ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on September 27, 2013 during the course and scope of his employment with Employer.

STIPULATION

The parties agreed that, if Claimant's claim is compensable, he incurred authorized, out-of-pocket medical expenses in the amount of $40.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Concert Stagehand. On September 27, 2013 Claimant's supervisor and Union Steward Laura Payne contacted Claimant and asked him to help "load out" a band from the Fillmore Theater in Denver, Colorado. Claimant testified that a "load out" involves removing band equipment from a concert venue.

2. Claimant explained that he was told to be on the loading dock or near the concert stage by 11:30 p.m. on September 27, 2013 to begin the load out. He noted that he receives four hours of pay when performing a load out regardless of how long the process lasts. Claimant emphasized that it is critical for stagehands to be at the loading dock area as soon as the band has completed a performance.

3. Claimant reported to the Fillmore Theater and signed in at slightly before 11:00 p.m. on September 27, 2013. He remarked that he reached the venue by 11:00 p.m. because arriving early is the custom in the concert industry. Claimant detailed that a semi-truck is waiting to be loaded and the driver is likely to spend the next 12 hours on the road. Moreover, the road crew for a band has often been at the venue for an entire day and usually wants to leave as soon as possible. Claimant commented that he could possibly have received a work "write-up" if he had arrived at the Fillmore Theater at the designated time of 11:30 p.m. Nevertheless, he acknowledged that he was not paid for arriving 30 minutes before shows and stagehands were permitted to do what they wanted before the designated reporting time.

4. Claimant commented that he explored the concert venue because he was looking for some caffeine to keep him awake. However, he only found water. Claimant then asked Ms. Payne whether he could leave the facility to buy a soda from a convenience store located across the street. Ms. Payne replied that she did not care where he went as long as he returned to the loading dock by 11:30 p.m.

5. Claimant subsequently left the Fillmore Theater to purchase a soda shortly after 11:00 p.m. As he was crossing a street he was struck by a motor vehicle. Claimant acknowledged that he was walking on a public street when struck. He was taken by ambulance to Denver General Hospital. The record reveals that the ambulance was dispatched at 11:04 p.m. and arrived at the accident scene at 11:06 p.m. Claimant suffered a left wrist injury and underwent surgical repair through Denver General Hospital. Employer did not pay Claimant for any work on September 27, 2013.

6. Ms. Payne also testified at the hearing in this matter. She noted that Claimant's reporting time on September 27, 2013 was 11:30 p.m. He was not required to arrive until 11:30 p.m. Claimant did not get paid for arriving early and was permitted to do what he wanted prior to 11:30 p.m. Ms. Payne denied that the custom in the industry was to arrive at a venue 30 minutes prior to the reporting time. She simply expected employees to arrive at the designated time. Employer had no requirement that stagehands were required to arrive early for a "load out." However, some stagehands arrived early to watch the end of concerts. Claimant was not paid for September 27, 2013 because he contacted Ms. Payne after he was struck by a motor vehicle and was unable to perform his job duties.

7. Claimant has failed to establish by a preponderance of the evidence that he suffered compensable injuries on September 27, 2013 during the course and scope of his employment with Employer. On September 27, 2013 Claimant arrived at the Fillmore Theater to participate in a load out of band equipment for Employer. Although the load out was scheduled to begin at 11:30 p.m., he explained that he reached the venue by 11:00 p.m. because arriving early is the custom in the concert industry. However, he acknowledged that he was not paid for arriving 30 minutes before shows and stagehands were permitted to do what they wanted before the designated reporting time. Furthermore, Ms. Payne credibly explained that Claimant was not required to arrive until 11:30 p.m. He did not get paid for arriving early and was permitted to do what he wanted prior to 11:30 p.m. Ms. Payne denied that the custom in the industry was to arrive at a venue 30 minutes prior to the reporting time. The preceding testimony reveals that Claimant's job did not begin until 11:30 p.m. on September 27, 2013 and he was permitted to do what he wanted prior to the designated reporting time.

8. Claimant left the Fillmore Theater shortly after 11:00 p.m. to buy a soda from a convenience store located across the street. He explained that he left the facility to purchase a soda because he needed caffeine to keep him awake. Claimant's actions were devoid of any duty component, and were unrelated to any specific benefit to Employer. While crossing a public street Claimant was struck by a vehicle at approximately 11:04 p.m. Claimant was hit prior to his assigned reporting time and was not on Employer's premises when he was struck by the vehicle.

9. The record reveals that Claimant's left wrist injury did not arise in the course and scope of his employment with Employer. Claimant's injury did not occur within the time and place limits of his employment because the accident happened almost 30 minutes before his scheduled work shift and he was not on Employer's premises when struck by a vehicle. Claimant's injury also did not arise out of his job

duties for Employer. Claimant's attempt to purchase a soda from a store across the street prior to his scheduled work shift was for his sole benefit and constituted a substantial deviation from the mandatory or incidental duties of employment. Claimant's job duties involved removing band equipment from a concert venue. His action of seeking to buy a soda from a convenience store across the street did not have its origin in his work-related functions and was not sufficiently related to his work activities to be considered part of his service to Employer. Accordingly, Claimant has failed to demonstrate that he suffered a compensable left wrist injury during the course and scope of his employment with Employer on September 27, 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 establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a 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. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAP, Jan. 10, 2006). The "place" limits of employment include parking

lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. Although injuries incurred while traveling to and from work do not occur in the course of employment, an employee who has fixed hours and a place of work is covered while going to and coming from work while on the employer's premises. *In Re Broyles,* W.C. No. 4-510-146 (ICAP, July 16, 2002). The preceding principle has been extended to injuries that occur on the employer's premises during an unpaid lunch break even if the employee is not required to remain on the premises for lunch. *Id.*

6. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. *Broyles,* W.C. No. 4-510-146. As noted in *Ventura v. Albertson's, Inc.,* 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

7. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Actions including eating, sleeping, resting, washing, toileting, seeking fresh air, drinking water and keeping warm have been determined to be incidental to employment under the personal comfort doctrine. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

8. The issue is thus whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant

stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). Ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00.

9. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

10. As found, Claimant has failed to establish that it is more probably true than not that he suffered compensable injuries on September 27, 2013 during the course and scope of his employment with Employer. On September 27, 2013 Claimant arrived at the Fillmore Theater to participate in a load out of band equipment for Employer. Although the load out was scheduled to begin at 11:30 p.m., he explained that he reached the venue by 11:00 p.m. because arriving early is the custom in the concert industry. However, he acknowledged that he was not paid for arriving 30 minutes before shows and stagehands were permitted to do what they wanted before the designated reporting time. Furthermore, Ms. Payne credibly explained that Claimant was not required to arrive until 11:30 p.m. He did not get paid for arriving early and was permitted to do what he wanted prior to 11:30 p.m. Ms. Payne denied that the custom in the industry was to arrive at a venue 30 minutes prior to the reporting time. The preceding testimony reveals that Claimant's job did not begin until 11:30 p.m. on September 27, 2013 and he was permitted to do what he wanted prior to the designated reporting time.

11. As found, Claimant left the Fillmore Theater shortly after 11:00 p.m. to buy a soda from a convenience store located across the street. He explained that he left the facility to purchase a soda because he needed caffeine to keep him awake. Claimant's actions were devoid of any duty component, and were unrelated to any specific benefit to Employer. While crossing a public street Claimant was struck by a vehicle at approximately 11:04 p.m. Claimant was hit prior to his assigned reporting time and was not on Employer's premises when he was struck by the vehicle.

12. As found, the record reveals that Claimant's left wrist injury did not arise in the course and scope of his employment with Employer. Claimant's injury did not occur within the time and place limits of his employment because the accident happened almost 30 minutes before his scheduled work shift and he was not on Employer's premises when struck by a vehicle. Claimant's injury also did not arise out of his job duties for Employer. Claimant's attempt to purchase a soda from a store across the street prior to his scheduled work shift was for his sole benefit and constituted a substantial deviation from the mandatory or incidental duties of employment. Claimant's job duties involved removing band equipment from a concert venue. His action of seeking to buy a soda from a convenience store across the street did not have its origin in his work-related functions and was not sufficiently related to his work activities to be considered part of his service to Employer. Accordingly, Claimant has failed to demonstrate that he suffered a compensable left wrist injury during the course and scope of his employment with Employer on September 27, 2013.

ORDER

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

Claimant has failed to demonstrate that he suffered a compensable left wrist injury during the course and scope of his employment with Employer on September 27, 2013.

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: December 23, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-499-370-07

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 17, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 11/17/15, Courtroom 4, beginning at 1:34 PM, and ending at 3:50 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection. A transcript of the evidentiary deposition of Guadalupe Ledezma, Ph.D., clinical psychologist, was received in lieu of Dr. Ledezma's testimony at hearing.

At the commencement of the hearing, the Claimant withdrew the issue of medical maintenance benefits and penalties against the Respondents. Also, the parties agreed to strike the Final Admission of Liability (FAL), dated November 4, 2011. The parties further stipulated to reasonably necessary and causally related medical maintenance care by ATPs, with the exception of ongoing care by Dr. Ledezma, and the ongoing prescription of Zoloft, an anti-depressant.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, giving the Respondents 2 working days within which to object as to form. The proposed decision was filed on

November 30, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant's ongoing psychological care and medication recommended by her authorized treating physician (ATP), Lon Noel, M.D., and her authorized treating psychologist, Dr. Ledezma, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of August 31, 2000; and, is it causally related thereto.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. On August 31, 2000, the Claimant sustained admitted injuries to her right wrist and hand during the course and scope of her employment. As a result of her right upper extremity (RUE) injury, in 2001, the Claimant developed an injury in her left upper extremity (LUE) (Claimant's Exhibit 1).

2. On April 24, 2001, ATP Dr. Noel noted that the Claimant was quite frustrated and was having mental problems secondary to the injury. He referred her to Cynthia Johnsrud, Psy.D., a clinical psychologist, for an evaluation of her functional state and depression related to the Claimant's bilateral wrist injuries (Claimant's Exhibit 2).

3. On May 15, 2001, Dr. Johnsrud diagnosed the Claimant as having an adjustment disorder with somatic reactivity and characteristics of a dependent personality (Claimant's Exhibit 3).

4. On January 11, 2002, the Claimant met with her personal physician, Alicia Vasquez, M.D. Dr. Vasquez reported that the Claimant was feeling depressed and experiencing crying spells. Dr. Vasquez diagnosed the Claimant with depression and started her on 50 mg of Zoloft (Claimant's Exhibit 4).

5. On January 18, 2002, the Claimant returned to see Dr. Johnsrud. Dr. Johnsrud diagnosed the Claimant with a mild depression and stated the opinion that psychotherapy (4-6 sessions) would be beneficial for her" (Claimant's Exhibit 3).

6. In March 2003, Dr. Vasquez reported that the Claimant "wants to try being off Zoloft as per the medical examiner's recommendation (evaluation done as part of her workman's comp exam)." After approximately six weeks, in April 2003, Dr. Vasquez reported that the Claimant's depression had worsened since being taken off Zoloft. Additionally, the Claimant now had anxiety, as well. Dr. Vasquez started the Claimant on 20 mg of Prozac (Claimant's Exhibit 4)

7. On May 2, 2003, Dr. Noel confirmed that the Claimant had begun having anxiety attacks after weaning her off antidepressant medication. Dr. Noel referred the Claimant to Dr. Ledezma for a psychological evaluation Claimant's (Exhibit 2). During her testimony, the Claimant could not recall being weaned off Zoloft because, as she stated, she "has taken Zoloft for such a long time." Nonetheless, the Claimant recalled that at one time she had been prescribed Prozac. She stated that her body "could not take it [Prozac]" and that "it agitated her real bad."

8. On May 9, 2003, Dr. Ledezma recommended that the Claimant's medication be switched back to Zoloft since the Claimant felt increased nervousness, irritability, and continued depression while on Prozac. Dr. Ledezma also noted that when the Claimant's pain was high, she often became depressed and irritable, despite the use of Prozac (Claimant's Exhibit 6).

9. On May 20, 2003, J. Stephen Gray, M.D., a Division Independent Medical Examiner (DIME), reported that the Claimant was seeing Dr. Ledezma for her depression and anxiety. Dr. Gray stated that it was appropriate to allow further treatment under the maintenance care rubric. According to Dr. Gray, "it is this examiner's opinion that [Claimant's] depression is related to her work-related problems. She had no history of prior depression" (Claimant's Exhibit 7).

10. After Dr. Gray's report, Dr. Noel restarted the Claimant's prescription of Zoloft on May 30, 2003 (Claimant's Exhibit 2).

11. After the Claimant began taking Zoloft, Dr. Ledezma reported that the Claimant was doing well overall and was responding well to Zoloft (Claimant's Exhibit 6).

12. On September 29, 2003, Dr. Ledezma reported that the Claimant was making considerable progress in her psychological state and anticipated the following session to focus on preparing the Claimant for discharge from treatment (Claimant's Exhibit 6).

13. On January 29, 2004, Dr. Noel referred the Claimant for "psych follow-up, 4-6 additional visits with Dr. Ledezma" (Claimant's Exhibit 2).

14. On October 13, 2004, the undersigned ALJ issued Specific Findings of Fact, Conclusions of Law and Order stating, "Respondents shall pay the costs of continuing maintenance medical benefits, under the *Grover* case, to maintain medical stability as recommended by Dr. Gray and prescribed by Dr. Noel including maintenance psychological treatment under Dr. Ledezma" (Claimant's Exhibit 8).

The Present Situation

15. The Claimant testified, however, that she had not sought further treatment from Dr. Ledezma after the October 2004 hearing because she did not know that she had the option of seeing Dr. Ledezma after what she considered the conclusion of her case.

16. On November 11, 2014, Dr. Noel noted that an interaction that Claimant had with the insurance carrier, wherein the adjuster enquired whether the Claimant had a re-injury, created a lot of stress, which caused an increase in symptoms (Claimant's Exhibit 2). The increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The ALJ draws a plausible inference and finds that the Claimant's fear and anxiety about losing her source of income triggered the renewed visits to Dr. Ledezma in 2015.

17. During her testimony, the Claimant confirmed this interaction and her resultant increase in stress because she believed she may have been at risk of losing her benefits.

18. According to the Claimant, after her interaction with the Insurance carrier, she discovered that she was still represented by counsel and contacted her attorney. The Claimant verbalized to her attorney that she was having difficulty coping with her pain. Her attorney informed her that she could return to see Dr. Ledezma pursuant to a court order.

19. On May 12, 2015, Dr. Noel reported that Claimant had some depressive affect (Claimant's Exhibit 2).

20. On May 14, 2015, Dr. Ledezma noted that the Claimant returned for psychotherapy after several years. Dr. Ledezma noted that a court ruling provided the Claimant with long-term psychotherapy treatment when she requires additional psychological assistance. Dr. Ledezma noted that the Claimant had been having more anxiety and emotional upset in the past months. Dr. Ledezma recommended that the Claimant's dose of Zoloft be increased since she was having increased psychological distress. On May 26, 2015, Dr. Ledezma continued to recommend that the Claimant's dose of Zoloft be increased (Claimant's Exhibit 6).

21. On June 2, 2015, Dr. Noel noted that the Claimant returned to see her authorized treating psychotherapist, Dr. Ledezma, for a post-maximum medical improvement (MMI) psychological reevaluation and follow-up visit. Dr. Noel issued a referral, stating, "My current referral was to cover the 05/14/2015 visit and to approve the 4 to 6 total maintenance followups [*sic*] pertaining to her work-related injury" (Claimant's Exhibit 2)

22. On June 16, 2015, Dr. Noel noted that the Claimant had another appointment scheduled with Dr. Ledezma, and that her appointments with Dr. Ledezma had been "okayed" per an adjudication judge. Dr. Noel reported that the Claimant was demonstrating some depressive affect. He noted that there were a few tears shed as she talked about her case, and she appeared to be upset and worried about the future. Dr. Noel increased the Claimant's Zoloft to 75 mg daily (Claimant's Exhibit 2).

Independent Medical Examination by Stephen Moe, M.D.

23. The Respondents contested the referral to and treatment from Dr. Ledezma. The Respondents requested an IME, which was performed by Dr. Moe, a psychiatrist. Dr. Moe is of the opinion that the Claimant's current psychological status is not causally related to her work injuries of 2000 and 2001.

24. Dr. Moe did not offer a persuasive opinion concerning whether ongoing psychological/psychiatric care for the Claimant, if not causally related, is reasonably necessary to cure the Claimant's chronic pain and depression nor did he offer a persuasive opinion concerning the Zoloft prescription.

25. The Claimant testified, however, that she needs care from Dr. Ledezma to cope with the pain and decreased functionality caused by her injuries. She stated, "Every day is hard for me dealing with my injuries, doing tasks with my hands. It's hard coping with the pain part, not being able to function the way a person functions that has the mobility in her hands." The Claimant complained that even simple household tasks require much effort on her part.

Dr. Ledezma's Evidentiary Deposition

26. On October 22, 2015, the evidentiary deposition of Dr. Ledezma was taken. Dr. Ledezma testified that anybody living with chronic pain and physical limitations will likely have times when their psychological state deteriorates, and therefore may require ongoing psychological treatment for the rest of the person's life if there continues to be problems that occur that will cause that regression in the person's functioning (Ledezma Depo. pp. 25-26, lines 21-25 & 1-2).

27. Dr. Ledezma testified that the treatment she provided in May and June of 2015 was strictly limited to issues related to the Claimant's work-related injuries and

chronic pain (Ledezma Depo. p. 8, lines 9-13; p. 10, lines 17-22; p. 11, lines 19-22; p. 51, lines 23-25; p. 66, lines 13-4).

28. According to Dr. Ledezma, the Claimant's situation is chronic by nature. She stated that the depression and anxiety that the Claimant is having is primarily related to issues around being physically limited and having to depend on other people for assistance with a lot of activities of daily living, and feeling basically that there is no sense of improvement forthcoming. Dr. Ledezma stated that this has been really emotionally devastating for the Claimant (Ledezma Depo. pp. 8-9, lines 25 & 1-9; pp. 56-57, lines 19-25 & 1; p. 57, lines 7-8).

29. According to Dr. Ledezma, it's not necessarily one specific thing that will cause the Claimant to have more depression or problems sleeping. It is a cumulative effect of basically realizing that as time goes on, she's noticing more and more problems here and there that are impacting her self-esteem, her quality of life, etc. (Ledezma Depo. p. 51, lines 13-18).

30. Dr. Ledezma stated that when she saw the Claimant in September of 2003, the Claimant was functioning fairly well, and she would consider the way she was functioning then to be her general baseline (Ledezma Depo. p. 58, lines 2-5).

31. Dr. Ledezma stated that when the Claimant came back into treatment in 2015, she was no longer at psychological baseline. There was a regression and deterioration in her psychological functioning. Dr. Ledezma stated that part of maintenance care is to maintain that baseline level, which at the time she saw the Claimant, she was not at baseline level in her opinion (Ledezma Depo. p. 13, lines 11-18; pp. 17-18, lines 25 & 1-4; pp. 22-23, lines 24-25 & 1-3; p. 43, lines 9-10).

32. Dr. Ledezma recommended ongoing maintenance care, which included the treatment she received in May and June 2015. Her recommendation, which is based upon her last visit in June 2015, would have been six to eight visits over the course of a year, more or less. Dr. Ledezma stated that that recommendation was consistent with her reading of the "medical treatment guidelines" [Division of Workers' Compensation Medical Treatment Guidelines]. Dr. Ledezma also stated that the possible treatment requirements for the future are something that she may need to assess on an as-needed basis, depending on what is going on with the Claimant. (Ledezma Depo. p. 13, lines 2-10; p. 14, lines 2-15; p. 54, lines 21-23; p. 57, lines 9-13; p. 66, lines 10-11).

33. According to Dr. Ledezma, if the Claimant's current functioning is the way she presented at her last session in June 2015, she would need ongoing treatment of some kind (Ledezma Depo. p. 18, lines 11-13).

34. In fact, Dr. Ledezma observed the Claimant's demeanor during the deposition and stated that it was more likely than not that the Claimant was still having symptoms of depression that had not been resolved or treated. Dr. Ledezma recommended possibly more psychological treatment, definitely ongoing medication, with a possible increase of medication, and a psychiatric referral (Ledezma Depo. p. 62, lines 15-20; p. 63, lines 14-20).

The Claimant's Testimony at Hearing

35. The Claimant testified that she has continuously been taking Zoloft from 2002 to the present and that Dr. Noel has continued to renew her prescription of Zoloft.

36. The Claimant also testified that on one occasion she discovered by accident that she cannot take the generic form of Zoloft. According to her testimony, Dr. Noel forgot to indicate on the prescription that the Claimant could not substitute the generic brand of Zoloft for the name brand. Consequently, she was dispensed Zoloft in generic form. The Claimant testified that she took it for approximately three months and the generic Zoloft did not work for her. The Claimant felt it did not stabilize her mood the same way that the name brand Zoloft did.

37. Dr. Moe testified that there is no consensus in the medical literature regarding the efficacy of generic versus name brand drugs. Dr. Moe also testified that it is a commonly reported phenomenon that some patients do not tolerate or do not do well on generic brands.

38. Dr. Moe was of the opinion that the Claimant has suffered from chronic disorder involving a blend of depression and anxiety since the mid-1990s, where she presented with symptoms associated with stress. It was recommended at that time that the Claimant get treatment and she declined.

39. According to Dr. Moe it is **possible** (emphasis supplied) that the Claimant could have been benefited from Zoloft even without the work injury. Dr. Moe, however, could not testify that this opinion was within a reasonable degree of psychological probability because the Claimant had not taken nor was prescribed any antidepressant medication prior to her work injury. The ALJ infers and finds that this is sheer speculation on Dr. Moe's part.

40. Based on her review of the records, however, Dr. Ledezma stated the opinion that the disorder has been persistent since the early aftermath of the Claimant's work injury. Dr. Ledezma stated, "Her depression has been present since the time that she was injured and was unable to return to her previous level of functioning, which makes it a chronic depression" (Ledezma Depo. p. 16, lines 19-24; p. 17, lines 1-4).

41. Dr. Ledezma further stated that there was no indication of any ongoing prior psychological issues or problems that were treated or identified prior to her 2000 injury, other than a medical report from 1995 that noted that the Claimant was taking care of her diabetic and blind mother and the death of Claimant's brother (Ledezma Depo. p. 16, lines 16-18; p. 17, lines 11-13).

42. According to Dr. Ledezma, the situation [in 1995] would have been a stressor that might have created a limited situational depression; however, she would expect there to be a lot of medical records if the depression had significantly continued, and the lack of records indicated to her that once the situational stressor was resolved, the Claimant's symptoms would also resolve (Ledezma Depo. p. 59, lines 6-20). Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and ATP Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible.

43. During his testimony, Dr. Moe agreed that the death of the Claimant's brother and the disabling condition of her mother could cause a situational depression and that it is not unusual for patients who suffer from chronic pain to experience depression and anxiety.

44. According to Dr. Ledezma, she did not see any indication that there would be any reason for the Claimant's depression other than her deep-rooted depression and anxiety from this injury (Ledezma Depo. p. 17, lines 17-21).

45. Dr. Ledezma is of the opinion that the Claimant's psychological state would worsen if the psychological care and the antidepressant medication were taken away from her (Ledezma Depo. p. 26, lines 20-24).

46. Dr. Ledezma stated that her goal is to bring the Claimant to a level of stable functioning where she's at a baseline level that she feels she can cope on a day-to-day basis with all the issues that she's facing (Ledezma Depo. p. 23, lines 19-22).

47. Dr. Ledezma stated that all of her opinions were within a reasonable degree of psychological probability (Ledezma Depo. pp. 26-27, lines 25 & 1-2).

Ultimate Findings

48. Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a

thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

49. Between conflicting psychiatric/psychological opinions, the ALJ makes a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

50. The Claimant has proven, by a preponderance of the evidence that her continuing need for psychological treatment and the Zoloft prescription is reasonably necessary to maintain her at MMI and to prevent a deterioration of her work-related psychological condition. The Claimant did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

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CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting psychiatric/psychological opinions, the ALJ made a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

Pre-Existing Condition

c. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). Despite

the Respondents' argument that the Claimant could easily have benefited from psychotherapy treatment and medication, and been on Zoloft for the past 20 years, she did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

Maintenance Medical Care (*Grover Medicals)*/Psycholgical/Zoloft Prescription

d. A claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law*, § 13.00 (1997). As found, the increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The call from the adjuster in 2014 and ongoing uncertainly about the possible loss of her benefits increased the Claimant's anxiety. As found, The ALJ drew a plausible inference and found that fear and anxiety about the Claimant losing her source of income triggered the renewed visits to Dr. Ledezma in 2015. There is no persuasive evidence that the Claimant's need for psychological treatment is based on a subsequent intervening event. The totality of the evidence, including the Claimant's testimony, demonstrated that the need for psychotherapy treatment and medication recommended by Dr. Ledezma and ATP Dr. Noel are reasonably necessary and causally related to the admitted injury of 2000 and the sequelae thereof

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld*

County Bi-Products, Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the ongoing need for psychological treatment and the Zoloft prescription.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The respondents shall pay the costs of ongoing psychological care at the hands of Guadalupe Ledezma, Ph.D., Licensed Clinical Psychologist, and Lon Noel, M.D., including the continuing costs of the Claimant's Zoloft prescription, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

PROCEDURAL BACKGROUND

A Hearing in this matter was held on August 6, 2015 before Kimberly A. Allegretti, Administrative Law Judge. The Claimant appeared and was represented by Kerry L. Sullivan, Esq. Respondents were represented by Tama Levine, Esq. This matter was digitally recorded in Courtroom 4 from 8:30 am to 12:00 pm in Denver, Colorado.

On August 27, 2015 an Order was entered by the ALJ and it was served on the parties on August 29, 2015.

A Petition to Review was filed on September 4, 2015 and a briefing schedule was set. A Brief in Support of the Petition to review was filed by the Respondents on November 17, 2015 and the Claimant did not file an Opposition Brief by the deadline specified in C.R.S. § 8-43-301(4). Upon review of the transcript, the evidence and the Respondents' brief, the ALJ has determined that a Supplemental Order is necessary and appropriate per C.R.S. § 8-43-301(4).

As set forth in more detail below, independent medical examinations ordered in the original Findings of Fact, Conclusions of Law and Order are no longer ordered. The ALJ continues to deny the Respondents' request to change physicians and continues to find post-MMI treatment, recommended by Dr. Jones, of trigger point injections and the prescription medication Skelaxin, to be reasonable and necessary to maintain the Claimant at his MMI status and to assist in the prevention of further deterioration of his condition.

ISSUES

1. Whether the ongoing medical maintenance care being provided by Byron Jones, M.D. consisting of ongoing trigger point injections, opioids, and a muscle relaxant constitutes reasonable and necessary medical maintenance care for the Claimant's January 7, 2002 industrial injury.

2. Whether the Respondents' request to change physicians should be granted.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant sustained a compensable industrial low back injury on January 6, 2002 when he slipped and fell at work (Respondents' Exhibit I, p. 152).

2. The Claimant was placed at maximum medical improvement on September 15, 2004 by the Division Independent Medical Examiner, Erasmus Morfe, M.D. (Respondents' Exhibit G).

3. The Claimant had sustained a prior low back injury in 1992 and has been under the care of Byron Jones, M.D. for approximately 23 years total. Dr. Jones has also been the primary treating physician for the last 13 years for the January 7, 2002 industrial injury.

4. The Claimant failed conservative care management and underwent an L-5 decompression with fusion at L5-S1 with Dr. Jatana on October 16, 2003. Dr. Jones testified credibly and persuasively that, although the surgical intervention was appropriate, ultimately, the Claimant did not have a good result overall.

5. Dr. Jones testified at hearing that he has been treating the Claimant for chronic pain since the Claimant was placed at maximum medical improvement in 2004. He testified that the Claimant would have some periods of improvement, but also times when the Claimant was essentially bedridden. He testified that over the course of treatment, many different modalities have been tried with the overriding concern of achieving a better level of function for the Claimant. He testified that he attempts to reach a balance with the Claimant's medication and treatment so that the Claimant is neither under-medicated nor over-medicated and the follow-up focuses on what the Claimant is able to do function-wise in his activities of daily living.

6. Dr. Jones is not Level II accredited, but testified that he is aware of the Colorado Medical Treatment Guidelines. He testified that the Claimant's care was initially within the Medical Treatment Guidelines, but after a certain point in this case, he found it necessary to exceed the Guidelines in terms of the numbers of trigger point injections provided and the sites injected. Over the course of care, Dr. Jones testified that, at times, he has tried to decrease the frequency of injections but this has resulted in increased pain and significantly decreased function for the Claimant. Dr. Jones further testified that the trigger point injections are combined with an active exercise approach, self-directed pain management and medical management of opioid prescriptions.

7. Dr. Jones acknowledged that under the Medical Treatment Guidelines, the maintenance duration for injection therapy is not more than four injections per session, not to exceed four sessions per 12 month period (Respondents' Exhibit J, p. 263). Dr.

Jones disagrees with this recommendation in this case and believes the Claimant is a "unique" case and requires eight injection sites every six weeks. Under the Medical Treatment Guidelines, if patients are provided with trigger point injections they should be reassessed after each injection session for an 80% improvement in pain and evidence of functional improvement for three months. Dr. Jones acknowledged that there is no documentation in the medical records of 80% improvement in pain or functional improvement for three months as the injections are provided every six weeks (Respondents' Exhibit J, p. 201).

8. Dr. Jones specifically acknowledged that his care and treatment for the Claimant exceeds the recommended treatment under the Medical Treatment Guidelines, but argues that, in this case, the treatment beyond the Guidelines boundaries is warranted. Dr. Jones performs trigger point injections on the Claimant every six weeks and when these injections are performed he injects eight sites. Over the course of care in this case, Dr. Jones has determined that the Claimant gets 6 weeks of good relief, after which the Claimant has a significant increase in pain and would come in to the office "writhing in pain."

9. Dr. Jones opined that the trigger point injections provided in excess of the Medical Treatment Guidelines is reducing the need for opioid medications and the potential need for having to increase the dosage of these medications. He believes that the Claimant is "not addicted" to the injections, but is physically dependent on such injections. The Claimant's level of opiates has not changed in the last 11 years and his use of opiates has not decreased with the ongoing trigger point injections being provided by Dr. Jones. However the use of opiates has not increased significantly either.

10. Dr. Jones does not follow Rule 16 or the Medical Treatment Guidelines in providing trigger point injections. He does not request preauthorization for the injections. According to Dr. Jones, he provides his office notes to the insurance company and he felt that this was a way that the insurance carrier would be apprised of his medical treatment of the Claimant. Dr. Jones also testified that "when Claimant comes in he is likely going to need trigger point injections."

11. An MRI was performed on January 20, 2015 (Respondents' Exhibit B). Dr. Jones opined that this showed a "worsening" at the L4-5 segment. His office notes reflect a potential referral to a surgeon but Dr. Jones has not made any referral for a surgical evaluation since January of 2015. The ALJ finds that the Respondents have not denied any written request from Dr. Jones for a surgical referral.

12. Dr. Jones has prescribed Skelaxin, a muscle relaxant, for over 13 years. He has opined that the Claimant obtains "functional benefit" from such medication and that since this is not a scheduled drug, it has a far lower risk than opiates. Dr. Jones specifically opined that he prefers Skelaxin to Flexeril because it is less sedating and allows for increased function.

13. According to Dr. Jones, the Claimant follows instructions and has been extremely compliant. However, Dr. Jones acknowledged that the Claimant utilizes marijuana and that Dr. Jones does not agree with this. `

14. Dr. Jones testified that the Claimant does not receive long-term, lasting relief from the injections. If the Claimant is not a surgical candidate, Dr. Jones intends to continue the same treatment program consisting of trigger point injections, opiates, muscle relaxant, and physical therapy. In the future Claimant may be referred for stem cell therapy or a spinal stimulator. Dr. Jones testified that he does not like to perform trigger point injections every six weeks because he is aware of the risks. However, Dr. Jones testified that, at the current time, this is the best treatment option for the Claimant of which he is aware.

15. The Claimant was evaluated by Joel L. Cohen, Ph.D. on July 22, 2013. Dr. Cohen's clinical impressions and recommendations were:

> Diagnostically, the information rendered thus far would suggest: Pain Disorder with a General Medical Condition and Psychological Factors (307.89) and Adjustment Reaction with Depressed Mood (309.00). I consider both to be injury related. More broadly, [the Claimant's] presentation now 11 years post-injury is also consistent with what we see as a behavioral chronic pain syndrome in the fact of significant injury and substantial ongoing pathophysiology. Clearly, much of the medical care he receives at this point is supportive and it is unclear to the extent that it increases his level of function. He has certainly not had psychological care since the injury and I think 8-10 behaviorally based psychotherapy would be beneficial if only to introduce cognitive behavioral techniques to stabilize his mood, diminish his depression and also address the possibility that he might engage in avoidant pain behavior (Respondents' Exhibit E, pp. 130-131).

16. The Claimant has been evaluated by John J. Aschberger, M.D. on numerous occasions since he was placed at maximum medical improvement. On March 25, 2013 Dr. Aschberger noted that there had been continued utilization of trigger point injections by Dr. Jones with no clear justification regarding the necessity of the injections for maintenance purposes other than from the Claimant regarding deterioration in his condition with attempts at tapering out the injections. Dr. Aschberger indicated that "there may be a pain avoidance/fear issue going on, and some psychological support and intervention may be helpful in terms of further weaning of treatment. It is unlikely that Mr. Sanchez will willingly taper down." (Respondents' Exhibit F, p. 133).

17. From November 20, 2013 to January 27, 2014, the Claimant treated with Amy Milkavich, Psy.D., and, per Dr. Cebrian's October 13, 2014 report, the Claimant's mood was significantly improved and he was more socially engaged over the course of the psychological treatment. There was no discharge summary provided, it was simply

noted that the last note available was from January 27, 2014 (Respondents' Exhibit D, p. 109).

18. Dr. Carlos Cebrian evaluated the Claimant on August 28, 2014 and issued a detailed report dated October 13, 2014 (Respondents' Exhibit D). Dr. Cebrian is Level II accredited. Dr. Cebrian testified at hearing that, subsequent to his independent medical examination, he had also had the opportunity to review the updated medical records and hear the testimony of Byron Jones, M.D.

19. Dr. Cebrian testified that he agrees that the Claimant does require long-term care and medications. However, he testified that the ongoing care and treatment provided by Dr. Jones consisting of trigger point injections, ongoing physical therapy, and use of a muscle relaxant, is not reasonable and necessary medical care under the Medical Treatment Guidelines.

20. According to Dr. Cebrian, chronic use of any muscle relaxant, including Skelaxin, is not recommended under the Medical Treatment Guidelines due to their habit-forming potential, seizure risk following abrupt withdrawal, and documented contribution to deaths of patients on chronic opioids due to respiratory depression. In this case, the Claimant has been on chronic opioids for over 20 years. Therefore, he believes that Skelaxin is an inappropriate medication for the Claimant in combination with sedating opioids. Dr. Cebrian believes that the opiates are more beneficial than the Skelaxin and that the combination of medications creates a dangerous situation. Dr. Cebrian testified that muscle relaxants should only be used for acute situations and never for chronic pain. He recommended that the Claimant be weaned from the Skelaxin over a 30 day period under the supervision of a physician. Dr. Cebrian recommended Flexeril instead of Skelaxin that, over time, would be tapered down.

21. Dr. Cebrian has reviewed the complete medical records in this matter dating back to 1994. He testified that these records reflect that the Claimant has been receiving trigger point injections to his thoracic and lumbar spine since 1994. Under Medical Treatment Guidelines Rule 17 regarding trigger point injections, Dr. Cebrian testified that there are certain guidelines that must be followed in terms of trigger point injections. Patients should be reassessed after each injection section for an 80% improvement in pain as well as evidence of functional improvement for three months. The Claimant has not had an 80% improvement in evidence of functional improvement for three months from the trigger point injections. Not only has he not returned to baseline function or had any increased activities, the trigger point injections have not decreased the use of the opioid medications in Dr. Cebrian's opinion. Dr. Cebrian notes that the injections have been going on since 1996 and do not constitute a recent phenomenon to maintain Claimant's condition. In addition, there is no documentation in Dr. Jones' records that he has ever attempted to increase the periods of time between injections. Dr. Cebrian has opined that it is not medically probable that the need for trigger point injections in the thoracic and lumbar spine is related to the January 7, 2002 industrial injury. Dr. Cebrian indicated that under the Medical Treatment Guidelines, a patient should never receive injections to more than four areas. Under maintenance

care, trigger point injections should only be provided four times per year with four injection sites. Dr. Jones has been injecting eight sites at one time, every six weeks. Dr. Cebrian indicated that this is not appropriate nor reasonable and necessary maintenance care.

22. In terms of other potential treatment modalities, Dr. Cebrian testified that he agrees with Dr. Aschberger that the continued trigger point injections and use of passive treatments is creating reliance in the Claimant. He opined that physical therapy can be appropriate in maintenance care, but it is not in this case. Dr. Cebrian testified that regular, self-directed exercise is the best form of therapy for chronic pain, including specific exercises to achieve a sustained, elevated heart rate. Dr. Cebrian testified that the new MRI findings were not unexpected and he was surprised the changes were not worse. However, he does not recommend a surgical consult and does not believe the changes are significant to necessitate a second surgery, especially as the first surgery was not successful.

