinal stenosis, lumbar degenerative disc disease, lumbar displaced disc and lower extremity radiculopathy.

21. Based upon the evidence presented, the ALJ finds the treatment rendered in this case, including the surgery performed by Dr. Stanton, reasonable and necessary to cure and relieve Claimant from his ongoing low back and right leg symptoms.

22. Claimant testified that he was unable to work following his June 29, 2015 surgery through August 3, 2015. Based upon the evidence presented, the ALJ finds that Claimant was excused from work on June 3, 2015 and returned to work on August 4, 2015. Claimant testified he earns $26.00/hour and works 6:00 a.m. to 4:30 p.m., Monday through Thursday and from 6:00 a.m. to 2:15 p.m. on Fridays. Review of Claimant's wage records reflect that between January 1, 2015 and May 24, 2015 (144 days), Claimant earned $24,524.11 for an average weekly wage of $1,192.14 ($24,524.11 ÷ 144 days × 7 days/week = $1,192.14).

23. On November 6, 2015, Dr. Edwin Healey performed an independent medical examination (IME) of Claimant at the request of his attorney. Dr. Healey examined Claimant and rendered an opinion that Claimant had sustained a compensable injury to his low back. Regarding causation, Dr. Healey's report states: His report states:

> Based on the history that Mr. Harris provided today and a review of his job description, it is my opinion within reasonable degree of

> medical probability that the right-sided L5-S1disc herniation and requirement for lumbar surgery to include L5-S1 revision laminectomy/discectomy was causally related to the work activities that Mr. Harris performed for his employer. He essentially had a severe aggravation of a pre-existing Work Comp injury which occurred initially in 1995 and required a left-sided laminectomy/discectomy. Mr. Harris had a weakened lumbar disc as a result of his initial lumbar injury at L5-S1 and the repetitive lifting, bending, and twisting that he performed subsequently caused the weakened disc to eventually herniate on the right side and necessitated a second lumbar discectomy at the same level as the original injury."

24. At hearing, Dr. Healey reiterated his opinion that Claimant's prior low back injury constituted a risk factor for the development of his subsequent disc herniation. Dr. Healey testified that the prior work-related left sided disc herniation "pre-disposed" Claimant to a right sided HNP which, according to Dr. Healey, was "bound to happen at some point" regardless of any specific job task on any given day or days. According to Dr. Healey, years and years of having to get into awkward positions, twist and lift heavy materials contributed to Claimant's right sided disc herniation. He testified further that there was no activity that was done on vacation which was likely to cause disc herniation.

25. During cross examination, Dr. Healey admitted that Claimant's job falls within the medium duty work category and that there are jobs that exist that are "heavier" than Claimant's job. Regardless, Dr. Healey testified that having to lift heavy items and get into awkward positions for 20 years, from 1995 through May 22, 2015, less 3 years, permanently aggravated Claimant's pre-existing low back condition leading to his subsequent right sided disc herniation and need for surgery.

26. Although Dr. Healey's report lists the date of injury (DOI) as May 2, 2015, he testified that this was an error; the correct DOI according to Dr. Healey is May 22, 2015. Dr. Healey opined that Claimant had increasing low back pain without leg radicular symptoms while performing strenuous work activities since early January 2015. Dr. Healey went on to state that Claimant experienced "the acute onset of low back and left leg pain" on May 22, 2015. This date, is, therefore the date of Claimant's injury, according to Dr. Healey.

27. Respondents contend that Dr. Healey's opinion regarding Claimant's DOI is based upon the wrong facts. Citing that Claimant experienced a severe onset of low back and left leg pain, which caused him to report the injury and seek treatment on June 3, 2015 and not May 22, 2015, Respondents assert that Dr. Healey's opinion concerning the DOI is unsupported by the record evidence, including Dr. Castle and Dr. Stanton's medical records. Consequently, Respondents suggest that because Claimant was not working at the time he experienced severe pain on June 3, 2015, there is no causal connection between his low back/leg pain and his work duties.

28. The exact timing of Claimant's acute disc herniation and the development of associated symptoms is complicated further by Dr. Healey's testimony that symptoms connected with acute disc herniation usually manifest within 24-48 hours of the herniation. Given that Claimant experienced severe low back and leg pain on June 3, 2015; Respondents contend that his disc herniation likely occurred 24-48 hours prior to June 3, 2015 and not May 22, 2015. As Claimant was not at work in the 24-48 hour period prior to June 3, 2015, Respondents reiterate their argument that there is no causal connection between Claimant's acute disc herniation and his subsequent need for low back surgery and his work duties.

29. Noting that Dr. Healey conceded that a simple cough or a sneeze, or the act of walking or sitting on an airplane (or anywhere for that matter) or bending, or any number of activities, could cause disc herniation, Respondents suggest that the most probable cause of Claimant's acute disc herniation would be a cough or a sneeze in the 24 to 48 hour time period prior to the June 3, 2015 when he was suffering from a cold so severe that he sought medical treatment from his family physician on June 1, 2015. The ALJ is not persuaded. While the ALJ is convinced that simple activities, including coughing and prolonged sitting can cause disc herniation, this fact does not support a conclusion that the disc herniation in this case undeniably occurred on the date of such activity, i.e. 24-48 hours before the onset of symptoms. Indeed, as Dr. Healey testified he has seen instances of patients having asymptomatic herniated discs which later become symptomatic while performing simple activities. Consequently, Dr. Healey testified that he could not specifically pinpoint the day Claimant's disc herniated.

30. On February 18, 2016, Amjun Sharma, M.D., conducted a Respondent IME. Dr. Sharma took a history from Claimant that his back "hurt all of the time." Dr. Sharma opined that there is no causal relationship between Claimant's back pain and a specific event or work activity. Dr. Sharma reported that he is in agreement with Dr. Castle and Dr. Stanton that Claimant's back condition and need for treatment, including surgery, is not work-related. Dr. Sharma explained that Dr. Stanton, who was aware of Claimant's previous left sided disc herniation, "would clearly understand that this is a chronic condition that would not have been exacerbated or aggravated by the work activities." Dr. Sharma also reviewed Claimant's job description and a video of Claimant's job duties and stated that: "I concur and opine with Dr. Stanton and Dr. Castle that this is not a claim related condition."

31. Based upon the evidence presented, the ALJ finds Dr. Sharma's opinion that "there is a disconnected time, a significant amount of time that had passed where the injured worker could have been exposed to other activities while on vacation," speculative and contradicted by the more persuasive testimony of Claimant and his wife.

32. Based upon the evidence presented, the ALJ finds Dr. Healey's opinions credible and more persuasive than the contrary opinions of Dr. Castle, Dr. Castro and Dr. Sharma. Consistent with the opinion of Dr. Healey, the evidence presented persuades the ALJ that Claimant, more probably than not, suffered a compensable aggravation of his 1994 low back injury manifesting initially as increased low back pain while engaged

prolonged exposure to frequent heavy lifting during the pendency of the Florida Mall Project. The balance of the persuasive evidence also convinces the ALJ that Claimant likely re-herniated his L5-S1 disc during this same time frame given his progressive right leg pain which culminated in his difficulty in standing and walking on June 3, 2015.

33. Respondent's contrary suggestion, specifically that Claimant's disc herniation and therefore, his disability and need for treatment, including the surgery performed by Dr. Stanton was caused by an intervening event is not supported by the evidence presented. While Respondents established that Claimant did go on vacation and did seek treatment for a cold upon his return, there is a dearth of evidence to support the suggestion that he was injured on that vacation or that his disc herniation was caused by coughing/sneezing.

34. Based upon the evidence presented, the ALJ finds that Claimant's increasing pain and corresponding functional decline over time were, more probably than not, related to the aggravation of his pre-existing back condition and the progression of symptoms associated with an undiagnosed and untreated disc herniation. Consequently, the ALJ finds that Claimant has proven that his need for treatment, including the surgery performed by Dr. Stanton is directly related to and caused his work duties associated with the Florida Mall Project in the weeks prior to leaving for vacation on May 22, 2015. As noted above, those duties aggravated the pre-existing condition of Claimant's low back over time and specifically by May 22, 2015 when claimant left for vacation. Consequently, the ALJ credits the testimony of Dr. Healey to find that Claimant suffered a compensable aggravation of his pre-existing low back condition as a direct consequence of his work duties for Employer.

35. The Claimant's time off work from June 3, 2015 through August 4, 2015 is directly related to this compensable aggravation as Claimant's inability to work was caused by the disability associated with the aggravation directly or with his recovery from surgery necessitated by the compensable work related aggravation. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits for this time period.

CONCLUSIONS OF LAW

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

General Legal Principals

A. 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 litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230*

(Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The 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). As noted in this case, Claimant's testimony is credible and convincing. Moreover, the expert medical opinions of Dr. Healey are more persuasive than the contrary opinions of Drs. Castle, Castro and Sharma when the evidentiary record is considered in its totality.

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

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and

place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *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) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries for which benefits are sought. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant argues that the evidence presented supports a conclusion that he suffered a compensable aggravation of a pre-existing condition caused by a 1995 injury to his low back. Claimant asserts further that this aggravation was occasioned by prolonged frequent lifting of heavy materials while working the Florida Mall Project in the weeks/months prior to going on vacation. He did not allege the occurrence of a discrete injury. Rather, he alleges that he suffered an occupational disease as a result of prolonged exposure to heavy lifting, bending and twisting occasioned by his work activities as a millworker for Employer.

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical

symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties 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 the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found in this case, the totality of the evidence presented persuades the ALJ that Claimant's worsening low back and right leg pain, more probably than not, arose from the duties associated with the Florida Mall Project. It is undisputed that Claimant was called upon to fabricate heavy wooden structures and fit them with Corian countertops. The process required repeated lifting of the countertops to ensure a proper fit and the project took 2-3 months to complete. The ALJ concludes that it is probable that these activities aggravated the underlying condition of Claimant's low back giving rise to worsening symptoms in the weeks prior to May 22, 2015. Here, Claimant testified to worsening pain in the 30 day period before leaving for vacation on May 22, 2015, or around April 22, 2015. According to Mr. Hamilton's testimony this would cover a period of time that the Florida Mall Project was ongoing as the project to not conclude until April 29, 2015. Claimant's testimony regarding his increased pain during this time period is supported by the observations of his wife. According to Mrs. Harris, Claimant's was moving slowly and appeared tired. Furthermore, he was unmotivated to perform household activities citing back pain as the cause. Consequently, the ALJ rejects Respondents' assertion that the evidence generally fails to support a temporal relationship between Claimant's heavy work and/or awkward body positioning and his increasing/worsening low back symptoms on and after May 22, 2015. Furthermore, Respondents suggestion that Claimant's worsening symptoms were caused by a disc herniation which occurred while he was on vacation or after coughing/sneezing due to his head cold is equally unpersuasive. There is simply no convincing evidence to support this conclusion. As found, the evidence presented persuades the ALJ that the aggravation of Claimant's underlying back condition likely resulted in his disc herniation and his progressive symptoms, including his leg pain were a direct result of that undiagnosed/untreated herniated disc. Accordingly, the ALJ is persuaded that Claimant's low back/right leg symptoms arose out of and in the course of his employment as a custom millworker for Employer.

I. As noted above, Claimant asserts that the aforementioned "aggravation" was caused by prolonged exposure to repeated lifting, twisting and assuming awkward position over time, especially in the weeks/months prior to leaving for vacation on May 22, 2015. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the

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

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). As part of the analysis regarding the compensable nature of Claimant's alleged occupational disease, the ALJ has considered the "peculiar risk test."

J. As the court pointed out in *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993), the plain language of section 8-40-201 (14) sets forth additional requirements to the requirement that the injury arise out of and in the course of employment. Before a disease can be found to be a compensable occupational disease, it must meet each element of the four-part test mandated by section 8-40-201(14) which, in effect, operates as an additional causal limitation, ensuring that the disease arise out of and in the course of the employment. The court in *Anderson v. Brinkhoff* further noted that the statutory language requiring that the disease "does not come from a hazard to which the worker would have been equally exposed outside of the employment" effectuates what is termed the "peculiar risk" test and requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. In other words, "the plaintiff must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Anderson v. Brinkhoff,* 859 P.2d at 824, *quoting Young v. City of Huntsville,* 342 So.2d 918, 922 (Ala. Civ. App. 1976).

K. The question of whether a claimant has proven that a particular disease, or aggravation of a disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d251 (Colo. App. 1999). The failure to satisfy each element of an occupational disease by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). The evidence presented persuades the ALJ that Claimant has satisfied the peculiar risk test and has otherwise proven that he sustained an occupational disease. Indeed, Claimant was exposed to the risk which caused his symptoms/disease in a measurably greater

degree than other persons in other occupations or in everyday life generally. Here, Claimant's position routinely required him to assume awkward positions, bend, twist and repeatedly lift materials weighing 150-215 pounds. In considering the evidentiary record as a whole a reasonable conclusion in this context is that, by comparison, Claimant's non- occupational exposure to the risk factors precipitating his symptoms is not equal to or greater than that present by his work. Given that Claimant has proven that his symptoms can be fairly traced to his employment as a proximate cause, i.e. they arose out of and in the course of his employment, and did not come from a hazard to which he was equally exposed outside of the employment, the undersigned ALJ concludes that Claimant has proven a compensable injury.

Medical Benefits

L. 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 claimant bears the burden of 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). A claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the Claimant's need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was 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); *Section 8-41-301(1)(c), C.R.S.*

M. Furthermore, any natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents suggest that such an injury occurred in this case either while Claimant was on vacation or as a consequence of coughing/sneezing due to a head cold. As found, Respondents' implication is not compelling given the lack of persuasive evidence that Claimant suffered an intervening injury and Dr. Healey's testimony regarding the difficulty in establishing the exact date for disc herniation given that some herniated discs can remain asymptomatic until a subsequent triggering event. Because Claimant has proven that his need for low back treatment was directly related to and caused by the compensable aggravation of a pre-existing low back condition and Respondents did not challenge the reasonableness or necessity of such treatment, Respondents are obligated to provide it. *Section 8-42-101(1)* (a), C.R.S.

Temporary Disability Benefits

N. To receive temporary disability benefits, Claimant must prove the injury caused a disability. Section 8-42-103(1), C.R.S. 2001; *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 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 § 8-42-105(3)(a)-(d), C.R.S. 2014. In this case, Claimant credibly testified and the medical records support that he suffered a large herniated L5-S1 disc causing severe spinal stenosis and cauda equina compression requiring surgery and after care. Claimant's testimony that he was unable to return to his usual job until August 4, 2015, due to the effects of his compensable work related injuries and subsequent surgery is convincing. Moreover, the persuasive evidence establishes that Respondents did not offer Claimant modified duty, likely because Employer could not accommodate his physical limitations. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and has established a wage loss. Thus he is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999).

Average Weekly Wage

O. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

P. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury comes from the wage records submitted into evidence. As found, in the 144 days prior to the injury in this case, Claimant earned a total of $24,524.11 for an average weekly wage of $1,192.14 ($24,524.11 ÷ 144 days × 7 days/week = $1,192.14). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his May 22, 2015 compensable work related injury. Accordingly, for purposes of this claim, Claimant's AWW is $1,192.14.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he suffered a

compensable injury to his low back and right leg as a consequence of prolonged exposure to heavy lifting, bending, twisting and assuming awkward positions occasioned by his work duties as a custom millworker for Employer on May 22, 2015.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his low back injury, including the surgery performed by Dr. Stanton on June 29, 2015. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987).

3. Respondents shall pay temporary disability benefits in accordance with section 8-42-103(1)(b), C.R.S. at a rate of sixty-six and two-thirds percent of his AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week for the time period extending from June 3, 2015 through August 3, 2015. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury, the three-day waiting period before payment of TTD benefits are to be paid does not apply in this case. Section 8-42-103(1)(b), C.R.S.

4. Claimant's AWW for purposes of paying TTD associated with this claim is $1,192.14.

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

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

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 20, 2016

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-987-724, 4-986-776

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable inguinal hernia while in the course and scope of her employment for Employer on May 29, 2015.

- If compensable, Claimant requests temporary disability benefits from September 12, 2015 and ongoing. She requests an average weekly wage (AWW) of $904.21. If compensable, Respondents contend Claimant's AWW is $569.12, and request penalties for Claimant's failure to report the May 29, 2015 injury until June 26, 2015.

FINDINGS OF FACT

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

1. On April 9, 2015, Employer hired Claimant to work as a furniture salesperson at its Thornton store. As part of her job duties, at the end of her shift Claimant dusted, vacuumed, and organized a portion of the showroom.

2. Claimant testified that on May 29, 2015, at approximately 9:45 p.m., she was vacuuming her work area. She stated that when she picked up the vacuum to get it over a shag rug, she had immediate pain in her right groin which went down her lower back. She stated that the pain was very severe but that after a short time, her pain lessened.

3. Claimant worked the rest of her shift and did not report any injury. She sought no medical care and she lost no time from work.

4. Claimant testified that on June 22, 2015, at about 9:15 p.m., she was walking at work while carrying a spray bottle and cloth when she experienced severe pain. She did not tell her manager that she had a work injury. She told her manager that she did not know what the problem was.

5. At hearing, Claimant testified that her pain on June 22, 2015 was the "same pain" that she previously had on May 29, 2015. Claimant testified that she was not injured on June 22, 2015, but instead experienced pain that day, which she stated was caused by the event on May 29, 2015 when she lifted the vacuum.

6. On June 23, 2015, Claimant went to the Emergency Room at St. Anthony's North. Those records state that Claimant started to have pain in her right lower back on the previous day, with no specific trauma or injury. Claimant was

diagnosed with right leg pain and probable sciatica. The record states that Claimant "had a similar incident one month ago that resolved on its own without any difficulty."

7. At hearing, Claimant testified that this medical record was incorrect because she did not tell the E.R. staff that her pain from the previous month (i.e., on or about May 29, 2015) had resolved.

8. The June 23, 2015 Emergency Room records contain no reference to Claimant's condition being work-related. At hearing, Claimant testified that she told the E.R. staff that her injury was work-related, and that the failure to reflect that fact was an error in the medical records.

9. On June 25, 2015, Claimant saw her personal physician, Dr. Karen Ratner, whose records reflect that Claimant had right back and right leg pain, which had a sudden onset three days ago "pushing heavy furniture at work" (quotation marks in original).

10. At hearing, Claimant testified that this medical record was incorrect, and that she did not tell Dr. Ratner that her pain was due to pushing heavy furniture at work.

11. On June 26, 2015, Claimant met with her store manager, Steve Williams. She testified that this was the first time that she reported an injury to her Employer. Claimant and Mr. Williams filled out an "Incident Report" together; he asked her questions, she answered, and he wrote down the answers. The Incident Report consists of two pages, both of which Claimant signed. It lists Claimant's injury as "sciatic nerve" and the body part as "lower back." It states that Claimant was injured while "reaching into an overhead cabinet to get some cleaning rags." It further notes that Claimant thinks "she may have injured herself vacuuming about a month prior at the Thornton store."

12. Steve Williams testified that he is Employer's store manager and Claimant's supervisor. Claimant called him on June 25, 2015, and asked to meet with him. He met with Claimant on June 26, 2015 to fill out an Incident Report and workers' compensation paperwork. He testified that prior to June 26, 2015, he had no knowledge that Claimant had any work-related injury, or that she had pain between late May and June 26, 2015.

13. Mr. Williams asked the Claimant various questions about her claimed work injury and he wrote down what she told him. On the Incident Report, he wrote "she tweaked her lower back while reaching into an overhead cabinet. This is what [Claimant] explained happened." He also wrote that Claimant "thinks she may have injured herself vacuuming about a month prior at the Thornton store." He stated that Claimant did not tell him that she lifted a vacuum.

14. Mr. Williams testified that Claimant continued to work for Employer through September 4, 2015, and then she stopped coming to work. He stated that

Employer was aware of Claimant's work restrictions and had accommodated them, and that no one at the store told Claimant that she should not come back to work. He stated that if she had continued to show up for work, she would still be working there, and that he did not know why she stopped showing up for work.

15. After meeting with Mr. Williams, Claimant went to see Dr. Michael Striplin. His records dated June 26, 2015 state that Claimant was pushing a vacuum on carpet a month ago and that she said she had some mild symptoms that persisted until June 22, 2015, when she noted the sudden onset of right hip and groin pain with no known injury. He noted she was diagnosed with sciatica at St. Anthony's North Emergency Room. He determined Claimant's pain complaints were not work-related and recommended that she follow-up with her personal care physician.

16. Contained in Dr. Striplin's records is Claimant's handwritten statement which reads, "I was vacuuming one day, I felt the pain while pushing the vacuum but I walked it off, a month later I was walking at work and the pain started again, but this time I could not walk, I went to the E.R."

17. Claimant testified that although her handwritten statement makes no reference to her pain being associated with lifting the vacuum, that she did lift it. She also stated that although she wrote that she had "walked off" the pain associated with vacuuming; her written statement was incorrect, and wrongly phrased.

18. Claimant stopped working for Employer on September 4, 2015. She said this was because she could not walk due to pain. She testified that no one told her she could not come back to work. She provided no documentation, including any medical record, to corroborate her statement that she was not able to continue working.

19. Employer's records show Claimant's last day at work was September 4, 2015, and that Claimant called in sick on September 5, 2015, and did not return.

20. On September 5, 2015, Claimant went to Kaiser and saw Dr. Jennifer Kuhl. Those records state that Claimant's "pain increased two weeks ago while playing with children and her son pulled her arm." At hearing, Claimant testified that her pain had increased the day before she saw Dr. Kuhl, not two weeks before.

21. On July 7, 2015, Claimant went to the North Suburban Medical Center Emergency Room for abdominal pain. This record reflects that Claimant reported "a tearing sensation in her right groin several weeks ago, progressively worse since that time occurred while lifting heavy objects at work at [Employer]." An ultrasound showed that Claimant had a "small defect" within the fascia, which measured 6.1 mm. The defect was referenced as a "small, fat-containing right-sided inguinal hernia."

22. On July 10, 2015, Claimant was seen by Edward Medina, M.D., who noted that he could not palpate Claimant's hernia. His note states that Claimant "lifted up a

vacuum when she felt pain in her right groin." This is the first reference in the medical records which associates Claimant's pain with having lifted a vacuum at work.

23. Medical records from Dr. Karen Ratner show that Claimant was diagnosed with chronic low back pain and arthropathy of multiple sites on three occasions prior to her May 2015 alleged injury. However, in her recorded statement, taken on July 8, 2015, Claimant denied having prior medical treatment to her low back.

24. A Kaiser record dated August 18, 2015 reflects that Claimant asked for a letter "to take to her work" and that her Kaiser physician, Dr. James Hutchings, responded that he had no documentation that Claimant truly had a hernia, and that he could not state that it was work-related. He stated that he could document only that Claimant reported that she had a work-related injury.

25. A Kaiser record from Dr. Karen Black dated November 20, 2015 reflects that Claimant called Dr. Black that day in order to obtain documentation regarding the causes of hernia. These records contain an email from Claimant to Dr. Black dated November 23, 2015 stating "I have never experienced this groin pain until I lifted a vacuum over a shag rug, can you please explain on your note if you think that vacuum could cause or aggravate a hernia." In response, Dr. Black wrote Claimant a letter dated November 25, 2015. This letter contains data on various factors that are associated with hernias. Dr. Black wrote, inter alia, that "the relationship between inguinal hernias and intermittent straining or heavy lifting is not clear; some studies suggest that the incidence of hernia is no higher in professions performing heavy manual labor than in sedentary professions, while others have come to the opposite conclusion." Dr. Black did not state that Claimant's having lifted a vacuum probably caused or aggravated her hernia.

26. At hearing, Claimant testified that no one had told her that there was a relationship between the pain which she felt on or about May 29, 2015 and the pain which she felt on June 22, 2015. Claimant submitted no medical record or report which: a) concluded there was any relationship between her pain on the two dates; b) found that her pain on May 29, 2015 was likely caused by lifting a vacuum at work; or c) found that lifting the vacuum probably caused her hernia.

27. Dr. Lesnak performed an IME for Respondents and testified at hearing. He testified that Claimant's complaints were primarily groin pain, and that while a hernia can cause groin pain, there are other causes, including hip pathology, muscle or nerve pathology, and unknown causes. He stated that an increase in abdominal pressure can cause a hernia and/or hernia pain. He noted that Claimant stated that she had pain while walking, including at work on June 22, 2015. He stated that walking does not cause an increase in intra-abdominal pressure, and that it is not probable that Claimant's pain complaints on June 22, 2015 were related to a hernia.

28. Dr. Lesnak testified that although an ultrasound detected a hernia, it was so small that he could not feel it. He characterized her hernia as a small, fat-filled

defect, which was not likely a pain generator. While Claimant had stated that walking, twisting, sitting, or having her child pull on her arm caused her symptoms, Dr. Lesnak testified that these activities do not cause an increase in abdominal pressure, and would not cause a hernia to become painful. He stated that any pain related to these activities would probably be related to Claimant's preexisting chronic multi-site arthralgia, i.e., joint pain, and was not work-related.

29. Dr. Lesnak stated that it was not medically probable that lifting a vacuum on or about May 29, 2015 caused Claimant's hernia, because lifting in the way Claimant described would not cause an increase in abdominal pressure. Dr. Lesnak testified that it is more probable than not that Claimant's pain on or about May 29, 2015 was due to her preexisting chronic back and joint pain.

30. Dr. Lesnak noted that the record shows multiple histories of how Claimant's purported injury occurred, and that it was not until July 10, 2015 that the records reflect that Claimant said she injured herself by lifting a vacuum at work. He commented that although Claimant testified she did not tell the E.R. personnel on June 23, 2015 that her prior pain from May 2015 had "resolved on its own without difficulty", that the E.R. note is more reliable. He stated that E.R. personnel would be unlikely to concoct such a note.

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

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

Claimant carries the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. *See City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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).

Claimant alleges that she sustained a work-related hernia on May 29, 2015 while pushing and then lifting a vacuum cleaner over a shag rug at work. She did not report this incident, sought no medical treatment, and lost no time from work. She alleges that her pain from this incident recurred on June 22, 2015 while she was walking at work. She does not contend that she was injured on June 22, 2015. Rather, she states that she felt pain on that day, which she believes was due to a hernia from lifting a vacuum on May 29, 2015. Claimant alleges she was misdiagnosed with sciatica.

When Claimant first sought treatment on June 23, 2015, those records state that while Claimant had pain from a similar incident a month earlier, her pain "resolved on its own and without difficulty." Although Claimant states she did not make this statement, it is improbable that the E.R. staff entered this note into the record without Claimant having made the statement. Claimant's testimony that several of her medical records contain errors or misstatements is not credible.

Prior to her claimed injury of May 29, 2015, Claimant had been diagnosed with chronic back and joint pain. While she may have had a flare of back pain on May 29, 2015 associated with vacuuming, there is no evidence that she sustained a compensable injury that day. She sought no treatment and lost no time from work. Instead, she stated that her pain lessened after a few minutes. The medical records show that this pain resolved on its own. While Claimant had another flare of pain while walking at work on June 22, 2015, she admitted that she was not injured at work on that day.

The evidence shows that Claimant's inguinal hernia is probably not the cause of her pain complaints. It is more probable that her pain complaints are due to her preexisting condition.

The record contains no documentation from any physician indicating that Claimant's pain, whether on May 29 or June 22, 2015, was probably related to her hernia. Claimant has failed to prove the existence of a compensable injury by a preponderance of the evidence.

ORDER

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

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman 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: March 9, 2016

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

ISSUES

1. Whether the claimant has proven, by a preponderance of the credible evidence, that he sustained a compensable injury on May 14, 2015;

2. If so, whether the respondent-insurer is responsible for the reasonable, necessary, and related medical care received by the claimant for the injury; and,

3. If so, whether the claimant was responsible for his wage loss as a result of the termination of his employment.

FINDINGS OF FACT

1. The claimant had been employed for almost three years as of May 2015 in the respondent-employer's warehouse handling shipping and receiving. His shift ran from 6:00 a.m. to approximately 3:30 p.m. The claimant arrived at work at approximately 6:00 am on May 14, 2015. When the claimant arrived at work his right shoulder, his neck, and his arm were feeling fine.

2. At some point between 7:00 and 7:15 a.m. on May 14, 2016, he was "re-palletizing," moving 50 pound bags of flour off of a pallet. During this process, the claimant felt pain mostly in the bicep and continuing up to the right shoulder with a little pain in the neck. The claimant reported the pain sensation to Anthony Copley, his supervisor. They completed some paperwork and the claimant continued working, finishing his shift while continuing to work.

3. The claimant was sore at the end of the day and went home to rest on a recliner.

4. The next day the claimant was still sore and he spoke with Anthony Copley and also reported the incident to another unknown supervisor that day. The claimant was then permitted to do light duty type work, including doing paperwork. While doing the light duty the claimant was hurting somewhat but as long as he was not using the right arm it was not bothersome.

5. Ultimately, the claimant sought treatment when the symptoms did not go away, and increased in severity.

6. The claimant saw Dr. Lakin on May 28, 2015, at the Southern Colorado Clinic.

7. Dr. Lakin's work related injury diagnoses included right biceps tendinitis and a sprain and strain of the right shoulder and upper arm.

8. The claimant received x-rays of his shoulder on May 28, 2015 with the Indication of ruptured bicep tendon and the Findings stating: "No comparison. No bony or joint abnormality is appreciated."

9. The claimant had a follow-up appointment with Dr. Lakin on June 11, 2015 where he requested an MRI.

10. The claimant stated that he was terminated in July 2015 for allegedly violating the respondent-employer's "lockout/tagout" (LOTO) policy. When asked about LOTO, the claimant said there were many types of LOTO. The claimant operated forklifts inside trailers, but never did it in violation of the LOTO policy.

11. For operations within a trailer, employees were supposed to use wheel chocks and that chocks and similar safety measures were meant to keep trailers from moving while at the loading dock.

12. The claimant denies that he violated the LOTO policy.

13. The ALJ finds that the claimant is not particularly articulate but that he is credible with respect to the mechanism of injury and the events surrounding his termination.

14. The ALJ finds that the claimant has established that it is more likely than not that he suffered an injury to his right upper extremity on May 14, 2015 arising out of and in the course of his employment with the respondent-employer.

15. The ALJ finds that the claimant has established that it is more likely than not that he requires medical care to cure or relieve him from the effects of his injury, specifically the care provided by Dr. Lakin and his referrals.

16. The ALJ finds that the respondents have failed to show that it is more likely than not that the claimant violated the LOTO policy, and therefore, they have failed to establish that it is more likely than not that he was responsible for his termination.

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. Indus. Claim Appeals Off.,* 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.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true 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).

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

4. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

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

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

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

9. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the 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. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment the claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the

preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

11. The ALJ concludes, as found above, that the claimant is credible.

12. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

13. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical care to cure or relieve him from the effects of his injury, specifically that care provided by Dr. Lakin and his referral for an MRI.

14. As found above, the ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant is responsible for his termination.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim is compensable under the Workers' Compensation Act of Colorado.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of his injury.

3. The respondents' defense of responsibility for wage loss is denied and dismissed.

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 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, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his neck, low back, right shoulder, and left shoulder on March 20, 2015.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits including physical therapy and/or surgery for his left shoulder recommended by Dr. Noonan.

FINDINGS OF FACT

1. Claimant was employed by Employer as a lease operator and began working for Employer in approximately August of 2007. As a lease operator, Claimant's job duties involved taking care of and checking on gas wells. Claimant made sure the wells were running and producing at maximum levels, fixed minor problems he discovered, and reported major problems he discovered. Claimant was required to drive to locations and get in and out of his truck often.

2. On March 20, 2015 Claimant was at Employer's maintenance building picking up snow chains for his company service truck. Claimant attempted to back the truck up to the loading dock to pick up the chains.

3. Claimant was approximately 15-25 feet away from the loading dock when his truck accelerated and slammed into the loading dock. Claimant attempted to stop the truck but was unsuccessful. Claimant is unsure how or why the truck accelerated.

4. When the truck hit the loading dock, Claimant's body was shaken and tossed from side to side and front to back. Claimant's head hit the inside of the cab. Claimant was wearing his seatbelt.

5. When the truck came to a stop Claimant got out and was slightly dazed. Claimant immediately called his supervisor to report what had happened. Claimant felt pain in his right shoulder, lower back, and neck within an hour of the incident.

6. Claimant did not immediately seek medical care and tried to work through his pain. However, on April 2, 2015 Claimant reported to Employer that his pain had increased and that he wanted to see a doctor.

7. On April 2, 2015 Employer submitted an Employer's First Report of Injury. Employer noted that Claimant reported an injury on March 20, 2015 to his neck when he

was backing up a truck and accidentally hit the dock. The report noted that Claimant mentioned his neck and shoulder being sore. *See* Exhibit 12.

8. On May 7, 2015 Claimant was evaluated by Thomas Noonan, M.D. Dr. Noonan noted that Claimant was an established patient at their clinic who had last been seen following a 2011 right shoulder arthroscopic rotator cuff repair and subacromial decompression. Claimant reported that he had been doing well and really had no significant complaints or issues until an accident at work on March 20, 2015. Claimant reported that the truck he was driving struck a loading dock and he had whiplash type injury to his neck and low back and also had bilateral shoulder pain, left worse than right. Claimant reported left shoulder pain that was achy and throbbing as well as having weakness, stiffness, and instability. Claimant reported numbness down his right hand, neck pain, and low back pain. Claimant denied any prior history or trauma to his neck or back. *See* Exhibit 1.

9. Dr. Noonan provided an impression of bilateral shoulder pain, left worse than right; right shoulder status post rotator cuff repair- likely rotator cuff irritation without re-tear; left shoulder pain with possible rotator cuff tearing; cervical spine tenderness with right sided radiculopathy; and lumbar spine with ride sided sciatica type symptoms. Dr. Noonan planned to get Claimant into physical therapy for his right shoulder and planned to obtain an MRI of Claimant's left shoulder to rule out rotator cuff tear. Dr. Noonan planned to refer Claimant to Dr. Bainbridge for evaluation of his cervical and lumbar spine issues. *See* Exhibit 1.

10. On May 7, 2015 Claimant also was evaluated at Denver Back Pain Specialists by Jadon Redington, PA-C. Claimant reported low back pain with radicular pain into the buttocks and lower extremities as well as neck pain and bilateral shoulder pain. Claimant reported that immediately upon impact with his truck and the loading dock, he had significant neck and upper back pain as well as low back pain. PA Redington noted that Claimant had been evaluated by Dr. Noonan earlier in the day for the shoulder pain symptoms. PA Redington performed a physical examination and assessed: brachial neuritis or radiculitis; cervical spondylosis without myelopathy, cervicalgia; degeneration of lumbar or lumbosacral intervertebral disc; displacement of lumbar intervertebral disc without myelopathy; lumbosacral spondylosis without myelopathy; lumbar sprain and strain; neck sprain and strain; and thoracic or lumbosacral neuritis or radiculitis unspecified. PA Redington opined that Claimant's symptoms were related to the motor vehicle accident/trauma work-related injury that occurred on March 20, 2015. PA Redington ordered physical therapy and radiographic imaging studies of the cervical and lumbar spine. *See* Exhibit I.

11. On June 2, 2015 Claimant underwent an MRI of his right shoulder interpreted by Russell Fritz, M.D. Dr. Fritz provided the following impression: large 29mm X 34mm tear of the supraspinatus tendon and anterior aspect of the infraspinatus tendon with moderate to severe atrophy of the supraspinatus and infraspinatus muscles; a 15mm X 23 mm tear of the superior aspect of the subscapularis tendon with moderate atrophy of the superior aspect of the subscapularis muscle; chronic-appearing

tear of the long biceps tendon; tear of the inferior aspect of the anterior labrum and mid to superior aspect of the posterior labrum as well as attrition of the superior labrum; high-grade cartilage loss along the superior glenoid rim and superior lateral aspect of the humeral head; and arthrosis of the acromioclavicular joint with advanced cartilage loss and mild spurring. *See* Exhibit 3.

12. On June 10, 2015 Claimant underwent an MRI of his left shoulder interpreted by Paul Hsieh, M.D. Dr. Hsieh provided the following impression: supraspinatus tendinosis along with a 1.0 X 1.2 cm 75% articular sided partial thickness tear of the distal tendon at the greater tuberosity insertion with no full-thickness rotator cuff tear; infraspinatus tendinosis without tear; mild subacromial-subdeltoid bursitis; chronic degenerative changes in the humerus head and in the acromioclavicular joint without acute bony lesion. *See* Exhibit 4.

13. On July 9, 2015 Claimant was evaluated by Dr. Noonan. Claimant reported continued pain in both shoulders that was fairly severe with the left worse than the right. Dr. Noonan noted that Claimant had recent MRI scans of both shoulders. The right shoulder MRI showed a recurrent massive rotator cuff tear with developing glenohumeral arthritis and high riding of the humeral head. The MRI of the left shoulder showed a high grade partial thickness tear of the supraspinatus measuring about 1 cm. Dr. Noonan provided the impression of right shoulder pain, massive irreparable rotator cuff tear, glenohumeral arthritis, left shoulder pain, high grade partial thickness rotator cuff tear, and impingement. Dr. Noonan recommended a left shoulder arthroscopy for rotator cuff repair, subacromial decompression, and likely biceps release and referred Claimant to Dr. Mayer for consideration of a reverse shoulder replacement on the right shoulder. *See* Exhibit 1.