23. In rebuttal testimony, Dr. Jones addressed some of the points discussed by Dr. Cebrian. He opines that a surgical consult is appropriate as there are objective findings and indicators of discogenic pain. In terms of the Claimant's exercise regimen, Dr. Jones testified that spine specific stability exercises are addressed but the Claimant is not yet at a point to receive benefit from aerobic exercises.

24. Rule 17-2(A) provides that all healthcare providers shall use the Medical Treatment Guidelines adopted by the Division. Rule 17-2(B) provides that payers shall routinely and regularly review claims to ensure that care is consistent with the Division's Medical Treatment Guidelines.

25. Rule 16-5(A) provides that in cases where treatment falls within the purview of a Medical Treatment Guideline, prior authorization for payment is unnecessary. However, in cases in which the treatment deviates from the Guidelines, the provider must request care and follow the procedures for prior authorization in Rule 16-9. Dr. Jones testified that he has not requested preauthorization for the treatment or the medication usage, although he is aware his treatment exceeds the recommendations in the Medical Treatment Guidelines.

26. C.R.S. § 8-43-501(2)(a) provides that, "an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider." Per C.R.S. § 8-43-501(2)(b), "prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) "when an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate.

27. Rule 10-1(A) provides that "a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, "the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure."

28. The ALJ finds that Dr. Jones has the Claimant's best interests in mind and that Dr. Jones, as the physician who has treated the Claimant over many years, is in a strong position to understand the Claimant's ongoing medical maintenance needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections beyond the recommendations in the Medical Treatment Guidelines is not optimal, but he reasonably believes that it is the best available option for the Claimant's pain management at this time. However, Dr. Jones is not following the rules of the workers' compensation system. His treatment is beyond the Medical Treatment Guidelines recommendations and yet he is not seeking prior authorization for this treatment. By bypassing the prior authorization procedure, he is prohibiting additional input from other physicians.

29. The Respondents have not requested a review of services by Dr. Jones per the utilization review process authorized by the statute and the Rules. This is an avenue by which the Respondents could obtain additional input from other physicians as to whether the medical services provided by Dr. Jones are reasonably necessary as medical maintenance treatment and by which the Respondents' request for change of physician (which is effectively seeking a de-authorization of Dr. Jones) could be addressed.

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).

Medical Benefits

Medical Maintenance Treatment after MMI and Respondents' Request for Change of Physician

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).

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).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at

W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

A change of physician can be requested by a claimant pursuant to C.R.S. 8-43-404(5)(a)(III) or (VI66666). However, nothing in these provisions authorizes Respondents to seek a change of physician. Rather, a medical utilization review is the process by which a medical provider's course of treatment of a claimant can be examined to determine its reasonableness. To the extent that Respondents seeks a "change of physician," Respondents are essentially seeking to de-authorize a treating physician and this would be governed by the medical utilization review process. *Franz v. Industrial Claim Appeals Office,* 250 P.3d 755 (Colo. App. 2010); *Garner v. Town of Ignacio,* W.C. 4-288-201 (ICAO October 5, 2001). C.R.S. §8-43-501(1) provides that,

> Insurers and self-insured employers should not be liable to pay for care unrelated to a compensable injury or services which are not reasonably necessary or not reasonably appropriate according to accepted professional standards. The general assembly, therefore, herby declares that the purpose of the utilization review process authorized by this section is to provide a mechanism to review and remedy services rendered pursuant to this article which may not be reasonably necessary or reasonably appropriate according to professional standards.

C.R.S. § 8-43-501(2)(a) provides that, "an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider." Per C.R.S. § 8-43-501(2)(b), "prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) "when an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate. Rule 10-1(A) provides that "a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one

prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, “the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure.”

All medical providers and evaluating physicians in this matter agree that some degree and level of ongoing medical maintenance care is reasonable and necessary for the Claimant. The physicians disagree as to the best course of care and as to which prescription would be most appropriate for a muscle relaxant.

Dr. Jones has expressed a level of frustration with the system and believes that the workers’ compensation system hampers his treatment of the Claimant. However, the ALJ finds that the care that is being provided is under the workers’ compensation system and this system holds the Respondents responsible for payment of the medical care but provides Respondents with the opportunity to challenge specific medical treatment, and the Claimant must prove that the treatment is reasonably necessary.

Over the course of his treatment of the Claimant, Dr. Jones has failed to comply with the Medical Treatment Guidelines and is not following the rules of the workers’ compensation system and this has the effect of preventing the Respondents from one of the various avenues by which they can evaluate ongoing medical treatment to ensure it is appropriate. Physicians are required to use the Medical Treatment Guidelines per Rule 17-1(A). In cases that require deviation, the physicians should follow the request for preauthorization. The ALJ finds that this process would benefit all parties. Dr. Jones should follow the prior authorization process which will allow additional input on the care and treatment being provided to the Claimant.

While the ALJ finds that Dr. Cebrian performed a thorough and extensive review of the medical records and provided additional insight and guidance for the Claimant’s medical treatment, and the ALJ also finds that Dr. Jones’ treatment has exceeded the Medical Treatment Guidelines, the ALJ declines to order a change in physician. The ALJ is uncomfortable making what is essentially a medical decision without the benefit of the utilization review process that the Respondents have not initiated. The Respondents have cited no legal authority to support a change of physician in the manner in which they are seeking, nor have Respondents provided any rationale for failing to comply with C.R.S. § 8-43-501(2)(a) and Rule 10-1(A) to seek a utilization review.

Further, in weighing the conflicting evidence and opinions presented at the hearing, it was found that, as the physician who has treated the Claimant over many years, Dr. Jones is in a stronger position to understand the Claimant’s ongoing medical maintenance needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections he is performing are beyond the

recommendations in the Medical Treatment Guidelines and that this is not optimal. Nevertheless, he reasonably believes that this the best available option for the Claimant's pain management at this time, along with the prescription of Skelaxin as a muscle relaxant and he persuasively opined that these treatments are necessary for the Claimant to maintain his level of function. While contradictory evidence was presented at the hearing, none of the evidence presented was as persuasive as the testimony of Dr. Jones on the issue of whether the current maintenance treatment was reasonable and necessary for the Claimant to prevent deterioration of his condition. The Claimant has established that these ongoing medical treatments provided by Dr. Jones are reasonably necessary as ongoing maintenance care in this case.

ORDER

It is therefore ordered that:

1. The Respondents' request to change physicians is denied.

2. Dr. Jones shall comply with the Medical Treatment Guidelines and Rule 16 in requesting preauthorization for any medications or treatment outside of the Colorado Medical Treatment Guidelines.

3. Respondents shall be liable for the post-MMI medical treatment consisting of, among other treatment, trigger point injections and muscle relaxants prescribed by Dr. Jones that is reasonably necessary to maintain the Claimant's MMI status, subject to the above limitations. Respondent shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

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

If you are dissatisfied with the Judge's supplemental 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 the certificate of mailing in the supplemental order, as indicated on the certificate of mailing or service; otherwise, the Judge's supplemental 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 supplemental order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. For statutory reference, *see* § 8-43-301(6), C.R.S.

DATED: December 21, 2015

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

ISSUES

I. Whether Respondent is collaterally estopped from seeking to withdraw its general admission of liability GAL) for post-MMI medical, and if not;

II. Whether Respondent has proven by a preponderance of the evidenced that it should be permitted to withdraw its admission of liability for post-MMI medical treatment, and if not;

III. Whether Claimant is entitled to post-MMI treatment consisting of additional injections, pool therapy and supplies, i.e. pads for her electrical stimulation (TENS) unit.

FINDINGS OF FACT

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

1. This matter proceeded to hearing before the ALJ on June 12, 2014, and a resulting order was issued on July 17, 2014. The July 17, 2014 was not appealed and is final. At the June 12, 2014 hearing, the Respondent explicitly stated that it was not seeking to withdraw its admission for post-MMI medical treatment. Instead, the issues for consideration at that hearing were the Claimant's Petition to Reopen and her request for past medical benefits.

2. The Claimant has neither endorsed collateral estoppel as an affirmative defense in any pleading nor attained an order adding its consideration. Respondent did not agree to litigate the issue of collateral estoppel at hearing on October 8, 2015.

3. The Claimant suffered an injury to her left anterior cruciate ligament (ACL) in 2001. According to the Claimant's testimony, she underwent therapy prior to being released to work.

4. Claimant was involved in a motor vehicle (MVA) accident in March 2005 and sought treatment for low back and left knee pain, among other conditions, with Dressen Chiropractic as a result of her MVA. As of August 24, 2005, the Claimant was still complaining to Dr. Dressen of pain in her left knee despite testifying at hearing that her left knee pain resolved within a couple of weeks of the MVA.

5. Claimant was working in her usual capacity as a correctional officer for

Employer on June 16, 2008 when she suffered an injury to her left knee. On this date, at approximately 10:00 PM, after assuming her shift, Claimant began her rounds. In order to complete her rounds, Claimant had to descend a flight of stairs. When Claimant reached the bottom of the stairway; she placed her left foot on the floor. As she transferred her weight to the left leg in order to step down with her right foot, Claimant's left knee popped and hyperextended. Claimant testified that she twisted the knee in the process. She did not slip. She did not fall. Claimant experienced acute pain and dysfunction of the left knee and leg, testifying that following this incident she had 10/10 pain and an inability to bear weight on her left leg.

6. Application of ice and a period of rest failed to relieve Claimant's symptoms. She then sought medical attention through the emergency room at St. Thomas Moore Hospital where she was evaluated by Dr. Dorothy Twellman. X-rays of the left knee were ordered and interpreted by Dr. Conor Heaney as negative for acute findings.

7. Claimant was subsequently evaluated at the Centura Centers for Occupational Medicine (CCOM) on June 18, 2008 by Physician Assistant (PA) Al Schultz. PA Shultz preformed a physical examination noting Claimant's inability to fully extend and flex the left knee. Examination of the knee was "very difficult" secondary to complaints of diffuse pain. PA Schultz recommended MRI to "further evaluate the cause" of Claimant's symptoms; he documented further that the work relatedness of Claimant's condition was "undetermined."

8. MRI of the left knee was completed June 23, 2008 at "Open MRI of Pueblo" and interpreted by Dr. William Needell. After review of the MRI images, Dr. Needell reached the following impressions: 1. "Fluid in the Joint especially the cruciate compartment with a probable partial tear of the anterior cruciate ligament estimated at approximately 30%. 2. Minimal Bone Bruise of the medial femoral condyle."

9. After conservative treatment, Claimant was placed at Maximum Medical Improvement (MMI) with impairment by her authorized treating physician (ATP), Dr. Nanes on February 6, 2009. Dr. Nanes recommended maintenance care in the "form of pain medications and the possibility of a Synvisc injection every six months time for the next two years." A follow-up maintenance care appointment was recommended in five months time.

10. The claim was later reopened and on March 17, 2010 the Claimant underwent an arthroscopic chondroplasty, lateral release and Fulkerson osteotomy on her knee with Dr. Walden. She underwent a second procedure on November 10, 2010 to remove surgical screws and have a fat pad excision, at which time her ACL was found to be "completely normal."

11. On February 25, 2011, Dr. Nanes returned Claimant to MMI status with an indication that maintenance care was unnecessary and that Claimant was being released from care.

12. On April 5, 2011, Claimant was re-evaluated by Dr. Nanes who rescinded MMI secondary to Claimant's worsened condition. Claimant was referred for a repeat MRI and second opinion with another orthopedist. Repeat MRI was completed on April 15, 2011.

13. Per Dr. Nanes' April 5, 2011 request, Claimant was evaluated by Dr. James Duffy, an orthopedic specialist on May 11, 2011. Dr. Duffy reviewed Claimant's April 15, 2011 MRI. He opined that Claimant's Fulkerson osteotomy had healed and that the MRI failed to reveal evidence of "chondral, meniscal or ligamentous deficit." Dr. Duffy suspected that Claimant had a "significant component of sympathetic mediated pain" for which he recommended the addition of Cymbalta and/or Neurontin to Claimant's prescription drug regime. Pool therapy was recommended for continued exercise. Further surgical procedures were not advised.

14. Claimant was returned to MMI for a third time on June 8, 2011 by Dr. Nanes.

15. Claimant testified that while her left knee "gives out" at times, the condition of her left knee did not change from the time she was placed at MMI on June 8, 2011 to June 12, 2014, and that she was at maximum recovery for her left knee on that date.

16. On July 3, 2014, Claimant treated with Centura Health and noted her recent diagnoses of diabetes.

17. On July 30, 2014, Claimant returned to Dr. Nanes seeking more treatment for her left knee. He noted good range of motion, no swelling and normal ambulation. Dr. Nanes' only diagnosis on this date was "Chondromalacia of patella." He stated that "we will go ahead and try to get a repeat Synvisc injection and renewal of her open pool therapy." Dr. Nanes did not plan to see the Claimant again until 2015.

18. On August 20, 2014, Dr. Nanes authored a letter in which he recounted reviewing Dr. Timothy O'Brien's IME report.[1] He stated agreement with Dr. O'Brien that further maintenance care was not warranted under this claim.

19. Claimant returned to Centura Health on January 22, 2015. She reported that she was not treating for her left knee. The Claimant brought unused left knee medications to return.

20. Claimant treated with her chiropractor six times between June 12, 2014 and March 9, 2015. Only once, on January 7, 2015, did the Claimant mark her pain diagram to indicate knee pain. On all other occasions she complained only of lower back pain.

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[1] Dr. Nanes does not reference which report, but the only two reports from Dr. O'Brien in existence at this point in time were those dated March 24, 2014 and August 11, 2014, both included in the record.

21. Dr. Timothy O'Brien, M.D., is a Harvard-trained, board-certified orthopedic surgeon. He is a fellow of the American Academy of Orthopedic Surgeons, and diplomat for both the American Academy and the National Board of Medical Examiners. He has been Level II accredited in Colorado since 1996. He has performed numerous arthroscopic surgeries of the knee and has replaced approximately 3000 knees throughout the span of his career. Claimant has twice assented to Dr. O'Brien's expertise in orthopedic medicine.

22. On August 19, 2015, Claimant returned for a second Independent Medical Examination (IME) with Dr. O'Brien. In his report issued following this second IME, Dr. O'Brien notes his previous examination and evaluation of the Claimant took place on March 7, 2014. During his second IME, Dr. O'Brien again examined the Claimant and reviewed relevant records. He reiterated his conclusions from 2014, that the Claimant suffered no anatomic change to her left knee on June 16, 2008, only an aggravation of her non-industrial, arthritic condition. Dr. O'Brien opined that any future treatment for the Claimant's left knee is unrelated to her June 16, 2008 injury and is instead directed at her non-industrial, arthritic condition. This ALJ finds Dr. O'Brien's testimony persuasive.

23. Dr. O'Brien testified via deposition on October 6, 2015. Dr. O'Brien testified that the Claimant showed no real change in her left knee condition from his initial evaluation in 2014.

24. Despite his previous testimony and opinions in 2014, Dr. O'Brien testified with the understanding that the Claimant did indeed twist her knee as reported on June 16, 2008.

25. Dr. O'Brien testified that the knee twist on June 16, 2008 caused enough tissue-yielding to aggravate the Claimant's underlying arthritis. But there was no effusion in the left knee immediately after the twisting injury and she had a relatively normal left knee exam within two days of the twisting injury.

26. Dr. O'Brien testified that left knee hyperextension, left knee pain, left knee instability, left knee locking, left knee swelling, left knee popping, clicking, cracking and crunching are all expected symptoms of the Claimant's progressive non-industrial arthritis.

27. Dr. O'Brien testified that the Claimant's ongoing complaints of her left knee "giving out" is a symptom of her non-industrial arthritis. He explained that the sensation of "giving out" is caused by the knee muscles' protective reaction to the inflammatory pain caused by her non-industrial arthritis.

28. Dr. O'Brien testified that the June 16, 2008 injury did not in any way accelerate or permanently alter the Claimant's non-industrial arthritis.

29. Dr. O'Brien testified that the Claimant's recently diagnosed diabetes is

acting in concert with her non-industrial arthritis to cause even more adverse impact to her knee tissue and is likely making that tissue weaker.

30. Dr. O'Brien reiterated his initial opinion that there is no evidence or scientific basis for any type of over-compensation injury to the Claimant's right lower extremity.

31. The Claimant testified that she is seeking the following specific medical treatment under the Respondent's current general admission for post-MMI medical treatment: (1) replacement pads for her e-stimulator unit, (2) pool therapy, and (3) injections. The Claimant testified that no medical professional has recommended any of this medical treatment since July 30, 2014.

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.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. 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 testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address 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).

Collateral Estoppel

D. Claimant has failed to demonstrate that Respondent is collaterally estopped from attempting to withdraw its admission of liability for post-MMI medical treatment. Collateral estoppel is an affirmative defense and affirmative defenses must be must be explicitly pled. *See Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977). Thus, in order to take advantage of collateral estoppel the proponent must, in a timely fashion, affirmatively plead the doctrine or it is waived. *Kersting v. Industrial Commission, supra.; See also* C.R.C.P. 8(c); *Terry v. Terry,* 154 Colo. 41, 387 P.2d 902 (1963); *Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995); *Salazar v. Alamosa County Road and Bridge*, W. C. Nos. 4-333-3 85; 4-393-720; 4-393-723; 4-393-726 4-397-554 (December 4, 2000)(an affirmative defense may be deemed waived if not raised at a point in the proceedings which affords the opposing party an opportunity to present rebuttal evidence). Furthermore, the mere mention of the defense in a brief or other pleading is not sufficient to raise the defense. *See Trujillo v. Farmers Insurance Exchange,* 862 P.2d 962 (Colo. App. 1993); *See majority opinion in Mahana v. Grand County* W.C. No. 4-430-788 (February 15, 2007).

E. As noted, affirmative defenses are subject to procedural waiver if they are not asserted and proven in a timely fashion. *Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995). Waiver is the intentional relinquishment of a known right, which may be express or implied. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Reese v. Cripple Creek Mountain Estates Country Club* (Colo. App. No. 91CA0291, November 29, 1991) (not selected for publication) (statute of limitations defense waived where not endorsed at beginning of hearing). Although issues may be "tried by consent" if not properly raised by the pleadings, amendments to pleadings at the conclusion of a trial or hearing should not be permitted unless there is no reasonable doubt that the issue was intentionally and actually tried. *Bill Dreiling Motor Co. v. Schultz*, 168 Colo. 59, 450 P.2d 70 (Colo. 1969); *Bradford v. Nationsway Transport Service*, W. C. No. 4-349-599 (March 16, 2000).

F. Generally, the question of whether a party waived a right is one of fact for

determination by the ALJ. *Quintana v. Sundstrand Aviation OPS*, W.C. No. 3-062-456 (September 24, 2007); *Wielgosz v. Denver Post* W. C. No. 4-285-153 (December 3, 1998). In this case, the record supports Respondent's contention that Claimant did not explicitly plead the defense of collateral estoppel prior to hearing. Moreover, the ALJ not persuaded by Claimant's assertion that Respondent was adequately notified of Claimant's intention on raising the defense because of the prior order issued in this case by the undersigned on July 17, 2014 and/or because OACRP 8 does not require Claimant to file a reply to a response to an application for hearing. Finally, and importantly, the record supports that Respondent did not consent to trying the issue at hearing. Because the record demonstrates that the affirmative defense was not timely plead, that Respondents did not have adequate notice that Claimant would be relying upon the affirmative defense and because Respondent did not try the issue by consent, the ALJ concludes that Claimant waived the defense of collateral estoppel. Consequently, this order does not address whether Claimant met his burden to establish the elements of the doctrine.

Withdrawal of Admission for Maintenance Care and Claimant's Entitlement to Additional Treatment Post MMI

G. Respondent has demonstrated by a preponderance of the evidence that Claimant's need for additional injections, pool therapy and TENS unit supplies are no longer reasonable and necessary to treat the effects of her industrial injury. Furthermore, Respondent has established that Claimant's current need for treatment is unrelated to her June 16, 2008 industrial injury. It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), respondents are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.*

H. Where, however, respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general

> or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

I. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when the respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits, " they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related. Based upon the evidence presented, the ALJ finds and concludes that Claimant's need for ongoing care in the form of injections, pool therapy and TENS unit supplies no longer reasonable or necessary to treat the effects of her 2008 industrial injury as the need for that treatment is not related to her injury.

J. 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. 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*.

K. 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 "before 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." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI due to the work injury. 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).

L. Based on the evidence presented, the ALJ is persuaded that while additional injections, pool therapy and continued use of a TENS unit is reasonable and necessary; the need for this treatment is not related to Claimant's June 16, 2008 work-related injury. In this case, the record demonstrates that Claimant has received substantial conservative and surgical care over the years since her 2008 injury. Moreover, by her accord, Claimant returned to baseline regarding her left knee by 2011, yet she remains symptomatic. While Claimant asserts that these ongoing symptoms are related to her industrial injury, the ALJ is not convinced. Instead, the ALJ credits the opinions of Dr. O'Brien to find and conclude that Claimant's ongoing symptoms are, more probably than not, associated with the natural progression of her pre-existing degenerative left knee osteoarthritis. Consequently, while Claimant would likely benefit from continued care in the form of additional injections, pool therapy and continued use of a TENS unit, those treatment modalities are not necessary to treat the effects caused by Claimant's industrial injury. Rather that treatment is necessary to address the ongoing symptoms caused by the progression of Claimant's pre-existing degenerative arthritis. Indeed, both Claimant's ATP and Dr. O'Brien have opined that no further medical care is warranted under this claim. Claimant's contrary opinions are not convincing. Based on the evidence presented, the ALJ concludes that Respondents have met their burden to prove that the current request for additional injections, pool therapy and TENS unit supplies is not reasonable, necessary or related to Claimant's June 16, 2008 industrial injury. Furthermore, based upon a totality of the evidentiary record, the ALJ is persuaded that Respondent's have proven that there is no longer any need for future care associated with Claimant's June 16, 2008 work-injury. Consequently, Respondents request to terminate all treatment under this claim is granted.

ORDER

It is therefore ordered that:

1. Respondent's request to terminate all medical benefits under this claim is granted. The Claimant is not entitled to further medical treatment under this claim.

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: December 14, 2015

/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 4-802-098-04

ISSUES

- Whether Claimant proved by a preponderance of the evidence mistake or change of condition sufficient to reopen medical benefits closed by the Stipulation of the Parties.

- Whether the fluoro guided Marcaine steroid injections and the right hip arthroscopy with resection of the pincer FAI OS acetabular labral repair and cold therapy are reasonable, necessary and causally related to the work injury of August 19, 2009.

FINDINGS OF FACT

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

1. Claimant, a detective with Douglas County, sustained a right knee injury on August 19, 2009, during a training exercise when she was hit on the lateral aspect of her right knee.

2. Claimant was initially seen on August 24, 2009 at Arbor Occupational Medicine by Dr. Robert Watson who became her authorized treating physician (ATP). An MRI taken the same day showed a full thickness disruption of Claimant's previous ACL graft. Dr. Garramone, M.D., an orthopedist, recommended ACL reconstruction, which was performed by Dr. Davis on October 9, 2009.

3. Claimant's femoral nerve was superficially injured during the ACL reconstruction which led to a significant amount of additional medical treatment, including physical therapy.

4. Claimant testified inconsistently about when her right hip pain began. She initially testified that all of her hip problems started during physical therapy in 2011. However, she later testified that she had an MRI in 2010 because of her hip problems, and later that she had hip complaints "early on in 2009 after physical therapy." When asked if she could pin point the time when she first started noticing hip pain, Claimant was not able to identify a date, but instead testified, "I cannot tell you that there was this one day when I was laying on the table, or when I was walking around, or anything like that." On cross-examination, Claimant identified Ms. Karen Kramer at Denver PT in Castle Rock as the therapist she was treating with when she felt pain in her right hip. Records for same are not entirely legible, but do clearly identify treatment of Claimant's *left* leg. They also include a diagnosis of left side bursitis.

5. In October 2010, Dr. Watson referred Claimant for a physical medicine evaluation, which was performed by Dr. Brunworth. Dr. Brunworth diagnosed a femoral

neuropathy and recommended EMG testing. Dr. Brunworth diagnosed a primary sensory nerve injury and referred Claimant for a right hip MRI to rule out a calcified hematoma. An incidental finding on the October 15, 2010 MRI was "Tearing involving the superior to anterior right acetabular labrum."

6. Claimant testified that she discussed treatment options for the labrum tear with Dr. Watson, but they deferred treating it then because Claimant was trialing a spinal stimulator at that time and her treatment needed to focus on that. Dr. Watson's notes from that time period (October 21, 2010; November 16, 2010; and November 23, 2010) do not document discussion of treatment options for the right labral tear. Dr. Watson's January 4, 2011 report is the first to even mention a right labral tear. On January 31, 2011, Dr. Watson first mentions treatment of the right hip as follows: "Angela and I talked about doing physical therapy for her hip . . . If [the spinal cord stimulator] does not help, then I would send her back to physical therapy for the labral tear." No persuasive evidence was offered to suggest that surgical repair of the labral tear was discussed.

7. Dr. Watson ordered an MRI to rule out a disc herniation, and referred Claimant to Dr. Barton Goldman. Dr. Goldman performed a records review and diagnosed Claimant in part with "Bilateral greater trochanteric bursitis of questionable correlation to the present claim."

8. On February 1, 2011, Claimant presented to the ER at Sky Ridge Medical Center complaining of severe right hip pain. An MRI was repeated and read as normal. Claimant was discharged with a diagnosis of "Right hip pain likely secondary to trochanteric bursitis seen on MRI." No labral tear was seen on the MRI. In his February 7, 2011 report, Dr. Watson subsequently adopted the diagnosis of "left greater than right greater trochanteric bursitis," noting also that the labral tear was not evident on the MRI. He recommended a repeat of an EMG, which was positive for no saphenous nerve response.

9. On June 2, 2011, Dr. Watson documented that the right labral tear was asymptomatic. Dr. Watson's documentation does not contain an analysis of whether he correlated the labral tear to the work injury.

10. Between August 26, 2011 and October 31, 2011, Claimant underwent unsuccessful trials of spinal cord stimulator implants with numerous complications and related treatment.

11. In December 2011 Dr. Watson indicated he was leaving the practice at Arbor. In his December 5, 2011 report he indicated that all narcotic medications were discontinued by Claimant. His successor, Dr. Jade Dillon, reported on December 23, 2011 that Claimant felt she had no restrictions and believed she could return to regular duties. Her gait was normal, low back range of motion was full and painless and there was no local tenderness in the lower extremities.

12. Subsequent hip complaints are not documented as often. Claimant even noted she was negative for hip pain between February 2011 and April 15, 2013. Then, on August 30, 2013, right hip pain was noted on Claimant's acupuncture records.

13. On October 7, 2013, Arbor physician Dr. Raschbacher placed Claimant at MMI by with a 13% lower extremity rating. He was aware of Claimant's hip complaints and diagnoses yet chose not to treat, rate, or diagnose a right hip injury. He gave Claimant no permanent restrictions. He did not reference any maintenance medical care related to her hip.

14. Claimant requested a DIME which was performed by Dr. Allison Fall who on April 30, 2014 placed Claimant at MMI as of October 7, 2013 with a 13% lower extremity rating. Dr. Fall documented that there was some right hip pain and discussed the diagnostic findings of labral tear and greater trochanteric bursitis. Dr. Fall specified in her report, "I have considered but did not find any impairment for . . . either hip."

15. Respondents filed a Final Admission accepting the rating of the DIME doctor, Dr. Fall. On July 2, 2014, Claimant filed an Application for Hearing on all issues ripe for hearing. Subsequently, the parties entered a Stipulation to resolve the issues remaining for hearing and this matter closed, except for specified maintenance medical care, subject to the reopening provisions in §8-43-303 C.R.S.

16. On May 14, 2015, almost two years after being placed at MMI, Claimant first presented for maintenance care for right hip complaints at Arbor. Claimant saw Dr. Alisa Koval who recommended a right hip MRI which was performed on May 19, 2015. The MRI read that there was no evidence of a tear within the labrum, and "there is no . . . greater trochanteric bursitis." Dr. Koval testified at hearing that she was not aware of any previous MRIs.

17. Claimant attributed her increased pain to an increased activity level and weight loss after November 2014 when she was diagnosed as diabetic. In a single answer, Claimant testified, "I lost a significant amount of weight," and "I lost some weight," and "I've lost a little bit of weight." Claimant also reported gaining over 30 pounds during the course of her claim. While Claimant's weight fluctuated over the course of her claim, her weight on the date of her injury was 167 pounds and her weight on June 22, 2015 was 165 pounds.

18. Dr. Koval referred Claimant to Dr. Papilion. Dr. Papilion's report dated May 26, 2015 remarked that Claimant's MRI from earlier that month "revealed some early degenerative changes in the acetabular rim" and "an os acetabuli consistent with pincer femoral acetabular impingement." He recommended right hip arthroscopy.

19. Dr. Papilion performed a CT-guided Marcaine/lidocaine injection in Claimant's right hip on June 12, 2015. Dr. Papilion noted that if Claimant had good relief from the injection, "she may be a good candidate for arthroscopy labral repair with resection of the femoral acetabular impingement." The injection was not successful as

Claimant's pre- and post-injection pain levels were both 5/10. In addition, Claimant testified that the injection "did not work."

20. On a partially illegible and undated fax sheet from Dr. Papilion's office to Insurer's claims adjuster, Dr. Papilion requested authorization for a right "scope hip resect pincer FAI. Os acetabular. Labral tear cold therapy." The cold therapy was for "post op use."

21. On August 21st, 2015, Insurer denied the request for steroid injections and arthroscopy as both not related to Claimant's claim, and not reasonable and necessary. Insurer relied in part on Dr. Cebrian's June 22, 2015 report in which he expressed his medically probable opinion that Claimant's right femoral acetabular impingement secondary to pincer type morphology with labral tear and the need for treatment "is independent, unrelated, and incidental to work activities performed on 8/19/2009 or her treatment thereafter." He concluded, "I recommend that any further treatment on the right hip, including a fluoroscopically guided Marcaine and steroid injection into the right hip and a possible right hip arthroscopy be denied as they are not medically reasonable, necessary and related to [Claimant's] 8/19/2009 claim."

22. Respondents applied for hearing pursuant to Rule 16 to contest Insurer's denial of treatment requested by Dr. Papillion.

23. At hearing, Dr. Cebrian testified as an expert in family practice. He performed a Rule 16 evaluation on June 22, 2015 and physical examinations of Claimant on August 29, 2014 and August 14, 2015 at Respondents' request.

24. Per Dr. Cebrian's record review, the first documentation related to Claimant's right hip was the MRI performed on October 15, 2010. That MRI was conducted to determine whether the damage to her right femoral nerve was caused by a calcified hematoma of the saphenous nerve. Incidentally, it revealed a right labral tear. After that, Claimant was treated for *left* hip complaints. To the extent bilateral hip pain was noted, it was noted as left greater than right.

25. Dr. Cebrian was critical that none of Claimant's medical providers, particularly Drs. Koval and Papilion, never explained how Claimant's right hip pain, which arose eighteen months after her injury, still correlated and was causally related to it. Dr. Cebrian also noted that neither Dr. Raschberger nor Dr. Fall related Claimant's right labrum tear to her claim.

26. Dr. Cebrian explained that Claimant's right labral tear was associated with her primary condition, femoral acetabular impingement, which can coincide with and cause labral tears. Dr. Cebrian testified that femoral acetabular impingement is a congenital abnormality and cannot be traumatically caused. Dr. Cebrian testified that Claimant had an "os acetabuli," a bone on the rim of the acetabulum of the hip that has not fused properly. This caused Claimant to develop a pincer abnormality, meaning that the labrum was pinched between the extra bone growth and the femoral head, causing damage to the labrum over time.

27. Dr. Cebrian explained that an altered gait could cause trochanteric bursitis, but could not caused labral tears. He explained that the majority of labral tears develop as the result of acetabular impingement, and that Claimant's labral tear did not show up on certain diagnostic imaging tests because it "is very subtle. It's not a significant tear."

28. Dr. Cebrian explained that a labral tear such as Claimant's would be treated by removing the extra bone, the os acetabuli, that was causing the pinching and then repairing the labral tear with re-suturing, and anchoring the tear into the joint.

29. Dr. Koval testified as an expert in occupational medicine over Respondents' objection. Dr. Koval had not previously testified as an expert or offered deposition testimony, however she had provided expert causation opinions based on record reviews and became Level II certified in April of 2014. Dr. Koval first evaluated Claimant on May 14, 2015, and reviewed medical records that were in Claimant's folder at Arbor.

30. The ALJ finds the following factors reduce the credibility and persuasiveness of Dr. Koval's testimony:

- Dr. Koval relied heavily on Claimant's subjective reports rather than on the more objective medical exams and diagnostic tests.
- Dr. Koval accepted as proof of relatedness Claimant's reports that her right hip complaints developed as the result of her physical therapy.
- Dr. Koval was not familiar with Claimant's extensive medical history. For example, she did not realize that imaging of Claimant's right hip had been performed prior to May 2015. Additionally, Dr. Koval had not seen Dr. Fall's DIME report or Dr. Cebrian's September 14, 2015 report.

31. Dr. Brendan Essary read the May 19, 2015 MRI, performed without contrast. He reported, "There is no evidence of a tear within the labrum." Under the heading "Impression," Dr. Essary noted, "8mm region of grade 3 cartilage loss in the superior anterior aspect of the acetabulum with minimal Subchondral edema. Adjacent to this area is a tiny area of fluid separating the labral cartilaginous junction. No discrete labral tear." Dr. Koval remained suspicious of a labral tear, notwithstanding the contrary MRI findings, and sent Claimant to Dr. Papilion who, she assessed, would be better able to interpret the sentence, "Adjacent to this area is a tiny area of fluid separating the labral cartilaginous junction."

32. Although Dr. Koval did not receive a follow-up note from Dr. Papilion's office, she understood him to have recommended arthroscopy. Dr. Koval's testimony was not offered to a reasonable degree of medical probability and suggested that Dr. Papilion's surgical recommendation was also speculative in that it proposed the surgery in order to determine whether there even was a problem:

> I actually never received a follow-up note from Dr. Papilion's office. We've requested it several times and not received it. So, I'm guessing at what – I'm kind of guessing at what he's trying to do, but I do know that hip arthroscopy – I think I got a handwritten note from him at one point that said he was he was recommending arthroscopy because, despite the fact that that there was no discreet obvious labral tear seen on the MRI, he felt that that sort of nebulous cartilage finding was suspicious for it nonetheless and that he should go in – the only way to know for sure was to go in and take a look and he could fix it if he encountered it.

33. Dr. Koval speculated that Claimant's hip injury could have been brought on during physical therapy, stating, "I think it's possible that it could have started there." She was unaware of what specific exercises Claimant was performing but stated she could "imagine . . . there had been quite a bit of exercise that used the hip joint." Dr. Koval acknowledged that she did not have any physical therapy notes.

34. Dr. Koval speculated that Claimant's abnormal gait combined with atrophy of the right leg could have caused a labrum tear.

35. Despite Claimant's counsel's numerous questions regarding the causation and treatment of trochanteric bursitis, the ALJ specifically finds that no issue regarding right hip bursitis was properly noticed for this hearing, and thus, will not be considered unless somehow relevant to the issues properly noticed.

36. Dr. Koval testified that a steroid injection "can be very helpful" for inflammation of the bursa, so long as there is not another chronic abnormality, in which case the steroid injection would "just be a Band-Aid." However, when asked whether she was recommending treatment for inflammation of the bursa, Dr. Koval answered, "I honestly don't know the answer to that."

37. Dr. Koval testified that she did not believe there were conservative measures to correct a labrum tear. She further testified, "However, I'm not an orthopedist so I'm not going to guess at this, but there seems to be, you know, some clinical judgment involved on the part of the specialist that, you know, this is too big to let it heal conservatively, so we need to go in and do arthroscopy."

38. Dr. Koval was critical of Dr Cebrian's diagnosis of femoral acetabular impingement because the diagnosis "is really common in active women," but Claimant had not been active for two years when she began complaining of right hip pain in 2011. Because Claimant had not been active for two years, and based on Claimant's subjective complaints, Dr. Koval testified, "So that's the part where I question that this is a completely [unrelated] issue and I do tend to think it's related." Dr. Koval further testified, "So, I'm led to believe that because of where her activity level was and because of the history she gives that this right hip pain that she was experiencing was

indeed the same right hip pain that she first reported in January 2011 and that it evolved over time."

39. The Lower Extremity Medical Treatment Guidelines provide that there are two types of impingement: pincer; resulting from overcoverage of the acetabulum and cam; resulting from the aspherical portion of the head and neck junction. Persistence of these abnormalities can cause early arthritis or labral tears. Regarding the Occupational Relationship, the Lower Extremity Guidelines indicate that impingement abnormalities are usually congenital; however they may be aggravated by repetitive rotational force or trauma. Labral tears may accompany impingement or result from high energy trauma. Ms. Fritz Spezzano did not sustain any high energy trauma to her hip that resulted in any hip complaints upon the occurrence of the August 19, 2009 injury or after that would sustain a finding of aggravation.

40. Dr. Cebrian testified that Dr. Koval misunderstood his report and that he did not indicate that Claimant's condition was caused by her level of activity, but rather that her condition was commonly associated with active females.

41. With respect to physical therapy, Dr. Cebrian noted that no physical therapy notes referenced activities that caused right hip pain. In addition, the physical therapy activities that Claimant described as causing her pain would not cause or worsen a labral tear.

42. The ALJ finds the opinions of Dr. Cebrian more credible and persuasive than those of Dr. Koval for the following reasons:

- Dr. Koval's testimony did not rise to the level of medical opinion, but rather was couched in weaker terms such as "tend to think that' and "I'm led to believe." Dr. Cebrian's opinions, in contrast, were stated in terms of reasonable medical probability.

- Dr. Cebrian was more familiar with the case having been involved for a longer period of time and having access to virtually all of Claimant's records. Dr. Koval was not even aware of previous diagnostic imaging of Claimant's hip.

- Dr. Cebrian's explanation of Claimant's torn labrum was more credible and persuasive, and more well-supported by objective medical evidence tha the testimony of Dr. Koval.

- Dr. Koval did not know whether the injections recommended by Dr. Papilion were for the treatment of bursitis.

- Dr. Koval offered no persuasive evidence that the injections, surgery, and cold therapy recommended by Dr. Papilion were reasonable, necessary, and related to her work injury.

43. The fluoro guided Marcaine steroid injections and right scope hip resect pincer FAI OS acetabular labral repair and cold therapy recommended by Dr. Papillion is for femoral acetabular impingement which is a congenital condition and which leads often to labral tears. Claimant anatomically has an os acetabuli which occurs when there is a bone on the rim of the acetabulum of the hip that has not fused properly and is a congenital condition. Claimant has developed a pincer abnormality which occurs when the labrum in the hip is pinched between the extra growth of bone and the femoral head. This causes damage over time and is why labral tears are associated with femoral acetabular impingement.

44. Based on the totality of the evidence, the ALJ finds it more medically probable that Claimant has a congenital condition not related to her work injury that resulted in a labral tear than that physical therapy caused labral tearing and the need for treatment.

45. Based on the totality of the evidence, Claimant has failed to establish by a preponderance of the evidence mistake or change of condition sufficient to reopen medical benefits closed by the Stipulation of the Parties.

46. Based on the totality of the evidence, Claimant has failed to establish by a preponderance of the evidence that the fluoro guided Marcaine steroid injections and the right hip arthroscopy with resection of the pincer FAI OS acetabular labral repair and cold therapy are reasonable, necessary and causally related to the work injury of August 19, 2009.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, et seq., C.R.S. (2015), 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). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2015). 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. § 8-43-201, C.R.S. (2015).

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

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, bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

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

Section § 8-43-303, C.R.S., provides that at any time within six years after the date of injury, any award may be reopened on the grounds of error, mistake, or change in condition. As pertinent here, a change of condition refers to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328, 1330 (Colo. App. 1985). The party seeking reopening bears "the burden of proof as to any issues sought to be reopened." Section 8-43-303(4), C.R.S. The reopening authority is permissive. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Considering all the evidence, the ALJ concludes that Claimant has failed to prove by the preponderance of the evidence that there has been a mistake or that her condition has worsened sufficient to reopen medical benefits. The ALJ further concludes that the injections and surgery recommended by Dr. Papillion are not reasonably necessary nor causally related to cure and relieve the effects of Claimant's work injury or to maintain maximum medical improvement.

ORDER

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

1. Claimant has failed to prove by a preponderance of the evidence mistake or change of condition sufficient to reopen her claim for additional medical benefits.

2. The fluoro guided Marcaine steroid injections and the right hip arthroscopy with resection of the pincer FAI OS acetabular labral repair and cold therapy recommended by Dr. Papillion are not reasonable, necessary or causally related to the work injury of August 19, 2009.

3. As a result, the medical treatment recommended by Dr. Papillion is denied.

4. 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: December 21, 2015

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

ISSUES

The following issues were raised for consideration at the hearing:

1. Whether Claimant proved by a preponderance of the evidence that he is permanently totally disabled;

2. Whether Claimant proved by a preponderance of the evidence his impairment rating should be converted from 18% scheduled rating to whole person rating;

3. Whether Claimant proved by clear and convincing evidence that the Division Independent Medical Examiner's opinion regarding the relatedness of the back injury and impairment rating was most probably incorrect; and

4. Whether Claimant proved that he is entitled to a disfigurement award.

FINDINGS OF FACT

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

1.Claimant is a 46-year-old undocumented Mexican immigrant with a sixth grade education. His work experience before coming to the United States was in agriculture which he performed without any mechanical tools, only manual tools such as a shovel and rake. Claimant has worked in the United States since 1997. He has worked in two industries, house framing and masonry. Claimant worked as a laborer in house framing and then as a laborer in masonry until he learned how to lay brick, block and stone. Claimant worked in masonry until May 25, 2010, the date of his work injury.

2. Claimant has never had any formal training in English. Claimant's ability to speak English is limited. He can communicate simple terms such as salutations and can understand parts of conversations. Claimant is not a licensed driver but does drive.

3. On May 25, 2010, Clamant was standing on scaffolding working when the scaffolding was hit by a tractor. Claimant jumped 12 to 15 feet, landing on broken pieces of bricks, injuring right lower extremity.

4. Claimant was taken by ambulance to North Colorado Medical Center. In the emergency room, Claimant was given fentanyl 25 mcg, intravenously. A hour later

the dosage was up to 50 mg with slow intravenous push and then followed by morphine for pain. He was diagnosed from x-rays and CT scans with fractures and dislocations in the Lisfranc area of his right foot at the first, second, third, fourth and fifth metatarsals. Claimant required an open reduction and internal fixation.

5. On May 25, 2010, Claimant was admitted to the hospital, he was examined by Scott Dhupar, an orthopedic surgeon. Claimant's right foot was painful and he was unable to walk on his right foot. Because of his foot swelling, Claimant's surgery was postponed.

6. On May 28, 2010, Claimant was discharged without surgery and sent home. His leg was splinted with a short leg mold and given a prescription for crutches.

7. On June 10, 2010, Claimant went to the Greeley Medical Clinic and was seen by Dr. Sides. Dr. Sides assessed severe displacement/injury in all five digits of Claimant's foot in need of open fixation. The surgery was scheduled and delayed because Respondents refused responsibility for his surgery, until sometime before October 8, 2010, when Dr. Bharat Desai, an orthopedic surgeon, performed an open reduction internal fixation of right first metatarsal medial cuneiform using orthohelix maxlock plates with proximal and distal fixations. He also did an ORIF of right second metatarsal middle cuneiform and fracture dislocation and fusion. The Lisfranc joint was reduced and supported with orthohelix maxlock plates.

8. On February 7, 2011, Respondents admitted liability for Claimant's injury.

9. Following the first surgery, Claimant was doing well until February 16, 2011, when physical therapy required full weight bearing only on his injured right foot. Claimant injured himself during physical therapy. He complained to Dr. Desai who ordered x-rays which showed that screws on one of his plates were broken.

10. Claimant underwent a lumbar MRI on February 22, 2011, which revealed multilevel degenerative disc disease with no stenosis nor surgical lesion.

11. On March 16, 2011, a second surgery was performed by Dr. Desai to remove Claimant's hardware from the Lisfranc joint, noting that the joint was unstable and failed to fuse. Dr. Desai re-fused the right tarsal metatarsal joint with a neutralization plate and compression screw.

12. On May 11, 2011, Claimant saw Dr. Desai. He was doing well with some mild pain and was using his walking boot. Physical therapy was restarted, but a week later, his foot began to worsen. A month later, he began to have ankle pain and his ankle was making noise and popping. On June 21, 2011, Dr. Desai documented moderate daily pain and swelling in Claimant's ankle with increased activity. His ankle was locking. Dr. Desai recommended arthrotomy, synovectomy, debridement and saucerization to correct the symptoms. Authorization was denied.

13. On June 30, 2011, Respondents obtained a second opinion from Dr. Kevin Nagamani who disagreed that surgery was necessary and recommended conservative treatment instead. On July 7, 2011, Dr. Desai reported that physical therapy was not helping Claimant's ankle pain. Claimant's ankle showed moderate tenderness in the lateral malleolus. Dr. Desai again recommended a debridement of post-traumatic synovitis and loose body removal. The surgery was denied. On September 7, 2011, Claimant continued to report to Dr. Desai constant pain and swelling in the right ankle. Dr. Desai recommended hardware removal in addition to his previously recommended surgery and Respondents authorized the surgery.

14. On October 4, 2011, Dr. Basse determined that Claimant had reached maximum medical improvement (MMI) for his low back complaints but deferred determination of MMI of Claimant's foot to Dr. Desai. Dr. Basse assigned work restrictions of medium work category based on Claimant's persistent subjective complaints.

15. On November 18, 2011, Dr. Desai performed a third surgery. He removed the painful hardware from the right first metatarsal cuneiform joint and did a right anterolateral synovectomy and debridement of soft tissue impingement on Claimant's ankle.

16. On January 10, 2012, Claimant reported feeling 60% better and walking up to a mile per day, and taking OxyContin for pain. Physical therapy from January 5 to February 23, 2012, improved the function of Claimant's foot but not his pain. On April 19, 2012, Claimant reported nerve pain and complained that his third and fourth toe were getting stuck and cramping. Dr. Desai diagnosed a neuroma in the second web space and injected the space and recommended removal of the neuroma.

17. On March 13, 2012, Dr. Desai determined that Claimant was at MMI and he communicated his opinion to Dr. Basse. She discussed case closure and restrictions with Claimant. She assigned restrictions of lift in the medium work category. For his foot injury, she assigned a maximum walk and stand of maximum 30 minutes per hour. Dr. Basse assigned a scheduled impairment of 17% for his foot which she converted to a 2% whole person impairment. For his back, Dr. Basse assigned a 21% whole person rating for his back.

18. Post-MMI, on May 29, 2012, Dr. Desai performed a neurectomy between the right second and third toes. He removed painful hardware in its entirety at the Lisfranc joint and shaved a bony prominence that had appeared over the medial cuneiform where the original hardware had been placed. Following his fourth surgery, Claimant continued to experience a lot of pain despite taking Oxycodone and Vicodin. He felt like his foot was pulsating and would go numb.

19. On August 14, 2012, Claimant returned to Dr. Basse for post-MMI maintenance treatment. Claimant reported foot pain increases with walking to a 7/10 and decreases to a 5/10 when he is not walking. Dr. Basse kept Claimant at MMI.

20. Dr. Brian Beatty performed a records review on September 7, 2012. Dr. Beatty opined that there was no known back injury at the time of Claimant's fall on May 25, 2010. Dr. Beatty stated Claimant has multilevel degenerative disc disease which pre-existed the injury and was not a ratable injury.

21. Claimant underwent a Division IME with Dr. Hompland on September 17, 2012. Dr. Hompland opined that Claimant reached MMI on March 13, 2012. The DIME examiner stated that although Claimant might have had some back pain due to gait abnormalities, Claimant did not suffer a spine injury requiring an impairment rating. Dr. Hompland assigned a lower extremity rating of 11% for the right foot, which would convert to 4% whole person.

22. On October 16, 2012, Respondents filed a final admission of liability (FAL) consistent with the DIME report. The FAL terminated TTD benefits and admitted to the 11% rating, worth $5,812.89. The FAL asserted an overpayment for TTD paid after MMI, and thus no benefits were owed pursuant to the FAL.

23. On November 8, 2012, Dr. Desai diagnosed post-traumatic degenerative joint disease. He injected the Lisfranc degenerative joint and proposed to reopen treatment and fuse the second and third cuneiform junction to alleviate Claimant's symptoms and reach MMI post-surgery.

24. On January 15, 2013. Dr. Timothy O'Brien performed an IME at the request of Respondents. According to Dr. O'Brien's report, Claimant exhibited full lumbosacral range of motion on exam. Dr. O'Brien opined that Claimant did not sustain a work-related low back injury, stating there was no temporal relationship to the work injury and Claimant's pain complaints were non-organic. Dr. O'Brien opined Claimant's back pain was most likely the result of age, genetics, and physical deconditioning.

25. Dr. O'Brien also addressed Claimant's right foot during the January 15, 2013, IME. Dr. O'Brien opined that Claimant had not reached MMI because he had untreated arthritis in his midfoot due to the injury and should undergo additional surgical intervention. Dr. O'Brien disagreed with Dr. Desai's proposed surgery of a fusion to the 2nd and 3rd metatarsal, stating that Dr. Desai's surgical treatment was not reasonable and had not met the appropriate standard of care. He criticized the multiple piece meal surgery approach and made it clear that Dr. Desai's approach was ill advised. Dr. O'Brien stated that Dr. Desai had failed to address the 3rd, 4th, or 5th tarsometatarsal fracture disclosations. He recommended that Claimant obtain a second opinion from a foot and ankle specialist for additional treatment.

26. In January 2013, Claimant's attorney wrote his ATP asking that she confirm Claimant suffered a work-related back injury. In a letter dated January 30, 2013, Dr. Basse responded, stating that her opinion regarding relatedness of Claimant's low back symptoms were based on Claimant's account; however, medical records suggest that low back symptoms were not present at the time of the injury.

27. On September 24, 2013, Claimant next treated with Dr. Scott Resig. On October 11, 2013, Respondents reopened the claim and filed a general admission, admitting for medical benefits and temporary total disability.

28. On October 31, 2013, Claimant returned to Dr. Resig. Claimant had pain with weight bearing and less pain without weight bearing. He proposed to fuse the first, second and third metatarsal with bone grafting and evaluate whether the Strayer procedure would work.

29. On December 13, 2013, Dr. Resig preformed a right midfoot fusion of the first, second and third tarsal metatarsal joint, fixing the joints with a cannulated screw and locking plates and using a bone graft from the proximal tibia. Midfoot was also fused. Regarding the Achilles, Dr. Resig did a Strayer procedure which improved the dorsiflexion from 0 degrees to 10 degrees with the knee extended. Claimant was to remain non-weight bearing for 6 to 8 weeks.

30. By March 25, 2014, Dr. Resig noted that the radiology reports shows that the first, second and third tarsal metatarsal joints were fused. By April 1, 2014, Claimant resumed activities of daily living and experienced most of his pain in the morning. He continued to have pain which Dr. Resig opined was nerve pain.

31. On April 29, 2014, Claimant reported to Dr. Resig that he was having more pain but Dr. Resig opined that from the standpoint of surgery he is doing well and that that Claimant's ongoing pain may be nerve related.

32. On May 27, 2014, Claimant complained of constant pain in the dorsum of his foot which radiated up into his right leg. On July 1, 2014, Dr. Resig diagnosed a neuroma and injected the neuroma between the 3rd and 4th metatarsals with significant relief.

33. Respondents denied authorization for recommended orthotics..

34. On August 18, 2014, Dr. Basse found Claimant was at maximum medical improvement for "any injuries that occurred on the job on 05-25-10" She noted she would address work restrictions after an FCE scheduled for August 22, 2014.

35. On August 19, 2014, Dr. Basse assigned an impairment rating of 9% lower extremity which she converted to a 4% whole person rating. She did not give Claimant an impairment for his lumbar spine, stating that she agreed with previous evaluators that his low back and knee are not part of this claim.

36. At the request of Claimant's counsel, Claimant underwent an FCE on August 28, 2014. Claimant reported that in a typical day, he spent 6 hours sleeping or lying, 9 hours standing or walking, and 9 hours sitting. The evaluation established that Claimant was able to work at the medium physical demand level. Postural limitations included occasional standing and walking. There were no limits on sitting.

37. Dr. Basse completed a post-MMI report on October 15, 2014, to address permanent restrictions. Upon exam Claimant showed a much more normalized gait and had no swelling. Dr. Basse reviewed Claimant's FCE and confirmed that Claimant was able to work at a medium capacity level.

38. Claimant was returned to Dr. Hompland for a follow-up DIME on October 22, 2014. The DIME examiner placed claimant at MMI as of May 27, 2014, and assigned an impairment rating of 18% lower extremity. The DIME examiner noted that Claimant had a limp but wore normal socks and athletic shoes.

39. On December 15, 2014, Respondents filed a Final Admission of Liability admitting to Dr. Hompland's 18% lower extremity impairment rating. Claimant objected and filed an application for hearing.

40. On December 16, 2014, Dr. Basse assigned restrictions of stand and walk occasionally (3 to 33 percent to up to 34 to 66 percent of the time) but he cannot walk over 67 percent of the time. His walking and standing should be limited to occasional to frequent which puts him in the sedentary to light category.

41. Video surveillance of Claimant taken February 10, and February 11, 2015, showed Claimant shopping in a grocery store, walking and standing outside of a mattress store, and outside his home, carrying groceries, getting in and out of a car and driving, and carrying chairs from the trunk of his car into his home. Claimant does not walk with a limp at any time in the video.

42. Dr. O'Brien performed a second IME of Claimant on February 18, 2015. Dr. O'Brien noted in his IME report, consistent with video surveillance, that Claimant did not walk with a limp at the IME. Claimant's foot was not swollen, and actually had less of a flat foot deformity when compared to the left side. Dr. O'Brien assigned Claimant a 12% lower extremity impairment rating, specifically stating that Claimant's injury was isolated to his foot.

43. During the February 18, 2015, IME with Dr. O'Brien, Dr. O'Brien opined that Claimant had an excellent outcome from the surgery with Dr. Resig. Dr. O'Brien agreed with the ATP's original restrictions of medium-duty work with no restriction on standing or sitting. Dr. O'Brien opined that Claimant is able to work in any capacity he wants. Claimant will not hurt his foot by standing on it.

44 Dr. Jeffry Wunder testified at hearing on March 26, 2015, as an expert in physical rehabilitation. Dr. Wunder testified that Claimant told him he felt back pain a day or two after the accident. Dr. Wunder opined Claimant suffered a back injury and assigned Claimant a 20% whole person impairment for his back. Dr. Wunder's opinion was contrary to four other physicians; Dr. Beatty, Dr. Basse, Dr. O'Brien, and Dr. Hompland. Dr. Wunder's opinion was less credible and persuasive as it is based on Claimant's subjective complaints and Dr. Wunder did not review Claimant's lumbar MRI scan nor MRI report. Dr. Wunder reviewed Dr. Beatty's interpretation of the MRI in

forming his opinions regarding Claimant's lumbar spine. Dr. Wunder assigned Claimant a 12% lower extremity impairment, identical to that of Dr. O'Brien. Yet, Dr. Wunder assessed Claimant to require greater permanent restrictions, limiting Claimant to only occasional walking and standing. Dr. Wunder also added additional restrictions of standing ten minutes of every hour, sitting and lifting no greater than 35 pounds.

45. Dr. Wunder's opinions were less credible and persuasive than the opinions rendered by experts called by Respondents. Dr. Wunder testified that he did not recall seeing Dr. Basse's letter indicating Claimant's ability to stand and walk up to two-thirds of the day. Dr. Wunder also was not aware of the fact that Dr. Resig limited Claimant to walk or stand 66 and 2/3% of the day. Dr. Wunder's opinions placed greater value on the FCE results over the opinions of longstanding treating physicians about the Claimant's physical abilities.

46. Ms. Katie Montoya testified at hearing on September 11, 2015, as an expert in vocational rehabilitation. Ms. Montoya provided a vocational assessment on March 5, 2015. Claimant reported to Ms. Montoya foot pain and constant back pain. Claimant told Ms. Montoya that he has difficulty driving and does not do it often, he cannot clean or cook, and he does not know how to use a computer.

47. Ms. Montoya addressed work restrictions provided by Dr. Basse, by Dr. O'Brien, and by Dr. Wunder. Ms. Montoya credibly determined that Claimant had work options within the Denver metropolitan labor market under each set of restrictions.

48. Ms. Montoya testified that Dr. Basse's letter indicating a standing and walking tolerance up to frequently would equate to 66% of Claimant's shift, 40 minutes an hour or 5 hours of a typical work day. Ms. Montoya testified that Dr. Basse did not place any restrictions on Claimant's ability to sit.

49. Claimant told Ms. Montoya that when applying for jobs, he tells employers he cannot walk more than 15 or 20 minutes and cannot sit for more than 15 or 20 minutes. Claimant also stated that according to restrictions he cannot lift more than 30 to 35 pounds. The restrictions Claimant reported when applying for jobs is in contrast to even the highest restrictions provided by Claimant's IME, Dr. Wunder, who provided that Claimant could walk 20 minutes, sit all day so long as he took a 10 minute break after 50 minutes of sitting, and lift 35 pounds.

50. Even with the exceedingly high restrictions Claimant reported to employers, Claimant told Ms. Montoya that he had secured an interview with Labor Ready. However, Labor Ready informed Claimant they could not offer him a job because he does not have documentation of eligibility to work in the United States.

51. Ms. Montoya testified that in accordance with the opinion of Dr. O'Brien who opined that Claimant should not be limited in his standing and walking ability, Claimant could return to some of his past work. Under Dr. O'Brien's restriction of avoiding walking on uneven surfaces, Ms. Montoya credibly opined Claimant would be

able to find work in maintenance, landscaping, production, cleaning/janitorial, warehouse, and driving.

52. Ms. Montoya opined that under the stricter restrictions of Dr. Basse, Claimant would still have work opportunities in production, assembly, office cleaning, and forklift operation. There are also possibility of landscaping alternatives as these often require operating machinery such as mowers that would allow for seated work and work done on the ground including planting.

53. Claimant testified that prior to May 2010, his lack of documentation of U.S. citizenship was not an issue to finding employment, but now potential employers ask him if he is documented to work in the United States or to complete E-verify. Claimant credibly testified that potential employers tell him they cannot hire him because he is undocumented.

54. Ms. Montoya credibly testified that Claimant would be employable regardless of the restrictions provided by either Dr. Wunder, Dr. Basse, or Dr. O'Brien. Ms. Montoya credibly testified that Claimant could qualify for the job physically, but may not be eligible for work because of E-verify.

55. Ms. Gail Pickett testified as a vocational expert for Claimant. Her testimony and opinions were found less credible and persuasive than that of Ms. Montoya. Some of the reasons Ms. Pickett's opinions are found to be less credible are that Ms. Pickett relied upon Claimant's assertions regarding his physical ability to form her opinion regarding Claimant's employability. Also, Ms. Pickett formed her opinion regarding Claimant's employability without a clear understanding of Dr. Basse's opinion of Claimant's physical abilities. Ultimately, Ms. Picket wrote her report and performed her vocational research under the incorrect assumption that Claimant could only walk and stand occasionally, a third of the time. Ms. Pickett found Claimant is unable to return to the workforce. Ms. Pickett stated she relied upon factors including that Claimant's education, ability to read and write in English, work history, and that he is undocumented and thus does not have a driver's license.

56. Based on the totality of the credible and persuasive evidence, it is found that the May 25, 2010, work injury did not constitute a significant causative factor in Claimant's permanent total disability. In order for Claimant to recover PTD benefits, there must be a causal relationship between the May 25, 2010, work injury to the right lower extremity and Claimant's disability. A disability arising from the work injury that prevents Claimant from working was not proven. The vocational expert, Katie Montoya, and all physicians, barring Dr. Wunder, agree that Claimant can perform medium work. And, according to Ms. Montoya, medium work is available to Claimant.

57. Claimant contends that his lack of documentation is a contributing factor which must be considered in determining PTD. However, it is found that Claimant's work injury is not a significant causative factor. Claimant does not have a disability resulting from the work injury which prevents him from working. The Judge need not

speak to the contribution played by Claimant's lack of documentation when the evidence established that Claimant's work injury is not significant causative factor in his PTD.

58. The ALJ finds that as a result of Claimant's May 25, 2010, work injury, Claimant has a visible disfigurement to the body consisting of scars on his right lower extremity, as follows: a 3" long and ¼" wide scar on the right knee; a right calf scar 1" and 1/8" wide; a right ankle scar ¾" long and ¼ " wide; two scars on the top of the right foot ½" wide and 1 and 3/4" long and 2" long; and a scar on the right toe 1/4" long. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

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

General Legal Principles

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 any litigation. Section 8- 40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a 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. An ALJ's factual findings concern only evidence that is dispositive of the issues involved; an ALJ need not address every piece of evidence that might lead to a conflicting conclusion and rejects evidence contrary to findings of fact. *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).

DIME opinion

4. Claimant contends that he presented clear and convincing evidence to establish that the DIME's determination with regard to impairment rating and causation of the back injury is most probably incorrect.

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

6. It is in the ALJ's sole prerogative to assess the credibility of the witnesses and the probative value of the evidence to determine whether the Claimant has met his burden of proof. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). It is within an ALJ's purview to assess the relative weight and credibility of various opinions. See, *Kraft v. Medlogic Global Corp. et al.*, W.C. No. 4-412-711 (ICAO, Mar. 15, 2001) (citing *Rockwell Internat'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)). Additionally, if an individual expert's opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Furthermore, an ALJ may resolve conflicts in the evidence based upon her credibility determinations. *See*, *Brodbeck v. Too Busy Painting and Pinnacol Assurance*, W.C. No. 4-163-762 (ICAO, Apr. 16, 2002).

7. Here, the weight of the credible and persuasive evidence supports the opinion of the DIME examiner, Dr. Hompland, that Claimant's back is not causally related to the work injury and that Claimant suffers no permanent impairment to his back.

8. The evidence established that Claimant was placed at MMI by his authorized treating physician (ATP), Dr. Basse, on August 18, 2014. On August 19, 2014, the ATP assigned Claimant a 9% lower extremity rating. Though the ATP had previously treated Claimant's back based on his subjective complaints, in her final

report, Dr. Basse stated that she was in agreement with previous evaluators that Claimant's low back was not part of this claim.

9. Claimant originally underwent a Division IME with Dr. Hompland on September 17, 2012. The DIME examiner opined that Claimant did not have a spine injury requiring an impairment rating. The DIME assigned Claimant an 11% lower extremity rating. Claimant returned for a follow-up DIME on October 22, 2014. Dr. Hompland assigned Claimant an 18% lower extremity rating and reaffirmed Claimant had not suffered permanent impairment to his back.

10. Two additional physicians, Dr. Beatty and Dr. O'Brien, also found Claimant had not sustained a work-related back injury.

11. The credible evidence established that the only physician that presently asserts Claimant suffered a work-related back injury or permanent impairment is Claimant's IME, Dr. Wunder, who admitted that he had not reviewed Claimant's lumbar MRI, that Claimant was in the hospital at the time Claimant alleged back pain appeared, and that hospital records show Claimant denied back pain while in the hospital, Claimant's back was examined, and Claimant's back examination was normal. Then, the evidence showed that Claimant testified that he felt low back pain a day or two after the work injury. However, hospital records reveal Claimant specifically denied back pain and state that Claimant's back was examined and revealed no spinal injury

12. It is concluded that Dr. Wunder's assessment constitutes a mere difference of opinion. This is especially true considering the fact that the opinion from the Division IME on the low back is supported by Dr. Basse, Dr. Beatty and Dr. O'Brien. Claimant failed to meet his burden of proof of overcoming the DIME opinion of Dr. Hompland by clear and convincing evidence. Claimant reached MMI with 18% lower extremity rating and no permanent impairment to his back on May 27, 2014.

Permanent Total Disability (PTD)

13. Claimant contends that he proved by a preponderance of the evidence that he is unable to earn wages and is therefore permanently totally disabled. The burden is on Claimant to prove entitlement to permanent total disability benefits by a preponderance of the evidence. Section 8-40-201(16.5)(a), C.R.S. A preponderance of the evidence is evidence that leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984). PTD is defined as an employee's inability to earn any wages in the same or other employment. Section 8-40-201(16.5)(a), *C.R.S.* The determination of PTD is based on human factors including the claimant's physical condition, mental ability, age, employment history, education and availability of work the claimant can perform. *Christie v. Coors Transp. Co.*, 933 P.2d 1330 (Colo. 1997). The test for determining the availability of work is whether the employment exists that is reasonably available to the claimant under his or her particular circumstances. *Weld County Sch. Dist. RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998)(holding that factor for consideration

includes commutable labor market or other analogous concept to determine employment reasonably available to claimant).

14. The industrial injury must be a significant causative factor in the claimant's permanent total disability in that it must bear a direct causal relationship between the precipitating event and the resulting disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986).

15. There is little question that Claimant suffered a significant injury to his right foot. However, Claimant can return to work under the restrictions provided by Dr. O'Brien, Dr. Basse, the FCE and/or Dr. Wunder.

16. Dr. Basse initially restricted Claimant to medium duty work with no limitations on standing or walking. Subsequently, based on Claimant's subjective complaints, Dr. Basse's changed the restrictions providing walking and standing restrictions from occasional (33% of the time) up to frequently (66% of the time).

17. Dr. O'Brien confirmed that there is no mechanical or anatomical reason to restrict Claimant. Dr. O'Brien opined that Claimant will not re-injure his foot by walking or standing on it. Dr. O'Brien found that Claimant could walk and stand 100% of the day. Both surgeons on this case, Dr. O'Brien and Dr. Resig, found that Claimant could walk or stand between 2/3rd of the day or up to a full day. All of the doctors including the FCE found that claimant could perform medium duty work.

18. The evidence established that Claimant can drive his children to school, do grocery shopping, lift a gallon of milk, push a shopping cart, drive, and walk without a limp. Surveillance shows Claimant engaged in daily activities inconsistent with the limitations he relayed to Dr. Wunder and Ms. Pickett.

19. Ms. Pickett's vocational evaluation and report are unreliable and unpersuasive given the fact that her assessment relied on Claimant's subjective complaints, limited medical records and a misreading of Dr. Basse's letter dated December 16, 2014, wherein Ms. Pickett mistakenly states Dr. Basse limited Claimant's ability to stand and walk to occasional or 33% of the time. No treating physician has limited claimant's walking and standing ability to occasional. Ms. Pickett also relied upon Claimant's status as an undocumented worker in making her determination that Claimant is not employable. Ms. Pickett also mistakenly stated in her report that Claimant sustained an injury to his right foot and low back restricting his ability to work. Four physicians, including Claimant's ATP, Dr. Basse, and the DIME examiner, Dr. Hompland, found Claimant did not sustain a ratable injury to his back.

20. Mrs. Montoya's vocational assessment and report are more reliable and credible because she had the benefit of additional medical reports and performed her vocational analysis under various sets of restrictions, including a correct reading of Dr. Basse's letter.

21. Mrs. Montoya's report provided several jobs within Claimant's labor market which are within Claimant's permanent restrictions. Ms. Montoya testified that jobs were available consistent with permanent restrictions that were provided by Dr. O'Brien, Dr. Basse and even Dr. Wunder. The types of jobs which were identified as appropriate for Claimant's skill set, even with his limitations of education and Spanish-speaking, were production, assembly, office cleaning, and forklift operation.

22. Claimant is only permanently and totally disabled if he is unable to earn any wages in the same or other employment. Section 8-40-201 (16.5), C.R.S. A claimant is not permanently and totally disabled if he is able to earn some wages in modified or part-time employment. *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

23. Ms. Pickett and Ms. Montoya both testified that all employers are now required to use E-verify or a similar verification process to verify the employment eligibility of a person to work in the United States. Claimant's job search records and testimony reveal that the primary reason employers did not hire claimant was his ineligibility to work in the United States, not his work restrictions. Claimant's inability to find work is due to his ineligibility to work in the United States and recently established requirement employers verify the employee's eligibility to work in the United States. Though Claimant may be ineligible for employment due to his status as an undocumented worker, work is available to Claimant in the Denver labor market taking into consideration his physical restrictions, education, language abilities, and skills. The evidence established that Claimant's work injury is not a significant causative factor in his inability to work.

24. As stated above, the determination of permanent total disability benefits is based on the claimant's physical condition, age, employment history, education and availability of work. *Christie*, 933 P.2d at 1330; *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Using these factors, Mrs. Montoya found several suitable employment positions for Claimant. Ms. Montoya's testimony is persuasive. Claimant failed to prove by a preponderance of evidence that he is permanently and totally disabled.

25. Claimant failed to prove that the May 25, 2010, work injury to Claimant's right lower extremity 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).

Disfigurement

26. he ALJ concludes that as a result of Claimant's May 25, 2010, work injury, Claimant has a visible disfigurement to the body consisting of scars on his right lower extremity, as follows: a 3" long and ¼" wide scar on the right knee; a right calf scar 1" and 1/8" wide; a right ankle scar ¾" long and ¼ " wide, two scars on the top of the right foot ½" wide and 1 and 3/4" long and 2" long; and a scar on the right toe 1/4" long.

Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

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

1. Claimant failed overcome the DIME opinion by clear and convincing evidence. This claim is denied and dismissed with prejudice.

2. Claimant failed to prove by a preponderance of evidence that he is permanently and total disabled. This claim is denied and dismissed with prejudice.

3. Insurer shall pay Claimant $3,000.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: __December 29, 2015__

DIGITAL SIGNATURE:

Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

The issues to be determined by the ALJ are:

1. Whether the claimant has proven by a preponderance of the evidence that her medical condition causally related to her February 9, 2011, injury covered by this claim has worsened since she was placed at maximum medical improvement (MMI) on July 22, 2013, by authorized provider (ATP) Timothy Sandell, M.D. and Division IME (DIME) provider William Watson, M.D. so that she is no longer at MMI, and her claim shall be reopened for additional medical benefits due to a change in condition pursuant to C.R.S. § 8-43-303 (1).

2. Whether the claimant has satisfied her burden of proof by showing by a preponderance of the evidence that she needs additional curative medical benefits that are causally related to her injury covered by this claim;

3. Whether the claimant has proven by a preponderance of the evidence that, if her condition causally related to this claim has worsened and she no longer is at MMI, she is entitled to temporary total disability (TTD) benefits beginning April 30, 2015, and continuing.

PROCEDURAL MATTERS

The parties reached the following stipulations:

1. Scott Stanley, M.D. is an authorized provider effective April 30, 2015. The claimant therefore withdrew the issue of a change of provider endorsed for hearing.

2. Respondents reserved the Workers' Compensation medical fee schedule for any medical benefit awarded or ordered.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. The claimant sustained an admitted industrial injury on February 9, 2011. The claimant's injury affected her lumbar spine and she also suffered radicular symptoms. As a result of her injury, the claimant underwent a lumbar fusion at the hands of Dr. David A. Wong, M.D.

2. Subsequent to surgery, the claimant continued her treatment with her primary physician, Dr. Timothy Sandell. On February 25, 2013, the claimant reported to Dr. Sandell that she was getting worse. On that date, an EMG was completed, noting the only abnormality was some nerve root irritation, which the doctor found not to be uncommon.

3. Dr. Sandell placed the claimant at Maximum Medical Improvement on July 22, 2013. In so doing, Dr. Sandell noted the July 18, 2013 re-evaluation of Dr. Wong who found that there is no significant surgical lesion and agreed with ongoing rehab and pain management. By report of November 13, 2013, Dr. Sandell addressed permanent impairment and permanent work restrictions. On December 4, 2013, Dr. Sandell noted that despite ongoing symptoms, there are no new treatment options available for the claimant. He continued to monitor her medications. On December 23, 2013, Dr. Sandell notes that the claimant comes in with concerns of worsening symptoms. He noted that while she had previously reported some tingling and numbness in the feet, this has become worse and is described as a burning sensation in the feet. He noted that she felt she was having difficulty walking and has used a cane. He noted that she had gone to the emergency room based on his instructions on December 19, 2013, where a lumbar MRI was performed that showed no acute changes. Dr. Sandell noted that an IME had been scheduled which he felt would be appropriate. In his report of March 18, 2014, Dr. Sandell noted that the claimant complained of six falls since she was last seen and has suffered episodes of not being able to walk.

4. On April 8, 2014, the claimant underwent a Division Independent Medical Examination (DIME) by Dr. William Watson. Dr. Watson stated in the discussions portion that he felt that it was appropriate, as the claimant still had so much pain and disability, to provide a provocative discography at the L4-5, L5-S1 and L3-4 level above. Depending on the results, he opined she may be a candidate for interbody fusion at either L4-5 or L5-S1 or both levels. He further stated that the claimant should return to Dr. Wong after the evaluation. He felt the discography should be done under maintenance care and he also stated that she would not be at Maximum Medical Improvement if it was found that she needed further surgery.

5. Dr. Sandell agreed with Dr. Watson's recommendation for lumbar discogram and possible surgical evaluation. Dr. Sandell referred the claimant to Dr. Mark Meyer for a lumbar discogram on June 2, 2014.

6. On July 31, 2014, Dr. Sandell indicated that he had no idea why the discogram was not approved as he had made the referral. The claimant was noted to have an evaluation with Dr. Wong.

7. The claimant was evaluated by Dr. Wong on August 5, 2014. Dr. Wong opined that other evaluations would be of higher priority than a discography. He recommended an evaluation with a neurologist and a psychological evaluation. The claimant was referred for a neurological evaluation and a psychological evaluation subsequent to her visit with Dr. Wong. On September 24, 2014, Dr. Sandell wrote a letter to Giovonna Maestas, a paralegal with Ritsema & Lyons, outlining that there was really no significant treatment recommendations by the psychologist, Dr. Weingarten. On September 29, 2014, Dr. Sandell made a recommendation for an evaluation by a neurologist. As of November 24, 2014, Dr. Sandell noted the claimant's continued complaints but felt that there was nothing new to offer her in regard to treatment.