14. On July 21, 2015 Robert Waltrip, M.D. performed a physician review recommendation for Insurer on the medical necessity of a left shoulder arthroscopy, rotator cuff repair, subacromial decompression, and possible biceps release for Claimant's left shoulder. Dr. Waltrip recommended denying the surgical procedure. Dr. Waltrip opined that the requested left shoulder procedure could not be recommended as medically necessary at this time. Dr. Waltrip noted that Claimant's injury was relatively recent and that Claimant had a partial thickness rotator cuff tear rather than a full thickness tear which might require more urgent surgical treatment. Dr. Waltrip opined that patients with partial thickness tears in general require at least a 3 month conservative treatment plan that includes active patient participation in appropriate shoulder rehabilitation before pursuing surgical intervention. Dr. Waltrip noted that if Claimant underwent a 3 month course of conservative treatment and still had ongoing symptoms, then surgery may be reasonable given the high grade nature of the partial thickness tear but noted that he could not recommend certifying the surgical request at this time. *See* Exhibit K.

15. On July 30, 2015 Frank Polanco, M.D. issued a peer review report. Dr. Polanco opined that a left shoulder arthroscopy, rotator cuff repair, subacromial decompression, and possible biceps release was not medically necessary. Dr. Polanco

noted that the medical records reflect a partial supraspinatus tear with good motion and function of the shoulder and that there was no indication in the records of participation in 3-4 months of rehab. Dr. Polanco noted that the medical treatment guidelines note that surgical indication is considered when functional deficits interfere with activities of daily living after 3-6 months of rehabilitation and opined that the request did not meet the criteria of the guidelines. *See* Exhibit L.

16. In September of 2015 Claimant began physical therapy. After an initial evaluation he ended up not continuing in physical therapy because it was not approved by Insurer. Claimant has not received any treatment for his shoulders, back, or neck since September of 2015.

17. Dr. Noonan testified via deposition in this matter. Dr. Noonan noted that at his May 2015 evaluation of Claimant, he was concerned with a possible left rotator cuff tear because Claimant had pain with testing and weakness. Dr. Noonan noted that Claimant's right shoulder strength was good so he suspected right shoulder rotator cuff irritation without a re-tear at that appointment. Dr. Noonan opined that later it was shown by MRI that Claimant had a very large recurrent rotator cuff tear in his right shoulder and that it is possible to have a large recurrent rotator cuff tear and still have good strength as Claimant did. Dr. Noonan opined that the right shoulder tear was not repairable and opined that physical therapy and surgery on the left shoulder was reasonable and necessary for Claimant.

18. Dr. Noonan opined that Claimant's right and left shoulder problems as well as Claimant's neck and back problems were caused by his March 20, 2015 work injury. Dr. Noonan noted that Claimant was much worse off after the 2015 accident than prior to it even if Claimant was not entirely asymptomatic prior to the accident. Dr. Noonan opined that it was possible for someone to have structural findings, have no symptoms, have trauma of some sort, and then end up with a clinical syndrome and he opined that then he would say that the trauma created the clinical syndrome.

19. Dr. Noonan noted that without an MRI the day prior to Claimant's March 20, 2015 accident, he could not say definitively whether or not Claimant's right shoulder recurrent rotator cuff tear was caused by the accident. He opined that looking at the MRI and seeing the fatty infiltration, those findings are more often seen in cases of chronic tearing and that based on the MRI alone, he would guess that the right shoulder injury was old. Dr. Noonan opined that with Claimant's age, the fact that he had a bad tear in 2011 in the right shoulder that was fixed, and the MRI findings, it was more likely than not that the recurrent right shoulder rotator cuff tear happened prior to the March 20, 2015 trauma.

20. Prior to the March 20, 2015 work incident, Claimant had an injury to his right shoulder that required surgical repair.

21. In April of 2011 Claimant was pulling on a wrench at work overhead when he felt a pop in his right shoulder and had immediate pain. Claimant had difficulty with

lifting or using his arm and high pain. An MRI revealed a full-thickness tear of the supraspinatus extending into the anterior fibers of the infraspinatus. Dr. Noonan evaluated Claimant and on October 3, 2011 Dr. Noonan performed a right shoulder arthroscopy, arthroscopic repair of supraspinatus tear, arthroscopic repair of subscapularis tear, arthroscopic subacromial decompression, right shoulder biceps release, and right shoulder debridement of degenerative tearing of posterior labrum. *See* Exhibit 1.

22. On January 12, 2012 Claimant was evaluated by Dr. Noonan. Dr. Noonan noted that Claimant was three months status post right shoulder arthroscopic rotator cuff repair and biceps release and that Claimant was doing fantastic and continuing in therapy. Dr. Noonan noted that Claimant had good strength and had full active motion in his right shoulder. *See* Exhibit 1.

23. On September 24, 2012 Claimant underwent a Division Independent Medical Examination (DIME) performed by Timothy Hall, M.D. Claimant reported fairly regular shoulder pain and aching with the use of his shoulder. Claimant reported some tightness in his neck but no significant neck pain. Claimant reported some shooting pain and some aching into the right biceps but not past the elbow. Claimant reported sleeping better than before his surgery but that he could not sleep on the right side and that he could not use his right arm as he once did. Dr. Hall noted that the operative report was reviewed and showed that minimal resections were performed on the acromion again due to the size of the rotator, care of potential part of the tear being chronic. Dr. Hall opined that Claimant was at maximum medical improvement and provided a 9 % whole person impairment rating. Dr. Hall opined that Claimant had more than the usual symptomatology including some local weakness and considerable functional deficits. *See* Exhibit N.

24. On January 9, 2013 Claimant underwent an Independent Medical Examination performed by Allison Fall, M.D. Claimant reported that his right shoulder ached all the time and that if he put pressure against his shoulder blade, his shoulder blade hurt. Claimant reported mostly aching pain but occasional sharp pain. Claimant reported his pain was aggravated by lifting of pulling hard or working with his hands above shoulder height. Claimant also reported that his neck ached and that his left shoulder was starting to bother him. Claimant reported that if he did something heavy with his left hand, he would start to feel aching in his left shoulder. On examination Dr. Fall noted that the right shoulder revealed tenderness over the proximal biceps and infraspinatus, no impingement signs, no gross instability, and reduced range of motion with pain at the AC area at adduction and more pain with internal rotation than external rotation. Dr. Fall noted that examination of the left shoulder revealed reported pain at the AC area but that range of motion was within functional limits with good internal rotation and abduction and no impingement signs, signs of bicipital tendinitis, or instability. Dr. Fall noted that the cervical spine lordosis was normal, paraspinal muscle tone was normal, and that Claimant reported tightness with forward flexion and bilateral lateral bending. Dr. Fall opined that Claimant was at maximum medical improvement with a whole person impairment rating of 5% whole person. *See* Exhibit N.

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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals*

Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden of proof to establish that he suffered a compensable injury to his left shoulder, cervical spine, and lumbar spine on March 20, 2015 when his truck struck the loading dock at work. Prior to March 20, 2015 Claimant had occasional aches into his neck, and had some occasional pain with his left shoulder from use. However, after the date of injury, Claimant has had consistent pain in his left shoulder, cervical spine, and lumbar spine. Claimant's examinations also reveal significant differences in symptoms and range of motion deficits and tenderness in his left shoulder and neck from the time he was placed at maximum medical improvement and evaluated for his 2011 injury and at the time he was evaluated following the March 20, 2015 injury. The opinion of Dr. Noonan is persuasive that Claimant's symptoms in the left shoulder, cervical spine, and lumbar spine were different and acutely caused by the March 20, 2015 work injury. PA Redington also provided an opinion after examining Claimant that the cervical and lumbar spine symptoms were related to the March 20, 2015 incident, which is consistent with Dr. Noonan's opinion. As found above, Dr. Noonan's main concerns at the first evaluation of Claimant following the March 20, 2015 incident were with a possible left rotator cuff tear and Claimant's main complaints were surrounding his left shoulder. Claimant had much worse pain and limitations in his left shoulder following the March 20, 2015 incident than he had when he was evaluated for his 2011 injury and mentioned occasional pain from use in his left shoulder.

Claimant has failed to establish that he suffered a compensable injury to his right shoulder in the March 20, 2015 incident. Rather, the medical records including the DIME evaluation and the evaluation performed by Dr. Fall show that Claimant had ongoing pain complaints and weakness in his right shoulder that were similar to the symptoms and reports Claimant made following the March 20, 2015 incident. The opinion of Dr. Noonan is also persuasive that, more likely than not, the recurrent tear of Claimant's right rotator cuff pre-existed the March 20, 2015 incident based on the MRI reports and Claimant's prior history. Further, Claimant has failed to establish that the March 20, 2015 incident aggravated or accelerated his pre-existing right shoulder problems. Rather, the evidence indicates that Claimant's right shoulder and right shoulder complaints and symptoms remained consistent from the time of he reached maximum medical improvement for his 2011 right shoulder injury and through the time he was evaluated following the March 20, 2015 incident. Additionally, it is noted that at his first evaluation with Dr. Noonan, Claimant's main pain concerns were surrounding

his left shoulder and Dr. Noonan noted the strength in Claimant's right shoulder was okay which caused Dr. Noonan to be more concerned with the left shoulder than the right shoulder. Although the right shoulder revealed a recurrent right rotator cuff tear on the MRI, Dr. Noonan testified and opined that the recurrent tear more likely than not pre-existed the March 20, 2015 incident. Claimant has failed to establish an aggravation or acceleration of his right shoulder condition or an acute injury to the right shoulder in the March 20, 2015 incident.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). 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. 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 his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Claimant has established that he sustained a work related injury to his left shoulder, cervical spine, and lumbar spine on March 20, 2015. Claimant is entitled to medical treatment reasonable and necessary to cure and relieve these injuries. Claimant has established that physical therapy for his left shoulder and/or surgery for his left shoulder is reasonable and necessary to cure and relieve the injury as opined by multiple providers.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left shoulder, cervical spine, and lumbar spine on March 20, 2015.

2. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on March 20, 2015.

3. Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits for his left shoulder, cervical spine, and lumbar spine including but not limited to physical therapy for his left shoulder and/or left shoulder surgery recommended by Dr. Noonan.

4. Any issues not determined 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 5, 2016

/s/ Michelle E. Jones

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

STIPULATIONS

At the outset of the hearing, the parties reached the following stipulations, which are approved by the ALJ:

I. The parties stipulated that if this claim is found to be compensable, that Dr. Charles L. Johnson will be the authorized treating physician.

II. The parties stipulated to an average weekly wage of $1,133.68.

ISSUES

The remaining issues addressed in this decision concern compensability, and Claimant's entitlement to temporary disability and medical benefits. The specific questions addressed are:

I. Whether Claimant established by a preponderance of the evidence, that he sustained a compensable injury arising out of and in the course and scope of his employment on April 9, 2015.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary partial disability benefits (TPD) from April 10, 2015 through July 10, 2015.

III. Whether the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from July 11, 2015 and continuing.

IV. If Claimant has established entitlement to TTD benefits beginning July 11, 2015, the question becomes whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause and is therefore not entitled to TTD benefits on or after July 11, 2015.

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and medical treatment stemming from the April 9, 2015 alleged injury.

FINDINGS OF FACT

Based on the testimony and evidence presented, including the deposition testimony of Wade Johnson and Dr. Carlos Cebrian, the undersigned ALJ enters the following findings of fact:

1. Employer is a full service, family owned automotive repair shop which has been operated by Rylan and Tia Blair for approximately 13 years.

2. Claimant was hired on March 2, 2015 as a heavy line ASE certified auto technician/mechanic. As part of his duties, Claimant worked on engines, brake lines, suspensions, transmissions and differentials. The job was physically demanding and at times required heavy lifting.

3. The Claimant contends that he sustained upper extremity injuries arising out of and in the course and scope of his employment on April 9, 2015 while working overhead separating a transfer case from a transmission on a pickup truck. According to the Claimant, he had split the transfer case from the transmission and as he was working to remove it, the transfer case began to roll off a block sitting on top of a jack holding it up. The 100 pound transfer case rolled to the left pinching Claimant's left hand and arm between the case and the frame rail of the truck. Claimant jerked his left arm out and grabbed the transfer case with his right hand, only to it roll back and pinch his right arm and hand between the case and the opposite frame rail. Claimant immediately hit the hydraulic lever on the bottom of the jack to lower it to a point of being right in front of Claimant's torso.

4. Claimant continued working after the incident which he testified occurred at approximately 10:30 a.m.

5. The Claimant testified that he reported this incident to Wade Johnson, his immediate supervisor, by writing down what happened on a blank piece of paper because the shop did not have incident report forms. According to Claimant, he gave the note to Mr. Johnson, who he believed put it on Mr. Blair's desk. During cross examination, Claimant testified that he thought Mr. Johnson placed the note on Tia Blair's desk.

6. Wade Johnson testified by evidentiary deposition on January 5, 2016. Mr. Johnson worked as a Service Advisor and was then promoted to General Manager for the Employer. He worked from January 12, 2015 through April 17, 2015, when he was diagnosed with cancer and it became necessary for him to terminate his employment with Employer and relocate to Texas for treatment.

7. Wade Johnson was the Claimant's immediate supervisor on April 9, 2015. Mr. Johnson testified that the Claimant did not report a work accident to him on that date or at any other time. Mr. Johnson denied that he had any knowledge concerning the informal accident report, which the Claimant states he completed on April 9, 2015 and gave to him. Mr. Johnson had previously worked at Goodyear and Firestone for over 20 years and was aware of the steps to take should he receive a report of injury. If the Claimant or any other employee had claimed an on-the-job injury, Mr. Johnson testified that the first thing he would have done was to ask if medical attention was needed. According to Mr. Johnson, the Claimant "never told me anything." The ALJ credits Mr.

Johnson's testimony to find, more probably than not, that Claimant did not report an injury to him.

8. Mr. Johnson testified further that he observed Claimant performing his job duties on a daily basis between April 9, 2015 and April 17, 2015. He spoke to the Claimant daily. According to Mr. Johnson, Claimant did not appear to be having any difficulty performing his job duties and he observed no contusions or bruises on Claimant's upper extremities following the claimed injury. Claimant testified that while he did not sustain any brushing, contusions or lacerations, his arm was "swollen and red" from being smashed even days later when he went to see his doctor. However, Claimant did not specify which arm.

9. Mike McWilliams, a co-worker of Claimant testified that he worked with Claimant later in the day on April 9, 2015. Mr. McWilliams testified that he needed assistance with a vehicle so he obtained Claimant's help. While Claimant was helping, Mr. McWilliams observed that he (Claimant) was having difficulty lifting an aluminum intake manifold into the car. It was at this time that Claimant purportedly told Mr. McWilliams that he hurt his arm although he did not go into "specifics on exactly what happened." According to Mr. McWilliams Claimant's right arm was hurting. Mr. McWilliams testified that he did not observe any "contusions or lacerations or blood or nothing like that." Mr. McWilliams testified that he saw Claimant wearing a compression wrap the next day. Mr. McWilliams testified that he and Claimant "converse", that they go out for tacos on Tuesdays and that Claimant has gone golfing since his claimed April 9, 2015 injury.

10. The Claimant has had long-standing significant medical problems. He was determined to be a Disabled Individual entitled to Supplemental Security Income beginning on November 17, 2005, primarily as a consequence of the condition of his shoulders and mental health conditions.

11. Claimant has preexisting medical problems to multiple body parts including, but not limited to, his left shoulder and cervical spine. On February 18, 2005, Dr. Zarian reported that the Claimant had two previous left shoulder surgeries. Claimant's Primary Care Physician (PCP) beginning in December 2012 was Dr. Charles Johnson. Prior to the time Claimant commenced employment for the Employer, Dr. Johnson had treated the Claimant for multiple conditions including, but not limited to, left shoulder impingement syndrome and arthritis, upper back and neck pain, cervical spine myospasm, somatic back dysfunction, gout and chronic pain. Dr. Johnson had treated Claimant with multiple treatment modalities including, but not limited to, physical therapy, massage therapy, and narcotic medication/Oxycodone for chronic pain.

12. On September 29, 2014, Dr. Johnson diagnosed left shoulder impingement syndrome and referred the Claimant for physical therapy for his left shoulder pain. On October 17, 2014, Dr. Johnson referred Claimant for physical therapy for cervical spine myospasm. On December 4, 2014, Claimant underwent a left shoulder x-ray which showed increasing degeneration of the glenohumeral joint with spurring. On January 8, 2015, Dr. Johnson reported that a recent x-ray of the Claimant's right (*sic*) shoulder

showed worsening arthritis of the glenohumeral joint. His assessment at that time was for severe degenerative joint disease of the right (*sic*) shoulder.

13. Claimant saw Dr. Johnson, on April 16, 2015. He reported swelling and pain in both hands, all fingers, radiating into his wrists and forearms. Although he specifically noted his primary complaint to be associated with his hands, wrists and forearms, Claimant did not report an on-the-job cause for his symptoms. Physical examination revealed functional active range of motion (FAROM) in the extremities and a positive Tinel's and Phalen's sign at both wrists. Dr. Johnson assessed Claimant with bilateral carpal tunnel syndrome (CTS) and ordered a electrodiagnostic study, i.e. an EMG with a nerve conduction velocity (NCV) of the upper extremities. He also refilled the Claimant's Oxycodone and noted that Claimant's desire to start Meloxicam for arthritis of the hands and ankles.

14. On April 28, 2015, Claimant sought treatment from an urgent care facility pain in his left arm, arthritis and an injury to his right index finger. The record from this visit documents that Claimant was injured approximately two weeks prior "from transmission falling on arms." The clinical impressions following evaluation included: left F.A. (forearm) sprain; right index (finger) sprain and arthritis.

15. Claimant saw Dr. Drake McDonald, a neurologist, on May 30, 2015 for the EMG/NCV ordered by Dr. Johnson. He reported a history of right greater than left hand numbness, most noticeable early in the morning. The Claimant denied neck or shoulder pain. The Claimant reported that his symptoms started after a day of intense work as a mechanic. The electrodiagnostic study demonstrated very mild, right-sided, carpal tunnel syndrome for which "continued conservative treatment" was recommended.

16. On June 5, 2015, the Claimant was seen by Dr. Johnson for worsening pain in the forearms, hands and feet with associated swelling and erythema at times. While CTS had been diagnosed by EMG, Dr. Johnson felt the Claimant's symptoms were consistent with a worsening inflammatory arthritic condition. Dr. Johnson's assessment was for bilateral carpal tunnel syndrome and rheumatoid arthritis. Claimant did not report a work related cause for his symptoms on this date. Referrals to podiatry and rheumatology were and additional lab work ordered.