8. On or about January 14, 2015, the claimant underwent an evaluation by Dr. Scott Stanley. At that time, Dr. Stanley recommended a CT myelogram as well as an EMG.

9. On a follow up evaluation, Dr. Timothy Sandell made a referral for a CT myelogram and an EMG. On April 30, 2015, Dr. Sandell noted that the claimant had the CT myelogram and the EMG with Dr. Pamela Knight. At that time, noting the new studies, Dr. Sandell referred the claimant to Dr. Stanley for surgical evaluation and likely treatment at his discretion. He further stated that, "Because she is pursuing further treatment and likely another surgery, she is now off Maximum Medical Improvement status until she stabilizes once again," which he anticipated to be post-operatively. On April 30, 2015, Dr. Sandell wrote a letter to Susan Canny, a Strategic Nurse Consultant of Pinnacol Assurance, indicating that we are anticipating another surgery. He further made a referral to Dr. Stanley. On June 4, 2015, Dr. Wong again examined and evaluated the claimant. At that time, he had the CT myelogram and EMG studies completed by Dr. Knight. Dr. Wong was of the opinion that he would need to know whether the finding of Dr. Pamela Knight were chronic or acute. He asked that Dr. Knight clarify acute vs. chronic question in terms of her right L5 changes on the EMG and nerve conductive studies. If more of the right L5 changes are seen, then the more likely that additional decompression might be helpful. Dr. Knight issued an addendum

to her report on August 17, 2015 indicating that the findings on the EMG were sub-acute.

10. The ALJ finds that the claimant has established as more likely than not that her condition has changed and worsened subsequent to MMI. This is based on the medical opinions of Dr. Sandell as well as that of Dr. Scott Stanley and Dr. Pamela Knight. It is also based on the opinion of Dr. Wong. It is noted that for some time after she was placed at MMI Dr. Sandell had nothing further to offer the claimant. However, after further testing and based on a progression of her symptoms post MMI, Drs. Wong, Sandell and Stanley all feel that the claimant would benefit from surgery. A change of her condition is supported by the EMG findings which were noted as sub-acute. The ALJ also credits the testimony of the claimant as to the progression of her symptoms including new symptoms which were noted by Dr. Sandell on December 23, 2013, a point in time subsequent to MMI.

11. The ALJ finds the claimant to be credible in her statements regarding the change in her condition. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to additional and curative care, including surgery, as recommended by Dr. Stanley.

12. The ALJ finds that the claimant has established that it is more likely than not that her case should be reopened as of April 30, 2015.

13. Based on the medical records and evidence submitted the ALJ finds that the claimant has established as more likely than not that she has been temporarily totally disabled from April 30, 2015 and continuing. The claimant testified that she has not earned any wages from at least April 30, 3015 and continuing. Further, the records support that the claimant had physical restrictions at all times which would prevent her from working in her occupation.

CONCLUSIONS OF LAW

1. 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. C.R.S. § 8-40-102 (1). 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." *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); C.R.S. § 8-43-201. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102 (1), C.R.S.

2. The question of whether the claimant met her burden of proof is one of fact for determination by the ALJ. See *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

3. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark*, 593 P. 2d 792 (Colo. 1979).

4. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witness' testimony, the fact that the witness' testimony in important particulars was contradicted by other witnesses; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness, and the bias or prejudice of the witness, if any. See *Prudential Insurance Co. of America v. Cline*, 57 P.2d 1205 (1936), CJI Civil 3:16 (2005).

5. After considering all of the evidence, the ALJ concludes that the claimant has met her burden of proof and the ALJ concludes that the claimant has established by a preponderance of the evidence that her condition changed as of April 30, 2015, a time subsequent to Maximum Medical Improvement as contemplated by section 8-43-303(1) C.R.S. and that her case should be reopened thereunder.

6. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. See § 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. As found, the claimant has established by a preponderance of the evidence that treatment and surgery as recommended by Dr.

Scott Stanley is related to this work injury and the ALJ concludes that such is reasonable and necessary to cure and relieve the worker from the effects of her injury.

7. A workers' compensation claimant is eligible for temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (2004). This ALJ has concluded that this claim should be reopened as of April 30, 2015. The ALJ further concludes that the claimant's injury has resulted in total disability as of April 30, 2015 and this total disability continues. Therefore the ALJ concludes that the respondents shall pay the claimant temporary total disability benefits starting April 30, 2015 and continuing until terminated by law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. This claim is reopened as of April 30, 2015.

2. The respondent-insurer is responsible for the payment of the claimant's reasonable, necessary, and related medical benefits for her low back injury, including the surgical treatment recommended by Dr. Scott Stanley.

3. The claimant is entitled to temporary total disability benefits from and including April 30, 2015 and continuing until terminated by operation of 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, 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: December 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examiner's (DIME) determination regarding maximum medical improvement (MMI) is most probably incorrect; and

2. Whether Claimant proved by a preponderance of the evidence that Respondents are liable for reasonably necessary and related medical benefits, specifically, repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair.

FINDINGS OF FACT

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

1. Claimant was employed by Employer for two and one half years as a commercial truck driver. On February 10, 2012, Claimant sustained an admitted injury to his left shoulder.

2. Claimant was walking around a truck trailer doing a pre-trip check on the vehicle before beginning a driving trip for Employer. As Claimant came around the back of the vehicle and started walking up towards the front, his feet went out from under him when he stepped on some black ice and fell on his left side.

3. Since it was Friday evening when the accident occurred, Claimant could not report the accident because there was no one at Employer to whom to report.

4. Claimant tried to complete his driving trip, which was supposed to go to Grand Junction, Colorado. However, he only made it to Rifle, Colorado. He was having too much pain from his fall. He called the team he was supposed to meet, and they exchanged trailers in Rifle, Colorado.

5. Claimant reported his injury and had his initial medical appointment with authorized treating physician, Michael Ladwig, M.D., on February 14, 2012. The initial diagnosis was contusion of the left humerus.

6. On February 21, 2012, Claimant was referred to have a MRI to rule out occult fracture of the left humerus.

7. The MRI, taken on March 6, 2012, was normal for the humerus, but a MR arthrogram was also done on March 6, 2012, on the left shoulder, which showed a full thickness tear distal supraspinatus tendon with 1 cm retraction, mild osteoarthritic changes AC joint and glenohumeral joint, and subchondral cyst formation at the junction of the rotator cuff tendons.

8. On March 8, 2012, Claimant was referred to Dr. John Papilion, orthopedic surgeon, by Dr. Ladwig. Claimant had his initial appointment with Dr. Papilion on March 20, 2012. Dr. Papilion found that Claimant failed conservative care, and that he was an excellent candidate for arthroscopy subacromial decompression and distal clavicle resection with arthroscopic rotator cuff repair.

9. Claimant had the surgery on June 11, 2012. The post-operative diagnoses were full thickness tear supraspinatus tendon, 2.5 cm, rotator cuff, left shoulder, chronic impingement, left shoulder, acromiculavicular joint arthropathy, left shoulder, and chronic biceps tendon rupture with degenerative tear superior labrum, left shoulder.

10. The operations performed consisted of examination under anesthesia, diagnostic video arthroscopy, arthroscopic debridement of the superior labrum and rotator cuff, arthroscopic subacromial decompression with release of coraccacromial ligament, arthroscopic distal clavicle resection, and arthroscopic rotator cuff repair with 4.7-mm Bic-Swivelocks x 4 with fibertape.

11. Claimant was placed in an abduction pillow shoulder immobilizer after the surgery. Claimant had to keep this device on all the time.

12. Claimant was prescribed Percocet upon discharge from the Lowry Surgery Center where the shoulder surgery was performed. The dosage prescribed was 1 – 2 pills by mouth every 4 – 6 hours, as needed.

13. Initially, Claimant took Percocet a few times during the day, one or two pills, depending upon how he felt. Claimant took at least two Percocet at night. When Claimant took the Percocet during the day, he would lie on the couch and nap.

14. Claimant was sleeping on a couch where he would not be able to roll over onto his left side because his arm was in the sling. In the last couple days of June 2012, Claimant fell at home.

15. On the night of the fall, Claimant took two (2) Percocet before or at bedtime. The Percocet prescription was a part of Claimant's medical care prescribed by an authorized treating physician.

16. Around midnight or one a.m., Claimant got up to go to the bathroom, and in the process of returning to the couch as he took a step to the right, he leaned over and fell on a living room chair and ottoman.

17. Claimant landed on his right side when he fell onto the cushioned chair with padded arms and a padded seat. Claimant came down on his right shoulder and hit his nose against the side of the cushion.

18. Claimant's use of the drug Percocet for pain following the first surgery made Claimant feel tired, groggy, and light headed such that he used the wall to steady himself going to and from the bathroom. Claimant's Percocet usage contributed to his fall in late June.

19. Claimant was wearing the shoulder immobilizer sling at the time he fell. Claimant did not feel any increased symptoms in his surgical left arm and shoulder after the fall or the next day.

20. Claimant began physical therapy on July 18, 2012. Claimant's fall occurred before this first physical therapy appointment. In the initial phase of physical therapy, Claimant progressed well. Claimant started to have problems occur as the physical therapy exercises became more difficult.

21. By September 10, 2012, Claimant was experiencing pain in his joint involving his upper arm. Claimant was also experiencing pain with overhead movement. By September 20, 2012, Claimant was experiencing popping in his shoulder. By September 27, 2012, Claimant reported soreness in the left shoulder that was not like the last physical therapy visit. His pain had increased.

22. By October 1, 2012, the pain was so bad that Claimant needed to sleep in a recliner. At the remaining physical therapy visits on October 4, 2012, October 15, 2012, October 22, 2012, October 25, 2012, October 31, 2012, November 1, 2012, November 5, 2012, November 8, 2012, and November 12, 2012, Claimant continued to report pain problems with certain motions of the shoulder.

23. Claimant had a follow up visit with Dr. Papilion on November 1, 2012, where he found that Claimant was almost five (5) months out from the repair of a tear in the rotator cuff and doing only fair. He noted persistent loss of motion and weakness that had plateaued in therapy.

24. Dr. Papilion ordered a post-surgical MRI, which was done on November 8, 2012. The repeat MRI showed a prior central rotator cuff repair but recurrent focal (12 x 10 mm) full-thickness tear of the anterior distal supraspinatus tendon overlying a suture anchor which may be bent or broken at the end sticking out.

25. Claimant had a follow up visit with Dr. Papilion on November 13, 2012, at which time Dr. Papilion found Claimant was a good candidate for repeat arthroscopy and rotator cuff repair.

26. Dr. Papilion's office scheduled the surgery to occur on December 7, 2012, but Respondents refused to authorize the surgery. In denying the request for authorization for surgery, Respondents relied on a record review performed by Dr. Allison Fall dated December 4, 2012. Dr. Fall opined that she was unable to state within a reasonable degree of medical probability that the second shoulder surgery was related to the work injury. She reasoned that the issue was the fall, which occurred three weeks after the first rotator cuff repair surgery. Dr. Fall opined that if this fall did cause the injury to the rotator cuff repair and caused a recurrent tear, this would be an intervening injury.

27. A second medical record review by J. Raschbacher, M.D. was performed on October 21, 2013. He opined that it would appear that a broken anchor would be more likely consistent with a fall rather than a spontaneous breakage or failure of the suture anchor. He did agree with Dr. Papilion that a certain number of rotator cuff repairs simply fail. He also stated that even if there was not a question of broken materials at the repair site, a fall in and of itself would be enough to cause a re-tear of the cuff. Dr. Raschbacher noted that Claimant's risk of surgical failure was higher because he smokes.

28. Claimant reported to Dr. Papilion that he fell three weeks after the first surgery on the right shoulder.

29. Claimant underwent a Division Independent Medical Examination with Dr. Thomas Fry on August 26, 2014. Dr. Fry assessed Claimant not at maximum medical improvement (MMI). Dr. Fry opined that it was unlikely that the fall three weeks post-surgery on the right shoulder re-injured the left shoulder, and the broken shoulder anchor and high surgical failure rate made it reasonable to assign Claimant's condition to a failure to heal from the original injury and surgery, and therefore a work related condition.

30. Dr. Papilion saw Claimant again on September 12, 2013. He found that Claimant had persistent symptoms with a recurrent tear 10 x 12 mm in

the rotator cuff of his left shoulder. He also noted Claimant was having pain, loss of function, weakness, and that he was unable to lift. He continued to recommend a repeat examination under anesthesia, arthroscopy, and a revision rotator cuff repair of the left shoulder.

31. Dr. Papilion's deposition was taken by Claimant on March 18, 2014. Dr. Papilion was accepted as an expert in orthopedic surgery. Dr. Papilion opined that the type of surgical repair that he performed on Claimant can fail without trauma.

32. Dr. Papilion described the shoulder immobilizer with an abduction pillow that Claimant was required to wear after surgery. Dr. Papilion opined that the anchor may not be broken, it could be dislodged. Dr. Papilion stated that a trauma would not necessarily be required for an anchor to pull out.

33. Dr. Papilion opined that a minor fall like that described by Claimant may have caused the rotator cuff to tear; because of its weakened state, in the early postoperative phase, the doctor opined that the shoulder's weakened state was susceptible to any kind of trauma, in physical therapy or a fall. Dr. Papilion's review of physical therapy notes caused him to credibly opine that the surgical failure occurred in the September time frame during the advancing physical therapy regiment.

34. Dr. Papilion provided letters dated September 26, and October 1, 2013, in response to letters sent by counsel. He found that Claimant was not at MMI. He stated that he was not convinced that the presumed second injury was responsible for the recurrent rotator cuff tear since physical therapy records document the advance of symptoms of pain, weakness, and loss of motion concurrent with the advance of physical therapy. Dr. Papilion opined that "There are percentages of rotator cuff repairs that do not heal and remain symptomatic, that require revision surgery." (Claimant Exhibit, pp. 2 – 3.) Dr. Papilion opined that the need for repair of the recurrent rotator cuff tear is related to the original work injury and subsequent surgical intervention.

35. On January 14, 2015, Dr. Hendrick Arnold opined, consistent with the opinions of Dr. Raschbacher and Dr. Fall, that it is within medical probability that the need for surgery is not related to the workers' compensation injury of February 10, 2012. Dr. Arnold found Claimant at MMI as of July 1, 2012. Drs. Arnold and Raschbacher acknowledged that a percentage of rotator cuff repairs fail spontaneously and require repeat surgery. Additionally, both doctors agree that Claimant needs repeat left shoulder surgery.

36. Dr. Arnold mentioned that medical records in 2013 reflect that Claimant had some substance abuse problems, however, Claimant took a drug test after the accident of February 10, 2012, that was negative. And, Claimant while employed by Employer for two and a half years gave random urine analysis samples that were negative for illegal drugs.

37. Claimant also maintained a commercial driver's license to drive for Employer. This license required physical examinations to maintain. Claimant also took a pre-surgical physical on May 25, 2012, which he passed.

38. The ALJ finds the medical records and the opinions in this case by Dr. Papilion and Dr. Fry are the most credible and persuasive. Drs. Arnold, Fall and Raschbacher presented different theories regarding the cause of the rotator cuff re-tear, however, their opinions do not rise to the level of clear and convincing evidence that the DIME opinion of Dr. Fry on the issue of MMI is most probably incorrect. Respondents failed to present clear and convincing evidence that Claimant's fall at the end of June 2012 was a separate intervening event and therefore not work related.

39. The ALJ finds Drs. Fry and Papilion's opinions are most persuasive that the need for additional surgical repair of the recurrent rotator cuff tear is related to the original work injury and subsequent surgical intervention. Further, Dr. Papilion explains that Claimant's initial tear was large and statistically a significant percentage of repairs do go on to fail for various reasons. Also, the doctor notes that Claimant had increased pain when physical therapy was advanced as corroborated by the physical therapy records and Claimant's testimony of increasing problems as physical therapy exercises progressed.

40. The ALJ finds the DIME opinion of Dr. Fry that Claimant is not at MMI and that the recurrent tear of the left rotator cuff is work related has not been overcome by clear and convincing evidence.

41. The ALJ finds that Claimant proved by a preponderance of the evidence that the rotator cuff repair recommended by Dr. Fry and the repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair recommended by Dr. Papilion are reasonably necessary and related medical benefits to which Claimant is entitled and for which Respondents are liable.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, *et seq.,* C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessary of litigation. Section 8-40-102(1), C.R.S. 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 claimant nor in favor of the rights of respondents and a workers' compensation case shall be decided on its merits. Section 8-43-201(1), 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 Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

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

OVERCOMING THE DIME ON MMI AND CAUSATION

4. In this case, Respondents contend that they presented clear and convincing evidence through the medical reports of Drs. Fall, Raschbacher and Arnold that the MMI and causation determinations of the DIME physician was most probably incorrect. Claimant argues that Respondents failed to sustain its burden of proof to establish that the DIME physician's opinion regarding MMI and causation are incorrect.

5. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. 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*.

6. 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 and causation 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).

7. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). 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).

8. In this case, Respondents failed to meet their burden of proof to overcome by clear and convincing evidence Dr. Fry's DIME opinion regarding MMI and causation. Specifically, it is concluded that Dr. Fry's determination that Claimant is not at MMI and that the current need for medical treatment and surgery for the left upper extremity is related to the work injury of February 10, 2012, was not overcome by clear and convincing evidence.

9. The evidence presented at hearing by Respondents through the reports of Drs. Raschbacher, Fall and Arnold amount to no more than a difference of opinion among experts and does not rise to the level of clear and convincing evidence. Claimant credibly testified regarding the mechanism of the late June 2012 fall onto a chair at home. Claimant was wearing an immobilizing arm sling and he fell on the right side. Relevant evidence was also revealed by Claimant's physical therapy records which showed Claimant's increasing

pain and loss of function as physical therapy progressed. Furthermore, Dr. Fry, Arnold, Raschbacher, and Papilion agreed that rotator cuff repair surgery fails at a very high incident rate with or without a precipitating traumatic event. Thus, it is concluded that Respondents' failed to establish by clear and convincing Dr. Fry's opinion on MMI and causation is most probably incorrect. Claimant is not at MMI and his need for medical treatment for the left rotator cuff is related to the work injury and is therefore compensable

REASAONBLE AND NECESSARY MEDICAL BENEFITS

10. Respondents contend that Claimant's need for left rotator cuff repair is not reasonably necessary medical treatment. Claimant contends that his need for repair of his left rotator cuff is reasonably necessary and that Respondents are liable for this medical treatment. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

11. The credible and persuasive evidence presented through the medical reports of Dr. Papilion and Dr. Fry established that Claimant proved by a preponderance that the repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair is reasonably necessary medical treatment for which Respondents are liable.

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ORDER

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

1. Respondents failed to sustain their burden of proof to establish that the DIME opinion regarding MMI and causation is most probably incorrect.

2. Claimant is not at maximum medical improvement and his need for medical treatment of the left rotator cuff is related to the work injury.

3. Respondents shall be liable medical treatment to cure and relieve Claimant of the effects of the left shoulder recurrent rotator cuff tear. Specifically, Respondents shall be liable for medical treatment in the nature of repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair.

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: _December 2, 2015_____

DIGITAL SIGNATURE:

Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. Whether the opinion of the DIME physician is ambiguous, and, if so, determination of the true opinion of the DIME physician.

3. Whether the party seeking to overcome the opinion of the DIME physician has proven that the DIME opinion is incorrect.

FINDINGS OF FACT

1. The Claimant worked for Employer as a painter, drywall finisher and wallpaper hanger. His job duties required that he often worked at, or above, shoulder level. He had to lift buckets of paint weighing up to 50 or 60 pounds. On March 22, 2012, the Claimant was up on a scaffold approximately 5 to 5 ½ feet high. The scaffold started to move, catching the Claimant off balance. He started to fall, but fell against a post. His injuries were initially to the right shoulder and upper back. He eventually underwent two surgeries on his right shoulder with little if any permanent benefit. Over the course of his medical treatment for the right shoulder injury, he had slightly over 100 sessions of physical therapy. During most of the nearly two years after the injury, the Claimant worked under restrictions. The principal restriction was to avoid working overhead with the right upper extremity. The Claimant also had other problems using his right shoulder.

2. The Claimant testified his left shoulder began hurting, "about five or six months" after his March 22, 2012 right shoulder injury. The Claimant testified he was, "just doing therapy, and started feeling a stabbing sensation on the shoulder." The Claimant testified the therapy caused problems with his left shoulder because he, "overdid it with the left shoulder, compensating. Even though, doing the machines – I had to compensate the strength that I didn't have in my right arm with my left." In another records, he claims lifting boxes in therapy caused his left shoulder to hurt. The Claimant also testified he was doing more with his left arm and shoulder than he was with his injured right arm and shoulder in therapy and in day-to-day life.

3. The Claimant testified he told his providers about his problems with his left shoulder, but the medical and physical therapy records do not support this statement. When looking at records from five to six months after the March 22, 2012 injury (the time frame when the Claimant testified his left shoulder began hurting because of

therapy and day-to-day overcompensation for his injured right shoulder), there is no mention of any left shoulder problems in the records. Five to six months after the injury is roughly July to September 2012. The records from July to September 2012 show no reports of left shoulder problems or any mention of overcompensation of the left shoulder.

4. The Claimant was initially evaluated by Dr. Steve Danahey on March 26, 2012. At the initial evaluation, there is no mention of any left shoulder issues. Dr. Danahey noted that the Claimant's primary complaint was pain over the right AC joint area and over the superior anterior shoulder. Dr. Danahey noted reduced range of motion limited by pain and discomfort. He initially diagnosed right shoulder and upper back sprain and strain. Dr. Danahey provided work restrictions limiting lifting to 10 lbs. and no repetitive shoulder motion or reaching above the shoulders. The Claimant was referred for physical therapy (Claimant's Exhibit 5, pp. 151-153; Respondents' Exhibit C, pp. 40-42). Dr. Danahey continued to treat the Claimant, but makes no mention of any left shoulder problems from July to September of 2012. On August 14, 2012, the Claimant saw Dr. Danahey and the Claimant had his employer come with to the appointment to review the Claimant's full history and to discuss the treatment options, including a recommended surgery. Dr. Danahey noted that the employer was very supportive of the Claimant's treatment and that they were interested in the Claimant's long-term outcome as he was a valuable employee. Dr. Danahey noted that he spent a significant amount of time discussing the history of the Claimant's injury and treatment thus far. There is no mention of any left shoulder pain or conditions. On September 24, 2012, the right shoulder was evaluated after his September 11, 2012 surgery and the note indicates that everything was good and there is no mention of left shoulder pain at this time either (Claimant's Exhibit 5, pp. 130-138; Respondents' Exhibit C, pp. 54-61). The Claimant continues to treat with Dr. Danahey from October of 2012 through August of 2013 with no complaints of left shoulder pain noted in the medical records from this time period (Claimant's Exhibit 5, pp. 117-129; Respondents' Exhibit C, pp. 62-84).

5. Dr. Hewitt, the Claimant's surgeon, first sees the Claimant on May 7, 2012. From that first visit through his visits in September of 2012, there is no mention of any left shoulder complaints (Claimant's Exhibit 4, pp. 83-89; Respondents' Exhibit D, pp. 104-109).

6. The physical therapy records from Concentra (Claimant's Exhibit 10) in the July through September 2012 time period make no mention of left shoulder pain or problems. The Division IME, Dr. Sharma, reviewed the records from that time period (Claimant's Exhibit 2, pp. 11-12; Respondents' Exhibit A, pp. 9-10) and found no mention of any left shoulder pain or problems.

7. On September 9, 2013 (one year and five months after the March 22, 2012 injury date), the Claimant reported to Dr. Danahey that he had left shoulder soreness that started two weeks earlier (which would have been approximately late-August, 2013). Dr. Danahey stated the Claimant still had "full range of motion with very slight impingement signs noted today on examination." The Claimant told Dr. Danahey

that he thought this might be “an overcompensation issue” (Claimant’s Exhibit 5, pp. 115; Respondent’s Exhibit C, p. 85). On September 30, 2013, Dr. Danahey noted that the Claimant reported more pain and discomfort in the left shoulder and that the Claimant experiences this primarily at night. The Claimant states to Dr. Danahey there was no specific event that occurred to the left shoulder. He wondered if it was gradual overcompensation, but he reported that he was doing nothing at work that aggravated the left shoulder. Dr. Danahey examined the shoulder and the findings were minimal. The Claimant had full abduction, full forward flexion, excellent motion, excellent strength, and no popping or clicking. Dr. Danahey suspected arthritis and took an x-ray (Claimant’s Exhibit 5, pp. 114; Respondents’ Exhibit C, p. 85).

8. On October 21, 2013, the Claimant again wondered on October 21, 2013 whether his exercises in physical therapy might have aggravated the left shoulder. But, his primary complaint was merely increasing discomfort in the shoulder without any aggravation from his work. Dr. Danahey questioned whether worker’s compensation should handle the complaint, since there was nothing specifically tied to work with the left shoulder complaints. However, Dr. Danahey nevertheless referred the Claimant for a physical medicine evaluation to see if there was anything that could be offered under the Workers’ Compensation claim (Claimant’s Exhibit 5, pp. 113; Respondents’ Exhibit C, p. 87).

9. Physical therapy records from around that time provide little support for claimant’s report of an injury in physical therapy. On September 11, 2013, the Claimant reported to his physical therapist that he feels a “little achy” in both shoulders perhaps because of the rainy weather. On September 27, 2013, the Claimant reported to the physical therapist he had not been sleeping well because he stopped taking sleep medication. The Claimant noted he was not comfortable on the left or the right side. On October 21, 2013, the Claimant reported pain on the left shoulder to his physical therapist; he wondered if he “slept too long on it and [that] caused him the pain.” As of October 14, 2013, the Claimant reported “no new complaints.” Then, on November 21, 2013, the physical therapy notes reflect that “patient reports onset of left upper extremity symptoms similar to right, i.e. sharp pain at distal anterior clavicle (Claimant’s Exhibit 9, pp. 285-236).

10. Dr. Aschberger first sees the Claimant on referral from Dr. Danahey on October 24, 2013. Dr. Aschberger notes the history of the Claimant’s injury and subsequent surgeries on his right shoulder and also notes that the Claimant is experiencing “irritation at the left shoulder.” The Claimant reported to Dr. Aschberger that as he has progressed through exercises and therapy, “he has experienced an increase in symptoms at the left shoulder predominantly at the anterior aspect” with trapezial pain but no cervical pain. Dr. Aschberger noted the Claimant was restricted from working above chest height and performed no heavy lifting. The Claimant reported no significant aggravation with his current work activities. Dr. Aschberger diagnosed “left shoulder bursitis with an element of impingement on examination.” He noted that he suspected “some aggravation with the rehabilitation program.” Dr. Aschberger recommended massage therapy and a prescription of Voltaren gel for both of his

shoulders. He also indicated the Claimant is a candidate for a subacromial injection at the left shoulder (Claimant's Exhibit 4, pp. 77-78; Respondents' Exhibit B, pp. 27-28).

11. On November 14, 2013, Dr. Aschberger notes that the Claimant continues to report pain at both shoulders. Dr. Aschberger also notes that he "received a letter from the insurer indicating that the left shoulder was not accepted as compensable under the claim." Dr. Aschberger nevertheless notes that the Claimant has positive impingement testing at the left shoulder and exhibits tenderness, but with good passive range of motion bilaterally (Claimant's Exhibit 4, p. 76; Respondents' Exhibit B, p. 29).

12. On November 18, 2013, the Dr. Danahey notes persistent right shoulder pain after operations on 9/11/2012 and 5/7/2013. He also notes "recent reports of left shoulder discomfort – not currently accepted as part of claims. On physical examination, Dr. Danahey notes that "with respect to the left shoulder, he has full range of motion , but he reports some discomfort at end ranges and has some slight impingement signs." On December 11, 2013, Dr. Danahey notes that he has been asked for clarification with regard to the Claimant's reports that he aggravated his shoulder doing a military press in physical therapy. Dr. Danahey notes that the Claimant described that he sat on a bench and pushed up against the weight with one arm at a time, alternating the arms. As of this office visit, the Claimant was no longer in formal physical therapy, but he was doing and independent exercise program (Claimant's Exhibit 5, p. 110; Respondents' Exhibit C, pp. 91-94).

13. As of December 4, 2013 and December 23, 2013 visits, the Claimant reported continued bilateral shoulder pain to Dr. Aschberger. Dr. Aschberger noted that the left shoulder was not currently authorized for treatment under the Workers' Compensation claim (Claimant's Exhibit 4, p. 72-74; Respondents' Exhibit B, p. 30-31).

14. The Claimant saw Dr. Aschberger on January 20, 2014 for an impairment determination. Dr. Aschberger continued to report irritation of his shoulders bilaterally. With respect to the left shoulder, Dr. Aschberger noted,

> [the Claimant] denies any specific injury. He thought there may be some irritation as a result of single-sided exercises performed while in rehabilitation. He describes some soreness and pain when lying down on the left shoulder at night. There has been no significant crepitation. On review of the records, Dr. Danahey initially noted symptoms in the left shoulder as reported by [the Claimant] with his evaluation on 09/30/13. That was noted to occur especially at night. Nothing specific happened with the left shoulder and the patient was wondering if it is gradual overcompensation. Dr. Danahey noted that [the Claimant] did not report anything at work that seemed to aggravate the shoulder. Examination showed near full range of motion of the right shoulder with minimal findings on the left with full motion and excellent strength and no popping or clicking. X-ray was negative.

On examination at the January 20, 2014 visit, Dr. Aschberger noted that the left shoulder had full range of motion with no crepitation. Dr. Aschberger again noted that he initially saw an element of left shoulder bursitis and impingement and he had recommended a subacromial injection. However, Dr. Aschberger further noted that the left shoulder was not accepted as compensable. In assessing the Claimant's left shoulder, Dr. Aschberger noted that there was probable left shoulder bursitis and that conservative measures were followed. He stated that a corticosteroid would be reasonable to prevent further deterioration of the left shoulder, but did not anticipate any permanent impairment. Dr. Aschberger noted that although the Claimant attributed the left shoulder irritation to overuse, he found "the etiology is likely multifactorial and that certainly can play a role. The left shoulder is not directly linked to the original event, however." In providing an impairment rating, Dr. Aschberger gave a 13% upper extremity rating for the right shoulder (which would convert to an 8% whole person rating) and he provided no impairment rating for the left upper extremity (Claimant's Exhibit 4, pp. 57-68; Respondents' Exhibit B, pp. 32-34).

15. On February 6, 2014, the Claimant underwent an FCE that showed he was capable of working heavy labor for an 8 hour day. The Claimant did report right shoulder pain and the evaluator was able to feel the "click" the Claimant described. The Claimant did not report his left shoulder as having any symptoms to the evaluator, although slight tenderness over the AC joint and AC ligament on the left side were reported on palpation, as compared to moderate tenderness over the right AC joint and AC ligament. The FCE was considered valid (Respondents' Exhibit F)

16. A Final Admission of Liability was filed on February 20, 2014 admitting for a 13% scheduled impairment consistent with the impairment determination by Dr. Aschberger on January 20, 2014 (Respondents' Exhibit H, p. 222).

17. The Claimant objected and, on April 10, 2014, requested a Division IME. In his request for a Division IME, the Claimant requested the following body parts be evaluated: "neck, right shoulder, right shoulder blade and left shoulder" (Respondents' Exhibit H, pp. 262-263).

18. Dr. Sharma was chosen as the Division IME. He prepared a written Division IME report on June 10, 2014 (Claimant's Exhibit 2; Respondents' Exhibit A). Dr. Sharma took a history from the Claimant and performed a very thorough review of the medical records and provided an extensive summary. His review of the medical records is provided in almost 18 pages of detailed notes regarding the Claimant's treatment over the years. The chronology is thorough and demonstrates Dr. Sharma's comprehensive knowledge of the Claimant's complaints and treatment. Dr. Sharma noted the diagnostics, injections, surgeries, physical therapy, medications, and massage therapy provided to him by his treatment providers. Dr. Sharma painstakingly goes through the 99 physical therapy visits the Claimant attended. There is no documentation supporting the Claimant's allegation he injured his left shoulder in therapy. Dr. Sharma documents on August 14, 2013 that the Claimant externally rotated his injured right arm, which aggravated his right shoulder. But there is no corresponding records indicating that the

Claimant injured his left shoulder in therapy (Claimant's Exhibit 2, pp. 8-26; Respondents' Exhibit A, pp.6-24).

19. Dr. Sharma notes that Dr. Aschberger placed the Claimant at MMI on January 20, 2014 and assigned a 13% upper extremity impairment rating which would convert to an 8% whole person impairment rating. Dr. Sharma notes that Dr. Aschberger did not count the left shoulder as part of the impairment and Dr. Sharma specifically noted this "appears to be appropriate" (Claimant's Exhibit 2, p. 25; Respondents' Exhibit A, p. 23). Dr. Sharma also reviewed the report from the functional capacity evaluation (FCE) performed on February 6, 2014, noting that the Claimant's work classification corresponds to a "heavy" classification, and lighter for constant activities (Claimant's Exhibit 2, p. 26; Respondents' Exhibit A, p. 24). Dr. Sharma also notes that Dr. Danahey saw the Claimant on February 6, 2014 and reviewed the impairment rating with the Claimant. Dr. Sharma's report points out that a comment on the left shoulder was made and it was determined that the Claimant would likely benefit from a left shoulder injection "although the left shoulder was not felt to be related to the injury" (Claimant's Exhibit 2, p. 26; Respondents' Exhibit A, p. 24).

20. On physical examination at the Division IME, Dr. Sharma noted that,

> The patient's shoulders are examined. The shoulder appears to have no atrophy in the upper extremity up to the forearm or in comparison to the left side. On palpation, there is a palpable crepitus when the patient moves his shoulder in abduction, adduction, external and internal rotation as well as cross abduction. I do not notice any impingement signs. The Claimant did not report any symptoms of pain when he was moving his shoulder but I found this to be somewhat concerning. However, on further questioning to the patient, the patient reported his symptoms were stable. The patient's range of motion was also measured by myself, Dr. Anjmun Sharma.

(Claimant's Exhibit 2, p. 26; Respondents' Exhibit A, p. 24).

21. Dr. Sharma agreed Claimant reached MMI for his injury on January 20, 2014. He provided an impairment rating of 21% for the upper extremity which would convert to a 13% whole person impairment rating. He noted that "no maintenance therapy is required at this time." Dr. Sharma opined the Claimant "is capable of working full duty with minimal restrictions." The restrictions provided were "to limit overhead lifting with his right and left arms to more than 10 lbs. He specifically noted that the restrictions were provided for 2 reasons: to decrease the risk of reinjury to his "shoulder", not shoulders, which implies he only consider one shoulder as injured. Additionally, Dr. Sharma indicated he thought the restriction would prevent further degeneration of his shoulder apparatus (Claimant's Exhibit 2, p. 27; Respondents' Exhibit B, p. 25). In his report, Dr. Sharma mentions only one injury to one arm when justifying the restrictions. Presumably that is the injury to the right shoulder, since that injury is undisputed. Had he said there were "injuries" to both shoulders rather than an

"injury" only to the right shoulder, such a statement might be some evidence of him finding a causal relationship between the left shoulder and the work injury. But he did not say there was more than one injury. This statement supports other conclusions he reaches in his report finding there was no causal relationship between the left shoulder and the work injury. Dr. Sharma notes there is ongoing degeneration in the shoulder apparatus. Again, this finding of "degeneration" is consistent with a non-work related cause for the left shoulder complaints and consistent with the rest of his conclusions regarding causation of the left shoulder complaints. Dr. Sharma noted the Claimant continued to work for the employer at that time and he felt the overhead lifting restriction was the only restriction necessary for the Claimant to "continue to do well in this capacity."

22. At the time of the Division IME appointment, the Employer and the Claimant worked together well and it was anticipated it would be a long-term relationship. Rather than a statement regarding causation, Dr. Sharma appears to be concerned with the Claimant continuing to work long term for the Employer. He remarks in paragraph 22 of his report (Claimant's Exhibit 2, p. 28; Respondents' Exhibit B, p. 26), the restrictions given "will be the least disruptive to his current position and will maintain him for the long-term." Dr. Sharma's restrictions are consistent with his efforts to maintain the good employment relationship the Claimant had with his Employer, not to assess causation for the left shoulder.

23. On causation, Dr. Sharma had numerous opportunities to state in his report there was a causal relationship between the Claimant's left shoulder complaints and the work injury, but makes no mention that he believes the left shoulder is related. Dr. Sharma's "Final Impressions" are:

- Claimant is at MMI as of February 6, 2014;
- Final whole person impairment of 13%;
- Status post subacromial decompression right shoulder;
- Status post right shoulder rotator cuff repair;
- Status post right shoulder distal clavicle resection;
- Maintenance therapy: None at this time. This patient has achieved maximum medical improvement and requires no maintenance care;
- Permanent work restrictions: The patient will be assigned a 10-pound permanent work restriction overhead lifting only. The patient is capable of working full duty in all other capacities at this time. This will be the least disruptive to his current position and will maintain him for the long-term.

(Claimant's Exhibit 2, p. 28; Respondents' Exhibit B, p. 26).

24. The Respondents filed an amended Final Admission of Liability on July 2, 2014 admitting for a 21% scheduled impairment consistent with the impairment rating provided by Dr. Sharma on June 10, 2014 (Respondents' Exhibit H, p. 222).

25. The Claimant saw Dr. Caroline Gellrick for an IME and she prepared a written report dated July 8, 2015. She performed a thorough medical record review that was summarized over 8 pages in her report (Claimant's Exhibit 2, pp. 33-40). The Claimant reported to Dr. Gellrick that he "is having ongoing problems with the shoulder with pain to the neck, right arm pain and left arm pain." He reported a pain level of 4/10 on the day of this IME (Claimant's Exhibit 2, p. 40). Dr. Gellrick noted that the Claimant reported that his pain was present all day and increased with sitting, standing, exercise, working, housecleaning, pushing, pulling, lifting and sexual activities. She noted that the Claimant's functional history showed that his hobbies and recreational activities have been impacted as he is unable to bike as he used to, work on cars, play with the children, play basketball, fun, fish and work out at the gym. She noted that the Claimant's activities of daily living were also impacted as he has trouble dressing, and yard work and housework aggravate the pain (Claimant's Exhibit 2, p. 40). The Claimant told Dr. Gellrick that at his new job he is able to work at chest level and below and does not have to do overhead painting. He typically paints below shoulder height for half the day and he supervises workers on the job for the other half of the day (Claimant's Exhibit 2, p. 41).

26. On the issue of whether whole person impairment should be considered as opposed to simply an upper extremity rating, Dr. Gellrick explained that,

> [the Claimant] should avoid overhead lift much above 5 pounds. This is going to exacerbate his right shoulder in particular and cause more pain and spasm in the trapezius muscles and the paraspinal muscles of the cervical spine. If one looks at the anatomy of the shoulder and the neck, the shoulder is connected to the neck and the major muscle body in between is the trapezius muscle. Under that, there are layers of muscles, including the supraspinatus and under the shoulder blade itself where this patient has tenderness, subscapularis, infraspinatus and these muscles are tight. When you reach overhead, these muscles are stretched and utilized, for reaching and tie in to the proximal areas of the trunk directly below the cervical spine, whereas the trapezius muscle goes partially into the cervical spine, and mostly the thoracic spine. It should be remembered initially this patient complained of upper thoracic pain and tenderness. Today, it is realized the pain is coming from the shoulder into this region and is manifest as subscapularis pain. Massage therapy notes have shown levator scapulae spasm, supraspinatus, subscapularis, latissimus dorsi, pectoralis minor.
>
> (Claimant's Exhibit 2, p. 44)

27. Dr. Gellrick also opined on the causation of the left shoulder symptoms. She acknowledged that there was "no defined injury status within the records reviewed" (Claimant's Exhibit 2, p. 43). However, she found tightness in the left upper trapezius. She also believed the Claimant has subacromial bursitis which should respond to a steroid injection. Dr. Gellrick stated:

> There is also tightness present, not as severe, with the left upper trapezius. This does affect function for this patient and his work. He is left with permanent work restrictions of avoidance of overhead work for prolonged periods of time. He cannot do repetitious work using his arms above chest level. He cannot lift heavy above chest level because of the pain in the right shoulder and the developing pan in the left shoulder. This examiner agrees with Dr. Aschberger. Through the rehab process, the left shoulder could have been affected, however, it is not a surgical situation. On testing he is intact on the left shoulder, but has pain and tenderness in the region. Most likely this represents subacromial bursitis and would respond to a steroid injection as recommended by Dr. Aschberger.
>
> (Claimant's Exhibit 2, p. 43)

28. The Claimant's credible testimony of pain in his shoulder, trapezius and neck, along with evidence of impairment, including supporting medical records, and the opinion of Dr. Gellrick which is persuasive on this issue, is consistent with functional impairment of the Claimant's right upper extremity as well as functional impairment extending past the arm. The functional impairment is evident in the Claimant's inability or limited ability to lift his arm past a certain point, to engage in actions requiring overhead movement, to reach behind him, or to turn his head. His impairments require him to make adaptations in the performance of work duties due to permanent work restrictions. Therefore, it is found as fact that, as a result of his March 22, 2012 work injury, the Claimant has a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S.

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.

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).

Disability Compensation Based on Scheduled Injury vs. Whole Person Impairment

The claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under§ 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4- 662-3 69 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W. C. No. 4-536-198 (ICAO June 20, 2005).

The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004).

There is no requirement that functional impairment take any particular form in order to be compensable under § 8-42-107(8)(c), C.R.S. Evidence of pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered impairment for this purpose. Aligaze *v. Colorado Cab Co. / Veolio Transportation*; W.C. No. 4-705-940 (ICAO April 29, 2009); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (ICAO November 29, 2004); *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-878 (ICAO November 20, 2001), aff'd., *Pinnacle Glass Co. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA2386, August 22, 2002) (not selected for publication). The courts have held that damage to structures of the "shoulders" may or may not reflect a "functional impairment" enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company,* supra*; Strauch v. PSL Swedish Healthcare System,* supra, *Langton v. Rocky Mountain Health Care Corp.,* supra*; Price v. United Airlines,* W.C. No. 4-441-206 (ICAO January 28, 2002); *Johnson-Wood v. City of Colorado Springs,* supra.

In this case, the Claimant's testimony, substantiated by the medical records, including the opinion of Dr. Gellrick, establish that the Claimant is entitled to a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. because he

has suffered a functional impairment to a part of the body that is not contained on the schedule. The Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder. Work activities and other activities of daily living cause pain in his shoulders, trapezius, and neck such that the Claimant is unable or limited in his ability to lift his arm past a certain point, to engage in actions requiring overhead movement, to reach behind him, or to turn his head. His impairment requires him to make adaptations in the performance of work duties due to permanent work restrictions. Therefore, the Claimant suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

ALJ Clarification of Conflicting or Ambiguous Opinions Issued by the DIME Physician

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a Division IME physician issues conflicting or ambiguous opinions, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. Once the ALJ clarifies the ambiguous opinion, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. The Division IME's opinions concerning a claimant's MMI status or permanent medical impairment, therefore, must be overcome by clear and convincing evidence even if the opinion is arguably initially ambiguous. C.R.S. § 8-42-107(8)(b)(III); *Clark v. Hudick Excavating*, W.C. No. 4-524-162 (November 5, 2004); *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). However the heightened burden to overcome the DIME opinion in the statute is only explicitly applicable to the issues of MMI status and permanent medical impairment.

Anjmun Sharma, M.D. acted as the Division IME physician for this March 22, 2012 work injury. The Claimant asserts the Division IME physician's opinion on the relatedness of the left shoulder is ambiguous because (1) Dr. Sharma made the decision to examine the left shoulder; and (2) Dr. Sharma provided work restrictions for left shoulder (in addition to the right shoulder).

As for the Claimant's first contention, Dr. Sharma examined the left shoulder because the Claimant requested that left shoulder evaluation as part of the Division IME process. After the treating physicians placed the Claimant at MMI and provided no impairment rating for the left shoulder, the Claimant requested a Division IME that, in part, asked the Division IME to determine whether the left shoulder complaints were causally related to the work injury. Dr. Sharma complied with that request as part of his Division IME evaluation. There is no authority for the proposition that the mere act of examining a body part renders that body part as causally related to an injury. Such a rule would create absurd results, as the party requesting an evaluation of a body part would unilaterally have almost unlimited control over what body parts are related.

Regarding the second argument, Dr. Sharma ultimately determined it was appropriate to exclude the Claimant's left shoulder from any impairment rating. Dr. Sharma, as the Division IME, exercised his statutory authority to determine the causal relationship, if any, of various complaints by the Claimant to the admitted work injury. The Division IME found the Claimant's left shoulder complaints were not causally related to the work injury. He assigned no impairment for the left shoulder in his Division IME report. He did not list the Claimant's left shoulder as part of his "final impressions" of the Claimant's work related conditions. He agreed with the conclusion of treating providers who found the Claimant's left shoulder complaints unrelated to the admitted work injury. Specifically, Dr. Sharma explicitly agreed with Dr. Aschberger, when he found the left shoulder should not be counted as part of the impairment rating for the work injury. Dr. Sharma states he made the determination to restrict the use of the right and left arms in overhead lifting for two reasons: to decrease the risk of re-injury to his "shoulder", not "shoulders," which implies he only considers one shoulder as injured. Additionally, Dr. Sharma indicated he thought the restriction would prevent further degeneration of his shoulder apparatus. By itself, Dr. Sharma's providing work restrictions that included the left shoulder in this case is not sufficient to create an ambiguity regarding the causation determination.

The ALJ finds Dr. Sharma's causation determination to be unambiguous. Regardless of why Dr. Sharma took the time to evaluate the left shoulder condition and provide an advisory opinion on permanent restrictions, his ultimate conclusion is clear that the left shoulder is not causally related to the claim. However, the ultimate effect of this on the burden of proof is further discussed below.

Challenging an Opinion Rendered by a DIME Physician on Causation

At the hearing and in post-hearing briefs, the Claimant argues that because the dispute in this case only concerns maintenance treatment for the left shoulder, and not MMI nor a challenge to the impairment rating for the left shoulder, the DIME physician's opinion is not entitled to enhanced weight and Claimant need only establish the right to maintenance care for the left shoulder by a preponderance of the evidence and not by the standard of clear and convincing evidence.

C.R.S. § 8-42-107(8)(b)(III) provides for an enhanced burden to overcome the DIME opinion as to MMI and impairment. Yet, the Act does not expressly set forth the standard of probability that a DIME physician must apply when determining whether or not a particular medical condition is causally related to an industrial injury. However, at C.R.S. §8-42-101(3)(a)(I), the statute authorizes the Director of the Division of Workers' Compensation (Director) to establish an accreditation program for physicians treating and rating workers compensation injuries. The ALJ notes that the Director's Level II accreditation curriculum, available on the Department of Labor's website, contains an express discussion of causation determinations by physicians in the section titled "Quality Medical Reporting for Workers' Comp." This section of the curriculum (on p. 22 of the current version on the website) states as follows:

> In workers' compensation the health care provider must discuss the relationship between the patient's diagnosis and the work-related exposure. The assessment process requires estimating the risk of developing the suspected diagnosis as a result of the actual exposure of the individual patient. Legally the physician must be able to state the medical probability, greater than 50 percent likelihood, that the patient's diagnosis and physical findings are related to the work-related exposure.

The ALJ concludes that it is appropriate to defer to the Director's determination of the standard of probability that a DIME physician must apply when determining whether a particular condition is or is not related to the industrial injury. *See Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005) (when construing workers' compensation statute deference should be given to the director's interpretation as the official charged with the statute's enforcement). The Director's interpretation, as reflected in the Level II curriculum, is consistent with the traditional rule in workers' compensation cases that causation must be established by a preponderance of the evidence. *See Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Finally, C.R.S. § 8-42-107(8)(b)(III) only provides for an enhanced burden to overcome the DIME opinion as to MMI and impairment. By omission, all other DIME opinion findings are challenged and overcome by the preponderance of the evidence standard which is the default burden of proof of the Colorado Workers' Compensation Act. Thus, no extra weight is given to the DIME physician's opinion and the Claimant must establish entitlement to benefits by a preponderance of the evidence.

The Claimant testified his left shoulder began hurting, "about five or six months" after his March 22, 2012 right shoulder injury. The Claimant testified he was, "just doing therapy, and started feeling a stabbing sensation on the shoulder." This history is inconsistent with other statements the Claimant made regarding the genesis of his left shoulder complaints. Claimant testified the therapy caused problems with his left shoulder because he, "overdid it with the left shoulder, compensating. Even though, doing the machines – I had to compensate the strength that I didn't have in my right arm with my left." In another records, he claims lifting boxes in therapy caused his left shoulder to hurt. The Claimant testified he was doing more with his left arm and shoulder than he was with his injured right arm and shoulder in therapy and in day-to-day life.

The Claimant testified he told his providers about his problems with his left shoulder, but the medical and physical therapy records do not support this statement. When looking at records from five to six months after the March 22, 2012 injury (the time frame when claimant testified his left shoulder began hurting because of therapy and day-to-day overcompensation for his injured right shoulder), there is no mention of any left shoulder problems in the records. Five to six months after the injury is roughly July to September 2012. The records from July to September 2012 show no reports of left shoulder problems or any mention of overcompensation of the left shoulder.

- Dr. Aschberger, a treatment provider, does not see the Claimant until October of 2013.

- Dr. Danahey, the Claimant's treatment provider from four days following the injury to the present, makes no mention of any left shoulder problems from July to September of 2012.

- Dr. Hewitt, the Claimant's surgeon, first sees the Claimant on May 7, 2012. From that first visit through his visits in September of 2012, there is no mention of any left shoulder complaints.

- The physical therapy records from Concentra (Claimant's Exhibit 10) in the July through September 2012 time period make no mention of left shoulder pain or problems.

The Division IME, Dr. Sharma, reviewed the records from that time period five to six months following the injury and found no mention of any left shoulder pain or problems. Thus, the Claimant's testimony that he began having left shoulder complaints five to six months after his injury and reported those complaints to providers is not supported by the medical and physical therapy records.

The medical records reflect a much later reporting of left shoulder symptoms to the Claimant's providers than per the Claimant's testimony. The first record of any left shoulder complaint did not occur until September of 2013 – more than 17 months after the right shoulder injury and almost a year after when he testified he reported his left shoulder problems to providers.

- On September 9, 2013 (one year and five months after the March 22, 2012 injury date), the Claimant tells Dr. Danahey he has left shoulder soreness that started two weeks earlier (late-August, 2013).

- On September 30, 2013, Dr. Danahey explains the Claimant is primarily feeling the left shoulder pain at night; there is no association with physical therapy. The Claimant states to Dr. Danahey there was no specific event that occurred to the left shoulder. He wondered if it was gradual overcompensation, but he was doing nothing at work that aggravated the left shoulder. Dr. Danahey examined the shoulder and the findings were minimal. The Claimant had full abduction, full forward flexion, excellent motion, excellent strength, and no popping or clicking. Dr. Danahey suspected arthritis and took an x-ray.

- The Claimant again wondered on October 21, 2013 whether his exercises in physical therapy might have aggravated the left shoulder. But, his primary complaint was merely increasing discomfort in the shoulder without any aggravation from his work. Dr. Danahey questioned whether worker's

compensation should handle the complaint, since there was nothing specifically tied to work with the left shoulder complaints. Dr. Aschberger was asked to help with both the right and left shoulder complaints. Dr. Aschberger reported the left shoulder as having "irritation." He believed there might be bursitis in the left shoulder. He "suspected" some aggravation with physical therapy.

- Physical therapy records from around that time provide little support for the Claimant's report of an injury in physical therapy. On September 11, 2013, the Claimant reported to his physical therapist that he feels a "little achy" in both shoulders perhaps because of the rainy weather. He noted he tolerated the prior treatment without any adverse reactions. On September 27, 2013, the Claimant reported to the physical therapist he had not been sleeping well because he stopped taking sleep medication. The Claimant noted he was not comfortable on the left or the right side. On October 21, 2013, the Claimant reported pain on the left shoulder to his physical therapist; he wondered if he "slept too long on it and [that] caused him the pain."

Following evaluations of the left shoulder, which included an x-ray, the treatment providers reached a consensus that it may be possible there was some overcompensation, but there were a myriad of possible causes. Overcompensation as a cause for the left shoulder complaints was a possibility, not a probability. Eventually, Dr. Danahey noted the left shoulder was not related to the current injury.

An impairment rating was provided by Dr. Aschberger, who opined the Claimant's left shoulder irritation had a multifactorial etiology, "The etiology is likely multifactorial and [overuse] can certainly play a role. The left shoulder is not directly related to the original event, however." The records do not support the Claimant's report of left shoulder pain five to six months after the original injury. While there is a "possibility" of work relatedness of the left shoulder, it does not rise to level of a probability.

Based on the findings of Drs. Aschberger and Danahey regarding impairment and permanent impairment, a final admission of liability was filed consistent with their findings. The Claimant objected and requested a Division IME. In his request for a Division IME, the Claimant requested the following body parts be evaluated: "neck, right shoulder, right shoulder blade and left shoulder." Dr. Sharma was chosen as the Division IME. In his June 10, 2014 report, he agreed the Claimant attained MMI for the work related components of his injury on January 20, 2014 with a 21% scheduled rating of the right upper extremity. If converted, the whole person rating was 13%. Respondents filed a final admission consistent with Dr. Sharma's report.

On causation, Dr. Sharma had numerous opportunities to state in his report there was a causal relationship between the Claimant's left shoulder complaints and the work injury, but makes no mention that he believes the left shoulder is related. Dr. Sharma's "Final Impressions" are:

- Claimant is at MMI as of February 6, 2014;
- Final whole person impairment of 13%;
- Status post subacromial decompression right shoulder;
- Status post right shoulder rotator cuff repair;
- Status post right shoulder distal clavicle resection;
- Maintenance therapy: None at this time. This patient has achieved maximum medical improvement and requires no maintenance care;
- Permanent work restrictions: The patient will be assigned a 10-pound permanent work restriction overhead lifting only. The patient is capable of working full duty in all other capacities at this time. This will be the least disruptive to his current position and will maintain him for the long-term.

Dr. Sharma's impairment rating analysis rates only the right shoulder, not the left. There is no evidence Dr. Sharma's rating was inconsistent with the Act, the Rules, or the AMA Guides. He rated the right shoulder for range of motion deficits and for the distal clavicle resection of the right shoulder. Dr. Sharma finds a right upper extremity rating of 21%. As provided for by the Colorado Division of Workers' Compensation, Dr. Sharma provides the whole person equivalent of 13% WP for the 21% right upper extremity rating. Dr. Sharma provides the appropriate worksheet for the right shoulder impairment evaluation. There is no mention of any related left shoulder injury or impairment when performing impairment rating.

Dr. Sharma's review of the medical records is provided in almost 18 pages of detailed notes regarding the Claimant's treatment over the years. The chronology is thorough and demonstrates Dr. Sharma's comprehensive knowledge of the Claimant's complaints and treatment. Dr. Sharma noted the diagnostics, injections, surgeries, physical therapy, medications, and massage therapy provided to him by his treatment providers. Dr. Sharma goes through the 99 physical therapy visits the Claimant attended. There is no documentation supporting the Claimant's allegation he injured his left shoulder in therapy. Dr. Sharma documents on August 14, 2013 that the Claimant externally rotated his injured right arm, which aggravated his right shoulder. But there is no corresponding records indicating the Claimant injured his left shoulder in therapy.

In his Division IME report, Dr. Sharma found no causal relationship between claimant's left shoulder complaints and the work injury. He notes there was no initial injury to the left shoulder. He chronicled the long history of treatment provided to claimant that included diagnostics, therapy, mental health counseling, injections, massage, and two surgeries. In addition to Drs. Danahey and Aschberger, the Claimant was also treated by Dr. Hewitt (surgeon), Dr. Esparza (psych), and various therapists and radiologists. None of the treating physicians found it probable the left shoulder complaints related to the work injury. Some acknowledged the possibility based on the Claimant's reports, but there were causes (the weather, sleeping on it the wrong way) that made causation difficult to associate with the work injury. The PT notes do not support claimant's version of how left shoulder began hurting.

Dr. Sharma thoroughly documented his review of the records. When the treatment providers questioned the relatedness of the left shoulder complaints to the work injury, Dr. Sharma stated he agreed when Dr. Aschberger found the left shoulder should not be part of the claim. Dr. Sharma stated it was “appropriate” to not include the left shoulder. This finding is consistent with causation standards that demand the causation be probably related to the work injury, not possibly related.

The Claimant relies on the opinion of Dr. Gellrick, his IME physician. Dr. Gellrick did not testify at hearing. Like other providers and evaluators, Dr. Gellrick admits it is a possibility the left shoulder is related to the work injury. Dr. Gellrick in her report states she agrees with Dr. Aschberger that the Claimant may have overcompensated with his left shoulder as the right shoulder was being rehabilitated, but her opinion never rises to the level of probability that the left shoulder is related to the work injury. The opinion of Dr. Gellrick is also less persuasive on this issue than that of the treating physicians, Drs. Danahey and Aschberger and the Division IME Dr. Sharma.

At the hearing, the Claimant testified that he believed he overused his left shoulder in therapy and that caused his left shoulder to begin hurt. That may be possible, but he has not established it is probable. The Claimant provided various explanations of why his left shoulder hurt. He told providers it was the poor weather. He indicated he might have slept on it wrong. He thought it was possible he was overcompensating. All of these are possibilities. The medical evidence ultimately demonstrates that the Claimant’s theory is only a possibility and not probable as a cause for the left shoulder pain sufficient to meet the burden of proof.

The Claimant has failed to establish that it is more likely than not that his left shoulder condition is causally linked to a work related exposure.

ORDER

It is therefore ordered that:

1. The Claimant suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. The opinion of the DIME physician Dr. Sharma was not ambiguous and he did not find the Claimant’s left shoulder to be causally related to the Claimant’s work-related exposure.

3. The Claimant failed to establish by a preponderance of the evidence that his left shoulder condition is causally related to his work injury.

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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. 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: December 1, 2015

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

ISSUES

The issues to be determined are as follows:

1. Whether the Claimant has proven that his request for right shoulder surgery recommended by Dr. Hatzidakis is reasonable, necessary and related to his work-related injury of September 18, 2012.

2. Whether the Claimant has proven that he is entitled to temporary total disability benefits from January 22, 2013 through March 31, 2013.

FINDINGS OF FACT

1. The Claimant is a 56 year-old man who sustained an admitted work-related injury on September 18, 2012. The Claimant's job duties are typically to deliver tanks of oxygen to patients who need home delivery. Prior to his injury, the Claimant testified that he could do his job with no restrictions. The Claimant testified that there is an FDA regulation that the delivered tanks have only one label with the name of the correct center on the tank. So, the employees were scraping the labels with the name of an incorrect center off the tanks. The Claimant was lifting tanks to assist with this process. He testified that he was twisting and lifting an oxygen cylinder that weighed about 15 pounds from floor level to about a 4-5 foot height when his right forearm was slashed by a blade from a knife used to remove labels that had been left on a cart shelf near where the Claimant was working. When the laceration occurred, the cylinder the Claimant was lifting was about shoulder height. The Claimant testified that as he felt the pain of the laceration, he jerked his arm away and that he hurt his shoulder as well as sustaining the laceration to the forearm. The Claimant testified that he is unsure about what he did with the oxygen tank that he was in the process of lifting. Upon sustaining the laceration, the Claimant testified that he immediately called out for assistance and a supervisor came over and put gauze on the cut and took the Claimant to the Emergency Department at Good Samaritan Hospital. He further testified that he told the doctor at the ER that he had laceration in his right arm and pain in his right shoulder. The Claimant's testimony on the mechanism of injury and initial emergency treatment is supported by the records in evidence, is credible and is found as fact.

2. The Claimant testified that he next saw Dr. Leonard at the clinic. He testified that he personally marked X's on the pain diagram on his forearm and shoulder. He couldn't fill out the rest of the form himself. The pain diagram in Claimant's Exhibit 1 dated 9/27/12 does have his right forearm and his right shoulder marked with X's which is consistent with the Claimant's testimony. The Claimant testified that he also told Dr. Leonard that he strained his shoulder in addition to the laceration. The Claimant

testified that he was referred to physical therapy for the shoulder, going to the clinic in Lafayette. The Claimant's testimony regarding his initial care with Dr. Leonard is credible and found as fact.

3. The Claimant saw Dr. Leonard on October 18, 2012 for recheck of the laceration on the right arm. The Claimant reported that, since his initial visit at Dr. Leonard's clinic on October 4, 2012, the Claimant had started therapy and was feeling a little better. The Claimant reported "pain over the anterior aspect of the shoulder with exercises. Physical examination confirmed mild tenderness to palpation over the anterior lateral shoulder region of the Claimant's right and left shoulders. Dr. Leonard noted "little, if any, tenderness while testing for impingement." Dr. Leonard suspected that the Claimant may have strained his biceps tendon and recommended continuation of supervised physical therapy. Dr. Leonard imposed a 10 pound lifting restriction for the right upper extremity (Claimant's Exhibit 1).

4. The Claimant saw Dr. Leonard again on November 15, 2012 for a recheck. Dr. Leonard noted the Claimant's right shoulder was improving and that he was moving his shoulder more easily. Examination showed "little, if any, tenderness while testing for impingement" and good rotator cuff strength. Dr. Leonard recommended continuation of physical therapy for the shoulders. He also recommended work restrictions limiting lifting to 15 pounds with the right upper extremity (Claimant's Exhibit 1).

5. On December 13, 2012, the Claimant saw Dr. Leonard again for a recheck appointment for the right arm and the Claimant reported no change in his symptoms. Dr. Leonard noted that he suspected "pectoralis major and minor strain." Dr. Leonard recommended an MRI with contrast for the right shoulder and noted that further treatment, which may include an injection or further therapy, would be based on the MRI. The 15-pound lifting restriction for the right upper extremity was continued (Claimant's Exhibit 1).

6. Although Dr. Leonard recommended a shoulder MRI at the visit on December 13, 2012, and further treatment would be based in part on those results, the Insurer declined to authorize the MRI, and instead sent the Claimant to Dr. Timothy Pater, a colleague of Dr. Leonard. Michael Ketter a senior claims consultant for Insurer had reviewed some of Dr. Leonard's medical records and physical therapy reports and determined that Dr. Leonard had not sufficiently established causation. Therefore, without having another physician review the MRI request from Dr. Leonard, the request was denied.[1] This denial proceeded to a hearing and ALJ Harr found that Mr. Ketter, and not Dr. Leonard, referred the Claimant to Dr. Pater for the MMI determination and impairment rating. Dr. Pater had only assessed the Claimant's forearm laceration, and

[1] In Dr. Lesnak's August 13, 2014 medical record review, he noted that Dr. Allison Fall later performed a Rule 16 review on the request for an MRI on September 24, 2013 and she stated, "in my opinion, Dr. Leonard"s request for a right shoulder MRI is reasonable and necessary based on the initial ER complaints and the ongoing complaints about the right shoulder area despite conservative treatment" (Respondents' Exhibit A, p. 18).

declared that the Claimant was at MMI with zero impairment on February 25, 2013. Based upon this opinion, the Insurer filed a Final Admission of Liability on March 20, 2013. The Claimant proceeded to challenge the FAL, and a Hearing was conducted on July 31, 2013. ALJ Harr ultimately determined that Dr. Pater was not an authorized physician, having not been referred in the ordinary course of treatment, and that Respondents could not rely on his declaration of MMI (Respondents' Exhibit F). However, for the purposes of determining eligibility for temporary disability benefits in this hearing, the date Dr. Pater placed the Claimant at MMI is still relevant.

7. On October 17, 2013, the Claimant underwent an MRI. The MRI report was not offered into evidence by either party. However, in his medical record review, Dr. Lesnak quoted directly from the report which stated, "Partial thickness articular sided rim rent type tear of the distal supraspinatus and infraspinatus tendons. No full thickness tear visualized, mild subacromial/subdeltoid bursitis. SLAP type glenoid labral tear with full thickness chondral loss at the anterior central glenoid cartilage. Osteoarthritis which is moderate to severe at the acromioclavicular articulation and mild to moderate at the glenohumeral articulation. There is anterolateral downsloping of a type 2 anterior acromion with undersurface spurring noted. An element of impingement is not excluded" (Respondents' Exhibit A, p. 19). After reviewing this MRI report with the Claimant, Dr. Leonard recommended that the Claimant see Dr. Cooney, who ultimately performed a subacromial injection on January 7, 2014 and a fluoroscopically guided intraarticular glenohumeral injection on February 24, 2014. Dr. Cooney noted that if the second injection did not provide benefit, then a surgical intervention should be considered (Respondents' Exhibit A, p. 19).

8. The Claimant testified that following the work injury and after his laceration had healed, he continued to work for his Employer with a weight restriction for lifting. He performed modified duty for approximately 4 months, working within his restrictions. The Claimant testified that in January 2013, he was told by his supervisor that he could no longer work light duty but that he couldn't work full duty until he received a medical release. The Claimant testified that Dr. Pater placed him at MMI and he brought paperwork to his Employer and went back to full duty work in March of 2013. Although the Claimant disputed the finding of MMI, he nevertheless had returned to work and no longer suffered a wage loss from that point forward. The Claimant's testimony generally corresponds to medical records in evidence on this issue and the August 12, 2013 Order issued by ALJ Harr, and his testimony on this issue is found as fact.

9. The Claimant testified that he is currently employed as a truck driver for a different employer. His current job duties include driving a truck, and loading and unloading pallets.

10. Claimant testified that his current authorized treating physician (ATP) is Dr. Mason and that she referred him to Dr. Hatzidakis to evaluate right elbow and shoulder pain. Claimant saw PA Fenton and Dr. Hatzidakis at Dr. Hatzidakis' office on two appointments in February and March 2015 (Claimant's Exhibit B, Respondents' Exhibit 3).

11. The Claimant testified that he currently experiences right shoulder pain and his current right shoulder symptoms are that he feels like it is "pinched" and "fatigued." He testified that he can neither move his arm to the side or above shoulder height, nor can he move his arm towards his back. The Claimant testified that he can push and pull with his right arm. The Claimant testified that his current work as a truck driver requires job duties consisting of moving pallets and office products, requiring pushing and pulling. The Claimant testified that he wants the surgery requested by Dr. Hatzidakis because he feels it is his only option, based in the fact that he has not had relief from medications, physical therapy and two injections. He testified that he has lived with the pain for the last 3 years and it is not getting better.

12. On August 13, 2014, the Claimant first saw Dr. Lawrence Lesnak for an Independent Medical Evaluation. Dr. Lesnak prepared a thorough written report, found at Respondents' Exhibit A, pp. 220-229. Dr. Lesnak took a history from the Claimant and discussed the Claimant's current symptoms. The Claimant complained of "constant pain involving his right anterior shoulder and occasional pain radiating into his right medial upper arm" along with "intermittent 'tightness' involving his right volar forearm." The Claimant reported symptoms increased with any type of overhead activities with the right upper extremity. Dr. Lesnak prepared an extensive summary of his review of medical records from May of 2005 – February of 2014. Although Dr. Lesnak noted a significant history of documented low back pain from 2005 to 2012, there is no record of right shoulder symptoms prior to the Claimant's 9/18/2012 work injury. Dr. Lesnak also conducted a physical examination and noted the Claimant had "giveway weakness secondary to pain when testing his right shoulder abductor musculature, right shoulder flexor musculature, and right elbow flexor musculature." Dr. Lesnak also noted tenderness to palpation over the Claimant's right anterior shoulder in the area of his right proximal biceps brachia tendon. Dr. Lesnak concluded that the Claimant's ongoing symptoms "correlate with a right biceps tendinitis" but he did not find clinical evidence of right rotator cuff impingement signs or symptomatic intraarticular right shoulder pathology or symptomatic right AC joint pathology. Dr. Lesnak did not find the Claimant a candidate for any type of surgical intervention directed at his right shoulder. Although, Dr. Lesnak did find that consideration of a one-time diagnostic/therapeutic right proximal biceps tendon sheath injection had merit prior to placing the Claimant at MMI. He opined that "any further treatments at this point in time should only be directed at his right proximal biceps tendon as it would pertain to the occupational injury of 09/18/2012" (Respondents' Exhibit A, pp. 220-229).

13. On December 15, 2014 the Claimant saw Dr. Mason for his initial evaluation with her office. Dr. Mason notes the Claimant suffered a right forearm laceration that has healed and right shoulder pain. Dr. Mason notes the Claimant continues to complain of forearm symptoms and pain in the anterior shoulder. On physical examination, Dr. Mason noted that the Claimant was "able to give full resistance of supraspinatus and deltoid but he describes pain in the shoulder. Impingement signs are weakly positive times one. Speed's test is positive. Maximum tenderness in the bicipital groove and, to a lesser extent, over the common rotator cuff

tendon." She assessed the Claimant with probable bicipital tendinitis with some evidence of rotator cuff involvement. Dr. Mason reviewed prior medical records and performed a physical examination. She noted that the Claimant received a shoulder injection and four physical therapy visits that did not improve the condition. In fact, the Claimant reported the physical therapy was too painful to continue. The Claimant advised Dr. Mason he had not received any medical treatment since a 2/24/14 follow up visit with Dr. Cooney, the doctor who provided a subacromial injection on 1/9/14. Dr. Mason referred the Claimant to Dr. Hatzidakis and noted the Claimant was not enthusiastic about medications or invasive options such as injections or surgery (Claimant's Exhibit 2, Respondents' Exhibit E, pp. 49-52).

14. The Claimant saw Dr. Mason again for a follow up examination on January 12, 2015. Dr. Mason noted that the Claimant was awaiting authorization for an appointment with Dr. Hatzidakis. The Claimant reported that the Claimant continued to report anterior shoulder pain and was able to lay on the shoulder only for short periods. The Claimant reported that driving was painful and keeping his arm extended for any reason is painful. The Claimant stated that he had trouble tolerating the MRI and that he feels things are getting worse with time with a current pain level of 7/10 (Claimant's Exhibit 2; Respondents' Exhibit E, p. 46).

15. On February 27, 2015, the Claimant saw Duane Fenton, PA-C at the office of Dr. Armodios Hatzidakis for evaluation of right shoulder and right elbow pain. Mr. Fenton performed a physical examination and noted that a right shoulder MRI from October 20, 2013 showed a partial-thickness articular surface rotator cuff tear. Mr. Fenton recommended an MRI with arthrogram to evaluate the rotator cuff, labrum and biceps tendon (Claimant's Exhibit 3; Respondents' Exhibit B, pp. 29-31).

16. The Claimant underwent an MRI of his right shoulder on March 11, 2015, at the request of Dr. Hatzidakis. The MRI report documented a type I acromion with moderate lateral downward sloping and noted a small partial thickness tear of the rotator cuff. It also identified early infraspinitis tendinosis and mild to moderate impingement anatomy (Claimant's Exhibit 4; Respondents' Exhibit C).

17. The Claimant saw Duane Fenton, PA-C from Dr. Hatzidakis' office again on March 24, 2015 and Dr. Hatzidakis also evaluated the Claimant and recommended the treatment plan. After review of the shoulder MRI from March 11, 2015, and a long discussion with the Claimant about his treatment options, Dr. Hatzidakis recommended surgical intervention and the Claimant advised that he was seriously considering the recommended surgery (Respondents' Exhibit B, pp. 24-25).

18. The Claimant saw Dr. Mason again on March 25, 2015 and she noted that Dr. Hatzidakis was recommending a subacromial decompression. Dr. Mason noted the Claimant continued to be tender to palpation over the extensor bundle with some tenderness over the bicipital groove. She opined that "impingement signs are strongly positive times two" with ongoing tenderness over the AC joint and some myofascial spasm in the trapezius. Dr. Mason assessed "right shoulder impingement and bicipital

tendinitis, which has become more symptomatic over time." Dr. Mason opined that "it does seem reasonable to go forward with surgery at this point as the patient has had a full trial of conservative care" (Claimant's Exhibit 2; Respondents' Exhibit E, p. 40).

19. The Claimant saw Dr. Mason again on April 23, 2015 and she noted that she had reviewed a note from Dr. Hatzidakis' PA that the proposed surgery was denied. Dr. Mason continued to asses "right shoulder impingement and bicipital tendinitis, more symptomatic over time, with a partial rotator cuff tear." Dr. Mason opined that she is "in agreement with him going forward with the surgery given that his symptoms have not remitted with a full trial of conservative care. I am not sure what the basis for the denial is…." (Claimant's Exhibit 2; Respondents' Exhibit E).

20. The Claimant saw Dr. Mason on June 25, 2015 for a follow up examination. On physical examination, Dr. Mason again noted, "impingement sign is strongly positive times two" with tenderness noted over the common rotator cuff tendon, bicipital groove and AC joint. She found no muscle atrophy but noted that "rotator cuff tests are somewhat provocative of pain, particularly supraspinatus." Dr. Mason also noted that the Claimant informed her that he had an IME scheduled but was not sure what type of doctor he was seeing for this (Claimant's Exhibit 2).

21. The Claimant saw Dr. Lesnak again for a reevaluation IME on July 21, 2015. Dr. Lesnak's IME report dated July 21, 2015 is found at Respondents' Exhibit A, pp. 3-9. Dr. Lesnak reviewed new medical records and performed another physical examination and interview. This July 21, 2015 report documented that rotator cuff impingement signs were negative. Dr. Lesnak reported that the Claimant had tenderness to palpation over his right anterior shoulder in the area of his right proximal biceps tendon but had no tenderness to palpation throughout the right suprascapular and scapular region, the glenohumeral joint or the AC joint. The July 21, 2015 IME report documented that the Claimant had undergone two corticosteroid injections on the shoulder, subsequent to an October 2013 MRI. Dr. Lesnak noted that the Claimant had a non-diagnostic response to these injections. Dr. Lesnak documented in the July 21, 2015 IME report that when he first examined the Claimant at the August 13, 2014 IME, the Claimant presented with clinical evidence of right proximal biceps tendinitis without clinical evidence of any other type of shoulder pathology, including any signs of impingement.