17. The Claimant was seen by Robin Leeman, PAC, at Dr. Johnson's office, on June 10, 2015 with complaints of increasing nasal discharge, intermittent nonproductive cough and intermittent low grade fever times two days. PA Leeman reported that the Claimant was slightly sick appearing. No injury or upper extremity complaints were reported.

18. On June 11, 2015, Claimant was excused from work until further notice for "medical reasons" by Dr. Johnson. Dr. Johnson did not provide a reason for Claimant's inability to work.

19. On June 17, 2015, the Claimant received a work excuse for "illness" for periods

covering June 8-12, 2015. The excuse does not provide a reason that Claimant was unable to work during the aforementioned time period.

20. Rylan Blair oversees production, how the technicians are working and helps problem solve. He is out on the work floor at least 20-30 times per day. He is occasionally out in the shop working on vehicles himself. Between April 9 and late May 2015, Mr. Blair observed Claimant performing his work duties on a regular basis. Mr. Blair did not observe any changes in Claimant's work performance. Claimant did not complain about an inability to perform his regular job duties, he did not appear to be in discomfort and did not appear to have any difficulty performing any of his work duties. Claimant was working at his regular pace.

21. During this period Claimant continued to perform his regular work duties full-time. Wage and technician productivity reports show that Claimant worked overtime hours for the weeks ending on April 17, 2015, April 24, 2015, May 1, 2015, May 8, 2015 and May 22, 2015.

22. In late May 2015, Mr. Blair noticed that Claimant showed up to work with a sleeve or brace on his left upper extremity. Mr. Blair asked Claimant what was going on and why he was wearing a brace. Claimant purportedly told Mr. Blair that he had arthritis or carpal tunnel syndrome and that he would be fine. Mr. Blair testified that at no time during this conversation did Claimant report an on-the-job injury. Mr. Blair was aware that Claimant was being seen by neurologist, Dr. McDonald, on May 30, 2015.

23. Following his appointment with Dr. McDonald and before Claimant reported a work related injury to his arms, Employer offered him a modified position as a Service Writer. According to Mr. Blair, he did not know what was wrong with Claimant's left arm and did not want to make anything worse. The Claimant was offered a 40-hour work week consisting of 10 hours per day on Monday, Tuesday, Thursday and Friday. It was Mr. Blair's understanding that Claimant wanted Wednesdays off so he could work on his golf game.

24. Before reporting his injury, Claimant surreptitiously called Wade Johnson to question him about the informal incident report he claims to have filled out. Based upon the timeline, the ALJ finds that the discussion between Claimant and Mr. Johnson probably took place on or about June 15, 2015. This conclusion is based on statements made by Claimant during the recording indicating that he was to start the service writing position in about three weeks. As the service writing position had been set to start the second week of July, i.e., right after the Fourth of July weekend or July 6, 2015, three weeks prior to would be June 15, 2015.

25. During the telephone conversation, Claimant mentioned to Mr. Johnson that he was calling because he wanted to know what had happened with the paperwork he (Claimant) filled out and turned in when he was first injured. Claimant asked Mr. Johnson whether Mr. Blair ever turned it in or if a claim was made. Mr. Johnson stated: I don't know anything about . . . I don't know what he did. The majority of the discussion

revolved around Employer hiring another tech and concern about Employers actions and the amount of work coming into the shop. Claimant expressed concern surrounding being terminated noting that he still had an injury and that Employer could not "fire me just to fire me" prompting Mr. Johnson to ask whether Claimant had done anything that may make Mr. Blair want to terminate him

26. Tia and Rylan Blair testified that Claimant did not report a claim or work reported injury until June 19, 2015. At that time, Claimant told the Blair's that he had previously reported his injury to Wade Johnson on April 9, 2015 and left an informal accident report on Tia Blair's desk at that time.

27. Shortly after Claimant reported his claim, Employer contacted Wade Johnson to determine if they could corroborate Claimant's contention that he had reported his accident to him (Mr. Johnson) on April 9, 2015. Mr. Johnson denied having any knowledge of this claim and denied that Claimant reported an on-the-job injury to him. He denied that he had knowledge of a completed accident report on April 9, 2015 or at any time. Tia Blair searched her desk and the office for the informal accident report that Claimant contends that he completed on April 9, 2015. She was unable to find a report.

28. On July 6, 2015, the Claimant presented Tia Blair with a document entitled, "Workman's Compensation Work Modification Agreement," which he asked her to sign. This agreement required that Employer provide Claimant with a one-year employment contract through July 6, 2016 as a service writer. Ms. Blair refused to sign this document.

29. On July 3rd and 10th, 2015, the Blair's sat down with Claimant to go over his Service Writer role and the pay associated with the position. The Blair's informed the Claimant that while he would continue to work a 40-hour work week, it was necessary to change his work schedule to five days per week at eight hours per day, Monday-Friday. The Blair's explained to Claimant that having him out on Wednesday was too disruptive to the business. The Claimant refused to accept the new schedule and raised concerns about the pay. Mr. Blair told Claimant that he would prepare resignation paperwork since he was not accepting the job offer. Claimant then told the Blair's not to bother, that he would get workers' comp involved to cover his $1,000.00 paychecks because he would not do 5 days a week. During the July 10, 2015 meeting, the Claimant, for the first time, submitted the June 11, 2015 work excuse note from Dr. Johnson which he suggests was provided due to the alleged April 9, 2015 injury.

30. Claimant returned to Dr. Johnson on July 16, 2015 where he was seen for renewal of his chronic pain medications. Claimant had continued complaints for pain in his forearms and tingling with pain in his hands and fingertips. During that evaluation, Claimant, for the first time, reported a work injury. Dr. Johnson reported that he had, "never seen [Claimant] for this injury as reported". Dr. Johnson renewed Claimant's Oxycodone prescription and prescribed physical therapy for Claimant's bilateral forearms and wrists.

31. Claimant presented for physical therapy at Memorial Hospital on July 22, 2015. Claimant reported that he wanted to proceed with physical therapy with "Mindy" who he stated, "can always stretch me out." Claimant had previously received physical therapy at Memorial for left shoulder pain and impingent syndrome of October 8, 2014.

32. Claimant was seen by Dr. Carlos Cebrian in an independent medical examination on December 4, 2015. Dr. Cebrian issued a report on December 29, 2015. Dr. Cebrian opined that if Claimant had sustained a work-related injury, it was limited to a mild right carpal tunnel condition, which had resolved. Claimant reported left shoulder and cervical pain, which Dr. Cebrian attributed to pre-existing conditions, including chronic pain disorder, degenerative joint disease, and glenohumeral joint arthritis of the left shoulder. Dr. Cebrian noted that according to Claimant's report, his arms did not become trapped, he was able to move them and only made contact with the transfer case for a split second. Dr. Cebrian noted that Claimant was able to continue working and performing his full duties as a mechanic through mid-June 2015. In Dr. Cebrian's opinion, Claimant did not have left-sided lateral epicondylitis.

33. Dr. Cebrian testified by evidentiary deposition on February 24, 2016 that Claimant did not exhibit any symptoms for left lateral epicondylitis on physical exam and there was nothing reported in Claimant's medical records, which would suggest that the he was suffering from left lateral epicondylitis. Dr. Cebrian disagreed with Dr. Hall's diagnosis of myogenic thoracic outlet syndrome (TOS). In Dr. Cebrian's opinion, the mechanics of the accident as described by Claimant, were not consistent with this causing this diagnosis. In Dr. Cebrian's opinion, Claimant's left upper extremity complaints were coming from the cervical spine and left shoulder.

34. Claimant was seen by Dr. Timothy Hall on December 17, 2015. Dr. Hall diagnosed myogenic thoracic outlet syndrome and left lateral epicondylitis. Dr. Hall believes that Claimant's lateral epicondylitis may have come from resistive forces of the wrist. In Dr. Hall's opinion, the Claimant had TOS, which was due to abduction of the wrist, which occurred at the time of the alleged accident.

35. As noted at paragraphs 10-12 above, Claimant has a history of previous upper extremity conditions. In conjunction with his claim for Social Security benefits, Claimant's medical records were reviewed. Claimant reported right upper extremity numbness for which a EMG was performed in 2000. His physical examination at this time suggested irritation of the ulnar nerve at the level of the elbow most notable with extreme elbow flexion while sleeping. In September 2000, Claimant apparently reported continued right ulnar paresthesias. In January 2001, Claimant had a return of his right hand numbness since stopping B complex. He was assessed with having right carpal tunnel and gout.

36. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment on April 9, 2015. While the ALJ finds that an incident involving a transfer case likely

occurred while Claimant was attempting to remove it, the evidence presented does not persuade the ALJ that Claimant suffered a compensable injury as a result.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *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). As found, the testimony of Rylan Blair, Tia Blair and Wade Johnson regarding the reporting of an injury is more credible and persuasive than the testimony of Claimant. Claimant's testimony that he reported an injury on April 9, 2015 to Wade Johnson and that he subsequently wrote out an incident report cannot be reconciled with the fact that he did not verbally report a claim to Employer until June 19, 2015, even when specifically approached by the Employer in late May 2015 regarding the condition of his left upper extremity. Moreover, the testimony by Mr. Johnson and the Blair's regarding the reporting of Claimant's alleged injury is supported by Claimant's failure to report an injury to Dr. Johnson. Claimant contends that he reported his injury to Dr. Johnson on April 16, 2015. This does not comport with Dr. Johnson's medical records which demonstrate that Claimant saw him multiple times following the alleged accident but did not report a work injury until July 16, 2015. To the extent that there is medical evidence to the contrary, that evidence is outweighed by the balance of the conflicting medical evidence contained in the record.

Compensability

A. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically removing a transfer case from a pickup truck as part of his duties as an ASE certified auto mechanic/technician for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

C. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while or shortly after performing job duties does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is

compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

D. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

E. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 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, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between Claimant's work and his symptoms exists in this case does not mean there is a causal connection between Claimant's injury and his work duties.

F. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001

(Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties 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 the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the totality of the evidence presented, including the testimony of Dr. Cebrian, in addition to Dr. Johnson reports and the contents of the Social Security record, persuades the ALJ that Claimant's worsening upper extremity pain/symptoms are, more probably than not, a direct result of the natural progression of his pre-existing arthritis, gout and CTS rather than his work duties on April 9, 2015. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. §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). Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim is denied and dismissed. Accordingly, his claims for medical and temporary disability benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's April 9, 2015 claim for work related injuries to his upper extremities, including his hands, wrists, arms and shoulders is denied and dismissed.

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

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

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see 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 28, 2016

/s/ Richard M. Lamphere

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

STIPULATIONS

1. The Claimant's Average Weekly Wage (AWW) is $1,206.00.

2. If the Claimant proves his alleged injury is compensable, the Claimant has not yet reached Maximum Medical Improvement (MMI).

3. If the Claimant proves his alleged injury is compensable, Dr. Sisson is the Authorized Treating Physician (ATP).

4. If the Claimant proves his alleged injury is compensable, TTD benefits from July 30, 2015 to October 19, 2015 are owed. The period beginning October 20, 2015 is disputed by Respondents.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on July 6, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits in this claim from October 20, 2015 ongoing.

3. If Claimant has proven that he is entitled to temporary disability benefits, whether Respondents have proven by a preponderance of the evidence that the Claimant was responsible for his termination.

FINDINGS OF FACT

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

1. The Claimant was employed by Employer as a dump truck driver for about a year and a half. The Claimant testified that his typical work duties involved driving a dump truck and he mostly drove. The Claimant would also operate a "vac" truck. The vac truck duties would involve driving and also operation of the hoses to suck up water, oil and other liquids.

2. The Employer has a "No Call No Show Policy" that the Claimant read and signed on November 5, 2013. The policy states,

> All employees employed with [Employer and other named companies] are expected to show up to work at their scheduled work time. If the employee is unable to work at their scheduled work time, they should notify their supervisor. Failure to notify their supervisor prior to their scheduled start time and/or failure to show up to work at their scheduled work time will result in an automatic self-termination. Employees who self terminate with the no call no show policy will receive their final paycheck on the next pay day.
>
> (Respondents' Exhibit E).

3. The Claimant testified that on the date he was injured, he was working with a vac truck and he was working on a project sucking up water in a cellar, which was different that his usual work. At the hearing, he Claimant testified that he doesn't remember the exact date of his injury, but he believes that it occurred on the 6th on a Monday about one and a half years after he started working for Employer. Employer's First Report of Injury lists July 6, 2015 as the date of injury (Claimant's Exhibit 1, p. 1). An interview statement signed by the Claimant on July 30, 2015 also indicates that the Claimant reported an incident that occurred on July 6, 2015 (Respondents' Exhibit C, p. 4).

4. The Claimant testified that he was in a squatting position while holding the hose and sucking water out of a cellar when the ground "gave way" beneath his left leg. When the ground "gave way," it created a hole and his left leg was sucked into the hole up to his knee. The Claimant stated that everything happened very fast, but he thinks he jumped out. The Claimant testified that at that point, he did not realize he was injured because he did not feel any pain. So, when the safety manager Mr. Wilkinson, who was a witness to the incident, asked the Claimant if he was okay, the Claimant testified he said, "Yes." The Claimant testified that the incident happened about 11:00 AM that day and his work day was normally finished at 1:00PM – 2:00 PM. He testified that he went home from work at the time he normally left. The Claimant's testimony regarding his mechanism of injury is consistent with reports to his medical providers and is found to be credible. The testimony is generally consistent with the statement of an Employer eyewitness who was supervising the Claimant. To the extent that there are differences in the testimony of the Claimant and the supervisor, the Claimant's testimony is found to be more credible and reliable.

5. The Claimant testified that after he left work, a supervisor named Rudy called him and asked that he get the truck somewhere, so at approximately 5:00 PM on the same day as the incident occurred, the Claimant went back in to work briefly.

6. The Claimant testified that after he went back to work the second time, he returned home and relaxed, showered and watched TV. He testified that it wasn't until he went to bed that night that his back started to bother him. He described the sensation as feeling "hot." The Claimant testified that he still didn't really think anything of it though because he didn't have pain.

7. The Claimant testified that the next day when he was at work and started moving hoses around, the pain started and it got worse. He testified that he had lower back pain and a sharp pain in his right knee. The Claimant testified that, in spite of the pain, he completed his work shift the day after the incident. At the end of the work day, the Claimant testified that he told his supervisor Rudy that he needed a day off and he told Rudy what had happened the day before and that his back was hurting.

8. The Claimant testified that the next day, he came in to work and met with Jeff Wilkinson and his supervisor Rudy and Mr. Wilkinson called the Claimant in to his office to make a report. After completing the report, a supervisor named Ash took the Claimant to the doctor.

9. The Claimant testified that he saw Dr. Sisson three times in total and, at the last visit, the Claimant was told he needed an MRI. The Claimant testified that he was provided with work restrictions of "no lifting," and that after this, his work duties changed because he could not lift or drag things.

10. On July 8, 2015, the Claimant saw Eric Hofmann, PA-C for Dr. Bradley Sisson at the Colorado Clinic. The Claimant reported an injury that occurred on July 6, 2015 when he was "holding a hose and the ground gave way under him due to increased ground water in the area. All of his weight went to the right side but he did not maintain his balance. His right leg went into the hole which he states was about knee deep, and he twisted his back to compensate. He denies feeling pain at the time of the injury but that night his left [sic] lateral knee and low back became painful." The Claimant reported pain in his low back and left [sic] knee described as "moderate, constant, sharp, numb and tingling in character and quality." On examination, PA-C Hofman noted, "tenderness to palpation: left iliolumbar. The right paravertebral and left paravertebral muscle groups were noted to be hypertonic." The Claimant's range of motion was noted to be painful with lumbar flexion. PA-C Hofman diagnosed the Claimant with right knee sprain (indicating that prior references to *left* knee pain were likely an error) and muscle spasms and a mild muscle pull of the low back. PA-C Hofman placed no work restrictions on the Claimant (Claimant's Exhibit 4).

11. On July 8, 2015, the Claimant's supervisor, Jeff Wilkinson, who was an eyewitness to the incident on July 6, 2015, submitted a handwritten statement that, "[the Claimant] was using a Zinek hose to suck out the water from inside a cellar ring / while doing this the ground around outside of ring gave way causing left leg to sink into ground" (Claimant's Exhibit 11). At some point, Mr. Wilkinson also signed a typewritten statement that further elaborated. This typewritten statement was undated. It states that, "[the Claimant] was standing with his knees slightly bent holding the hose into the cellar ring so the water could be sucked out. While holding the hose the ground around his left foot gave way causing his leg to drop into the soft dirt up to his knee. [The Claimant] continued to hold onto the hose and stepped up out of the hole. I then asked [the Claimant] if he was ok, [the Claimant] replied he was ok and continued to finish sucking the water out of that ring" (Claimant's' Exhibit 8).

12. On July 13, 2015, the Claimant returned to the Colorado Clinic and met with Dr. Sisson, reporting that his prior symptoms have gotten worse, although the back spasms were noted to be better and the knee pain "is almost all gone." On examination, the right knee was noted to be tender in the lateral aspect of the knee, but full, normal range of motion was noted. The Claimant was diagnosed with muscle spasms, right knee sprain, lumbago and sciatica or the right leg. The Claimant was provided with lidoderm cream medrox. Dr. Sisson commented that "it seems his symptoms are now almost all LBP and mild right sciatica (Claimant's Exhibit 3).

13. On July 21, 2015, the Claimant saw Dr. Sisson at the Colorado Clinic again reporting that his prior symptoms remain unchanged and that he was still having low back pain and right leg pain and tingling in his right leg. As the Claimant continued to have low back pain and mild radicular complaints, Dr. Sisson recommended an MRI. Dr. Sisson noted that "the patient may return to work with no restrictions. Patient's supervisors and patient advised to take precautions regarding lifting, bending, etc. Work as tolerated." Dr. Sisson also opined that "based on the patient's history and clinical evaluation, the current problem is a work related injury that is consistent with the work injury described by the patient" (Claimant's Exhibit 2).

14. On July 30, 2015, the Claimant met with Ronnella Rissler, the HR Director for the Employer for an interview and a written statement was prepared and the Claimant signed that it was, "a true and accurate reflection and documentation" of what was discussed during the interview. The statement describes the mechanism of injury as follows:

1. I was sucking from a cellar ring water and the ring is approximately 4' high, waist level as I am 5'9".
2. I was squatting with my knees slightly bent as I don't like to lean over the edge of the ring and bending over, I prefer the squatting level.
3. Ground gave way on left side via pocket in the dirt and my left foot went into the dirt, it sunk up to midway of my left thigh. I could not grab the ring as I was using both hands on the hose that weighs approximately 3-4 lbs., and a 2" hose.
4. I think I just jumped out of the hole, don't remember as it happened so quickly, I never let go of the hose when it happened.
5. That evening my back started hurting, felt really hot and I was sweating and didn't think anything about it.
6. The next day, started to hurt worse and again, did not say anything to anyone.
7. On July 9, 2015, I called Rudy prior to my shift and told him I need a day off as my back was killing me. Rudy asked me if I hurt my back at work or at home, I then told him about my knee sinking in the dirt on Monday and it was hurting from that.
8. I reported and at that time, was asked to come in and report what was going on with me.