22. Dr. Lesnak noted in the July 21, 2015 IME report that the Claimant was referred to Dr. Hatzidakis' office by Dr. Mason for consideration of an ultrasound guided proximal biceps tendon sheath injection. Dr. Lesnak noted that upon examination at Dr. Hatzidakis' office, what Dr. Lesnak opines was a very incomplete history was obtained from the Claimant prior to Dr. Hatzidakis or his PA recommending an MRI. Dr. Lesnak also documented that the Claimant returned to Dr. Hatzidakis' office for follow-up with the PA, who again, per Dr. Lesnak's opinion, did not obtain a complete history, but then recommended right shoulder surgery based on the MRI which reported unchanged right shoulder joint pathology. Dr. Lesnak noted that the right biceps injection requested by Dr. Mason was not performed (Respondents' Exhibit A, p. 8).

23. Dr. Lesnak opined in the July 21, 2015 IME report that the Claimant had a non-diagnostic response to two steroid injections in the right shoulder. He opined that this would confirm that the Claimant's current symptoms are not stemming from any pathology involving the right shoulder joint, including a small partial thickness tear with tendinosis and osteoarthritis. He further opined that therefore, the Claimant is not a candidate for surgery directed at the right shoulder for treatment of a non-symptomatic reported MRI pathology. Dr. Lesnak opined that there is no evidence that any of the Claimant's right shoulder joint pathology is related to the September 18, 2012 work injury. He stated that this was due to the fact that no treating physician noted any evidence of shoulder impingement or symptomatic right shoulder joint pathology for at least five months subsequent to the date of the work injury. Dr. Lesnak specifically noted that the Claimant's most recent ATP, Dr. Mason, documented that Claimant had no significant evidence of impingement from the time of her initial evaluation on December 15, 2014 through February 2015 and only noted it beginning in March 2015, two and half years after the date of injury (Respondents' Exhibit A, p. 9).

24. The Claimant saw Dr. Mason again on July 30, 2015 for a follow up examination. Dr. Mason noted that the Claimant underwent an IME with Dr. Lesnak but has not seen the report yet. Dr. Mason expressed some disappointment that the IME was not with an orthopedic surgeon since the question was surgical. On physical examination, Dr. Mason noted "Neer and Hawkins-Kennedy impingement signs are both present" with tenderness over the common rotator cuff tendon, bicipital groove and AC joint. She also noted "quite a bit of tightness in the trapezius and somewhat of a forward rotation of the shoulder." She noted a "painful arc" between approximately 60 and 120 degrees. Dr. Mason continued to assess, "right shoulder impingement, bicipital tendinitis and partial rotator cuff tear with surgery recommended but not yet authorized" (Claimant' Exhibit 2).

25. Dr. Mason testified in a prehearing deposition on October 5, 2015. Dr. Mason testified that she began treating Claimant on December 15, 2014 and she had reviewed medical reports from Dr. Lesnak as well (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp 4-5). She testified that she was unaware of Claimant having any prior shoulder problems prior to his date of injury (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 6).

26. Dr. Mason testified that she performed a physical examination of Claimant's shoulder and found no instability. She stated that her initial assessment was probable bicep tendonitis and possibly rotator cuff involvement (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 7-8). She testified that she referred Claimant to Dr. Hatzidakis who referred Claimant for a second MRI of the right shoulder. Dr. Mason testified that it was her opinion that the tendonitis and Claimant's anterior shoulder pain began with the work-related injury because these structures are in close proximity to each other. She further opined that Claimant does have some pain coming from the biceps tendon due to the work related injury (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 9).

27. Dr. Mason testified that it was her understanding that PA Fenton from Dr. Hatzidakis' office was more concerned with the rotator cuff tear and the possibility of impingement (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 10-11). Dr. Mason testified that Dr. Hatzidakis had recommended arthroscopic surgery, which is expected to be rotator cuff repair and subacrominal decompression. Dr. Mason testified that she agrees with this recommendation (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 13).

28. Dr. Mason stated that the second MRI of the right shoulder, performed in March 2015, demonstrated normal biceps, a small partial tear of the supraspinatus, some impingement, and a little arthritis (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 12). Dr. Mason testified that upon examination, the Claimant did have a positive Speed's test, which assesses biceps tendon stress. She further testified that Claimant was not particularly tender over the AC joint and that the AC joint provocation tests were not positive (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 8). She also testified that the Claimant has had clinical impingement signs and the MRI showed impingement anatomy, so she is in disagreement with Dr. Lesnak on this point (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 14-16).

29. On cross-examination, Dr. Mason testified that the Claimant was averse to both medications and physical therapy and that the physical therapy actually made his pin worse. She noted that the Claimant had four physical therapy sessions and saw no improvement, so she did not recommend that the Claimant continue with physical therapy (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 21). Dr. Mason also agreed that the Claimant had undergone a subacromial injection with Dr. Cooney and that there was no benefit (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 23-24).

30. Dr. Lesnak testified at the hearing regarding his IMEs and record reviews performed in this case. He testified that the Claimant reported to him that he sustained an acute work-related laceration to his right forearm while moving an oxygen cylinder. Dr. Lesnak noted that the Claimant went the ER for the laceration. He further noted that the medical records document that the Claimant reported some tenderness reported by Claimant in the front part of the shoulder. Dr. Lesnak testified that nine days after the date of injury, the Claimant's then ATP, Dr. Leonard, noted that the laceration was healing and that Claimant had also suffered a strain to his biceps tendon. Dr. Lesnak testified that the biceps tendon and chest muscles are outside of the shoulder joint. Dr. Lesnak further testified that about 6 weeks later Dr. Leonard had noted the forearm and front of the shoulder symptoms improving. Dr. Lesnak testified regarding the Claimant's MRIs . He testified that there was no presentation of an abnormal biceps tendon on an MRI. However, Dr. Lesnak did agree that an MRI may be normal and but an individual can still have symptoms stemming from the biceps tendon. Dr. Lesnak also testified that the MRI showed a partial thickness tear of the distal supraspinatus and infraspinatus tendons. Although, he also testified that current medical literature states that 75% of the general population over age 50 have partial rotator cuff tears. In discussing the March 11, 2015 MRI, Dr. Lesnak explained that the documented MRI findings were

inconsistent because the radiologist noted “impingement anatomy,” but that there was no evidence of impingement in the MRI and furthermore, that would not be something that a radiologist would see on an MRI because the MRI described type 1 acromion, which is anatomy not associated with impingement syndrome. He noted that if there was type II or type III acromion shown, then this could possibly lead to impingement. Dr. Lesnak testified that Claimant’s 2015 MRI noted a type I acromion which does not indicate impingement, even though a radiologist noted impingement anatomy.

31. Dr. Lesnak testified that Dr. Leonard had overseen injection therapy but the Claimant saw no improvement in his symptoms from those injections. Dr. Lesnak testified that there was diagnostic information obtained from those injections because the Claimant had no relief from them. Essentially, the lack of relief was an indicator that there were no symptoms generated from inside the shoulder, where the injection was performed.

32. Dr. Lesnak noted that the Claimant presented at the IME complaining of a constant soreness in the right anterior shoulder region that was worsened with prolonged driving activity. Dr. Lesnak further testified that Claimant also reported increased pain when attempting to move his arm in front of him across his body. Dr. Lesnak had documented in his IME report that it was his opinion that the Claimant presented with clinical evidence of a proximal right biceps tendinitis without clinical evidence of right rotator cuff impingement signs or symptomatic right AC joint pathology. He further testified that Claimant had no clinical evidence of symptomatic intra-articular right shoulder joint pathology and had a previous non-diagnostic response to the corticosteroid injection trials performed by Dr. Cooney. He testified that the Claimant had two intra-articular joint injections performed and had no diagnostic responses, noting that the injections did not numb or take away Claimant’s reported symptoms. He testified that it was his opinion that all of this indicated that the symptoms were not coming from those joints. Dr. Lesnak testified that there was no evidence of impingement and had a negative diagnostic response to the shoulder injections. He further testified that the Claimant is working full duty but that the Claimant perceives himself as functionally limited. Dr. Lesnak testified that during both of his examinations of the Claimant, he opined that the symptoms were coming from outside the shoulder joint. Dr. Lesnak testified that it was his opinion that, within a reasonable degree of medical probability, the proposed shoulder surgery is not indicated and that it would not help the Claimant’s condition because the symptoms are not coming from the shoulder joint. Dr. Lesnak testified that the current medical literature does not recommend surgical intervention for partial tears. Dr. Lesnak’s opinion regarding the lack of evidence of impingement is at odds with the opinions of other treating physicians in this case and the MRI reports. Additionally, Dr. Cooney, the physician who performed the injections noted that if there was no response, then surgical intervention should be considered, which contradicts Dr. Lesnak’s opinion that the lack of benefit from the injections was a contraindication for surgical intervention.

33. On cross examination, Dr. Lesnak testified that the Claimant’s mechanism of injury is not consistent with the shoulder injury on the MRI. He opined that when a

person is lifting a 15-pound oxygen tank at shoulder level, a person would not put any significant stress on the rotator cuff. He stated that stress or injury to the rotator cuff would only occur if there was lifting above the shoulder level or overhead. He testified that the Claimant is too tall for the injury to occur with him lifting above the shoulder. He opined that as the Claimant reported the mechanism of injury, the Claimant would only have been lifting at or below shoulder level. Dr. Lesnak opined, that based on the Claimant's reported mechanism of injury, if anything was stressed during the work accident, it would be the Claimant's biceps tendon, not his shoulder joint or rotator cuff. Dr. Lesnak stated that if anything, the Claimant would have been extending or flexing his elbow because he was lifting, and that would stress the biceps tendon. Dr. Lesnak testified that he had previously recommended an injection to the right proximal biceps tendon but was unsure what he would currently recommend that because he is not sure if it would help given the amount of time that has passed. He does disagree with Dr. Mason that the Claimant needs a rotator cuff repair with subacromial decompression.

34. In considering the opinions of Dr. Mason and Dr. Lesnak, the ALJ finds the opinion of Dr. Mason, as further supported by the medical records from the office of Dr. Hatzidakis and the Claimant's MRI imaging, to be more persuasive than the opinion of Dr. Lesnak in this case.

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. 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 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 – Related and Reasonably 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. 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).

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).

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).

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).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the “Medical Treatment Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff’d Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In this claim, there was no persuasive evidence presented of the Claimant being symptomatic in his right shoulder prior to his reported work injury on September 18, 2012. As stated above, the Claimant was performing his work duties for his Employer which provides home oxygen equipment and supplies. The employees were scraping labels off of oxygen tanks. The Claimant was moving oxygen tanks that were having old labels scraped off, moving them from the bottom shelf of a cart and pivoting around to place them on a counter up at a higher level. As the Claimant was lifting one of the tanks he felt that his right arm was being sliced open, and he abruptly jerked his arm away from the blade while releasing the tank.

After Claimant was seen at the Emergency Room, he went to Front Range Orthopedic on September 27, 2012. The intake form filled out by the Claimant shows demarcations of pain on his right forearm, the site of the laceration, and his right shoulder. On October 18, Dr. Leonard stated that the Claimant likely strained his shoulder at the time of injury, and limited Claimant to 10 pounds lifting. Physical therapy was done. On November 15, Dr. Leonard increased lifting to 15 pounds, assessment of right shoulder bursitis and right forearm laceration. Dr. Leonard recommended a shoulder MRI at the visit on December 13, 2012, and indicated further treatment would be based in part on those results.

The Insurer declined to authorize the MRI, and instead sent the Claimant to Dr. Timothy Pater, a colleague of Dr. Leonard. Dr. Pater only assessed the Claimant's forearm laceration, and declared that the Claimant was at MMI with zero impairment. Based upon this opinion, the Insurer filed a Final Admission of Liability. The Claimant proceeded to challenge the FAL, and a Hearing was conducted on July 31, 2013. The ALJ determined that Dr. Pater was not an authorized physician, and that Respondents could not rely on his declaration of MMI. Meanwhile, the Claimant lost time from work due to the continuing restrictions from Dr. Leonard beginning in January of 2013, and he did not return to work until he obtained a full duty release in March of 2013.

Following the Order from the ALJ on the issue of MMI and striking the FAL, the Claimant resumed medical treatment for this work injury, and received two injections at Front Range Orthopedic Center. His care was then transferred to Kristin Mason, M.D. On December 15, 2014, Dr. Mason assessed the Claimant with probable bicipital tendinitis, with some evidence of rotator cuff involvement as well. She referred the Claimant to Dr. Hatzidakis, an orthopedic surgeon. The Claimant was evaluated at Western Orthopedics on February 27, 2015. The assessment was traumatic right shoulder pain with rotator cuff strain, versus possible rotator cuff tear and subacromial impingement. An MRI with arthrogram was recommended for further imaging of the damage. On March 24, 2015, Dr. Hatzidakis reviewed the MRI, and he recommended that the Claimant consider surgery.

The medical benefits issue in this case generally comes down to consideration of the contrasting opinions of Dr. Mason and Dr. Lesnak. In considering the opinions of Dr. Mason and Dr. Lesnak, the ALJ finds the opinion of Dr. Mason, as further supported by

the medical records from the office of Dr. Hatzidakis and the Claimant's MRI imaging, to be more persuasive than the opinion of Dr. Lesnak in this case.

Dr. Lesnak has opined that the Claimant presented with clinical evidence of a proximal right biceps tendinitis without clinical evidence of right rotator cuff impingement signs or symptomatic right AC joint pathology. He further testified that Claimant had no clinical evidence of symptomatic intra-articular right shoulder joint pathology and had a previous non-diagnostic response to the corticosteroid injection trials performed by Dr. Cooney. He testified that the Claimant had two intra-articular joint injections performed and had no diagnostic responses, noting that the injections did not numb or take away Claimant's reported symptoms. He testified that it was his opinion that all of this indicated that the symptoms were not coming from those joints. Dr. Lesnak testified that there was no evidence of impingement and had a negative diagnostic response to the shoulder injections. He further testified that the Claimant is working full duty but that the Claimant perceives himself as functionally limited. Dr. Lesnak testified that during both of his examinations of the Claimant, he opined that the symptoms were coming from outside the shoulder joint. Therefore, Dr. Lesnak testified that it was his opinion that, within a reasonable degree of medical probability, the proposed shoulder surgery is not indicated and that it would not help the Claimant's condition because the symptoms are not coming from the shoulder joint. He also opines that the Claimant's mechanism of injury is not consistent with the shoulder injury on the MRI. Dr. Lesnak opined, that based on the Claimant's reported mechanism of injury, if anything was stressed during the work accident, it would be the Claimant's biceps tendon, not his shoulder joint or rotator cuff. Dr. Lesnak testified that he had previously recommended an injection to the right proximal biceps tendon but was unsure what he would currently recommend that because he is not sure if it would help given the amount of time that has passed. He does disagree with Dr. Mason that the Claimant needs a rotator cuff repair with subacromial decompression.

Dr. Mason testified that the Claimant has consistently described anterior shoulder pain. At the time of her first visit, she was not certain whether this was coming from the biceps tendon, or more from the shoulder area. The newer MRI demonstrated that the biceps tendon looked pretty normal, but there was an articular surface rotator cuff tear coupled with an impingement anatomy. The surgery needed is a rotator cuff repair along with a subacromial decompression. Dr. Mason observed that surgery was mentioned by Dr. Cooney back in early 2014 as a possible treatment option. The impingement anatomy allows for less room for the movement of tendons, and it is probable that the Claimant's condition is a result of the traumatic injury on top of chronic wear and tear. The recoil of the Claimant's arm during the work injury more likely than not caused the rotator cuff problem. Dr. Mason further testified that conservative medical treatment has not helped and the Claimant's condition seems to be worsening, which is also consistent with Dr. Fall's observation on September 24, 2013 during her Rule 16 medical review of the recommendation for an MRI. Ultimately, based on the opinions and recommendations of Dr. Mason and Dr. Hatzidakis, the proposed surgery is found to be reasonable, necessary, and causally related to the accident.

The Claimant has established that the surgical recommendations of Dr. Hatzidakis are reasonable and necessary to treat the Claimant's right shoulder condition.

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*.

The Claimant testified credibly and persuasively that following the work injury, and after his laceration had healed, he continued to work for his Employer with a weight restriction for lifting. He performed modified duty for approximately 4 months, working within his restrictions. The Claimant testified that in January 2013, he was told by his supervisor that he could no longer work light duty but that he couldn't work full duty until he received a medical release. No persuasive evidence to the contrary was presented. The Claimant testified that Dr. Pater later placed him at MMI and he brought paperwork to his Employer and went back to full duty work in March of 2013. Although the Claimant disputed the finding of MMI, he nevertheless had returned to work and no longer suffered a wage loss from that point forward. The Claimant's testimony generally corresponds to medical records in evidence on this issue and the August 12, 2013 Order issued by ALJ Harr.

There was no persuasive evidence to establish the exact start date for TTD. The Claimant did not specifically provide a date in January and no employment or other records were entered into evidence to establish when in January he was not permitted to work. However, the Claimant's testimony that it occurred in January of 2013 is found to be credible. Therefore, the start date will be January 31, 2013. Even if no other evidence was introduced to establish the start date, because the Claimant's testimony was found credible as to the month and no evidence to contradict this was introduced, then the Claimant suffered a wage loss as of January 31, 2013. He may have suffered a wage loss prior to this date in January. However, the Claimant had the burden to establish that date and did not present sufficient evidence of an earlier start date.

There is likewise a problem regarding determination of the exact date in March of 2013 that the Claimant returned to work after bringing a full duty release to his Employer. In the absence of this evidence, the ALJ nevertheless finds that it is not likely Claimant would not have returned to work full duty prior to being placed at MMI by Dr. Pater on February 25, 2013. In addition, the Claimant's testimony that he returned to work in March of 2013 was credible, and no evidence to the contrary was presented. Therefore, it is more likely than not that the Claimant suffered a wage loss due to his injury until at least March 1, 2013. Again, he may have suffered wage loss due to his injury until a later date in March, 2013. However, the Claimant had the burden to establish the last date that he suffered a wage loss that would entitle him to TTD and did not present sufficient evidence of any later date in March of 2013.

Thus, the ALJ concludes that the Claimant has proven entitlement to TTD benefits from January 31, 2013 to March 1, 2013. The Claimant failed to prove entitlement to TTD benefits outside of those dates by a preponderance of the evidence even though it is possible that there was wage loss prior to and after the TTD period determined.

ORDER

It is therefore ordered that:

1. The right shoulder surgery recommended and requested by Dr. Hatzidakis is reasonable and necessary to treat the Claimant's right shoulder condition, and is causally related to the September 18, 2012 work injury.

2. Respondent's liability shall specifically include medical treatment consisting of the above surgery, and all related medical treatment required for appropriate preparation for the surgery, as well as reasonably necessary post-surgical follow-up treatment per the Division of Workers Compensation Medical Fee Schedule.

3. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing January 31, 2013 through March 1, 2013.

4. Respondents shall pay the Claimant statutory interest at the rate of 8% per annum on all amounts 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, 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 petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 14, 2015

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

ISSUES

➢ Whether a new Division-sponsored Independent Medical Examination ("DIME") Panel should be issued in this case based upon respondents filing a motion to cancel and strike the DIME prior to the DIME panel being issued?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on October 29, 2012. Claimant was eventually placed at maximum medical improvement ("MMI") for her injuries and a final admission of liability ("FAL") was filed by respondents in this case. Claimant objected to the FAL and filed a Notice and Proposal to Select an Independent Medical Examiner on June 2, 2015.

2. Respondents subsequently filed a Notice of Failed IME negotiations on June 22, 2015. Claimant then was required to file the application for hearing pursuant to the applicable rules. Notably, W.C.R.P. 11-3(A)(3), states in pertinent part:

> The requesting party shall submit an application for an IME according to 11-3(B), below. If the parties did not agree on the physician, the insurer shall notify the Division and the other party on a prescribed form regarding the failed negotiation within 30 calendar days of their failure to agree. The party disputing the determinations of the authorized treating physician, and seeking review of those determinations ("requesting party") shall file an application for IME within 30 days of the date of the failure to agree upon an IME physician.

3. The parties agree that claimant did not file an application for IME within 30 days of the date the respondents filed the Notice of Failed IME negotiations. Respondents then moved to strike the DIME process on July 28, 2015. A copy of respondents' motion was sent to eh DIME unit.

4. Claimant responded by immediately filing the application for DIME on July 29, 2015.

5. The DIME unit issued a three physician panel pursuant to W.C.R.P. 11-3(C) on July 30, 2015. W.C.R.P. 11-3(C) states in pertinent part:

> <u>IME Physician Selection</u>: If the parties are unable to agree upon a physician to conduct the IME, the Division will select via a revolving selection process a panel of three qualified physicians from its list of qualified physicians, from which one physician shall be designated to perform the IME. To obtain a pool of qualified physicians from which the Division shall make the selection of the three physician panel, the Division shall consider to the extent possible the criteria identified in

> the application for IME as set forth in section 11-3(B) of this rule. The Division will correlate the body parts or medical conditions on the IME application with the appropriate medical treatment guideline on the table designated in section 11-12. The three-physician panel will be comprised of physicians based on their accreditation to perform impairment ratings on the body part(s) and/or medical conditions designated by the requesting party on the IME application. At the time a physician applies to join the IME panel of physicians, he/she shall designate the body parts or medical conditions that he/she is willing and able to evaluate. Physicians electing not to perform impairment ratings on certain body parts or conditions shall not be included in any three-doctor panel where those body parts or conditions are listed on the IME application pursuant to section 11-3(B)(2).

6. Claimant responded to respondents' Motion to Strike the DIME on July 31, 2015. PALJ De Marino denied Respondents Motion to Strike the DIME on August 4, 2015. Claimant struck a physician from the Panel issued by the DIME unit on August 5, 2015.

7. Respondents then filed a Contested Motion to Hold the DIME process in Abeyance, Strike the IME Physician Panel Issued on July 30, 2015 and to reissue the IME Physician Panel on August 7, 2015. This Motion was denied by PALJ De Marino on August 14, 2015. Respondents filed an application for hearing to address the denial of their Motion by PALJ De Marino. Because respondents did not strike one of the physicians, Dr. Yamamoto was selected as the DIME physician on September 9, 2015.

8. Respondents argue that the DIME unit improvidently issued the DIME Panel on July 30, 2015 while their Motion to Strike the DIME was still pending. Respondents argue that the entire DIME proceeding should have been held completely in abeyance while the motion was pending and the issuance of the DIME Panel is contrary to the rules.

9. Respondents noted during the hearing that this case is governed by the rules of procedure as they apply to the DIME process. Notably, W.C.R.P. 11-3(O) states in pertinent part:

> <u>IME Proceedings Held in Abeyance:</u> If a party files a motion involving a pending IME proceeding, the moving party shall provide a copy of the motion directly to the Division's IME Unit. The IME proceeding shall be held in abeyance until the Division IME Unit is notified of the disposition as provided in this rule. When the motion is disposed of by written order or other means, the moving party shall provide a copy of the order or other dispositive document to the Division's IME Unit

10. As respondents noted at hearing, this case hinges on the interpretation of the phrase, "The IME proceeding shall be held in abeyance until …." and whether that phrasing negates an IME panel from being issued where a motion is currently pending.

11. Respondents argue that because the DIME procedure should have been held in abeyance with the filing of their Motion to Strike the DIME on July 29, 2015, the DIME panel that was issued on July 30, 2015 should be stricken.

12. The ALJ finds no error in the issuance of the DIME Physician Panel on July 30, 2015 by the DIME Unit. The ALJ finds that the mere issuance of the DIME Panel does not violate the provision of W.C.R.P. 11-3(O) that requires that the IME proceeding be held in abeyance. The ALJ notes that the Motion was replied to and ruled on within a few days of the Motion and determines that, based on a reading of the rules requiring the IME Unit to provide the parties with the DIME panel under W.C.R.P. 11-3(C) that the filing of a motion does not preclude the IME Unit from issuing the DIME Panel to comply with the DIME process.

13. The ALJ finds that the term "shall be held in abeyance until the Division IME Unit is notified of the disposition as provided in this rule" does not prohibit the DIME Unit from issuing the DIME Panel with the motion pending.

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, 2008. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. As the parties note, there is no current case on point as to how to interpret the Workers' Compensation Rules of Procedure involving the DIME process as it relates to this specific fact scenario.

3. As found, the purpose of the Workers' Compensation Act is not compromised by the interpretation of the Workers' Compensation Rules of Procedure to allow for the DIME Unit to issue the DIME Panel while a motion is pending. In this case, the mere issuance of the DIME Panel does not require that the entire DIME process (going back to the issuance of the DIME Panel) be restarted at this point.

4. Respondents' request to reissue the DIME panel is DENIED.

ORDER

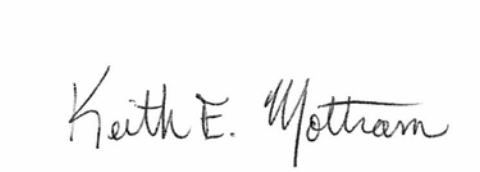
It is therefore ordered that:

1. The DIME procedure may continue with Dr. Yamamoto as the DIME physician.

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: December 30, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-018-01

ISSUES ON REMAND

- Whether Claimant is at maximal medical improvement?
- Whether Claimant has established a permanent impairment?

FINDINGS OF FACT

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

1. This claim involves an admitted left wrist injury and subsequent medical treatments.

2. On June 17, 2014, Claimant's authorized treating physician (ATP), Dr. Mars, placed Claimant at MMI and assigned a 19% upper extremity impairment rating which converts to an 11% whole person impairment.

3. Respondents subsequently filed an Application for Hearing pursuant to the version of Workers' Compensation Rule of Procedure 5-5, 7 CCR 1101-3, in effect at that time. At that time, W.C. Rule 5-5(H) provided that after a determination of permanent impairment from an authorized Level II accredited physician is mailed or delivered, Insurer shall either file a final admission of liability consistent with the physician's opinion, or set the matter for hearing at the Office of Administrative Courts. This Rule was amended effective January 1, 2015. Respondents endorsed, as issues to be heard at the hearing, medical benefits, reasonably necessary, permanent partial disability (PPD) benefits, and whether the scheduled rating for Claimant's industrial injury was correct. Respondents contended that Claimant's left shoulder condition was not related to her admitted injury, the treatment Claimant received for her left shoulder was not reasonable and necessary, and Claimant's scheduled impairment was only 3% of the left upper extremity.

4. In her response to Respondents' Application, Claimant identified medical benefits, authorized provider, reasonably necessary, and temporary partial disability (TPD) benefits from 5/1/2014, through 8/26/2014. As "other issues," Claimant identified temporary total disability (TTD) benefits and TPD benefits from 5/1/2014 to continuing.

5. At the commencement of the hearing, Claimant argued that even though Respondents had endorsed the issue of PPD benefits in their Application for Hearing, this issue was not ripe for hearing because Claimant was not yet entitled to a Division-sponsored Independent Medical Examination (DIME) to

determine MMI, and MMI had to be determined before impairment. Claimant also argued that the ALJ could not determine a permanent impairment rating before Claimant went to a DIME on a possible non-scheduled rating, since Claimant's shoulder condition likely was related to the admitted injury and could be converted to a whole person permanent impairment rating. Claimant then argued that the ALJ should delay considering the issue of impairment until she obtained a DIME.

CONCLUSIONS OF LAW

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

It is well settled that an ATP makes the initial finding of MMI, and assigns a permanent impairment rating if appropriate. If a party wishes to challenge the ATP's MMI determination, the impairment rating, or both, the party must request a DIME in accordance with the procedures established in §8-42-107.2, C.R.S. Section 8-42-107(8)(b)(II), C.R.S.; §8-42-107(8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002). The DIME physician's opinions concerning MMI and permanent impairment then become binding on the parties and the ALJ unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III) and (8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals office, supra*.

Additionally, the initial question of whether a claimant sustained a scheduled or non-scheduled rating is one of fact for determination by the ALJ. That determination depends on whether the claimant establishes the industrial injury caused functional impairment not found on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Although the opinions and findings of the DIME physician may be relevant to this determination, a DIME physician's opinion is not mandated by the statute nor is the ALJ required to afford it any special weight. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000). It is only after the ALJ determines the claimant sustained whole person impairment that the DIME physician's rating becomes entitled to presumptive effect under §8-42-107(8)(c), C.R.S. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998)(DIME provisions do not apply to the rating of scheduled injuries).

In *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000), the Colorado Court of Appeals addressed a situation similar to that presented here. In *Delaney*, the claimant suffered an admitted industrial injury, originally diagnosed as a cervical strain. The ATP placed her at MMI with 5% impairment of each upper extremity because of diffuse shoulder girdle myofascial pain. The physician opined the claimant suffered no impairment of the cervical spine.

The claimant applied for a hearing on medical and temporary disability benefits and on compensability of a second injury. The respondents endorsed the issue of permanent impairment benefits. The claimant filed for a DIME to dispute the ATP's extremity rating, and she also moved to strike the issue of permanency, arguing that the

DIME could not be completed by the time of the scheduled hearing, and she would be unable to meet her burden of proof as to that issue. The ALJ denied the motion.

Hearings eventually were held, and at the beginning of the first hearing, the claimant argued that the permanency issue was not ripe because the DIME had not yet taken place. The ALJ disagreed, concluding that a DIME report was a prerequisite to a hearing on permanent disability only in cases involving non-scheduled injuries. Then, based on the evidence presented at the hearing, the ALJ determined that the claimant had failed to prove she sustained a non-scheduled impairment and was thus entitled only to a scheduled benefits award. The Panel affirmed.

On appeal to the Court of Appeals, the claimant argued that the ALJ erred in awarding her benefits for a scheduled injury under §8-42-107(2), C.R.S. rather than for whole person impairment under §8-42-107(8), C.R.S. The claimant contended that under §8-42-107(8)(c), C.R.S., injured workers have an absolute right to a DIME before a hearing can be held on permanency, regardless of whether scheduled or non-scheduled injuries are involved. She argued that because she requested a DIME, the ALJ erred in adjudicating her right to whole person impairment benefits before he received the DIME physician's report, and he also erred in declining to reopen the evidence to consider the DIME report.

The Court agreed with the claimant's argument that resolution of the permanency issue should have been deferred until after the DIME report had been filed. The Court explained that it was not a case in which it was undisputed that only a scheduled injury was involved. Instead, the Court held that at the time the hearing was held, there was a legitimate dispute as to whether the claimant had a non-scheduled impairment, and the claimant had requested a DIME to challenge the ATP's determination as to this issue. According to the Court, whether the claimant had a non-scheduled as well as a scheduled impairment was central to determining her entitlement to permanent benefits. Consequently, the Court held that in the particular circumstances, even though the statute did not so require, the claimant should have been given the opportunity to have the DIME report considered before the permanent benefits issue was resolved or, at a minimum, to have the evidence reopened when the report became available. The Court explained that considerations of due process and fairness make such a procedure appropriate since the respondents, and not the claimant, sought to have the permanency issue resolved at a time when the DIME had not yet been performed. The Court therefore concluded that where an employer endorses the issue of permanency for hearing, a legitimate dispute has been raised as to whether the claimant has a non-scheduled injury, and a DIME has been requested, resolution of the permanent impairment issue should be deferred until after the DIME report has been filed.

Here, while it is undisputed that Claimant had not requested a DIME prior to the time the hearing was held, the holding in *Delaney* is instructive. Similar to *Delaney*, in their Application for Hearing, Respondents sought to have the permanency issue resolved at a time when the DIME had not yet been performed, and Claimant raised a legitimate dispute at the hearing as to whether she was at MMI and whether she had sustained a non-scheduled injury. That is, in her Response to Respondents' Application

for Hearing, Claimant endorsed medical benefits, and TPD and TTD from 5/1/14 to continuing under “other issues” as issues for hearing. Further, in her Case Information Sheet, Claimant identified medical benefits, TPD, and TTD as issues remaining for hearing. Because temporary benefits must cease at the point of MMI, the endorsement of this issue of temporary benefits is necessarily a contention that MMI is in dispute. Section 8-42-105(3)(a), C.R.S. Also, during the hearing, Claimant testified that she felt as though she was not 100%, and that she believed she needed further treatment. Additionally, during the hearing, Claimant repeatedly argued that the ALJ should defer ruling on permanency until the DIME had been completed on the issues of MMI and whole person conversion. While it is for the ALJ to decide whether Claimant sustained a scheduled or non-scheduled rating, the issues of MMI and impairment are DIME issues. Section 8-42-107(8)(b)(III) and (8)(c), C.R.S. Thus, similar to the holding in *Delaney*, even though the statute did not so require, Claimant should have been given the opportunity to have the DIME report considered before the permanent benefits issue was resolved.

ORDER

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

1. A DIME is required before the issues of MMI and permanent impairment can be decided. Claimant may proceed with the DIME process as provided by statute.

2. If disputed issues remain after the DIME process is complete, either party may file an application for hearing as provided by statute.

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: December 22, 2015

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

ISSUES

- 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 ongoing medical benefits after maximum medical improvement?
- Did Claimant make a proper showing for a change of physician?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1, 2 and 4 were admitted into evidence. Respondents' Exhibits A through AA were admitted into evidence.

2. Claimant sustained an admitted low back injury on August 6, 2012.

MEDICAL EVIDENCE

3. Claimant was treated at Concentra on referral from the Employer.

4. On August 21, 2012 PA Chelsea Dezen examined Claimant at Concetnra. At that time Claimant reported low back pain, worse on the left side. PA Dezen assessed lumbosacral sprain with radiculopathy of the left leg. She imposed restrictions of no lifting greater than 25 pounds.

5. On September 5, 2012 Claimant underwent an MRI of the lumbar spine. At L3-4 the radiologist noted an extruded disc abutting the exiting L3 nerve. The radiologist opined this "could be producing left sided radicular symptoms." At L4-5 there was a right paracentral extrusion and at L5-S1 there was a large disk extrusion that appeared to be abutting but not impinging the S1 nerve root.

6. PA Dezen referred Claimant to a physiatrist, Fredric Zimmerman, D.O. Dr. Zimmerman examined Claimant on October 4, 2012. Claimant reported symptoms of left-sided lumbar pain radiating down the left lower extremity. Dr. Zimmerman reviewed the MRI. He assessed lumbar spondylosis and lumbar radiculitis with neurologic encroachment in the L3-4 distribution consistent with left-sided L3-4 radicular symptoms. Dr. Zimmerman prescribed medication including Vicodin and recommended Claimant undergo L3 and L4 transforaminal epidural steroid injections (ESI).

7. On October 18, 2012 Dr. Zimmerman noted Claimant demonstrated a "diagnostic and partial therapeutic response" to an ESI performed on October 10, 2014. The Claimant's left leg pain resolved but the Claimant reported new pain shooting down the right lower extremity. Dr. Zimmerman again recommended bilateral L4 transforaminal ESI.

8. On November 8, 2012 Dr. Zimmerman noted he performed a repeat L-4 transforaminal ESI on October 23, 2012. Claimant reportedly had a diagnostic response. Dr. Zimmerman assessed lumbar spondylosis and lumbar radiculitis with resolution of L3-4 radicular symptoms in both lower extremities. He also assessed bilateral lower extremity weakness and posterior leg pain classified as mild. Dr. Zimmerman recommended continuation of "aggressive" physical therapy (PT) and Vicodin for pain.

9. On November 9, 2012 Joel Cohen, Psy. D., performed a psychological evaluation of Claimant. Dr. Cohen assessed the Claimant as suffering from an injury-related adjustment reaction with anxious mood. Dr. Cohen recommended six treatment sessions to address stress management and pain coping skills. In addition, Dr. Cohen opined Claimant has underlying posttraumatic stress disorder (PTSD) with some indication of residuals from a closed head injury. Dr. Cohen attributed the PTSD to the Claimant's wartime military service in Bosnia. Dr. Cohen opined the PTSD is not attributable to the industrial injury and should be treated outside the workers' compensation system.

10. On December 17, 2012 John Aschberger, M.D., performed an electromyographic assessment of Claimant's right lower extremity. Dr. Aschberger wrote that the testing was "negative for any acute, subacute, or chronic radicular abnormality."

11. On January 24, 2013 Dr. Zimmerman noted he performed an L5 plus S1 transforaminal ESI on January 16, 2013. Dr. Zimmerman noted that this injection was "diagnostic" and provided only "minimal therapeutic benefit." Dr. Zimmerman assessed lumbar spondylosis and lumbar radiculitis in the right lower extremity with evidence of L5-S1 disk herniation causing S1 nerve root compression. Dr. Zimmerman referred Claimant to orthopedic surgeon Bryan Castro, M.D.

12. Dr. Castro examined Claimant on February 6, 2013. Claimant stated that his main complaint was right lower extremity pain. Dr. Castro reviewed imaging studies and noted disk herniations at L4-5 and L5-S1. Dr. Castro's impression was "a large disk herniation at L5-S1 causing S1 radiculopathy." Dr. Castro stated the Claimant's radicular complaints were consistent with the imaging studies and that a microdiscectomy/decompression of L5-S1 on the right side was a reasonable consideration.

13. On March 14, 2013 Dr. Castro performed surgery on Claimant described as a partial laminectomy right-side at L5-S1 and microdiscectomy right-side at L5-S1.