9. Also on that day, Jeff Wilkinson, Trucking Field Specialist, was standing behind me approximately 3' to 4' and saw me sink. He asked if I was okay, and I replied yes, I am okay.

(Claimant's Exhibit 10; Respondents' Exhibit C).

15. The Claimant testified that the Employer has a policy for reporting injuries and every day employees have to sign out and indicate if they were not injured on a sheet. On direct examination, the Claimant pointed out that on July 6, 2015 he signed the sheet indicating "no injury" because he thought he was okay that day. He testified that he did not sign the sheet on July 7, 2015 that he had "no injury" because he felt very bad that day (also see Claimant's Exhibit 7). On cross-examination, the Claimant admitted that sometimes the employees did not sign the sign-out sheets indicating "no injury" like they were supposed to do, but not necessarily due to having an injury that day. The Claimant also admitted that he did not tell anyone during his shift on July 7, 2015 that he couldn't work due to pain. Only after the shift did the Claimant tell a supervisor that he couldn't work due to pain.

16. The Claimant testified that he made a request for Paid Time Off (PTO) that was approved by his supervisor Ash. A PTO request for 7/9/2015 and 7/10/2015 was approved by Ash Janssen and entered on 7/13/2015 (Claimant's Exhibit 6). The Claimant's Earnings Statement indicates that he received 8 hours of PTO on July 9, 2015 and July 10, 2015 (Claimant's Exhibit 9). The Claimant's Earnings Statement indicates that the Claimant worked and received payment on July 13, 2015 for 8.43 hour, that he only worked and received payment for 1.65 hours on July 14, 2015 and only .87 hours on July 15, 2015. Then, on July 16, 2015 he worked and received payment for 9.93 hours and on July 17, 2015 he worked and received payment for 8.82 hours. No further paystubs or wage records were provided for the time period between July 18, 2015 and July 29, 2015 (Claimant's Exhibit 9).

17. While the medical record from the final visit with Dr. Sisson indicates there are not formal temporary work restrictions, there is a note that the Claimant and his supervisors are advised to take precautions regarding lifting, bending, etc. and that the Claimant was to "work as tolerated." The Claimant testified that based on this and his inability to lift and drag things, at some point, Employer representatives advised him that they could not accommodate this and there was not work available for him.

18. The Claimant testified that while the MRI request recommended by Dr. Sisson was pending, Ronella, the Employer's HR director, discussed FMLA with the Claimant. The Claimant testified that he understood being on FMLA as being "on hold" while waiting for the insurance company to clear the MRI. The Claimant testified that he understood that Ronella would call the Claimant if he would be permitted to go back to the doctor or if he would be going back to work. The Claimant testified that he had not heard back from Ronella yet and he did not receive any notice of termination of employment.

19. The Claimant testified that he received a notice that he was eligible for FMLA effective July 30, 2015 due to his health condition (Claimant's Exhibit 5, p. 15; Respondents' Exhibit D, p. 5). In the notice form, Ronella, the HR director checked that the Claimant did not need to provide any additional certification or information (Claimant's Exhibit 5, p. 16; Respondents' Exhibit D, p. 6). There is a place to check if the Claimant needed to provide periodic reports or an "intent to return to work" every 20 days, but this section was not checked (Claimant's Exhibit 5, p. 17; Respondents' Exhibit D, p. 7). The Claimant was notified that he had a right to up to 12 weeks of FMLA leave commencing on Thursday, July 30, 2015 (Claimant's Exhibit 5, p. 17, Respondents' Exhibit D, p. 7).

20. The 12 weeks of FMLA leave expired on Wednesday October 21, 2015. The FMLA paperwork provided to the Claimant states that the Claimant has the right to be reinstated to the same or equivalent job with the same pay, benefits, and terms and conditions of employment on his return from FMLA-protected leave. However, if his leave extends beyond the end of his FMLA entitlement, then he does not have return to work rights.

21. The Claimant testified on cross-examination that he did not contact his Employer during the entire time he was off work with FMLA leave. The Claimant testified that he was aware of the Employer's no show/no call policy. However, he didn't call in to the Employer after 90 days of FMLA leave either because he was of the understanding that his Employer would be contacting him and that he was not required to call the Employer. The Claimant testified that his understanding was based on the fact that he was not told to contact Employer or bring in any additional documents per his FMLA paperwork.

22. The Claimant testified that since he stopped working, his back and knee still have pain. The Claimant testified that the pain is very bad even when he is standing still. The Claimant testified that he wants to return to see Dr. Sisson.

CONCLUSIONS OF LAW

Generally

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), the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

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

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the

industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to his lower back and right leg on July 6, 2015 and the Claimant's testimony regarding his mechanism of injury was credible and no persuasive evidence was presented to contradict his testimony. In fact, the medical records and Employer records support the Claimant's testimony. Although Respondents have argued that the condition was pre-existing, the medical reports in evidence do not support this theory. The fact that the Claimant did not have an immediate onset of pain, but rather pain developed later in the evening of his incident and progressively worsened the follow day, does not establish that the injury did not occur when and how the Claimant described. The Claimant provided this information about the delayed onset of pain to his ATP, Dr. Sisson, and Dr. Sisson nevertheless attributed the Claimant's back and radicular symptoms to the described mechanism of injury on July 6, 2015.

The ALJ, having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, found the opinions of the Claimant's treating physician, Dr. Sisson to be credible and persuasive. These opinions are based, in part, on the Claimant's history. The Claimant's testimony and the history he provided to his ATP and his employer have remained consistent and the Claimant's testimony is found to be credible. An employer witness provided a description of the incident that did not substantially differ from that of the Claimant and to the extent that it differed, the Claimant's statements are found to be more credible and persuasive.

As of the date of the hearing, there was also evidence to establish that the Claimant continued to have symptoms, and the parties stipulated that the Claimant is not at MMI if the claim is determined to be compensable.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on July 6, 2015 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the

right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). 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).

Here the Claimant began treating with Dr. Sisson who had last recommended an MRI. Dr. Sisson specifically attributed the Claimant's current symptoms to the work injury the Claimant described happening on July 6, 2016. As of the last visit the Claimant had with his treating physician, Dr. Sisson continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury he suffered on July 6, 2015 and the parties stipulate that if the injury is compensable, then the Claimant is not at MMI. Thus, the Respondents shall be liable for the continued medical treatment recommended by Dr. Sisson and his authorized referrals that is reasonably necessary to cure and relieve the Claimant from the effects of his July 6, 2015 work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that he suffered a compensable work injury on July 6 2015. It further appears that the Claimant was approved for PTO leave and did not work on July 9, 2015 and July 10, 2015 due to the effects of his injury. It is not entirely clear when the Claimant may have worked or not worked between July 11, 2015 and July 30, 2015 and whether or not he suffered any wage loss during this time period due to the injury. There is some evidence of wage loss on certain days during this time period. Namely, per the Claimant's Earnings Statement, he only worked and received payment for 1.65 hours on July 14, 2015 and only .87 hours on July 15, 2015, however, there was no persuasive evidence to establish that any wage loss on those days was due to his injury. No further paystubs or wage records were provided for the time period between July 18, 2015 and July 29, 2015. However, after July 30, 2015, the Claimant was granted FMLA for 12 weeks and he testified that he did not work during this period, which would have expired on Wednesday October 21, 2015. The FMLA was authorized due to the Claimant's own serious medical condition per the terms of the FMLA documents. The Claimant suffered an actual wage loss after July 30, 2015 due to disability related to his industrial injury on July 6, 2015.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits after October 20, 2015 because the Claimant is responsible for his termination as a result of violating the No Show No Call Policy.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the

termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The Employer has a No Show No Call Policy which was communicated to the Claimant and which the Claimant received in writing and signed. The policy provides,

> All employee employed with [Employer and other named companies] are expected to show up to work at their scheduled work time. If the employee is unable to work at their scheduled work time, they should notify their supervisor. Failure to notify their supervisor prior to their scheduled start time and/or failure to show up to work at their scheduled work time will result in an automatic self-termination. Employees who self terminate with the no call no show policy will receive their final paycheck on the next pay day.

In this case, the Claimant subsequently received a notice that he was approved for FMLA leave of 12 weeks which commenced on July 30, 2015. In the notice form, the HR director for the Employer checked that the Claimant did not need to provide any additional certification or information and did not check the provision that the Claimant needed to provide periodic reports or an "intent to return to work" every 20 days. Per the terms of the FMLA paperwork, the FMLA leave expired on Wednesday October 21,

2015. The FMLA paperwork provided to the Claimant provides that the Claimant has the right to be reinstated to the same or equivalent job with the same pay, benefits, and terms and conditions of employment on his return from FMLA-protected leave. However, if his leave extended beyond the end of his FMLA entitlement, then he did not have return to work rights.

The Claimant testified on cross-examination that he did not contact his Employer during the entire time he was off work with FMLA leave. This was reasonable per the terms of the FMLA documentation. However, the Claimant didn't call in to the Employer after 90 days of FMLA leave expired based on an understanding that he was not told to contact Employer or bring in any additional documents per his FMLA paperwork. While it was reasonable for the Claimant not to call in during the 12 weeks of FMLA leave, the paperwork makes it clear that a return to his position is not guaranteed if he does not return to work on the expiration of his FMLA leave period. At this point, the Claimant, being aware of the No Show No Call policy, should have contacted the Employer. Failure to contact the Employer or show up for work after the expiration of his FMLA leave resulted in the automatic termination of the Claimant's employment per the terms of the Employer's attendance and call in policy. The policy is clear and unequivocal. It was not reasonable for the Claimant to assume that because he did not hear from the Employer that either his MRI was approved or he was to return to work that he was not subject to the No Show No Call policy after the expiration of the FMLA leave. His failure to at least call his supervisor or contact HR at the Employer establishes that, with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance and call in policies for reasons other than his work injury. The Claimant's employment was terminated as a result of these violations and he is not entitled to temporary disability benefits after the expiration of FMLA on October 21, 2015.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on July 6, 2015.

2. The Respondents are liable for medical treatment recommended by Dr. Sisson or by his referrals that is reasonably necessary to cure and relieve the Claimant from the effects of his July 6, 2015 work injury.

3. The Claimant is entitled to temporary disability benefits from July 30, 2015 to October 21, 2015.

4. The Claimant is responsible for termination, effective October 22, 2015, for violation of the Employer's No Show No Call Policy after the expiration of his FMLA leave period and the Claimant is not

entitled to temporary total disability benefits from October 22, 2015 ongoing.

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

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

DATED: April 26, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

STIPULATION

1. The parties stipulate to an average weekly wage of $913.65.

ISSUES

Based on the stipulations reached by the parties, the issues remaining for adjudication at hearing are:

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on July 23, 2015.

2. If Claimant has otherwise proven that he sustained a compensable injury, whether Respondent has proven by a preponderance of the evidence that Claimant was engaged in 'horseplay' at the time of the injury, such that it created a substantial deviation that removed Claimant from the course and scope of his employment.

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that treatment he received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

4. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits in this claim from August 1, 2015 ongoing.

FINDINGS OF FACT

1. The Claimant was employed by Employer since November 1, 2001 at the Denver Complex, a women's correctional facility as a CSTS 1, which is a trade supervisor. His job duties are to take offenders authorized with a gate pass outside the detention facilities to teach them lawn and landscaping maintenance skills.

2. The Claimant testified that in the past he has supervised 8-10 offenders, but in the summer season during 2015, he typically only supervised 3-4 inmates. Job duties included ensuring that the lawn in front of the detention facilities was mowed and the Claimant testified that he felt pressure to complete the jobs assigned from his supervisor even though he had fewer workers to get the job done.

3. On July 23, 2015, the Claimant was pushing a lawn mower and he tripped over the lawn mower bag on the grass catcher. The Claimant testified that he went to the right and went over the handles and fell on his extended right arm as he fell and landed.

4. The Claimant's fall as he was pushing the lawn mower was captured on one of the prison's surveillance cameras. In the video, the Claimant and an inmate appear to be lining up to race with their lawn mowers. The Claimant waits for the inmate to complete a row of mowing while he waits at one end and then the inmate turns the mower around and she and the Claimant appear to line up so as to start at the same time. Once the two start to mow, they move at what appears to be a very fast pace for mowing grass and not a normally-paced lawn mowing rhythm. The Claimant then falls to the right and rolls a bit on the grass. The surveillance video does not contain any sound recording (Respondent's Exhibit J).

5. In addition to the surveillance footage, there is some conflicting testimony about what occurred before and up to the Claimant's fall on July 23, 2015 when he landed on his right side injuring his right shoulder and neck.

6. The Claimant testified that due to the pressure he felt to complete the assigned work on the day of his accident, he instructed inmate Garvey to mow in one direction and he went the other direction. Then, he testified that while assisting with the mowing, he got tangled up in the lawn mower bag and tripped on the grass catcher which made him fall to the right and injure himself. He testified that he immediately felt burning pain in the right shoulder, but he tried to get up and shake it off. On cross-examination, the Claimant testified that he did not agree that he and the inmate, Ms. Tessa Garvey were engaging in a "race." The Claimant testified that when a co-worker came out he asked the co-worker to take over supervision of the inmate so that he could go inside and advise his supervisor what happened and seek medical attention. The Claimant testified that he was initially told that he could not go to Concentra on July 23, 2015 and he did not complete a formal report of the injury on that day.

7. On cross-examination, the Claimant disputed that he was in a "rematch" with Ms. Garvey from an earlier race that day that the Claimant had lost. When questioned if the Claimant had a reputation of joking around with Ms. Garvey, the Claimant testified that he treated the inmates with respect and human dignity. He testified that it was not his job to "punish" the inmates because their punishment was being in prison. He testified that he understood his duties as being there to engage the offenders in activities. The Claimant testified that he worked for the DOC for 14 years and was familiar with the Code of Conduct. He agreed that the Code of Conduct (Respondent's Exhibit I, p. AG020) stated that, "DOC employees, contract workers, and volunteers shall not wager or engage in any unauthorized game, contest, or sport with any offender." He further agreed that the Code of Conduct (Respondent's Exhibit I, p. AG020) provided that, "horseplay between DOC employees, contract workers, and volunteers, with each other or with offenders is prohibited. Horseplay includes, but is not

limited to, wrestling, pushing, chasing, or practical jokes." On redirect examination, the Claimant testified that prior to July 23, 2015, he had mowed the lawn before, especially if the inmates were on lockdown and he had no inmates on his crew to perform the mowing.

8. Captain Johnnie Nevin is employed by Employer as a CSLTS maintenance supervisor. His rank is captain and his position is to supervise various departments at the Denver Complex, including the maintenance department. He is familiar with the Claimant and aware that the Claimant injured his right shoulder on July 23, 2015. Captain Nevin testified that the Claimant came in and told him about it on July 24, 2015. Captain Nevin located the camera on which video surveillance of the incident on July 23, 2015 would be located. The video surveillance recorded on the DVD that is Respondent's Exhibit J was played for Captain Nevin and he testified that he recognized the video surveillance and that no changes or alterations to the video were made. Captain Nevin testified that the purpose of giving jobs to offenders at the Denver Complex is so that they can learn skills and earn money. The role of supervisors of the offenders is (1) to make sure the offenders don't leave; (2) to ensure the safety of the offenders; and (3) to train the offenders in skills. Captain Nevin testified that the Code of Conduct for the DOC provides that there is to be no contact with offenders and no horseplay or games. Captain Nevin testified that if the Claimant was racing with an offender, this would constitute a violation of the DOC Code of Conduct as it would be considered "horseplay." Captain Nevin also testified that engaging in racing or games with offenders raises safety concerns in this case since a lawn mower can be a dangerous piece of machinery. Captain Nevin testified that if he saw an employee engaged in horseplay, he would discipline the employee. Captain Nevin also testified that after the Claimant's report, he, along with Life Safety Officer Taylor inspected all 6 lawn mowers at the women's detention facility to ensure that they were all in good working order with no defects. He further testified that all lawn mowers were found to be in good working order with the bags attached correctly. On cross-examination, Captain Nevin agreed that it is important to motivate inmates, but stressed that only as long as it is not through "horseplay." He agreed that mowing lawns was a part of the Claimant's job duties, but, on redirect, Captain Nevin clarified that he did not think that the Claimant was properly supervising the inmate when engaged in the activity shown on the surveillance footage. Captain Nevin testified that it is more important to supervise the inmates than it is to complete jobs assigned.

9. Major Jay Guilliams has been employed by Employer for 25 years. He is the physical plant manager at the Denver Complex. His job duties include managing upkeep of the facility, HVAC, grounds maintenance and projects. He was the Claimant's supervisor from September 2012 until the Claimant's resignation. Major Guilliams testified that the number one priority for the Claimant was to supervise the inmates to do their jobs correctly and safely. He is aware that the Claimant injured his shoulder falling while using a lawn mower. Major Guilliams testified that the lawn mowers used at the facility are residential grade lawn mowers that are serviced and replaced regularly. He testified that there are always new lawn mowers ready to replace old ones as they wear

out. Major Guilliams testified that after the Claimant's injury, an inspection of all lawn mowers was completed and all were found to be in good working order and that there was no equipment failure issue. Major Guilliams also testified that DOC supervisors are advised not to engage in "familiarity" with offenders as this creates a situation that degrades control and supervision and can also create a safety issue. Major Guilliams testified that if the Claimant was "racing" his lawnmower with an inmate, that this would be a violation of Employer policy. Major Guilliams testified that the Claimant had prior instances of engaging in policy violations such as when he gave out Christmas candies and an instance where he left an offender in a running vehicle while he was outside the vehicle at the rear of the truck (also see Respondent's Exhibit G). When questioned whether or not Employer expects its supervisors to be "kind," he testified that supervisors are expected to be "professional and humane."

10. Warden David Johnson has been employed by Employer for 20 years. He is currently the warden of the Denver Complex with overall responsibilities for the facility including personnel and budget matters. Warden Johnson is familiar with the Claimant who he identified as a former employee. As warden, Warden Johnson receives all reports from accident investigations. He testified that he received. A copy of the safety investigation report (Respondent's Exhibit F) from the facilities' Life Safety Coordinator dated July 27, 2015. Based on this short report, Warden Johnson requested more information and Exhibit E was prepared with additional information provided by the Claimant related to his lawn mower injury on July 28, 2015. After receiving this additional information, Warden Johnson testified that he felt that the Claimant was deflecting responsibility. Warden Johnson testified that the later incident report prepared by the Claimant (Exhibit E), was different from the original report of the Claimant and that in this follow up report, the Warden opined that the Claimant was not taking responsibility for his conduct. Warden Johnson testified that he met with the Claimant after receiving the incident report at Exhibit E and asked if the Claimant wanted to add anything. Warden Johnson testified that the Claimant stated he did not want to add anything and so the warden decided to proceed to a 6-10 hearing. As part of the 6-10 hearing, Warden Johnson interviewed offender Garvey to obtain more information. After he interviewed Ms. Garvey, Warden Johnson concluded that the Claimant was "racing" Ms. Garvey with the lawn mower. He determined that this was a safety issue, that it indicated a lack of professionalism for crossing boundaries, it constituted a lack of supervision and that the Claimant diminished his authority by his actions with an offender. Warden Johnson testified that he considers racing with a lawn mower to be "horseplay" under the DOC Code of Conduct. In addition to finding theses violations at the 6-10 hearing, Warden Johnson determined that the manner in which the Claimant presented himself during the investigation and hearing was deceitful and his credibility was tarnished. Warden Johnson testified that the complete results of the investigation and 6-10 hearing were set forth in a notice dated September 1, 2015 (Respondent's Exhibit B). Warden Johnson testified that if the Claimant had not resigned, he would have terminated the Claimant's employment with Employer for the reasons set forth in the September 1, 2015 notice. Warden Johnson testified that there is no level of physical horseplay that is appropriate in the workplace at the Denver Complex. He

testified that when supervisors are responsible for offenders, it is important to maintain a high degree of professionalism to maintain safety and maintain the integrity of the supervision. Warden Johnson, who was present during the Claimant's testimony at the hearing disagreed that it was important that the Claimant finish mowing the grass by a particular deadline. Rather, he testified, the most important part of his duties is offender supervision. On cross-examination, Warden Johnson testified that the biggest factor in the decision to terminate the Claimant's employment was the Claimant's lack of integrity and dishonesty at the 6-10 meeting and throughout the investigation process. Warden Johnson also agreed that under normal circumstances DOC employees should try to complete a task assigned by their supervisor and that the Claimant was mowing the grass at the Denver Complex to benefit the Employer. However, on redirect examination, Warden Johnson clarified that he does not expect employees to use any means possible to complete a job and that it is never appropriate to violate the DOC Code of Conduct to complete a job.

11. A Denver Women's Correctional Facility inmate on July 23, 2015, Ms. Tessa Garvey testified on December 17, 2015. She testified that the Claimant was her boss in charge of outside grounds maintenance. She testified that she recalls mowing the lawn in front of the correctional facility on July 23, 2015. Ms. Garvey testified that she and the Claimant were "competing to get the lawn done." She further testified that they engaged in two races that day and she won the first one so there was a rematch. Ms. Garvey testified that for the second race, they lined up at the beginning and on the count of three they "took off." She testified that, immediately after, the Claimant tumbled over the lawn mower bag that had fallen off and he fell over it. Ms. Garvey testified that when the Claimant fell, she started laughing and fell over in the lawn. Ms. Garvey testified that this was the only time in the 2 months that she was on the maintenance crew that she and the Claimant engaged in lawn mower races. However, she testified that she and the Claimant did joke around verbally. On cross-examination, Ms. Garvey testified that there was a smaller crew working on mowing the lawn than usual as some of the girls had to leave early for appointments. She testified that usually, just the inmates would do the lawn mowing, but on July 23, 2015, the Claimant mowed too. On redirect examination, Ms. Garvey testified that she never recalled any other staff member doing the lawn mowing with the inmates. Ms. Garvey's testimony was credible, corresponded with the surveillance footage and is found to be reliable and persuasive in terms of explaining what occurred on July 23, 2015 prior to, during and after the Claimant falling while mowing the lawn at the Denver Women's Correctional Facility. To the extent that Ms. Garvey's testimony conflicts with the Claimant's testimony, Ms. Garvey's testimony is found to be more credible and persuasive.

12. The Employer has a Code of Conduct that applies to all employees, contract workers and volunteers. The Code of Conduct was provided as Respondent's Exhibit I. The Code of Conduct was applicable to the Claimant per Section III (D) which defined an "Employee." Section IV sets forth a number of rules and standards and states that "violations of these principles may result in corrective and/or disciplinary action." Pertinent to this case, Section IV(D)(2) provides, "DOC employees, contract

workers, and volunteers shall not wager or engage in any unauthorized game, contest, or sport with any offender." Also pertinent to this case is Section IV(E) which provides, "horseplay between DOC employees, contract workers, and volunteers, with each other or with offenders is prohibited. Horseplay includes, but is not limited to, wrestling, pushing, chasing or practical jokes."

13. The Claimant completed an Incident Report on July 24, 2015 describing his injury as follows, "pushing lawn mower / catcher bag fell off / tripped over bag landed on right shoulder" (Respondent's Exhibit D, p. AG009).

14. Employer filed a First Report of Injury or Illness on July 24, 2015 for the July 23, 2015 injury noting the Claimant injured his right shoulder when "employee was pushing the mower, catcher bag fell off, and the employee tripped over the bag and landed on his right shoulder" (Claimant's Exhibit 1, p. 1).

15. On July 24, 2015, the Claimant saw Dr. Sobanski and reported that he "was at work doing grounds maintenance for DOC when the guard of the lawn mower came off and he tripped over it. He fell landing on right shoulder. Dr. Sobanski performed a physical examination of the Claimant's right shoulder and notes tenderness in the deltoid and anterior glenohumeral joint, a limited range of motion in all planes, and pain in all planes. Dr. Sobanski diagnosed a shoulder strain and prescribed the Claimant Tramadol HCL and Cyclobenzaprine, and provided a referral for physical therapy (Claimant's Exhibit 6, pp. 14-15). Dr. Sobanski also provided restrictions on the Claimant's work activity. The restrictions include no reaching above his head with the right arm, limiting any lifting to five pounds, and any pushing or pulling to ten pounds (Claimant's Exhibit 6, p. 17).

16. On July 24, 2015, Warden Johnson places the Claimant on leave after he is notified of the Claimant's work restrictions. In a letter to the Claimant, Warden Johnson writes "Due to the nature of your restrictions, and due to the needs of the facility, it has been determined that a placement cannot be made at this time, which adequately meet your work restrictions" (Claimant's Exhibit 5, p. 12). The Claimant testified that due to his restrictions of no lifting more than five pounds and no pushing or pulling of more than ten pounds he would not be able to perform his full job duties such as mowing the lawn, planting flowers, and lifting bags of fertilizer.

17. On July 24, 2015, the Claimant began physical therapy on his right shoulder with Mr. Darwin Abrams, PT. Mr. Abrams notes the Claimant's severe tenderness, report of ten out of ten for his pain level, and lack of joint mobility in the right shoulder (Claimant's Exhibit 7, pp. 37-38).

18. On July 28, 2015, the Claimant prepared a detailed report of his injury occurring during Incident # 828034. The Claimant stated that he was supervising the grounds maintenance crew of three people on July 23, 2015. He stated that one of the three in his crew had restrictions he had to accommodate. As he felt he could not

complete the task of mowing the DWCF side of the law by Friday with the small crew he had, the Claimant decided to push a lawn mower himself. The Claimant stated that the mowers that he and the grounds maintenance crew were using were not designed for the terrain that they were mowing and that he had previously made his supervisors aware of this. The Claimant stated that due to the type of mower and the terrain, this "caused the wheels to bow and the grass catchers to drag." The Claimant stated that he began pushing the mower in this instance and, as he pushed it, the grass catcher detached itself from the mower and he tripped over it. The Claimant stated he landed and injured his right shoulder. He stated that he declined medical assistance at first, but after a sleepless night due to pain, he reported the injury the next day (Respondent's Exhibit E, pp. AG011 – AG012).

19. On July 31, 2015, the Claimant saw PA-C Amber Payne. Ms. Payne noted the Claimant's limited use of his right arm and difficulty sleeping due to the pain in the right shoulder. She noted that the Claimant reported that initially the pain was not too bad, but it worsened overnight. PA-C Payne also noted that the Claimant had prior right shoulder surgery 7-8 years ago. She ordered a MRI of the Claimant's right shoulder (Claimant's Exhibit 6, pp. 21-22).

20. On August 5, 2015, the Claimant met with Warden Johnson and Major Guillams pursuant to State Personnel Board Rule 6-10 to discuss allegations of violations of the DOC Code of Conduct, Code of Ethics and Individual Performance Objectives identified in the Claimant's Performance Plan. Warden Johnson memorialized his recollection of the August 5, 2015 meeting in letter dated September 1, 2015. In this letter, it provides that, at the meeting it was discussed that the Claimant engaged in a race with an offender while pushing a lawn mower on July 23, 2015 and the Claimant was injured when the grass catcher on the Claimant's mower dislodged and he tripped over it. The report of this meeting indicates that the first report of injury the Claimant completed lacked detail and that the Claimant was asked to prepare a more detailed report. The Warden noted that at the meeting, the Claimant claimed the grass catcher came off the mower due to the equipment being faulty and that he had done nothing to cause the grass catcher to come off the mower. The note states that, at the meeting, the Claimant denied "horse playing" when he tripped over the grass catcher, but rather, that he was moving rapidly in order to get an increased amount of exercise. The Claimant specifically denied that he was "racing" with an offender (Respondent's Exhibit B, pp. AG 002-AG003).

21. The Claimant underwent a multiplanar multisequence MRI of the right shoulder without contrast on August 7, 2015. Dr. O'Malley noted that the Claimant has tendinosis of the distal fibers of the supraspinatus and the infraspinatus tendons, a large full-thickness tear of the distal supraspinatus and infraspinatus tendons, a superior glenoid labrum lesion (SLAP) tear with a paralabral cyst, and a subacromial impingement (Claimant's Exhibit 9, pp. 80-81).

22. On August 13, 2015, the State Personnel Board Rule 6-10 meeting was reconvened with the Claimant, Major Guilliams and Warden Johnson in attendance. Warden Johnson notified the Claimant that he had interviewed the offender that the Claimant was supervising on July 23, 2015 and that she stated that she and the Claimant were racing one another and that the Claimant had initiated the race. Warden Johnson further informed the Claimant that, the offender told him that after the Claimant tripped over the grass catcher, both of them laughed together. Warden Johnson noted that at the August 13, 2015 meeting, the Claimant again denied racing or engaging in horseplay and that the Claimant could not remember laughing. Also at the meeting, the Claimant stated that although he was operating the lawn mower "rapidly," he believed that he was operating it safely. The letter notes that the Claimant agreed that if he had been operating the mower while walking behind it rather than using it rapidly, he would not have fallen over the grass catcher. The Claimant was advised of a safety inspection that found all lawn mowing equipment to be operable with no safety defects, but the Claimant reiterated that the equipment was defective and the terrain on which it was used was hazardous (Respondent's Exhibit B, p. AG003).

23. On August 14, 2015, the Claimant saw PA-C Nicole Leitch reporting that "he had a '610' hearing yesterday with employer d/t concern that pt has injury while 'horseplaying.' Pt denies that he was 'horseplaying.' States he was using a defective lawnmower (which he had reported – wheels bent, bag dragged on ground). Told he was pushing the lawnmower 'too fast' and pt states he may have been going 'rapid' and was under pressure to get task done" (Claimant's Exhibit 6, p. 30). After reviewing the MRI results with the Claimant, Ms. Leitch advises the Claimant he has a right shoulder SLAP tear, a tear of the right supraspinatus tendon, a tear of the right infraspinatus tendon, and a shoulder strain. PA-C Leitch refers the Claimant to orthopedic surgeon Dr. Hewitt (Claimant's Exhibit 6, p. 32).

24. On September 1, 2015 Warden Johnson prepared a written "Notice of Disciplinary Action after Rule 6-10 Meeting" letter to the Claimant. In addition to memorializing the discussions at meetings held on August 5, 2015 and August 13, 2015 (discussed above), Warden Johnson discusses the Employer policy violations and cites the policies in the letter. He finally notes that for the reasons set forth in the complete letter, that he has "decided to separate [the Claimant] from employment with the Department of Corrections effective September 3, 2015" (Respondent's Exhibit B, pp. AG002). While the letter indicates that the intent was to hand deliver the document to the Claimant, there is no signature and date of the Claimant on the letter indicating that the letter was, in fact, hand delivered to the Claimant.

25. On September 3, 2015, Warden Johnson prepared another letter that was sent to the Claimant by certified mail. This letter indicates that the Claimant notified the warden's office manager that he wished to resign from his position as CSTS I. The warden noted that he accepted the resignation effective September 4, 2015. The letter provides that if the Claimant were to re-apply with Employer, he would first have to address the issues that were under consideration at the 6-10 hearing. The warden also

provided information for appeal to the State Personnel Board in the event that the Claimant felt the resignation was coerced or forced (Respondent's Exhibit C).

26. On November 24, 2015, the Claimant went to the Denver VA because he was having significant pain in his right shoulder. Based in part on his review of the MRI images and report from August 7, 2015, Dr. McBryde noted the Claimant has tendinosis of the distal fibers of the supraspinatus and the infraspinatus tendons, a full-thickness tear of the distal supraspinatus and infraspinatus tendons, a SLAP tear with a paralabral cyst, and a subacromial impingement (Claimant's Exhibit 10, p. 82).

27. On December 11, 2015, Dr. Sawyer, at the Denver VA, examined the Claimant and reviewed his MRI. Dr. Sawyer noted that "I consider it is likely [Claimant] will need shoulder surgery" (Claimant's Exhibit 10, p. 85).

CONCLUSIONS OF LAW

Generally

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). The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Ctr. 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*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Because the facts surrounding and leading up to the mechanism of the Claimant's shoulder injury are disputed by other fact witnesses and are called into question due to apparent discrepancies with video surveillance footage, the credibility of

the Claimant is a crucial component of this claim. The Claimant's credibility is questioned in light of inconsistent reporting of the mechanism of injury to his supervisors over the course of the claim. While the Claimant has stated and argued that he was not engaged in a race or contest, he has admitted (in the face of video surveillance covering his actions at the time of his injury), that he was operating a lawn mower "rapidly." However, he has also repeatedly stated and argued that the machinery he was operating was either defective/faulty or not intended for the terrain over which it was operated. Alternatively, he provided a written statement that he was moving rapidly in order to get an increased amount of exercise. Alternatively, the Claimant has stated that he felt under pressure to complete assigned lawn maintenance tasks by a deadline. The Claimant's credibility is of increased importance in this case where there is clear interplay with the "horseplay" or "substantial deviation" doctrine which could render the injury not compensable.

Horseplay Doctrine / Substantial Deviation Test

The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires a 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.* It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). In *Panera Bread,* while the Claimant was injured when lifting a leg as if he were going to kick a coworker (who was far enough away that it was apparent he could not actually strike the coworker), the claimant slipped and fell. Yet, the ALJ concluded that the claimant's injuries in that case were compensable because his actions "did not constitute an extensive or serious deviation from his employment duties" and the injuries arose out of a combination of "a slippery floor, his shoes, and his actions in attempting to kick toward his coworker." However, in a case found to be "consistent with the requirements of *Panera Bread*," the Industrial Claim Appeals Office found that where a claimant engaged in the "ill-advised nature of an activity wherein a smaller person runs and jumps at a 6'8" 280 pound coworker" to perform a celebratory "chest bump," this could be seen as a "substantial deviation from work duties" and not integral with the activities of the job, as the claimant in that case argued. *Trujillo v. Lowes,* WC 4-932-395-01 (ICAO, July 29, 2014).

If a claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the

activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). Where, the alleged deviation from employment involves "horseplay," our Courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

(1) the extent and seriousness of the deviation;

(2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty;

(3) the extent to which the practice of horseplay had become an accepted part of the employment; and

(4) the extent to which the nature of the employment may be expected to include some horseplay.

No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. The first two factors have been held to be more critical than the third and forth, which "may be viewed merely as specific methods of proving that a claimant's actions became part of the employment." Ultimately, resolution of the issue is one of fact for determination by the ALJ. *Panera Bread, LLC v. Industrial Claim Appeals Office, supra.*

The Claimant's testimony regarding the mechanism of injury and the facts surrounding a fall over the lawnmower grass catcher was at odds with the testimony of other fact witnesses and did not seem to accurately correspond to activities witnessed on video surveillance. The testimony of a Denver Women's Correctional Facility inmate, Ms. Tessa Garvey was that she and the Claimant were "competing to get the lawn done." She further testified that they engaged in two races that day and she won the first one so there was a rematch. Ms. Garvey testified that for the second race, they lined up at the beginning and on the count of three they "took off." She testified that, immediately after, the Claimant tumbled over the lawn mower bag that had fallen off and he fell over it. After this, both the Claimant and Ms. Garvey were on the ground laughing. Ms. Garvey also testified that she and the Claimant did joke around verbally prior to that. Ms. Garvey's testimony was credible, corresponded with the surveillance footage and was found to be reliable and persuasive in terms of explaining what occurred on July 23, 2015 prior to, during and after the Claimant falling while mowing the lawn at the Denver Women's Correctional Facility. To the extent that Ms. Garvey's testimony conflicted with the Claimant's testimony, the ALJ credited Ms. Garvey's testimony over the Claimant's. This is based in part on the finding that, overall, the weight of the testimony and documentary evidence indicates that the Claimant has been less than credible over the course of his claim and during the hearing. Additionally, although the Claimant also argued that the lawnmower was somehow faulty or defective, a safety inspection of all of the equipment determined that it was in good

working order with no defects. Based on the entirety of the evidence presented in this case, the Claimant's actions at the time of his injury involved engaging in a race or contest with an inmate to see who could mow a row of the grass the fastest.

In this particular case, based on the nature of the employment, which involved supervision of offenders at a detention facility, there was no persuasive evidence presented that the practice of horseplay had become an accepted part of the employment or that the nature of the employment may be expected to include some horseplay. Rather, there is a strictly enforced Code of Conduct and Code of Ethics that governs the employees of the Denver Complex, a women's correctional facility, which is in place to protect the inmates as well as all others in the facility. Given the very nature of the employment in this case, and crediting the testimony of Warden Johnson, Major Guilliams and Captain Nevin, the ALJ finds that this is not the type of workplace where horseplay is an accepted practice. In fact, the opposite appears to be true.

Thus, the focus turns to whether or not this lawnmower race constituted such a *substantial* deviation from the circumstances and conditions of the Claimant's employment that the activity is for the Claimant's sole benefit and does not arise out of the Claimant's job duties.