14. On April 11, 2013 Steve Danahey, M.D., examined Claimant at Concentra. Claimant advised Dr. Danahey that he was experiencing some right low back pain with radiation into the right gluteal region. Claimant also reported that he was feeling back pain that radiated down his left leg to the foot. Dr. Danahey opined that Claimant appeared to have developed a left lower extremity radicular component. Claimant was on a "no activity status" at this time.

15. On April 18 2013 Claimant advised Dr. Danahey that he had pain "going down the right lower extremity" and rated this pain at 5/10. Claimant told Dr. Danahey that this level of discomfort was very much upsetting his life. Dr. Danahey referred the Claimant to Dr. Zimmerman for assistance in full rehabilitation, started PT, and submitted a referral for a psychiatric consultation.

16. On May 2, 2013 Dr. Zimmerman examined Claimant. Dr. Zimmerman noted Claimant was "showing significant improvement and has strength and mobility that are better than prior to his surgery." Nevertheless, Claimant was "frustrated with his progress." On physical examination Dr. Zimmerman noted Claimant ambulated "with an upright posture and normal gait pattern." Straight leg raising was positive on the right and neural tension sign was positive bilaterally. Dr. Zimmerman assessed spondylosis post microdiscectomy, lumbar radiculitis greater in the right than the left lower extremity and depression "possibly interfering with the rehabilitation process." Dr. Zimmerman recommended Claimant continue with PT and prescribed Cymbalta, Vicodin, and Celebrex.

17. On May 7, 2013 Gary Gutterman, M.D., performed a psychiatric evaluation of Claimant. Claimant told Dr. Gutterman that surgery had not helped him but PT was beneficial. Claimant reported he had become more irritable since being injured and since he had surgery. He was having difficulty sleeping and was experiencing nightmares involving relatives and friends who were in the Bosnian war. Dr. Gutterman stated that during the evaluation Claimant "sat comfortably in an oversized chair for one hour." Dr. Gutterman described Claimant's speech as coherent and logical and Claimant's thoughts were goal directed. Dr. Gutterman determined that the Claimant had a mild exacerbation of his PTSD associated with the Bosnian war. Dr. Gutterman opined this "may have been triggered by his having had surgery and his being more limited in his activity." Dr. Gutterman opined that Cymbalta was appropriate medication to treat the residual PTSD symptoms.

18. On May 10, 2013 Claimant underwent another lumbar MRI.

19. On May 15, 2013 Dr. Castro examined Claimant. Dr. Castro commented that Claimant was doing "much better" and was "standing and walking without difficulty." Dr. Castro reviewed the recent MRI that showed the "previous significant disc herniation seen on the right side at L5-S1 is largely resolved" and there was no "significant compression" of the L5 nerve root. Dr. Castro stated he would allow Claimant to "buckle down and increase his activities" to include PT and walking a mile per day.

20. Dr. Danahey examined Claimant on June 17, 2013. Claimant reported that he was "not good" and had strong low back pain radiating into the gluteal area. Dr. Danahey noted that Dr. Castro "felt there was nothing further surgical to do" and that Claimant had refused an ESI offered by Dr. Zimmerman. On physical examination (PE) Claimant was comfortable in the seated position, uncomfortable standing and with movement and his gait was "nonantalgic." Dr. Danahey noted Claimant was on a no work activity status and should be transitioned to light duty in the near future. Dr. Danahey recommended continued PT and referred claimant to Dr. Burris "to deal with slow and/or delayed recovery situations."

21. On July 22, 2013 Dr. Danahey imposed restrictions of no lifting over 5 pounds, no bending greater than 4 times per hour and no pushing and/or pulling with over 10 pounds of force.

22. On July 30, 2013 John Burris, M.D., examined Claimant at Concentra. Dr. Burris noted Claimant was referred for "delayed recovery issues." Claimant reported to Dr. Burris that he had "5/10 low back pain with some intermittent pain down both legs along the back of the legs." Claimant denied persistent numbness or weakness in the legs. On examination Dr. Burris noted Claimant's range of motion (ROM) was functional with some limitations particularly in forward flexion." Claimant's motor strength was "5/5 in all muscle groups" and straight leg raising to 90 degrees was negative bilaterally. Dr. Burris diagnosed "low back pain" and wrote that Claimant exhibited "a benign examination with no evidence of radiculopathy." Dr. Burris recommended that Claimant's rehabilitation be finalized with "6 additional weeks in therapy." Dr. Burris imposed restrictions of no lifting over 20 pounds.

23. On August 6, 2013 Claimant returned to Dr. Danahey and expressed concern about the 20-pound lifting restriction imposed by Dr. Burris. Claimant reported "excessive pain with exercise" and expressed the view that he would "never be 100%." On physical examination Claimant appeared comfortable in the seated position and his gait was "nonantalgic." Dr. Danahey agreed with the 20-pound lifting restriction imposed by Dr. Burris and stated his preference that Claimant "stay with Dr. Burris."

24. Following the surgery in March 2013 Claimant underwent an extensive course of PT. On May 3, 2013 the therapist opined Claimant's progress was "slower than expected" and that claimant reported 3/10 pain. On August 13, 2013 Claimant reported 5/10 pain and told the therapist that his back was "not improved with surgery" and that he wanted to "retire" when therapy was over. On September 12, 2013 Claimant rated his pain at 1-2/10 during the day and "5 grade max at night." On this date Claimant advised the therapist he was feeling a "lot better" and that working out at the gym was helping him feel better. The therapist noted "significant improvement" and that the Claimant's progress was "as expected." On September 16, 2013 Claimant advised the therapist that he back was feeling better and he was working out at the gym every day. Claimant stated that by next year he would be back to his pre-injury status.

25. Claimant returned to Dr. Burris on September 17, 2013. Claimant reported "diffuse pain complaints involving the low back, 5/10 in severity extending

down the back of both legs." Claimant walked with a normal gait and transferred "without hesitation." Dr. Burris attempted to measure ROM by the dual inclinometry method but reported the measurements were "completely nonphysiologic and inconsistent with [Claimant's] observed behavior." Dr. Burris opined Claimant demonstrated a "benign examination with significant nonphysiologic overlay and no objective findings." Dr. Burris opined Claimant had reached maximum medical improvement (MMI) and was entitled to a 10% whole person impairment rating based on a specific disorder of the lumbar spine. Dr. Burris assigned claimant to the medium duty category with a permanent restriction of no lifting greater than 40 pounds. Dr. Burris opined that no maintenance or follow-up care was necessary.

26. On September 18, 2013 Claimant told the physical therapist that "the other day" during therapy he bent over to pick up a box and experienced marked pain from the lumbar region to his neck. Claimant rated his pain as 10/10.

27. On September 23, 2013 the physical therapist reported Claimant was depressed. Claimant advised the therapist that his pain had increased "last week" after picking up a 27 pound box.

28. On September 24, 2013 Dr. Burris again saw Claimant for the purpose of performing repeat ROM measurements. However, Dr. Burris wrote Claimant was not cooperative with the ROM maneuvers and chose "to spend the majority of the visit verbalizing his discontent with Concentra as well as this provider personally." Dr. Burris opined Claimant had been through exhaustive therapy and that no further treatment would change Claimant's "subjective complaints."

29. On October 10, 2013 Insurer filed a Final Admission of Liability (FAL). The FAL admitted for permanent partial disability (PPD) benefits based on Dr. Burris's 10% whole person impairment rating.

30. On January 21, 2014 Claimant underwent a Division-sponsored independent medical examination (DIME) performed by Stanley Ginsburg, M.D. Dr. Ginsberg took a history from Claimant, reviewed medical records and performed a physical examination. Claimant reported that he had "severe" pain with some right buttock pain and numbness. Claimant also reported that the back pain went down his legs and that he experienced numbness in the legs. Claimant added that he developed headaches at the time of the injury and was depressed.

31. On physical examination Dr. Ginsberg noted the Claimant was "at times depressed and at times angry, firmly stating that he had not been helped at all by any of the therapeutic maneuvers, which had been utilized for his benefit." Dr. Ginsberg reported that on examination of the lower extremities, particularly the right, there was "a great deal of 'giving in' weakness – non-physiological." Sensory examination produced complaints of "hypalgesia in a non-physiological pattern in the right lower extremity intermittently." Dr. Ginsberg performed extensive ROM testing but stated the Claimant had "markedly non-physiological responses." Dr. Ginsberg commented that he could not "regard these findings at all accurate" and declined to use them as the basis for

formulating an impairment rating. He also observed that this was the third attempt at ROM measurements and all had the "same result." Dr. Ginsberg assigned a 10% whole person impairment rating based on a specific disorder of the lumbar spine. Dr. Ginsberg opined there was no psychiatric impairment.

32. On February 13, 2014 Insurer filed an FAL. The Insurer admitted liability for PPD benefits based on Dr. Ginsberg's 10% rating. Insurer denied liability for medical benefits after MMI.

33. On May 1, 2014 Claimant was seen by Lon Noel, M.D. This visit was apparently on referral by the Insurer to determine if further treatment was appropriate. Dr. Noel noted that Claimant appeared "using a cane as an assistive device with some antalgia." Claimant reportedly appeared "angry at various timed during the history taking portion of the examination."

34. Claimant returned to Dr. Noel on May 8, 2014. Dr. Noel assessed "status post low back surgery with chronic pain." Dr. Noel referred Claimant for chiropractic/acupuncture treatments with Dr. Gridley, maintained previous restrictions and stated that the "current treatments" were considered to be post MMI maintenance treatments.

35. On May 15, 2014 Dr. Zimmerman examined the Claimant again. Claimant told Dr. Zimmerman that he "did nothing right." Claimant stated he had disabling low back pain radiating down both legs. Claimant advised Dr. Zimmerman that his impairment rating was "very little" and he "couldn't live on that." Claimant stated he needed a 5-pound lifting restriction so that he could apply for disability or no restrictions so that he could return to work. Claimant was taking a number of medications including hydrocodone, methcarbamol, nabumetone, cyclobenzaprine, Celebrex, respiridone, buspirone, lisinopril, benztropine, Lyrica and Cymbalta. Dr. Zimmerman assessed Claimant with "postlaminectomy syndrome" and observed that Dr. Burris had placed Claimant at MMI in September 2013 with empirical permanent work restrictions of 40 pounds lifting. Dr. Zimmerman advised Claimant to either pursue permanent work restrictions or apply for disability. Dr. Zimmerman further advised Claimant "to perform range of motion legitimately with his best effort so that consistency and validity is most likely to occur." Dr. Zimmerman suggested to Claimant that he request "Dr. Leon [sic]" to obtain an FCE "as part of determining more objective permanent work restrictions." Dr. Zimmerman released Claimant with restrictions "of Primary Care Physician." (Respondents' Exhibit X p. 1064). Dr. Zimmerman stated that further "maintenance decisions" would be "managed by Dr. Leon [sic]." The ALJ infers that Dr. Zimmerman's reference to Dr. "Leon" is actually a reference to Dr. Lon Noel.

36. Claimant received chiropractic treatment from Jason Gridley, D.C., between May 16, 2014 and August 19, 2014.

37. Claimant saw Dr. Noel on July 24, 2014. Claimant advised Dr. Noel that the chiropractic treatment was helping "somewhat." Dr. Noel noted chiropractic treatment would be finished after 2 more treatments by Dr. Gridley. Dr. Noel stated

Claimant had completed the recommended course of post MMI treatments and no further appointments were necessary. Dr. Noel listed Claimant's "work restrictions" as "per previous impairment rating."

38. On August 19, 2014 Dr. Gridley checked boxes on a form indicating that Claimant was "poorly stabilizing" and experienced a "poor response" to chiropractic/acupuncture treatment. Dr. Gridley wrote that no further treatment was recommended and referred Claimant back to Dr. Noel.

39. In December 2014 Claimant underwent a functional capacities evaluation (FCE). The FCE was performed by Kristine Couch, OTR. As part of the FCE Claimant underwent the "West Lifting Evaluation." OTR Couch reported Claimant was unable to lift from floor to knuckle level on an occasional basis. Couch explained that Claimant "reported" that his low back pain rendered him "unable to safely forward bend, squat, kneel or 1/2 kneel to manage lifting at this level." Claimant was able to occasionally lift 15 pounds from knuckle level to shoulder level. Claimant "determined" that this "represented his maximum safe, reliable lift at this level at this time secondary to his symptom report." Claimant was able to complete a maximum bilateral lift of 10 pounds from shoulder to eye level. Claimant "determined" that this "represented his maximum safe reliable lift at this level at this time secondary to his symptom report." Claimant was able to complete a maximum bilateral lift of 5 pounds from shoulder level to overhead on an occasional basis. Claimant "determined" that this "represented his maximum safe, reliable lift at this level at this time secondary to his symptom report."

40. OTR Couch reported that Claimant demonstrated a sustained seated tolerance of 36 minutes before needing to alter his position "secondary to his report of increased low back pain and bilateral lower extremity 'numbness, pain, needle' symptoms." Claimant demonstrated a standing tolerance of 18 minutes "before changing position secondary to his report of increased low back and bilateral lower extremity symptoms." On a walking test Claimant was able to complete 1 of 10 laps (100 feet) before he "determined he was unable to continue with this test secondary to his symptom report." OTR Couch noted Claimant ambulated with an "antalgic gait pattern, using a single point cane." Claimant reported that his walking was limited to 5-10 minutes secondary to pain.

41. OTR Couch reported that Claimant's "overall capacities as evidenced by his ability to lift weight are perhaps most closely described BETWEEN the SEDENTARY & LIGHT work groups as described by the United States Department of Labor." In her report OTR Couch "requested" that the results of the FCE "be correlated with objective physical findings" and stated that the results are "subject to further interpretation and determination of validity by the treating physician."

42. On March 10, 2015 David Orgel, M.D., evaluated Claimant for purposes of completing a social security disability evaluation. This evaluation was performed at Claimant's request. The Claimant advised Dr. Orgel that he was experiencing 5/10 pain in his low back with the pain radiating into both legs. Claimant stated that these symptoms had caused "balance problems" causing him to fall. Consequently Claimant

stated that he walked with a cane. On PE Dr. Orgel noted there was pain on percussion of the lumbar spine with "decreased range of motion in all planes due to pain with very limited motion to side bending and extension and, to a lesser extent flexion." A straight leg raising test caused "axial back pain bilaterally" and no weakness was noted. Dr. Orgel reviewed the FCE performed by OTR Couch and had a discussion with Claimant about his "functional capabilities." Dr. Orgel wrote that Claimant is limited to lifting up to 10 pounds occasionally; no carrying; a maximum of 30 minutes sitting at one time and a total of 4 hours sitting in an 8 hour work day; a maximum 20 minutes standing at one time and a total of 2 hours in an 8 hour work day; a maximum walking 10 minutes at one time and a total of 1 hour in an 8 hour work day. Dr. Orgel opined that Claimant requires use of a cane to ambulate. Dr. Orgel imposed restrictions of no climbing ladders or scaffolds, no balancing, stooping, kneeling, crouching or crawling; no unprotected heights; occasional operation of a motor vehicle; and, occasional presence around moving machinery. Dr. Orgel noted that the Claimant said he needed to "lie down frequently throughout the day because of his pain."

43. Dr. Orgel testified at the hearing. Dr. Orgel stated that based on PE Claimant's straight leg raising test was "not positive" because it did not produce radiating pain in the legs. Dr. Orgel also stated there "were no obvious neurological abnormalities." Dr. Orgel explained that he imposed the 10-pound occasional lifting "limitation" based on the FCE and his discussion with Claimant. Dr. Orgel explained that the limitations on sitting, standing and walking were also based on the FCE.

44. On cross-examination Dr. Orgel stated that the only medical records he possessed were the FCE, Dr. Burris's September 17, 2013 report, the "IME report" authored by Dr. Scott and his own report. Dr. Orgel testified he had not reviewed Dr. Noel's reports or Dr. Ginsberg's impairment rating. Dr. Orgel did not have Dr. Danahey's treatment records. Dr. Orgel stated that his opinions regarding Claimant's inability to crawl, crouch and kneel were based on the FCE and his discussion with Claimant. Dr. Orgel stated that if Claimant testified he could kneel that this would "change" his opinion regarding Claimant's limitations.

45. On May 19, 2015 Douglas Scott, M.D., conducted an independent medical examination of Claimant at the Respondents' request. Dr. Scott is board certified in occupational medicine and is level II accredited. Dr. Scott took a history from Claimant, reviewed medical records and performed a PE.

46. In the written report Dr. Scott stated that he agreed with Dr. Burris, Dr. Zimmerman and Dr. Noel that Claimant "can work in a medium work category with a 40 pound weight lifting restriction." Dr. Scott further opined that it is probable Claimant is employable within the 40-pound restriction and that Claimant is not "totally or permanently disabled."

47. Dr. Scott testified at the hearing. Dr. Scott opined that on July 24, 2014 Dr. Noel adopted the 40-pound lifting restriction imposed by Dr. Burris in September 2013. Dr. Scott based this opinion on Dr. Noel's statement that Claimant's restrictions

were “per previous impairment rating.” Dr. Scott reasoned that Dr. Noel must have been referring to Dr. Burris’s September 17, 2013 report.

48. Dr. Scott opined that Dr. Zimmerman adopted the 40-pound lifting restriction imposed by Dr. Burris in September 2013. Dr. Scott pointed out that Dr. Zimmerman’s May 15, 2014 explicitly refers to the 40-pound restriction imposed by Burris.

49. Dr. Scott testified that the FCE conducted by OTR Couch was not correlated with “objective findings.” Dr. Scott opined that much of the FCE was based on Claimant’s self-reported symptoms and his self-reported ability or inability to perform the physical tasks. Dr. Scott stated that the FCE results would best be interpreted by a treating physician in the context of serial examinations.

50. Dr. Scott opined that in light of Dr. Burris’s examination findings Claimant exhibited symptoms without a basis in physiology or pathology. Dr. Scott further opined that in light of Claimant’s failure to produce valid ROM measurements it could not be expected Claimant would produce valid measurements on a “subjective” FCE.

51. Dr. Scott testified the Claimant has reached the point where no further care is needed. According to Dr. Scott Claimant reached that point when Dr. Burris placed the Claimant at MMI on September 17, 2013. Dr. Scott is aware Claimant received post-MMI treatment from Dr. Noel and the chiropractor, Dr. Gridley. Dr. Scott opined that the post-MMI treatment was not reasonable because it did not help the Claimant.

52. Claimant reported to his personal healthcare provider, Kaiser Permanente, on June 22, 2015. Claimant was treated for the problems of paresthesia and lumbar radiculopathy. Lumbosacral x-rays were ordered. On June 26, 2015 Claimant returned to Kaiser Permanente and was seen by Mark Ptaskiewicz, M.D. Dr. Ptaskiewicz prescribed gabapentin for Claimant’s “lumbar radiculopathy.”

VOCATIONAL EVIDENCE

53. Ms. Katie Montoya (Montoya) was qualified as an expert in vocational rehabilitation. Montoya performed a vocational evaluation of Claimant at Respondents’ request. Montoya produced a written report dated June 22, 2015 and testified at the hearing.

54. As part of her vocational evaluation Montoya interviewed Claimant, reviewed pertinent medical records, performed vocational research and conducted a labor market “investigation.” In the vocational report Montoya noted Claimant had a high school education in Bosnia and had been in the United States since May 2001. Prior to coming to the United States Claimant had experience doing mining work in Bosnia. In Colorado Claimant performed various jobs including roofing, masonry and “caulking” work. Montoya noted Claimant “primarily” speaks Bosnian. However, she was able to use English for 15 to 20 minutes when she interviewed Claimant.

55. Montoya testified that it is her understanding that Dr. Burris, Dr. Noel and Dr. Scott opined that Claimant has a permanent work restriction of no lifting in excess of 40 pounds. Montoya stated this restriction does not give Claimant full access to the medium work category because the Dictionary of Occupational Titles states that medium work requires occasional lifting of up to 50 pounds. However, Montoya stated that the 40-pound restriction is most reasonably understood as placing Claimant in the medium work category. Montoya opined that the 40-pound lifting restriction means Claimant is employable in the Denver metropolitan labor market. According to Montoya Claimant is employable in various jobs including porter, office cleaning, production work, car wash agent, janitorial work, delivery and some maintenance positions. Montoya testified that in accordance with her research these types of positions are routinely available in the Denver labor market.

56. Montoya reviewed the FCE and the opinions of Dr. Orgel. Montoya stated that the FCE restrictions would place the Claimant in the sedentary to light work classifications. Montoya testified that in her experience an FCE is a tool that should be used in the context of the "objective medical evidence." Montoya explained that the results of an FCE can be influenced by the subject's "desire to perform." Montoya testified that in this case she saw no medical evidence indicating that any physician except Dr. Orgel agreed with the FCE results. Montoya opined that if the FCE and the opinions of Dr. Orgel are correct regarding Claimant's physical limitations then it is highly unlikely Claimant can earn any wages.

CLAIMANT'S TESTIMONY

57. Claimant testified as follows. The work he has performed in the United States required him to lift weights of 80 to100 pounds. The most weight he has lifted since the surgery in March 2013 is about 10 pounds. He began walking with a cane 10 to 15 days after surgery, although the cane was not prescribed by any authorized treating physician. He began to walk with the cane because weakness in his legs caused him to fall. He uses a cane at all times. He could not walk "normally" in September 2013 and the medical records are "mistaken" if they say he could. Claimant believes he could return to work for the Employer if he had a 5-pound lifting restriction and could rest ½ hour after each hour of work.

58. Claimant further testified as follows. He currently needs assistance from his wife when showering, shaving and brushing his teeth. He does not cook and the heaviest thing he can lift is a cup of coffee. He cannot walk more than 15 minutes at a time, cannot sit longer than 20 minutes at a time, cannot drive more than 30 minutes at a time and cannot climb ladders. He cannot stoop or crouch, but he believes he can be on his knees. Claimant also testified that he has problems with vision, hearing and exposure to dust and noise. He does not sleep well.

59. Claimant admitted that since his surgery he has not looked for any work other than contacting the Employer. Claimant stated that he called the Employer and was told they do not want him back at work.

FINDINGS CONCERNING CLAIM FOR PERMANENT TOTAL DISABILITY BENEFITS

60. Claimant failed to prove it is more probably true than not that the industrial injury of August 6, 2012 has rendered him unable to earn any wages in the same or other employment. Rather, a preponderance of the credible and persuasive evidence establishes Claimant can earn wages in the Denver metropolitan labor market.

61. The ALJ credits Dr. Burris's opinion that Claimant's only injury-related restriction is the 40-pund lifting restriction. In his report of September 17, 2013 Dr. Burris credibly opined that Claimant's PE was "benign" and that Claimant evidenced "non-physiologic overlay" without objective findings. Dr. Burris persuasively explained that Claimant demonstrated "non-physiologic" ROM measurements.

62. Dr. Burris's opinion that Claimant demonstrated a "benign" PE and non-physiologic ROM measurements is corroborated by opinions of the DIME physician, Dr. Ginsberg. The ALJ finds that Dr. Ginsberg's opinions are very credible and persuasive since there is no apparent reason for him to favor one side or the other in this case. On PE Dr. Ginsberg noted that Claimant exhibited "non-physiological" lower extremity weakness, right lower extremity "hypalgesia in a non-physiological pattern" and "markedly non-physiological responses" on ROM testing.

63. Dr. Burris's opinion that Claimant has a 40-pound lifting restriction is corroborated by the credible opinion of Dr. Zimmerman. The ALJ infers (as did Dr. Scott) that Dr. Zimmerman endorsed the 40-pound lifting restriction in his May 15, 2014 reports. On that date Dr. Zimmerman recognized that Dr. Burris imposed the 40-pound lifting restriction and released Claimant from treatment with the restriction imposed by the "Primary Care Physician." In context and considering the totality of the May 15 reports it is apparent Dr. Zimmerman agreed with Dr. Burris's 40-pound lifting restriction and certainly did not alter it.

64. Dr. Burris's opinion that Claimant has a 40-pound lifting restriction is corroborated by the credible opinion of Dr. Noel. On July 24, 2014 Dr. Noel endorsed the work restrictions "per previous impairment rating." The ALJ infers from this statement (as did Dr. Scott) that Dr. Noel was referring to the 40-pound restriction imposed by Dr. Burris in his September 17, 2013 report. It was on that date that Dr. Burris also assessed the 10% whole person impairment rating.

65. Dr. Burris's opinion that Claimant has a 40-pound lifting restriction is also corroborated by the credible opinion of Dr. Scott.

66. Insofar as the FCE would permit findings that Claimant is limited to lifting 10 pounds occasionally, no carrying, 20 minutes of standing and 10 minutes of walking, this evidence is not persuasive. The findings of the FCE demonstrate that the alleged "limitations" on Claimant's activities are largely based on Claimant's self-reported symptoms and limitations. Dr. Scott credibly and persuasively opined that FCE is not reliable since it is based on Claimant's self-reporting and not correlated with "objective

findings." Dr. Scott explained that the FCE is not a reliable indicator of Claimant's limitations because Dr. Burris and Dr. Ginsberg both found that Claimant produced invalid ROM measurements. Dr. Scott persuasively argued that if Claimant did not report valid ROM he cannot be expected to reliably report his symptoms and limitations at an FCE.

67. Dr. Orgel's opinion, which is largely based on the FCE and Claimant's self-reported limitations, is not persuasive for these same reasons stated in Finding of Fact 66. Moreover, Dr. Orgel failed to review a complete set of Claimant's medical records. Dr. Orgel also stated his opinions would change if Claimant testified he could kneel. Claimant in fact testified he believes he can be on his knees.

68. Claimant's testimony that he is severely limited by injury-related symptoms is not credible and persuasive. Claimant's credibility is undermined by his failure to report valid ROM to Dr. Burris and Dr. Ginsberg. Claimant's testimony also lacks credibility because it differs significantly from pertinent medical records. Claimant testified that he began using a cane within two weeks of the March 2013 surgery because of weakness and instability of his lower extremities. However, on May 2, 2013 Dr. Zimmerman noted claimant demonstrated a "normal gait pattern." On May 15, 2013 Dr. Castro noted Claimant was "standing and walking without difficulty." On June 17, 2013 and August 6, 2013 Dr. Danahey described Claimant's gait as "nonantalgic." On July 30, 2013 Claimant saw Dr. Burris and denied persistent numbness or weakness in his legs. On September 17, 2013 Dr. Burris noted Claimant walked with a "normal gait." In January 2014 Dr. Ginsburg examined Claimant's lower extremities and noted a "great deal of 'giving in' weakness." The ALJ is not persuaded by Claimant's assertion that all of these physicians recorded "mistaken" observations about his ability to ambulate.

69. Claimant's credibility is further undermined by evidence from which the ALJ infers that Claimant's testimony was significantly influenced by a desire to portray himself as disabled in order to reap financial gain. The ALJ notes that on May 15, 2014 Claimant requested Dr. Zimmerman to give him no restrictions so he could return to work or a 5-pound restriction so he could apply for disability. Claimant also told Dr. Zimmerman he could not live on the impairment rating. On July 30, 2013 Dr. Burris reduced Claimant's restriction to permit lifting up to 20 pounds. Within a week of July 30 Claimant went to Dr. Danahey and expressed his concern about Dr. Burris's modification of the lifting restriction. On August 13, 2013 Claimant advised his physical therapist that surgery had not helped him and he wanted to "retire" after therapy was complete. On September 16, 2013, one day *before* Dr. Burris placed Claimant at MMI and imposed the 40-pound lifting restriction, Claimant told his physical therapist that he was feeling better and going to the gym every day. However, on September 18, 2013, one day *after* Dr. Burris placed Claimant at MMI and imposed the 40-pound lifting restriction, Claimant advised the physical therapist that "the other day" he hurt is back in when picking up a box and that his pain level was 10/10. There is no credible evidence that Claimant reported the alleged box-lifting incident to Dr. Burris on September 17, 2013, and Dr. Burris stated that Claimant's pain level was only 5/10 on that date.

70. The ALJ credits Montoya's expert vocational testimony that with a 40-pund lifting restriction Claimant is employable in various positions that are readily available in the Denver metropolitan labor market. Montoya's opinion was not refuted by any credible and persuasive opinion to the contrary.

FINDINGS CONCERNING CLAIM FOR POST-MMI MEDICAL BENEFITS

71. Claimant failed to prove it is more probably true than not that he is entitled to a general award of post-MMI medical benefits to relieve the effects of the injury or prevent deterioration of his condition.

72. On September 17, 2013, the date of MMI, Dr. Burris credibly and persuasively opined that no maintenance or follow-up care was necessary. On September 24, 2013 Dr. Burris persuasively opined that nor further treatment would change Claimant's subjective complaints.

73. Dr. Burris's opinion that no further treatment is necessary is corroborated by the credible opinion of Dr. Scott.

74. Despite the opinion of Dr. Burris the Respondents provided post-MMI treatment in the form of a referral to Dr. Noel. Dr. Noel in turn referred Claimant to Dr. Gridley for chiropractic/acupuncture treatment. On July 24, 2014 Dr. Noel indicated that no further visits were necessary. Claimant then completed two more treatments with Dr. Gridley. On August 19, 2014 Dr. Gridley stated that Claimant was "poorly stabilizing" and had a "poor response" to treatment. Dr. Gridley recommended against any further chiropractic/acupuncture treatment. The ALJ infers from this evidence that the course of post-MMI treatment rendered by Dr. Noel and Dr. Gridley provided no significant and lasting relief and was not reasonable and necessary to relieve Claimant's condition or to prevent further deterioration of the condition.

75. Insofar as the treatment recommended by Kaiser Permanente might permit a different conclusion, the ALJ finds this evidence is not persuasive. A review of the Kaiser records provides no persuasive evidence that Dr. Ptaskiewicz is familiar with Claimant's long course of treatment or the results of that treatment. Therefore, Dr. Ptaskiewicz's recommendations for additional treatment are not persuasive evidence that Claimant needs ongoing treatment after MMI.

76. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

PERMANENT TOTAL DISABILITY

Claimant alleges that a preponderance of the credible and persuasive evidence establishes that he is permanently and totally disabled. He relies heavily on the FCE results, the opinions expressed by Dr. Orgel and his own testimony to establish that he has severe restrictions on lifting, standing, sitting and walking. The ALJ disagrees with Claimant's argument.

To prove his claim that he is permanently and totally disabled, 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) C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). 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. *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 Claimant's physical condition, mental ability, age, employment history, education, and the availability of

work that he could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents an issue of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As determined in Findings of Fact 60 through 70, the Claimant failed to prove it is more probably true than not that the effects of the admitted industrial back injury have rendered unable to earn any wages in his labor market. The ALJ is persuaded that the only permanent restriction resulting from the industrial injury is the 40-pound lifting restriction imposed by Dr. Burris and endorsed by Dr. Zimmerman, Dr. Noel and Dr. Scott. The ALJ is further persuaded by Ms. Montoya's testimony that with this restriction Claimant is able to earn wages in the Denver metropolitan labor market.

For the reasons stated in Findings of Fact 66 and 67 the ALJ is not persuaded by the FCE and the opinions of Dr. Orgel that Claimant has much more extensive permanent restrictions than that imposed by Dr. Burris. The ALJ is also not persuaded by Claimant's testimony for the reasons stated in Findings of Fact 68 and 69.

The ALJ concludes the claim for permanent and total disability benefits must be denied.

POST-MMI MEDICAL BENEFITS

Claimant contends he has proven by a preponderance of the evidence that he is entitled to a general award of ongoing medical treatment after MMI to relieve the effects of the industrial injury. In support of this contention argues that he obtained relief of his symptoms during the "brief period" of post-MMI treatment provided by Dr. Noel and Dr. Gridley. The ALJ is not persuaded.

The right to receive medical treatment may extend beyond the date of MMI where a 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 ongoing medical benefits after MMI 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 ongoing 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 71 through 75, Claimant failed to prove it is more probably true than not that he is entitled to a general award of post-MMI medical benefits to relieve the effects of the injury or prevent deterioration of his condition. To the contrary, the ALJ is persuaded by the credible opinions of Dr. Burris and Dr. Scott that no additional treatment is necessary. The ALJ also finds, contrary to Claimant's argument, the post-MMI treatment rendered by Dr. Noel and Dr. Gridley did not provide any significant relief to Claimant or prevent any deterioration in his condition. Rather, the persuasive evidence establishes that this post-MMI treatment was not reasonably necessary to relieve the effects of the injury or prevent any deterioration of Claimant's condition.

In light of this determination the issue of whether Claimant has made a showing sufficient to change the authorized treating physician is moot.

ORDER

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

1. The claim for permanent total disability benefits is denied and dismissed.

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

3. 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: December 2, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

I. Whether scars located on Claimant's wrist and shoulder constitute serious permanent disfigurement which would entitle her to additional compensation pursuant to C.R.S. § 8-42-108.

II. Whether Claimant is entitled to have her average weekly wage ("AWW") adjusted.

III. Whether Claimant's scheduled impairment should be converted to whole person impairment.

IV. Whether Claimant has established, by a preponderance of the evidence that she is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of her admitted May 7, 2013, industrial injury.

FINDINGS OF FACT

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

1. Claimant is a 46 year old female who resides in Pueblo, Colorado. She immigrated to the United States from Guatemala in 1989 when she was approximately 18 years of age. She received formal education in Guatemala to the sixth grade and after moving to the U.S. never returned to school. She has no GED.

2. Since moving to the U.S. Claimant has worked as a babysitter, a housekeeper/head housekeeper- working supervisor at a hotel, a school cafeteria worker and lastly as a packager for Employer for the past seven years.

3. As a packager, Claimant's job duties were repetitive and included sealing bags, sorting, and packing tortillas by hand for 8 – 12 hours a day.

4. On May 7, 2013, Claimant reported an onset of bilateral shoulder, bilateral elbow and bilateral wrist pain to Employer. Liability for the claimed injuries/conditions was admitted and on May 13, 2013, Claimant began treatment with Dr. Terrence Lakin of the Southern Colorado Clinic.

5. On May 14, 2013 Dr. Lakin injected claimant's right shoulder with cortisone. He imposed work restrictions, which consisted of limited use of both arms, no repetitive work, a maximum limit of 5lbs for lifting, and no overhead use of right arm.

Claimant was returned to light duty work and from May 8, 2013 to September 17, 2013. spent her time doing less repetitive work. Dr. Lakin noted that her left arm improved.[1] However, Claimant's symptoms concerning her bilateral wrists, bilateral elbows and right shoulder failed to progress with conservative care. Consequently, diagnostic testing was performed to determine Claimant's surgical candidacy.

6. On June 26, 2013, Dr. Dwight Caughfield performed a nerve conduction study and clinic exam. The study displayed right median neuropathy consistent with carpal tunnel syndrome and his physical examination was consistent with right rotator cuff tendonitis with impingement.

7. On September 18, 2013 Claimant underwent right carpal tunnel release by Dr. Philip Marin. At this time, Claimant was taken off work and did not return to modified duty as there was no accommodation. Claimant has not returned to work since this date.

8. On November 18, 2013 an MRI of the right shoulder revealed distal rotator cuff tendinitis with a short segment area of interstitial delamination. On March 1, 2014 Claimant underwent right ASO with acromioplasty and distal clavicectomy by Dr. Roger Davis.

9. Claimant continued treating and became symptomatic for right dorsal wrist ganglion. On September 9, 2014 she underwent a ganglion excision, synovectomy of the wrist, and FCR tendon synovectomy, performed by Dr. Marin.

10. On April 9, 2014, Claimant was released from care by Dr. Martin following her right carpal tunnel release. At that time, she had full range of motion, flexion and extension of her fingers and she had good sensation throughout the hand. She was to return on an 'as needed' basis. Claimant testified she never returned to see Dr. Martin for this condition.

11. On July 24, 2014, Claimant was released from care by Dr. Davis following her right shoulder surgery. At that time, she had some pain but good functional return. She was essentially at MMI. She was to continue rehabilitation exercises on her own. She had no restrictions from Dr. Davis' perspective in regards to her right shoulder. Claimant testified she never returned to see Dr. Davis after that.

12. On 2/16/15, Claimant was released from care by Dr. Martin for her right dorsal ganglion excision and FCR synovectomy. At that time, she had some pain in her index finger. She had good range of motion of her fingers and she was able to make a full fist with full extension. She was to return on an 'as needed' basis. Claimant testified she never returned to see Dr. Martin for this condition.

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[1] As of March 13, 2015, Claimant's left arm complaints had resolved completely according to the impairment rating report of Dr. Lakin.

13. During the time Claimant was convalescing from her three right arm surgeries, Dr. Lakin cautioned her to not overuse her left arm to compensate for her right arm limitations.

14. On March 13, 2015 Dr. Lakin determined Claimant had reached maximum medical Improvement ("MMI"). He assigned 34% right upper extremity impairment. Claimant's 34% right upper extremity scheduled impairment equates to 20% whole person impairment. No impairment was assigned for the left arm. Dr. Lakin assigned permanent physical restrictions consistent with the results of a functional capacity assessment including, "lifting/carrying capabilities between sedentary and sedentary light, no crawling activities as unable to bear weight on right wrist, displays frequent tolerance to upper extremity repetitive motion activity of light weight objects between waist and chest height, with 10-15 minutes at a time and 20-30 minutes in any one hour time period; limit above shoulder height activities." and a recommendation for maintenance medical care

15. On April 20, 2015 a Final Admission of Liability was filed by respondent-insurer. Claimant objected and filed an Application for Hearing on April 29, 2015.