The Claimant has argued that, to the extent that he was operating the lawn mower, which is outside of the norm as a supervisor for the offenders providing grounds keeping maintenance, his actions benefitted the Employer. His argument follows that the task of completing the lawn mowing had to be completed by a specific deadline and he needed to assist with the mowing as he had a smaller work crew, one of whom had work restrictions that he needed to accommodate. However, every one of the Claimant's supervisors who testified, including, Captain Nevin, Major Guilliams and Warden Johnson confirmed that the role of the supervisors for the offenders is to first, ensure they don't leave, second, to ensure the safety of the offenders and others in the facility and third, to train the offenders in skills. Further, while the supervisors are expected to be professional and to treat offenders humanely, they are specifically trained to avoid familiarity and engaging in behavior that diminished authority. Having worked for the Department of Corrections for 14 years, the Claimant was clearly instructed and aware of a strictly enforced Code of Conduct and Code of Ethics that required maintaining professional demeanor at all times, which is critical to ensuring the safety and control of inmates in the detention facility. Interactions with offenders that improperly crossed boundaries and encouraged familiarity were forbidden. Additionally, from the warden to supervisors down the line who testified in this case, it is clear that supervising inmates correctly and safely is always a priority over completing a task list. Warden Johnson specifically and persuasively testified that it would never be more important to finish mowing grass by a particular deadline than it would be to supervise offenders with a high degree of professionalism. He testified that it is never appropriate to violate the Code of Conduct to complete a job. In any event, by engaging in the conduct that he did, the Claimant created a situation where was not only injured, but he lost control of the situation and he and the offender fell on the grass laughing which

would have a negative impact on the maintenance of the integrity of his supervision of inmates at this detention facility. As such, the Claimant's injury producing activity was a clear deviation.

As to whether or not the deviation was substantial enough to constitute horseplay and take the injury-producing conduct outside of being compensable, the ALJ notes that racing with a lawnmower is not consistent with the balance of the work required of the Claimant. While the Claimant has argued that he was motivating the offender to work faster so that the job could be completed, it is not clear that racing with lawnmowers would be intended to accomplish this. Rather, if the Claimant had merely assumed control of one of the lawnmowers and quickly, but safely, mowed the lawn alongside the offender, this would be more likely to accomplish the task, to educate the offender in the skill and to maintain the integrity of his supervision over detention facility inmates. To the extent that the Claimant had been mowing safely and stayed behind the lawnmower, he even testified that he would not have tripped over the catcher bag and would not have fallen and injured his shoulder. The Claimant's argument is also at odds with other explanations that he gave over the course of investigation into the accident, such as his statement that he was mowing the lawn rapidly to increase his exercise benefit.

In any event, ultimately, the Claimant's activities in racing the offender do not appear calculated to encourage more efficient and faster completion of a mowing task, which may have had some benefit to the Employer. Rather, the Claimant's activities appear to be calculated to inject a competition and some levity into the work situation. Unfortunately, this is not the type of workplace where this type of behavior can be accommodated. Even if the Claimant and his crew had completed the work more quickly, which is not likely, there is still a greater negative effect due to the Claimant's action; namely, the loss of integrity of the supervision and the negative impact on the authority of a supervisor over a detained offender of the facility. Based upon the Employer's specific and detailed policies, combined with the persuasive testimony of the Claimant's supervisors about the work priorities for supervisors, it is abundantly clear that the negative impact of the Claimant's actions in this case far outweighed any possible benefit of completing an assigned task of mowing the lawn within a deadline. The Claimant's activities in participating in a lawnmower race with an offender being detained at the facility that he was in charge of supervising constitute a deviation from employment so substantial that the activities cannot be considered part of the employment relationship.

Because it is found that the Claimant's injury-producing actions constituted horseplay and a substantial deviation from the Claimant's employment, the Claimant has failed to meet his burden of proving that he suffered an injury while performing services arising out of and in the course of his employment in this case. The Claimant's alleged injury is not found to be compensable. Because the injury is not compensable, the remaining issues regarding medical benefits and temporary disability benefits are moot.

Additionally, although in Claimant's Response to Respondent's Brief, the Claimant argued that Respondent was not entitled to argue that the Claimant was responsible for his termination as this was an affirmative defense that was not properly endorsed or raised at the hearing, this point is also moot given the above findings. As the ALJ found that the Claimant's injury was not compensable under the Act since the injury-producing conduct constituted a substantial deviation from the Claimant's employment, the Claimant is not entitled to temporary disability benefits in this case and so the issue of the Claimant being responsible for termination is not reached.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence by establishing that an incident occurred on July 23, 2015 arising out of his performance of work duties for his Employer. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is therefore denied and dismissed.

2. As the injury is found to be not compensable, the Claimant's remaining claims for medical benefits and temporary disability benefits are likewise denied and dismissed.

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

DATED: April 20, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the right shoulder arthroscopy recommended by Dr. Romero is reasonable and necessary medical treatment for the admitted right shoulder injury.

FINDINGS OF FACT

1. The claimant is employed by the respondent-employer, at the Colorado State Mental Hospital. On May 5, 2015, she reported that she was involved in training on take-downs. Coworkers were holding both of her feet and hands, and her right shoulder was hyperextended.

2. Authorized treating physician Dr. Merchant diagnosed the claimant with "pain, shoulder, right."

3. The only W-164 form in evidence, signed by Dr. Merchant, states that the claimant's work related medical diagnosis is "right shoulder trauma."

4. The respondent ultimately admitted liability for the claimant's injury, and provided medical benefits and ongoing wage loss benefits.

5. The claimant underwent an x-ray of her right shoulder on May 5, 2015. The findings were, "no fracture or dislocation. No radiopaque foreign bodies. No significant arthritis." The impression was "Normal."

6. The claimant underwent an MRI on May 15, 2015. The impression was: 1) Moderate tendinosis along the subscapularis tendon without tear; 2) Mild tendinosis of the supraspinatus tendon without tear; 3) Mild arthrosis in the acromioclavicular joint with mild subacromial bursitis. No severe impingement.

7. ATP Dr. Merchant referred the claimant to orthopedic surgeon Dr. Romero. The claimant's initial visit with Dr. Romero was on August 3, 2015.

8. On August 3, 2015, Dr. Romero had reviewed the report from objective scans of claimant's right shoulder. "I visualized an MRI report from Open MRI which is suggestive of supraspinatus and subscapularis tendinosis."

9. Having reviewed the MRI report and examined claimant, Dr. Romeo opined on August 3, 2015 as follows. “I do not see anything that would require surgical interventions at this point.”

10. Dr. Romeo provided the claimant with an AC joint injection, which she would report at her next visit gave her good relief for about a week.

11. Dr. Romeo saw the claimant again on September 15, 2015. On that visit, he stated, “I am recommending the patient undergo an arthroscopy of the shoulder with a biceps tenodesis arthroscopic versus subpect based on intraoperative findings. We will also evaluate her rotator cuff at the time and debride her distal clavicle/AC joint.” The record does not state what “intraoperative findings” upon which he was basing this request. The record does not state why Dr. Romero changed his original opinion that claimant had nothing that would require surgical intervention.

12. In response to a letter written to ATP Dr. Merchant, Dr. Schwender wrote that the claimant’s request is reasonable. “Pt has significant functional restrictions/ limitations in R shoulder, which is getting worse. Surgery could significantly improve this impairment.”

13. Dr. Wallace Larson performed an Independent Medical Examination in this matter. Dr. Larson is a board certified orthopedic surgeon with a subspecialty in hand and upper extremity. Approximately 70-80% of Dr. Larson’s practice involves hand and upper extremity surgeries. He performs shoulder surgery approximately once per week. Additionally, Dr. Larson is Level II accredited. He was accepted as an expert in orthopedic surgery.

14. Dr. Larson discussed the three findings on the claimant’s MRI. Tendinosis is extra fluid within the tendon. The claimant’s tendinosis, as well as her arthrosis in the acromioclavicular joint, “are all very common findings, even in normal middle-aged people that do not have any symptoms.”

15. Regarding the claimant’s MRI scan, Dr. Larson stated, “There’s nothing here on the MRI scan that would indicate the need for surgical repair.”

16. Dr. Larson stated that it is very uncommon for subscapularis tendinosis to cause pain. There is not a surgical option for the claimant’s subscapularis tendinosis.

17. Dr. Larson further explained that none of the three impressions from claimant’s MRI would be related to her work injury. “No, it’s clear none of those findings were traumatic in origin. They’re really degenerative…As all of us age, our tendons

weaken a little bit….It's a degenerative change, not a tendinitis. It's not an inflammation of the tendon. It's a degenerative change in the tendon. It's age-related."

18. Dr. Larson was asked about claimant's physical or anatomical diagnosis of her right shoulder. "She doesn't have any established anatomic diagnosis….Nobody has established any anatomic deficiency or traumatic change in her shoulder as a result of the injury."

19. Dr. Larson stated that the claimant has no objective findings of an anatomic shoulder injury. The objective findings he would expect to see on exam or MRI include: instability; muscle atrophy; crepitus; ligament ruptures; rotator cuff rupture; internal swelling; bone edema, or extra fluid. The claimant has none of these.

20. Dr. Larson understands that Dr. Romero has requested an "exploratory surgery" to look in the claimant's shoulder joint with an arthroscope to see if something in particular can be identified and repaired.

21. Dr. Larson testified that it is not reasonable to scope into claimant's shoulder and see if there is anything to fix in there. "The likelihood of surgery either reducing or eliminating symptoms and pain in her shoulder is very, very remote."

22. Dr. Larson stated that in addition to not being helpful, an unnecessary exploratory surgery presents risks to the claimant. These risks include "the obvious risk of anesthesia…bleeding…infection…some nerve or blood vessel injury." Additionally, the surgery presents risks to the claimant's shoulder. The arthroscope produces joint surface injury with its scraping. Moreover, the claimant could have injury to her joint cartilage just from the fluid and local anesthetics.

23. Dr. Larson further explained that in this case it is not reasonable to shave part of claimant's shoulder joint to make more room for her rotator cuff. "It's more likely to make her worse than better." He explained that Dr. Romero's requested procedure will release ligaments in the front of the shoulder that help stabilize the joint.

24. Dr. Larson further explained that because claimant has no anatomic source of her pain, with an unnecessary surgery, her risk of increasing pain symptoms and risk of longer-term stiffness is significantly increased.

25. Dr. Larson stated that a surgeon should "consider to correlate the imaging findings with the patient's symptoms and your physical findings on examination to see if all that matches up. And if it does, then they're probably a good candidate for surgery.

And if it doesn't match up--in this case, it clearly does not--they are probably a very poor candidate for the surgery."

26. Dr. Larson testified that claimant does not have an anatomic correlation with her symptoms, but rather, "non-physiologic findings." A non-physiologic finding is "not a finding that could be explained by any injury or structure deficiency within her shoulder."

27. Dr. Larson explained that claimant's mechanism of injury would have resulted in a minor shoulder strain that would get better with or without treatment, in a few weeks or a month. Yet, claimant has a "history of the type of symptoms that she reports that really don't correlate with any kind of known anatomic deficit and her non-physiologic finding--that she really falls quite clearly into the category. She has persistence of symptoms that are not explained by any anatomic deficit."

28. Dr. Larson disagrees that the claimant's purported positive response to Dr. Romero's injections is reasonable grounds to perform a surgery. "There's still nothing being identified as an anatomic deficit."

29. Dr. Larson also disagrees with Dr. Schwender's statement that surgery is reasonable. He stated the surgeon should identify something that is likely to be corrected with surgical intervention. "Just a persistence of pain symptoms is not an adequate reason for surgical intervention."

30. Dr. Larson further disagrees with Dr. Schwender's statement that the proposed surgery is likely to help claimant's impairment. "Oh, no. I think it's likely to make it worse."

31. Dr. Larson's ultimate opinion as an expert in orthopedic medicine is that Dr. Romero's surgery recommendation is not reasonable or necessary to cure the claimant from the effects of her work injury.

32. The ALJ finds Dr. Larson's analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that the surgery recommended by Dr. Romero is reasonable or necessary to cure or relieve her from the effects of her admitted industrial injury.

CONCLUSIONS OF LAW

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

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

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); *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).

4. 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); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected

evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. The respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

7. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

8. In this case, it is clear the claimant suffered trauma to her right shoulder during the training accident which forms the basis of this claim. The claimant presented immediately to respondents designated health care providers. She was examined numerous times by CCOM personnel and by Dr. Romero, who specializes in orthopedics.

9. Nonetheless, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the surgery being recommended by Dr. Romero is reasonable or necessary.

10. The ALJ concludes that Dr. Larson's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Romero id denied and dismissed.

2. 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 4, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on March 12, 2015.

2. Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to provide a written list of at least four designated medical providers within seven days after receiving notice of his injury.

FINDINGS OF FACT

1. Claimant worked for Employer as an Operator Assistant. On March 12, 2015 he and a coworker were moving an iron pipe by carrying it on their shoulders. As Claimant lowered the bar he experienced a "pop" in his right shoulder area. Claimant completed his work shift and went home about two or three hours after the incident.

2. Claimant testified that at approximately 1:00 a.m. on March 13, 2015 he awoke to excruciating right shoulder pain. He contacted his supervisor and reported his right shoulder injury.

3. On March 13, 2015 Employer directed Claimant to Injury Care of Colorado for medical treatment. Claimant explained that Employer's Safety Manager met him at the facility. Employer did not provide Claimant with a written list of at least four designated medical providers or any other treatment options.

4. At Injury Care of Colorado Claimant reported right shoulder pain. He was diagnosed with a work-related right shoulder strain/sprain. The treating physician released Claimant to full duty, prescribed x-rays and recommended a follow-up visit.

5. On March 15, 2015 Employer completed a First Report of Injury regarding the March 12, 2015 incident. The First Report specified that Claimant suffered a "shoulder strain" on March 12, 2015.

6. On April 22, 2015 Claimant underwent a right shoulder MRI. The MRI revealed an Acriomioclavicular (AC) joint separation.

7. On April 30, 2015 Employer provided Claimant with a Designated Provider List. The document specified that, pursuant to W.C.R.P. 8-2(A), Claimant could obtain treatment from any of the four enumerated providers. Claimant chose Injury Care of Colorado from the Designated Provider List.

8. Claimant continued to receive conservative medical treatment from Injury Care of Colorado. In June 2015 he underwent a second MRI that revealed a right shoulder separation. Claimant was directed to Orthopedic Surgeon James Johnson, M.D. for a consultation.

9. On September 25, 2015 Claimant visited Dr. Johnson for an examination. Claimant reported that he injured his right shoulder while carrying pipes for Employer. Dr. Johnson diagnosed Claimant with inflammation of his AC joint with a grade 1-2 AC joint separation. He administered an intra-articular injection into Claimant's right AC joint. Claimant experienced approximately 90% pain relief from the procedure. Dr. Johnson prescribed physical therapy and recommended a return visit in one month to ascertain whether Claimant required surgery.

10. On October 8, 2015 Claimant visited William Miller, M.D. for an evaluation. Claimant reported that on March 12, 2015 he and a coworker were moving a pipe by carrying it on their shoulders. As Claimant lowered the pipe, he experienced a "pop" in his right shoulder. Claimant remarked that the pipe weighed between 40-75 pounds. Dr. Miller determined that Claimant had suffered a right AC joint injury that was aggravated by his work activities for Employer. He assigned work restrictions and recommended a follow-up appointment in three weeks.

11. On March 3, 2016 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Claimant reported that on March 12, 2015 he and a coworker were carrying an iron bar on their shoulders. As he lowered the bar, he experienced a "pop" in his right shoulder area. After conducting a physical examination and reviewing medical records, Dr. Fall diagnosed Claimant with a grade 1 AC joint right shoulder separation. She concluded that Claimant's work activities on March 12, 2015 caused his right shoulder symptoms and he had not reached Maximum Medical Improvement (MMI). Dr. Fall remarked that shoulder separations typically do not require surgery and thus recommended physical therapy.

12. Dr. Fall testified at the hearing in this matter. She recounted that Claimant heard a "pop" in his right shoulder while carrying an iron pipe on March 12, 2015. He did not initially experience pain but awoke at approximately 1:00-2:00 a.m. with excruciating symptoms. After conducting a physical examination and reviewing Claimant's medical records, Dr. Fall determined that Claimant suffered a grade 1 AC joint right shoulder separation. She maintained that Claimant's right shoulder symptoms were caused by his work activities for Employer on March 12, 2015. Dr. Fall recommended a course of physical therapy before Claimant proceeded with right shoulder surgery.

13. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on March 12, 2015. Claimant credibly explained that on March 12, 2015 he and a coworker were moving an iron pipe by carrying it on their shoulders. As Claimant lowered the pipe he experienced a "pop" in his right shoulder area. Claimant was initially diagnosed with a work-related shoulder strain/sprain.

14. The medical records reveal that Claimant has consistently maintained that he injured his right shoulder while carrying a pipe for Employer. Dr. Miller persuasively determined that Claimant had suffered a right AC joint injury that was aggravated by his work activities for Employer. Dr. Fall also noted that Claimant suffered a grade 1 AC joint right shoulder separation. She maintained that Claimant's right shoulder symptoms were caused by his work activities for Employer on March 12, 2015. Accordingly, the overwhelming evidence reflects that Claimant's work activities on March 12, 2015 aggravated, accelerated or combined with his pre-existing condition to cause a right shoulder injury.

15. Claimant has failed to establish that it is more probably true than not that the right of medical selection passed to him because Respondents did not provide a written list of at least four designated medical providers within seven days after receiving notice of his injury. Claimant testified that at approximately 1:00 a.m. on March 13, 2015 he awoke to excruciating right shoulder pain. He contacted his supervisor and reported his right shoulder injury. On March 13, 2015 Employer directed Claimant to Injury Care of Colorado for an examination. On March 15, 2015 Employer completed a First Report of Injury that specified Claimant suffered a "shoulder strain" on March 12, 2015. Employer had thus been notified of an injury because it had some knowledge of the accompanying facts connecting the injury with Claimant's employment and a reasonably conscientious manager would recognize that the case might involve a potential compensation claim.

16. Claimant continued to receive conservative medical treatment from Injury Care of Colorado. On April 30, 2015 Employer provided Claimant with a Designated Provider List. The document specified that, pursuant to W.C.R.P. 8-2(A), Claimant could obtain treatment from any of the four enumerated providers. Claimant chose Injury Care of Colorado from the List. Although Respondents failed to timely supply Claimant with a Designated Provider List pursuant to statute and Rule, Claimant signified through his words and conduct that he had chosen a physician to treat his injury. Claimant has thus already exercised his right of selection and chose Injury Care of Colorado to treat his March 12, 2015 right AC joint injury. His desire to obtain medical treatment from another physician thus requires him to obtain permission from Respondents or the approval of an ALJ.

CONCLUSIONS OF LAW

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

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that 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 the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on March 12, 2015. Claimant credibly explained that on March 12, 2015 he and a coworker were moving an iron pipe by carrying it on their shoulders. As Claimant lowered the pipe he experienced a "pop" in his right shoulder area. Claimant was initially diagnosed with a work-related shoulder strain/sprain.

8. As found, the medical records reveal that Claimant has consistently maintained that he injured his right shoulder while carrying a pipe for Employer. Dr. Miller persuasively determined that Claimant had suffered a right AC joint injury that was aggravated by his work activities for Employer. Dr. Fall also noted that Claimant suffered a grade 1 AC joint right shoulder separation. She maintained that Claimant's right shoulder symptoms were caused by his work activities for Employer on March 12, 2015. Accordingly, the overwhelming evidence reflects that Claimant's work activities on March 12, 2015 aggravated, accelerated or combined with his pre-existing condition to cause a right shoulder injury.

Right of Selection

9. Section 8-43-404(5)(a)(I)(A), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the respondents must provide injured workers with a list of at least four designated medical providers. §8-43-404(5)(a)(I)(A), C.R.S. The respondents must supply a copy of the written designated provider list to the injured worker "in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." W.C.R.P. 8-2(A)(1). The list must include the insurer's contact information "including address, phone number and claims contact information." W.C.R.P. 8-2(A)(2).

10. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the "services of a physician are not tendered at the time of injury, "the employee shall have the right to select a physician." W.C.R.P. 8-2(E) additionally provides that "[i[f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician" of his choosing. An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). However, in those situations where the claimant has signified, by words or conduct, that he has chosen a physician to treat the industrial injury he has made a physician selection. See *Rivas v Cemex* W.C. No. 4-975-918 (ICAP, Mar. 15, 2016); *Tidwell v Spence Technologies,* W.C. No. 4-917-514 (ICAP, Mar. 2, 2015).

11. In *Miller v Rescare, Inc.,* W.C. No. 4-761-223 (ICAP, Sept. 16, 2009) the employer failed to timely supply the claimant with a written list of designated medical providers. However, the claimant treated with one of the employer's available providers for two visits. Because the claimant was dissatisfied with her medical treatment, she sought to designate another treating physician. In rejecting the claimant's contention, the ICAP noted "…the salient point is that she sought treatment with" an authorized provider. The claimant had therefore exercised her right to select a treating doctor. The claimant's desire to treat with a new doctor required her to obtain permission of the respondents or the approval of an ALJ.

12. Similarly, in *Pavelko v Southwest Heating & Cooling*, W.C. No. 4-897-489 (ICAP, Sept. 4, 2015) the employer did not timely provide the claimant with a list of designated providers. However, the claimant treated with one of the doctors recommended by the employer for two years. The choice of physician had thus passed to the claimant and he exercised his right of selection by his "words or conduct."

13. As found, Claimant has failed to establish by a preponderance of the evidence that the right of medical selection passed to him because Respondents did not provide a written list of at least four designated medical providers within seven days after receiving notice of his injury. Claimant testified that at approximately 1:00 a.m. on March 13, 2015 he awoke to excruciating right shoulder pain. He contacted his supervisor and reported his right shoulder injury. On March 13, 2015 Employer directed Claimant to Injury Care of Colorado for an examination. On March 15, 2015 Employer completed a First Report of Injury that specified Claimant suffered a "shoulder strain" on March 12, 2015. Employer had thus been notified of an injury because it had some knowledge of the accompanying facts connecting the injury with Claimant's employment and a reasonably conscientious manager would recognize that the case might involve a potential compensation claim.

14. As found, Claimant continued to receive conservative medical treatment from Injury Care of Colorado. On April 30, 2015 Employer provided Claimant with a Designated Provider List. The document specified that, pursuant to W.C.R.P. 8-2(A), Claimant could obtain treatment from any of the four enumerated providers. Claimant chose Injury Care of Colorado from the List. Although Respondents failed to timely supply Claimant with a Designated Provider List pursuant to statute and Rule, Claimant signified through his words and conduct that he had chosen a physician to treat his injury. Claimant has thus already exercised his right of selection and chose Injury Care of Colorado to treat his March 12, 2015 right AC joint injury. His desire to obtain medical treatment from another physician thus requires him to obtain permission from Respondents or the approval of an ALJ.

ORDER

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

1. On March 12, 2015 Claimant suffered an industrial injury to his right shoulder during the course and scope of his employment with Employer.

2. Claimant has exercised his right of selection by choosing Injury Care of Colorado to treat his March 12, 2015 right AC joint injury.

. 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 18, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her low back/right leg on December 22, 2014 while lifting a portable copy machine; and if so,

II. Whether she established, by a preponderance of the evidence, that the treatment rendered by Employer and his referrals, specifically Dr. Illig was reasonable, necessary and related to that December 22, 2014 industrial injury.

FINDINGS OF FACT

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

1. Claimant is employed as the office manager for Employer's medical practice. She has worked in this position for approximately the past 6 years.

2. Claimant manages the daily operations of the practice. She oversees billing, handles scheduling and supervises employee relations among other things.

3. On December 22, 2014, at approximately 8:15 a.m., Claimant testified that she bent over slightly to pick up a small copy machine, which she estimated to be 3 feet long by 2 feet wide, off a cart. As Claimant lifted the machine and twisted to the right to place it on a counter, she felt a pop and developed pain in her low back.

4. A co-worker, Laura Hartless was present and Claimant reported to her that she injured her back. Claimant did not report the injury to Employer. Rather, she continued her work hoping that her pain would simply "go away." Claimant's pain did not subside and she worked the balance of her work day in pain.

5. On December 23, 2014, testified that she went to work in pain but still did not report her injury to Employer.

6. On December 24, 2014, Claimant worked a half day in pain. The office closed early in advance of the Christmas Holiday. Although Claimant continued to mention back/leg pain to Ms. Hartless, she did not report it to Employer.

7. Claimant returned to work following the Christmas Holiday on December 29, 2014. According to Claimant, Employer asked her how her time off from work was to which she responded it was "horrible" secondary to pain caused by lifting the copier on December 22, 2014. Claimant's back was then examined by Employer, who is board

certified in internal medicine and also acts as Claimant's primary care provider (PCP) (See generally, Respondents' Exhibit A).

8. Although Claimant was evaluated medically by Employer, no report of a work related injury was completed by either Claimant or Employer on December 29, 2014. Claimant also testified that she was not referred to a designated provider for additional treatment at this time. Rather, Claimant testified that she was examined informally by Employer without a medical file being opened for her injury. Employer corroborated Claimant's testimony, testifying that he examined Claimant's back on December 29, 2014. Employer had no explanation regarding the absence of a treatment record for December 29, 2014, outlining Claimant's symptoms, his examination findings and any treatment rendered despite being aware that the cause of Claimant's pain came from lifting a portable copy machine.

9. Claimant has had sciatic pain, a self described diagnosis, off and on for years prior to December 22, 2014. As Claimant's PCP, Employer has treated flare ups of her sciatic pain previously. According to Employer, Claimant had sporadic flare ups of her sciatica once every couple of years for which he would provide Toradol and anti-inflammatories. Based upon the evidence presented, the ALJ finds that Employer, more probably than not, treated Claimant's report of increased back/leg pain in a similar fashion on December 29, 2014 and as a consequence of his prior treatment of Claimant did not feel it necessary to report a work related injury.

10. Claimant's pain did not improve with time and the limited care provided by Employer. On February 9, 2015, Claimant was seen in a "Follow-Up Visit" by Employer. A clinic noted was generated from this visit. The note reflects that Claimant was being seen for "sciatica" affecting the right leg and for "low back sprain." The note also reflects that Claimant "stooped over to pick up object" causing pain in the low back and down the outside of the right leg to the top of knee and a little bit below. When asked, Employer testified that he would have called the copier Claimant reported lifting an "object" in his medical record.

11. On March 30, 2015, Claimant was seen in follow-up by Employer who documented that Claimant was being seen for upper back pain. Careful review the clinic note generated from this date of encounter persuades the ALJ that Claimant's treatment on this date is unrelated to her low back sprain and right leg pain. Rather, the record reflects that Claimant was experiencing upper back and thorax "musculo-skeletal soreness and tenderness secondary to protracted coughing."

12. On April 17, 2015, Employer re-evaluated Claimant for persistent "sciatic pain." On this date of visit Claimant reported continued right leg pain which was worse for the past week. X-rays of the lumbar spine were ordered and Claimant was referred to physical therapy (PT).

13. X-rays obtained April 20, 2015 demonstrated "disk space narrowing L4-L5 and L5-S1 with moderate facet arthritis at L4-5 and L5-S1." The radiologist's

impression after viewing the x-rays was documented as "chronic changes lumbar spine."

14. Claimant presented for her initial PT evaluation on April 24, 2015. The report generated from this evaluation is devoid of any reference to Claimant experiencing increased back and leg pain secondary to lifting a portable copy machine. Rather, the report documents that Claimant reported a history of sciatic pain for many years that would "[go] away without treatment" most of the time. The report goes on to state that Claimant developed sciatic pain "approximately 2 weeks ago" that had not resolved. Claimant was assessed with having "low back instabilities as well as tight piriformis leading to radicular symptoms."

15. On May 8, 2015, Claimant was evaluated by Family Nurse Practioner (FNP), R. "Casey" Straight, as Employer was out of the office. Claimant testified that she could not stand completely up right by this date and the note generated from this date of visit documents that Claimant could not walk as it was "too painful to bear weight on right leg." FNP Straight assessed Claimant with right sciatica and degenerative disc disease with associated symptoms. He ordered an MRI.

15. MRI of the lumbar spine was performed May 13, 2015. The MRI demonstrated "[d]egenerative disk disease at L4-5 with severe spinal stenosis from a large extruded disk fragment" which had herniated posteriorly and extended caudally in the midline at that level.

16. Claimant testified that she met with Employer to review the findings on her MRI. Employer testified that the nature of Claimant's disc herniation, i.e. centrally and downward likely caused Claimant's leg symptoms. Based upon the MRI findings, Employer referred Claimant to Dr. Joseph Illig for a surgical consultation.

17. On May 15, 2015, Claimant completed a request to obtain a copy of her MRI images maintained on a compact disk (CD). In completing this form, Claimant did not check that a copy of the CD was needed for worker's compensation purposes. Rather, Claimant credibly testified that she checked the box entitled "Further Medical Care" because she was scheduled to see Dr. Illig and wanted to make sure he had a copy of her imaging.

18. Claimant was evaluated by Dr. Illig on May 20, 2015. She reported a chief complaint of "back pain with right leg pain with weakness and numbness." There is no mention of Claimant lifting a portable copy machine as the cause of her back and leg pain. Rather, Dr. Illig's medical record notes that Claimant's pain "began towards the end of March" and was "of gradual onset and without clear precipitating etiology." Dr. Illig noted that Claimant's pain had been "refractory" to medication and PT. He recommended an epidural steroid injection but also discussed the option of a L4-L5 decompression and discectomy. Claimant elected to proceed with surgery.

19. Claimant testified that she told Dr. Illig about picking up a copy machine and explained that the reference to a "gradual onset" was her account that her symptoms from the date of onset to her inability to stand "gradually" worsened with time.

20. Although reference to lifting a copy machine does not appear in the initial PT evaluation or Dr. Illig's consultation report, the ALJ finds from Employer's testimony that Claimant, more probably than not, lifted a portable copy machine and this activity is the likely cause of her symptoms and subsequent need for treatment. Consequently, the ALJ finds Claimant's testimony regarding the mechanism of injury (MOI) and her subsequent symptoms credible and persuasive despite the inconsistencies between her testimony and the content of the PT record and Dr. Illig's reports.

21. Dr. Illig took Claimant to the operating room on June 4, 2015, where he performed a "right L4-L5 partial hemilaminectomy, medial facetectomy, microdiskectomy, foraminotomy, decompression of descending L5 nerve root. The operative report from this date of service reflects that Dr. Illig interpreted Claimant's MRI as demonstrating a "partially calcified central disk bulge at L4-L5 with possible extruded disk fragment inferior to the space" along with "significant recess narrowing at L4-L5 right responsible for compression." Consequently, Dr. Illig noted that the surgery was "deemed reasonable." Based upon the evidence presented, including Claimant's testimony and the content of Dr. Illig's medical reports, the ALJ finds the surgery performed by Dr. Illig reasonably necessary and related to Claimant lifting a small copy machine on December 22, 2014.

22. While performing the aforementioned procedure, Dr. Illig discovered a L4 nerve root crossing the disc space lateral to the L5 nerve root. It was felt that this finding either represented a low take off of the L4 nerve below its pedicle or a conjoined L4 nerve root. Regardless, the procedure performed decompressed this nerve root as well. The report also notes that the thecal sac was decompressed following removal of soft disc material lodged beneath the L4 and L5 nerve roots. Finally the report notes that the more medial aspect of the disc in question was calcified and left alone, because the thecal sac was "nicely decompressed and pulsatile" with removal of the soft disc material found "right underneath" the above referenced nerve roots.

23. Employer testified that the extruded disc fragment was recent and an acute finding. Based upon the testimony of Employer, Dr. Illig's interpretation of the MRI findings and the actual pathology observed during surgery, the ALJ finds that there were both acute and chronic changes located at the L4-L5 level of Claimant's lumbar spine. Based upon the evidence presented, the ALJ finds that the extruded disc fragment causing severe stenosis, more probably than not, represents an acute finding explaining Claimant's sudden onset of intractable back and right leg pain which failed to resolve as it customarily had in the past. The ALJ credits the testimony of Employer to find that the popping Claimant felt when lifting the copier was probably associated with the rupture of her diseased L4-L5 calcified disc causing an extruded fragment to compress the nerve roots in the area leading to Claimant's immediate onset of low back and right leg pain.

24. The majority of costs associated with Claimant's medical treatment, including the costs linked to her MRI and surgery were covered by her personal health insurance. Claimant testified that when she began receiving billing invoices for her care, she approached Employer and asked why the costs of her treatment were not covered by workers' compensation given that the need for treatment was a direct consequence of the December 22, 2014 work related lifting incident. It was discovered that no claim associated with her low back injury had been filed.

25. A document from the Colorado Division of Labor (Division), entitled "First Report Display/Update" reflects that a claim administrator was notified of Claimant's December 22, 2014 injury on August 28, 2015. The document provides that Employer was notified of the injury on December 29, 2014. Despite notification on August 28, 2015, the claim was not received by the Division until October 28, 2015. The description of injury appearing on the First Report Display/Update form is consistent with Claimant's testimony regarding the cause of her pain, namely that she was lifting a copy machine. The documents provides: "strain from lifting or carrying- clmt reports herniated disk from lifting a copy machine. Medical, surgery, and lost time claim."

26. Based upon the evidence presented, the ALJ is persuaded that steps to report Claimant's December 22, 2014 injury were taken by Employer after he and Claimant discussed her receipt of bills associated with her surgery by Dr. Illig despite his knowledge that Claimant had injured her back/leg while lifting a copy machine on December 22, 2014. The evidence presented also convinces the ALJ that Employer delayed sending the claim information to the Division as evidenced by the indication on First Report Display/Update documentation that the claim was not received until October 28, 2015. Consequently, the ALJ finds it probable that Employer delayed sending an initial report of injury to the Division despite Claimant's report of injury to Employer early on. Given these facts and Employer's testimony that he was aware that Claimant was injured while stooping to lift an object he understood to be a copy machine which resulted in his treatment of Claimant on December 29, 2014, the ALJ finds, Respondents' suggestion that Claimant only reported/filed her claim when she became aware she would have out of pocket expenses associated with the treatment she received from Dr. Illig unconvincing.

27. Claimant has established by a preponderance of the evidence that she sustained an injury to her low back/right leg while lifting a portable copy machine as part of her duties as Employer's office manager on December 22, 2014.

27. Claimant has proven by a preponderance of the evidence that her December 22, 2014, work injury caused her need for the medical treatment she received from Employer and his referrals, including Dr. Illig. Specifically, the ALJ finds that Claimant has met her burden of proof to establish that the surgery/treatment provided by Dr. Illig was reasonable, necessary and causally related to her December 22, 2014 industrial injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. 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 litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The 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). As noted in this case, Claimant's testimony is credible, convincing and supported by the testimony of Employer.

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

Compensability

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically moving a portable copier which is connected to her duties and position as office manager for Employer. Nonetheless, the question of whether the alleged injury "arose out of" Claimant's employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

G. In this case, the question is whether Claimant's low back and right leg pain and her subsequent need for treatment was caused by her work related functions of moving a portable copy machine. Here, the evidence presented establishes that Claimant bent at the waist slightly and twisted to the right in an effort to lift and move a small copier from a cart to a counter. In the process, Claimant felt a pop and developed

immediate pain in her back and right leg which failed to respond to conservative care. Claimant's testimony regarding the mechanism of injury and her symptoms is largely supported by Employer who is also a physician and Claimant's PCP. Here, the objective medical evidence presented supports a reasonable inference that the extruded disc fragment, compressing the L4 and L5 nerve roots, visualized on MRI and subsequently during surgery, was likely caused by an acute rupture of her diseased L4-L5 disc. More probably than not, the rupture was caused by lifting and twisting with the copier in question rather than the natural progression of a pre-existing, non-work-related condition as suggested by Respondents' counsel. Furthermore, Respondents' suggestion that Claimant fabricated her injury and only reported it after she began to receive billing invoices for the out of pocket expenses associated with her surgery is not supported by the totality of the persuasive evidence. Consequently, the ALJ concludes that a logical causal connection exists between the Claimant's injury/symptoms and her work-related duties on December 22, 2014. The claim is compensable.

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was 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*, *supra*. 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).

I. In this case, the record evidence demonstrates that Claimant's initial care from Dr. Reppert (Employer) and his referrals to physical therapy and Dr. Illig were reasonable, necessary and related to her acute low back/right leg injury. Dr. Reppert's care and treatment was necessary to assess and treat the acute effects of her injury. Additionally, the PT referral was reasonable and necessary to determine if Claimant would respond to directed rehabilitation efforts. Finally, the referral to Dr. Illig was reasonable and necessary given the findings on Claimant's MRI and her failed response to PT. As found, the compressive nature of the pathology noted on MRI made the

surgery performed by Dr. Illig a reasonable and necessary modality to ameliorate Claimant's ongoing symptoms.

ORDER

It is therefore ordered that:

1. Claimant's December 22, 2014 low back/right leg injury is compensable.

2. Respondent shall pay for all reasonable, necessary and related medical treatment, resulting from the Claimants compensable low back/right leg injury, including but not limited to the care provided by Employer and his referrals, specifically all diagnostic studies, PT and the surgery performed by Dr. Illig.

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 26, 2016

/s/ Richard M. Lamphere

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