16. Claimant testified that she moved to Pueblo, Colorado in 1992 and got a job as a "lunch lady" working in the cafeteria a school where she also occasionally acted as an interpreter. As this job did not provide sufficient hours, Claimant quit and secured employment in the hotel industry as a maid.

17. After approximately 2-3 years as a maid, Claimant was promoted to a head housekeeper position supervising other maids due to her experience and work ethic. She spent about 7 years as the head housekeeper/supervisor where her duties included hiring, firing, training, completing paperwork and ordering supplies. Claimant was terminated after a disagreement with another supervisor. She then gained employment with Employer in 2005. Claimant completed her application for employment with Employer in English.

18. Claimant has a valid, unrestricted Colorado driver's license. She took the driver's test in English and testified that she understands English and can read, write and speak it at a basic level. Claimant did not require the use of an interpreter at any of her medical appointments or for her meetings with the parties' respective vocational experts in this case. Rather, Claimant testified that she has never claimed that she does not understand English or that she is non-conversant in English. Based upon the evidence presented, the ALJ finds that while English is not Claimant's first language, she has sufficient command of English to complete written job applications in English and otherwise work in environments where English is spoken routinely.

19. Claimant testified that she currently has daily pain in her neck, her right shoulder blade, her upper back (trapezius) and left arm when she is active. She testified that her pain and limited range of motion in her neck and arms limits her driving. She reportedly

cannot lift a gallon of milk or reach overhead for more than ten minutes. Consequently, Claimant testified she requires some assistance with household chores and activities of daily living, such as combing her hair. The ALJ finds a dearth of medical evidence to support Claimant's assertions of impaired functional ability concerning the use of her arms, especially the left arm or her reported neck/upper back pain. Consequently, the ALJ finds her testimony as to her subjective physical limitations, pain complaints and restrictions unconvincing.

20. Claimant has failed to prove, by a preponderance of the evidence, that she has a functional impairment beyond the arm at the shoulder which would warrant conversion of her right upper extremity scheduled impairment to impairment of the whole person.

21. Claimant testified that she applied for and received unemployment benefits during the pendency of the claim. She admitted she understood that by receiving those benefits, she was admitting to the State of Colorado she was ready, willing, and able to work.

22. While Claimant testified that, post MMI, she had applied for jobs and was not hired; she had no idea if any of the employer's where she had applied were actually hiring at the time. While alleging she was permanently and totally disabled; Claimant failed, without explanation, to apply for Social Security benefits.

23. Bruce Magnuson testified as to the human factors specifically unique to Claimant in this case. He testified that she is 46 years of age, lives in Pueblo, Colorado, has sixth grade education from Guatemala, is not a native English speaker, and her past employment consists of the tortilla packager position, a maid position, and lunch room position. He testified as to the permanent restrictions provided by Dr. Lakin. He testified he heard Claimant's testimony regarding her residual functional capacity. He testified that based upon his review of the medical records and Claimant's testimony that she cannot perform her past employment. Mr. Magnuson also testified that there is not employment reasonably available to the claimant. In his opinion, the claimant meets the definition of permanent total disability in Colorado.

24. On cross examination, Mr. Magnuson conceded that he assumed Claimant's restrictions to include the bilateral upper extremities. He admitted further that it would be unusual for a doctor to place restrictions on a body part that was not permanently injured, such as Claimant's left arm in this case. Finally, Mr. Magnuson admitted that Claimant's age, in and of itself, was not a detriment to her being able to work and earn wages.

25. Mr. Magnuson did not do any labor market research or formal testing on the Claimant and he did not meet with or speak to any potential employers. Rather, he met with Claimant on one occasion for about one hour.

26. Patricia Anctil, Respondents' vocational expert, testified that Claimant is still able

to earn wages. Ms. Anctil based her opinions in part on an analysis of transferable skills and her vocational research. Ms. Anctil testified that, based upon her review of the medical records in the case; Claimant's work restrictions only involve her right upper extremity.

27. Ms. Anctil noted correctly that Claimant is bilingual; although the ALJ finds Claimant only possesses basic English skills.

28. Ms. Anctil also correctly noted that per the FCE results, Claimant had the frequent ability for upper extremity repetitive motions (Mr. Magnuson's opinion incorrectly notes this limitation as occasional).

29. In her reports and subsequent testimony, Ms. Anctil identified several positions that Claimant could perform including front desk clerk at La Quinta Inn or Super 8; order-taker/cashier at McDonalds or ticket seller/cashier at Cinemark theatres.

30. Based upon a totality of the evidence presented, including the medical records, the ALJ finds Ms. Anctil's opinions credible and more persuasive than the contrary opinions of Mr. Magnuson. Accordingly, the ALJ finds that Claimant failed to prove she is unable to earn any wages and is permanently and totally disabled.

31. Claimant presented evidence which establishes an average weekly wage of $549.36. Documentation entered into evidence regarding this issue consists of the wage records demonstrating Claimant's gross wages from May 6, 2012 through May 4, 2013 for a period of 363 days. The injury in this case occurred on May 7, 2013. Wage records submitted into evidence for this time period establish that Claimant was paid $27,660.75 leading up to the date of injury. When one performs the necessary calculation ($27,660.75 / 364 days × 7 days/week = $533.40), Claimant's average weekly wage, at the time of injury was $533.40. However, after January 1, 2015, Claimant lost her employer sponsored health insurance benefits that had previously been valued at $15.96 per week. When the $15.96 is added to the $533.40, it yields a value of $547.90. Consistent therewith, after January 1, 2015, Claimant's average weekly wage is calculated to be $549.36.

32. The ALJ finds that as a result of her May 7, 2013 work injury, Claimant has a visible disfigurement to the body consisting of surgical scarring on the right wrist and shoulder described as follows: There are three surgical scars about the right wrist, the first appearing approximately ⅜ inch long and red in color when compared to the surrounding skin. The second scar is approximately 1 inch long by 1/16 inch wide. This scar is lightly pigmented when compared to the surrounding skin. The third scar appears approximately 1 inch in diameter and is variously pigmented when compared to the surrounding skin. There are also three scars located on the right shoulder. The first scar, located on front of the shoulder, is approximately ½ inch long by 1/16 inch wide. This scar is lightly pigmented and slightly depressed when compared to the surrounding skin. On the outside portion of the right shoulder, there is a surgical scar possessing the same dimensions and overall characteristics of the scar located on the front of the

shoulder, except this scar is light pink in color when compared to the surrounding skin. On the back of the right shoulder there is red surgical scar appearing approximately ½ inch long by 1/16 inch wide. Claimant's residual scarring about the right wrist and shoulder alters the natural appearance of her skin which constitutes a disfigurement as provided for by Section 8-42-108 (1), C.R.S. Consequently, the ALJ finds that Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation.

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., *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. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the totality of the evidence presented, that Ms. Anctil is a credible witness. Moreover, the ALJ finds and concludes, based upon the evidence presented, that Ms. Anctil's opinions are more persuasive than those of Mr. Magnuson. Conversely, the ALJ finds Claimant's testimony regarding her asserted current functional limitations, restrictions and pain complaints incredible and unconvincing.

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item

contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Disfigurement

D. 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." In this case, the ALJ conducted a disfigurement viewing. As part of that viewing, the ALJ observed the residual surgical scarring described above at FOF ¶ 32. As found, Claimant's scars constitute a disfigurement as provided for by § 8-42-108 (1), C.R.S. Accordingly, Insurer shall pay Claimant $1,200.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Average Weekly Wage Adjustment

E. 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).*

F. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), gives 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 her diminished earning capacity comes from the wage records submitted into evidence. In this case, the ALJ concludes that Respondent's methodology in utilizing the first 133 days in 2013 to calculate Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's earnings over time. The ALJ adopts Claimant's methodology in calculating his AWW, but utilizes the total number of days in the time period extending from May 6, 2012 to May 4, 2013 to arrive at a daily rate which the ALJ subsequently multiplies by 7 to arrive at a weekly rate as this method accounts for Claimant's average weekly earnings over a 363 day time period leading up to the injury in this case. Accordingly, the ALJ determines that Claimant's average weekly wage is $549.36. The ALJ finds that this figure most closely approximates Claimant's actual wage loss and diminished earning capacity.

Conversion

G. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person.

This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder.

H. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Furthermore, as pointed out by Claimant's counsel, functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Consequently, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare*

System, supra; Langton v. Rocky Mountain Health Care Corp., 937 P.2d 883 (Colo. App. 1996)

I. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet her burden to establish that she has sustained functional impairment beyond the arm at the shoulder warranting conversion of her scheduled impairment to impairment of the whole person. At hearing, Claimant testified that since her admitted shoulder injury she has experienced neck pain, difficulty sleeping, upper back (trapezius) pain, difficulty reaching overhead for more than 10 minutes and using her arms to lift objects. Accordingly, Claimant asserts that she has functional limitations in her ability to carry out activities of daily living, including driving and combing her hair. Claimant argues that these complaints/limitations justify an award of whole person impairment. The ALJ is not persuaded for the following reasons: (1) The ALJ finds Claimant's report of symptoms beyond the shoulder into the neck and upper back unsupported by the totality of the medical record and; (2) no restrictions have been imposed on the use of Claimant's left arm. Indeed according to Dr. Lakin, the authorized treating physician in this case, Claimant's left upper extremity resolved fully by March 13, 2015. Consequently, the ALJ finds Claimant's assertions of functional impairment beyond the arm at the shoulder contradicted and substantially eroded by the balance of the evidence presented. While the Claimant's shoulder injury may have caused referred pain to other parts of the body, including the trapezius and the lower neck, the ALJ is not persuaded that Claimant's shoulder injury has resulted in any decreased capacity in Claimant's ability to meet her personal, or social demands.

Permanent Total Disability

J. Under applicable law, Claimant is permanently and totally disabled if he is unable to "earn any wages in the same or other employment." *Section 8-40-201(16.5)(a), C.R.S.* 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 *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

K. There is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes

that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995).

L. When determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Considering Claimant's unique "human factors", the ALJ is not convinced that she is incapable of earning any wages. Here, the evidence presented establishes that Claimant is a younger worker who has sufficient skills to obtain and maintain employment. While Claimant has a limited education, she understands and is conversant in English. She reads and writes English at a basic level. Her education background and her language skills were the same prior to her May 7, 2013 injury and have never precluded her from securing employment in the past. She has a sufficiently diverse work background which includes supervising others and ordering inventory. Moreover, she possesses a unrestricted driver's license and while she suggests that her shoulder injury limits her driving and therefore her access to the labor market, the assertion is unsupported by the record evidence. Here, despite claimant's assertions, there is a paucity of evidence to support a conclusion that Claimant's restrictions include the left arm. Furthermore, the restrictions imposed are not likely to affect Claimant's ability to drive. Consequently, the ALJ is not persuaded by the suggestion that Claimant does not have access to labor markets within a reasonable commutable distance from Pueblo.

M. Likewise the ALJ is not persuaded by Claimant's assertion that there is no work available to her given the restrictions assigned by Dr. Lakin. While it is more probably true than not, that Claimant is precluded from returning to her former occupation as a packager and/or the housekeeping positions she held in the past, the representative sampling of positions identified by Respondents' vocational expert as being within Claimant's physical/mental capabilities represent a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. As noted above, there is no requirement that Respondents locate a specific job Claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, *supra*. Nonetheless, Ms. Anctil reviewed the restrictions imposed by Dr. Lakin and took all into account when performing labor market research to identify those positions comprising her sampling. She identified Claimant's transferable skills and persuasively testified that Claimant retains the ability to earn wages in the positions she identified as being within Claimant's capacity.

N. Based upon the evidence presented, the ALJ concludes that Ms. Anctil's opinions and testimony are credible and more persuasive than the contrary opinions of Mr. Magnuson who failed to document any transferrable skills or conduct any labor market research. He offered opinions on Claimant's ability to perform specific jobs without ever contacting the employers to determine the actual job duties. Finally, he incorrectly assumed that Claimant's upper extremity restrictions extended to both arms

and he incorrectly noted that Claimant was limited to occasional repetitive movements of the upper extremities when the FCE listed the same as frequent. Accordingly, Claimant has failed to demonstrate by a preponderance of the evidence that she is incapable of earning any wage in the same or other employment as a result of her May 7, 2013 work injury.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant $1,200.00 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

2. Claimant is entitled to an adjustment of her AWW to $549.36

3. Claimant's request for conversion of her scheduled upper extremity impairment to impairment of the whole person is denied and dismissed.

4. Claimant's claim for permanent total disability benefits is denied and dismissed.

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: December 23, 2015

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant has overcome the opinion of the Division Independent Medical Examiner ("DIME") regarding maximum medical improvement ('MMI") by clear and convincing evidence.

II. Whether the left total knee replacement procedure recommended by Dr. O'Brien is reasonable, necessary and causally related to Claimant's admitted industrial injury.

III. If Claimant is at MMI for the work-related injury, whether she has established by a preponderance of the evidence that her scheduled impairment rating should be converted to a whole person impairment rating.

IV. Whether Claimant is entitled to disfigurement benefits for her work-related injury.

FINDINGS OF FACT

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

1. On March 27, 2015, Claimant was in the course and scope of her employment as a flight attendant for Employer when she injured her left knee. Claimant was working in the galley of the plane when the aircraft was shaken violently by some turbulence causing her to twist her left knee. Claimant completed her shift by working a flight from Houston, Texas to Colorado Springs, Colorado; however, she began to experience swelling and pain in her knee on the return flight. Claimant reported the injury to her employer upon her return and the claim was admitted.

2. Claimant came under the care of Dr. John Reasoner. Dr. Reasoner obtained MRI images of the claimant's left knee which revealed moderate to advanced degenerative changes and osteoarthritis along with associated degenerative tearing of the medial meniscus. Conservative treatment failed to resolve Claimant's symptoms and she was referred to Dr. David Walden for an orthopedic consult.

3. Dr. Walden diagnosed left knee degenerative joint disease. He opined further that Claimant likely sustained an acute medial meniscus tear "superimposed" on her degenerative joint disease. Dr. Walden determined that Claimant had not made significant improvement with conservative care and thus he recommended an "arthroscopic partial medial meniscectomy and chrondroplasty to try to return [her] to as close to baseline as possible". Dr. Walden requested pre-authorization from the workers' compensation insurer to proceed with the recommended surgical intervention.

Insurer approved the surgery and on May 31, 2013, Dr. Walden performed a left knee arthroscopic partial medial meniscectomy, a left knee arthroscopic partial lateral meniscectomy, and a left knee arthroscopic chondroplasty of the patellafemoral joint, medial femoral condyle, and medical tibial plateau.

4. Surgery failed to resolve Claimant's symptoms and actually made them worse. Consequently, Dr. Walden directed visco-supplementation to the left knee which also failed to produce any material effect on Claimant's ongoing symptoms. A new MRI was performed on December 4, 2013, which, according to a December 16, 2013 report from Dr. Walden, confirmed severe degenerative changes in Claimant's left knee as well as degenerative tears of the medial and lateral meniscus. Dr. Walden opined that Claimant would not benefit from additional arthroscopies and that the majority of her pain was coming from osteoarthritis. Dr. Walden opined further that because Claimant was not "benefiting from conservative measures she would be considered a candidate for a total knee arthroplasty". According to Dr. Walden, the work-relatedness of the need for this procedure was a "somewhat difficult" question because, while it was clear that the work injury did not cause Claimant's osteoarthritis, the work related tearing of the meniscus was exacerbating the situation and Claimant had not returned to her pre-injury baseline since her injury and subsequent surgery. Dr. Walden referred Claimant for consideration of a total knee replacement.

5. On February 17, 2014, Claimant was evaluated by orthopedic surgeon, Dr. Timothy O'Brien regarding her need for a total knee arthroplasty. Dr. O'Brian noted Claimant's report that the surgery performed by Dr. Walden had actually made her symptoms worse. Dr. O'Brian agreed that the claimant was in need of a total knee replacement; however, he withheld an opinion on causation between Claimant's work injury and her need for a replacement arthroplasty as he was unable to review all of the medical documentation.

6. On April 21, 2014, Dr. Mark Failinger evaluated Claimant in the setting of an independent medical examination (IME) at Respondents' request. Dr. Failinger made note of the mechanism of injury, describing how Claimant twisted her knee and continued working despite experiencing pain and swelling of her knee because she thought she had "tweaked" her knee. He also documented Claimant's report that she was able to walk to her car following completion of her shift on the day of injury as well as her reported history of intermittent left knee pain prior to the work injury for which no treatment was sought. Focusing on the work related injury, i.e. the exacerbation of pre-existing arthritis and meniscal tearing, Dr. Failinger opined as follows: "in my opinion, there was high-grade chrondromalacia, in other words, degenerative joint disease, prior to the 3/27/2013 incident. There was an exacerbation of preexisting arthritis and lower chance that the 3/27/2013 event created significant new pathology, but, may have caused some further meniscus tearing for which the appropriate treatment has occurred. No further treatment needed for such". Based upon Dr. Failinger's report, the ALJ finds that Dr. Failinger believes that Claimant's meniscal tearing was causally related to her March 27, 2013 industrial injury. Moreover, the ALJ infers from the content of Dr. Failinger's IME report that this compensable meniscal tearing was

adequately treated with the care provided by Dr. Reasoner and Dr. Walden. Consequently, while Dr. Failinger did not expressly address whether Claimant's need for a left total knee arthroplasty was causally related to the industrial injury, the ALJ finds that Dr. Failinger's report supports a finding that he does not believe that Claimant's need for a total knee replacement is related to the work injury.

7. Following Dr. Failinger's IME, Claimant as placed at MMI by Dr. Reasoner, on May 15, 2014. During his exam of Claimant, Dr. Reasoner noted that there was a normal exam of the lumbar spine. He provided a diagnosis of left knee osteoarthritis aggravation. Dr. Reasoner specifically opined that "no further active medical or surgical treatment with (sic) be beneficial," thus implicitly opining against a left total knee replacement as being related to the work injury. Two years of medication was put forth as maintenance care.

8. Dr. Cynthia Lund examined Claimant on June 7, 2014, for purposes of assigning an impairment rating. Dr. Lund made note of the fact that Claimant stated she had occasional minor pain in her knee prior to the work injury. Dr. Lund agreed with the MMI date of May 15, 2014, and assigned a 36% scheduled impairment rating of the left lower extremity. Maintenance care to include two years of pain medication was recommended. Dr. Lund did not opine that the left total knee replacement surgery should be performed as a result of this work injury nor did Dr. Lund state that Claimant's scheduled impairment rating should be converted to whole person impairment.

9. Respondents filed a Final Admission of Liability ("FAL") on September 9, 2014, consistent with the opinions of Dr. Reasoner and Dr. Lund. Claimant objected to the FAL in a timely manner and requested a Division Independent Medical Examination ("DIME").

10. The DIME was performed by Dr. Scott Ross on January 16, 2015. Dr. Ross agreed with the MMI date of May 15, 2014 and assigned a 45% scheduled impairment rating of the left lower extremity. He did not indicate that Claimant's scheduled impairment should be converted to whole person impairment. He also indicated that because the work injury did not cause Claimant's degenerative arthritis, there was no liability for the total knee arthroplasty under the workers compensation system. While acknowledging that Claimant had seen Dr. O'Brien and noting that Dr. O'Brien had recommended a TKA, the evidence presented fails to establish that Dr. Ross requested Dr. O'Brien's records before placing Claimant at MMI. Moreover, although available prior to hearing, Dr. Ross was not provided with Dr. O'Brien's records review report for comment. Based upon the evidence presented, the ALJ finds Dr. Ross' opinions concerning MMI to be based upon an incomplete review of the medical record concerning cause of Claimant's need for a total knee arthroplasty, its relatedness to her industrial injury and its impact on MMI. Consequently, the ALJ finds Dr. Ross' opinions regarding MMI highly probably incorrect. Claimant has proven by clear and convincing evidence that she was not at MMI on May 16, 2014. Consequently, the ALJ finds Claimant entitled to temporary total disability benefits as requested by Claimant from October 6, 2015 and ongoing.

11. Respondents filed a FAL on March 13, 2015, that is consistent with the DIME opinion. The claimant objected and requested a hearing.

12. On September 15, 2015, Dr. O'Brien was asked to conduct a records review and address the question of whether Claimant's need for a total knee arthroplasty was causally related to her March 27, 2013 industrial injury. Following that records review, Dr. O'Brien opined that the arthroscopic procedure performed by Dr. Walden was contraindicated, and that the performance of this procedure accelerated the progression of Claimant's preexisting osteoarthritis, thereby causing her need for a total knee replacement. According to Dr. O'Brien, the only thing that Dr. Walden's surgery served to do was to introduce a rigid arthroscope into Claimant's osteoarthritic knee causing surgical trauma which in turn created an "intractable synovitis, which in almost all cases results in a dramatic progression of osteoarthritic symptomology".

13. Based on the evidence presented, the ALJ finds that Dr. O'Brien was presented with a comprehensive set of Claimant's medical records including the DIME report of Dr. Ross when he was tasked by Respondents to address the cause of Claimant's need for a TKA and the relatedness of the procedure to her admitted left knee injury. Conversely, as noted above, Dr. Ross did not have a complete set of records when he placed Claimant at MMI, nor was he provided with Dr. O'Brien's records review report for additional comment prior to the October 6, 2015 hearing. Consequently, the ALJ credits the opinions of Dr. O'Brien over those of Dr. Ross to find that Claimant's need for total knee arthroplasty is reasonable, necessary and causally related to her March 27, 2013 industrial injury.

14. Claimant testified at the hearing in this matter. She testified that she was active prior to suffering the work-related injury in this case. She testified that, prior to the date of injury; she never had any significant pain or functional limitations relative to her left knee. She was able to walk approximately two miles daily, was able to hike occasionally and engage in gold panning and rock hounding. The claimant testified as to her mechanism of injury and the pain she experienced leading up to the May 31, 2013 arthroscopic surgery performed by Dr. Walden. She testified that, after the surgery performed by Dr. Walden; her left knee symptoms became significantly worse. She testified that at no time since the work-related injury has she returned to her pre-injury baseline. Nonetheless, the admitted that she retains the ability to cook, do laundry, grocery shop, perform general housekeeping tasks, groom herself, take trips in a car to Missouri and Nebraska to visit her children and get into and drive her Dodge Ram 2500 truck. She testified that she gets pain in her low back and left hip, and that she had a bursitis in her left hip approximately three years prior to the work injury. Claimant further testified that she does not use any medical assistive devices, such as a cane or walker.

15. Dr. Michael Dallenbach testified at hearing. He testified that Claimant suffered from severe preexisting osteoarthritis and cartilage loss in the left knee resulting in bone on bone contact. He also testified that Claimant likely suffered from preexisting

meniscus tears in her left knee. According to Dr. Dallenbach, Claimant's condition became symptomatic following the work injury and that the arthroscopic procedure performed by Dr. Walden could have caused Claimant's preexisting condition to become symptomatic. He testified that, in his expert opinion, Claimant's need for a total knee arthroplasty was caused by the work-injury and the treatment thereof. He testified that a proper analysis of whether the claimant is at MMI includes an analysis of whether the injury aggravated or accelerated the underlying degenerative condition causing the need for treatment. He testified that in his opinion, the work injury aggravated and accelerated the need for the total knee replacement. Therefore, Dr. Dallenbach opined that Claimant is not at MMI.

16. Claimant was sent a letter informing her of her award of Social Security Disability Insurance benefits on April 20, 2015. That letter stated that Claimant became disabled under their rules on March 27, 2013. However, because Claimant did not file for benefits until March 3, 2015, she was only entitled to benefits beginning in March of 2014. Claimant was to receive a lump sum payment of $8,780.00 around April 26, 2015, and monthly benefits of $683.00 moving forward.

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, §§ 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*, 592 P.2d 792 (Colo. 1979).

B. 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).

C. 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).

Overcoming the DIME

D. Claimant's request to set aside the Division IME opinion of Dr. Ross that Claimant reached MMI for the effects of her admitted industrial injury on May 15, 2014 is granted. A DIME physician's finding regarding MMI is 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). Furthermore, the Colorado Court of Appeals has previously held that the DIME physician's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. *Denham v. L & L Disposal and Pinnacol Assurance, supra; citing Qual Med, Inc., v. Industrial Claim Appeals Office, supra; Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). "Because the issue of MMI inherently requires a determination of the cause or causes of the claimant's medical condition, a DIME physician's opinion that a causal relationship does or does not exist between a particular condition and the industrial injury must also be overcome by clear and convincing evidence." *Nilsestuen v. Nuanez Trucking and Pinnacol Assurance*, 2002 WL 1008778, at *1.

E. "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 or the cause of a particular component of a claimant's medical condition the party challenging the DIME physicians opinions must demonstrate that the 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 (ICAP, 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.*

F. The question of whether the Claimant has overcome the DIME physician's

findings regarding MMI and/or causality, by clear and convincing evidence, are one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. In deciding whether Claimant has met her burden of proof, the ALJ is empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). In this case, the issue of whether Claimant was properly placed at MMI by Dr. Ross involves a complex medico-legal question regarding the cause of Claimant's need for a total knee replacement procedure. Succinctly, Claimant contends that her compensable left knee injury necessitated an arthroscopic surgery which aggravated and also accelerated the progression of her underlying pre-existing left knee osteoarthritis thereby contributing substantially to her need for a total knee arthroplasty (TKA). As such, Claimant contends that her need for a TKA is directly causally related to her admitted work injury. Claimant contends further that because Dr. Ross did not independently consider whether Claimant's arthroscopic surgery, as performed by Dr. Walden aggravated, accelerated, or combined with her pre-existing arthritis so as to produce the need for the TKA, his opinion regarding MMI is erroneous.

G. Because the question of whether Claimant attained MMI inherently requires a determination of the cause or causes of the claimant's medical condition and need for medical treatment, the ALJ concludes that a proper analysis of whether the need for a TKA is causally related to the industrial injury is fundamental to the question of whether Claimant was properly placed at MMI. Here, the evidence presented persuades the ALJ that Dr. Ross' opinion concerning MMI is highly probably incorrect because it is based upon an incomplete understanding of the cause or causes of the claimant's current medical condition and her need for a TKA. Careful review of the DIME report persuades the ALJ that rather than considering whether the work injury or any treatment (surgery) received as a consequence aggravated, accelerated or combined with Claimant's pre-existing condition to produce the need for a TKA, Dr. Ross rather simply opined that Claimant's work injury did not cause her pre-existing condition. Thus, according to Dr. Ross there is no liability for the TKA under the workers compensation system. He did not explain this opinion, nor did he address whether the admitted "exacerbation" was temporary or permanent in nature or whether it accelerated Claimant's underlying arthritis beyond its normal rate of progression. He simply did not render opinions in this regard. Moreover, while acknowledging that Claimant had seen Dr. O'Brien and noting that Dr. O'Brien had recommended a TKA, Dr. Ross failed to request Dr. O'Brien's records before placing Claimant at MMI despite the availability of the record. Finally, although available Dr. Ross was not provided with Dr. O'Brien's records review report for comment. Consequently, as found above, the ALJ finds Dr. Ross' opinion that Claimant had reached MMI to be based upon an incomplete review of the record concerning cause of her need for a TKA and its relatedness to her industrial injury.

H. To the extent that Dr. Ross' opinions concerning causality, and therefore, MMI diverge from those expressed by Dr. O'Brien, the ALJ concludes those discrepancies constitute more than a professional difference of opinion. While a mere difference of

opinion between physicians fails to constitute error, *Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000), the evidence presented in this case persuades the ALJ that Dr. Ross' opinion regarding MMI is based upon an incomplete review of the record and the cause of Claimant's need for a TKA and its relationship to her March 27, 2013 industrial injury. Consequently, the ALJ concludes that Dr. Ross performed an incomplete causality assessment regarding Claimant's need for a TKA and its relationship to her MMI status. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. *Section 8-40-201(11.5), C.R.S.* Here, the weight of the persuasive evidence demonstrates that Claimant's need for a TKA is directly related to the treatment she received for her industrial injury. Because the TKA is necessary to cure Claimant of the ongoing effects of the aggravation caused by the surgery performed by Dr. Walden and is likely to improve her condition, and because Dr. Ross failed to consider the totality of the medical record before placing Claimant at MMI or perform a complete causality assessment addressing Claimant's need for a TKA to her MMI status, the ALJ concludes that Claimant has proven that it is highly probable that Dr. Ross erroneously placed her at MMI on May 15, 2014 for her March 27, 2013 left knee injury.

Relatedness of Claimant's Need for a Total Left Knee Arthroplasty to the March 27, 2013 Injury

I. 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). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary 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).

J. Regardless, a 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). 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 were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

K. Based on the totality of the evidence presented, the ALJ credits the opinions of Dr. O'Brien to conclude that Claimant's immediate need for a left total knee replacement is reasonable, necessary and directly related to the admitted March 27, 2013 left knee injury. Here, the conclusions of the medical literature cited by Dr. O'Brien persuades the ALJ that the arthroscopic surgery performed by Dr. Walden, to treat pain emanating

from Claimant's compensable injury, was contraindicated and served only to accelerate the progression of her underlying osteoarthritis hastening her need for a total knee replacement. As eloquently stated by Dr. O'Brien, "[t]he only thing that this surgery serves to do is introduce surgical trauma that creates an intractable synovitis which in almost all cases results in dramatic progression of osteoarthritic symtomatology". Consequently, the ALJ concludes that Respondents are liable for the left knee TKA to cure and relieve Claimant of the ongoing symptoms associated with the progression/acceleration of the underlying arthritis caused by Dr. Walden's original arthroscopic surgery.

Conversion

L. Because this order determines that Claimant has proven by clear and convincing evidence that Dr. Ross' opinion regarding MMI is erroneous and that she is in need of a TKA, the ALJ concludes that Claimant's request for conversion of her scheduled impairment rating to impairment of the whole person is moot. Consequently, this order does not address this issue further.

Disfigurement

M. 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." In this case, the ALJ conducted a disfigurement viewing. As part of that viewing, the ALJ observed mild generalized swelling of the left knee when compared to the contra-lateral limb. Additionally, Claimant has two (2)⅜ inch in diameter semi -circular, light red arthroscopic scars located in the area of the left knee. Finally, Claimant ambulates with a perceptible limp favoring the left leg as a consequence of what the ALJ concludes emanates from a stiff knee lacking full range of motion. The ALJ concludes that Claimant's mild swelling, scars and appreciable limp constitutes disfigurement as provided for by § 8-42-108 (1), C.R.S. Accordingly, Insurer shall pay Claimant $1,800.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Offset for Claimant's Receipt of SSDI Benefits

N. Pursuant to C.R.S. § 8-42-103(1)(c)(I) the aggregate benefits payable to a Claimant for TTD shall be reduced, but not below zero, "by an amount equal as nearly as practical" to one-half the federal periodic benefits paid to a Claimant for federal "Old-Age, Survivors, and Disability Insurance Amendments of 1965". The "offsets" provided for under C.R.S. § 8-42-103(1)(c)(I) are statutory in nature. Consequently, Respondent's are entitled to apply the provisions of C.R.S. § 8-42-103(1)(c)(I) and offset the TTD benefit to be paid to Claimant if the circumstances raised by C.R.S. § 8-42-103(1)(c)(I) otherwise apply to the case. Here, Respondents have proven by a preponderance of the evidence that Claimant became entitled to SSDI benefits

beginning March 2014 in the amount of $683.00 per month. Accordingly, the offset provisions of C.R.S. § 8-42-103(1)(c)(I) apply in this case. However, Claimant simply requested that TTD benefits be reinstated in this case from the date of the hearing and ongoing, should Claimant be found not at MMI. Based on this, Respondents are entitled to a weekly offset of $78.81 ($683.00 x 12 months, divided by 52 weeks and divided by .50), beginning October 6, 2015 and ongoing.

O. Based on the admitted AWW of $747.29 and resulting TTD rate of $498.22, Claimant shall be entitled to weekly TTD payments, after application of the aforementioned offset, in the amount of $419.41 beginning October 6, 2015 per her request.

ORDER

It is therefore ordered that:

1. Claimant has overcome the opinion of the DIME physician in regards to MMI by clear and convincing evidence.

2. Claimant has established, by a preponderance of the evidence, that the left total knee replacement procedure recommended by Dr. Walden is reasonable and necessary medical treatment, which is causally related to her March 27, 2013 work injury.

3. Claimant has proven by clear and convincing evidence that she is not at MMI. Consequently, her request for conversion of her scheduled impairment rating to whole person impairment is moot.

4. Claimant is entitled to disfigurement benefits in the amount of $1,800.00.

5. As Claimant has proven that she is not at MMI, her request for reinstatement of TTD benefits beginning October 6, 2015 is GRANTED. Respondents are entitled to a weekly offset against temporary disability benefits of $78.81 based on Claimant's receipt of SSDI benefits, to be applied to any TTD benefits paid in conjunction with the claim beginning October 6, 2015 and ongoing.

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

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

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

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

DATED: December 21, 2015

/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 the need for a total hip replacement was proximately caused by the industrial injury she sustained on May 18, 2013?

- Did Claimant prove by a preponderance of the evidence that a total hip replacement constitutes reasonable and necessary medical treatment?

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 8 were received into evidence. Respondents' Exhibits A though M were received into evidence.

2. Claimant was born on January 4, 1943. She was 72 years of age on the date of the hearing.

3. Claimant was employed a "grocery stocker" in the Employer's store. Claimant credibly testified that on May 18, 2013 she was climbing a ladder to move materials when she experienced low back pain. On December 6, 2013 the Respondents filed a General Admission of Liability for Claimant's injury.

4. Claimant selected Colorado Health Management Group (CHMG) as the authorized medical provider for this injury.

5. Nurse Practitioner Laura Turk evaluated Claimant at CHMG on May 18, 2013. Claimant complained of low back pain but denied any "loss of strength or sensation in the legs." NP Turk assessed lower back pain and recommended activity modification and rest. NP Turk prescribed "Norco" for pain and diazepam for muscle spasm.

6. Physician's Assistant Michael Dietz evaluated the claimant on May 23, 2013. PA Dietz assessed acute left back pain, strain. He prescribed Tylenol 500 and Lidoderm patches. He also referred Claimant for physical therapy (PT). PA Dietz imposed lifting, walking and standing restrictions and limited Claimant's work to 4 hours per day.

7. On June 5, 2013 Claimant commenced PT at Pro Active Physical Therapy (Pro Active). On June 10, 2013 the Pro Active physical therapist noted that Claimant

was now complaining of right-sided hip pain. The therapist wrote the pain was in the right buttock.

8. On June 11, 2013 Claimant told PA Dietz that she underwent her first "formal" PT visit the previous day and that she was "stiff and sore." Claimant also reported that she was experiencing some right hip pain that sometimes radiated to her right knee. PA Dietz referred Claimant for an MRI to "rule out HNP pathology lumbar."

9. On June 14, 2013 Claimant underwent a lumbar MRI. The radiologist's general impression was "spondylitic changes in the lumbar spine."

10. On July 12, 2013 Kevin T. O'Connell, M.D., examined Claimant at CHMG. Claimant reported "intense pain coming from the right SI joint radiating into the right leg." Claimant advised Dr. O'Connell that PT was not helpful and that on the "initial sessions there was 1 movement that particularly aggravated her back with pronounced pain down into her right leg." Dr. O'Connell noted Claimant had recently been seen by Robert Benz, M.D., for an orthopedic spine consultation. Dr. Benz had recommended an L4-5 facet injection and an L5-S1 right-sided transforaminal epidural steroid injection (ESI). Dr. O'Connell also reviewed the lumbar MRI. Dr. O'Connell assessed right L5 lumbar disc syndrome secondary to facet arthropathy and a degenerative L4-5 disc. Dr. O'Connell referred Claimant to George Girardi, M.D., to perform the injections recommended by Dr. Benz.

11. On August 14, 2013 Dr. O'Connell noted Claimant underwent a transforaminal ESI which provided significant but brief relief of her symptoms. Dr. O'Connell referred Claimant for additional PT with a different provider.

12. On September 19, 2013 Dr. O'Connell assessed lumbar sprain with aggravation of lumbar degenerative disc disease and right leg sciatica. Dr. O'Connell referred Claimant to Rebekah Martin, M.D., for a pain management consultation.

13. Dr. Martin examined the Claimant on September 24, 2013. Claimant reported pain from the suboccipital region all the way down into the low back and right lower extremity. When Dr. Martin asked Claimant where she experienced the most pain Claimant pointed to the right groin and lateral hip regions. Based on the history, physical examination and review of imaging studies Dr. Martin opined that Claimant's pain generator "may be coming" from her right hip. Dr. Martin recommended a right hip intraarticular joint injection. Dr. Martin explained that she was suspicious Claimant might have sustained a labral tear at the time of her first PT visit.

14. On October 7, 2013 I. Stephen Davis, M.D., conducted an independent medical evaluation at the request of the Insurer. Dr. Davis is board certified in orthopedic surgery and is level II accredited. Dr. Davis took a history from Claimant, reviewed pertinent medical records and performed a physical examination. Dr. Davis noted that Claimant's pain complaints were in her right lower extremity and not the back. On physical examination Dr. Davis found Claimant's right hip was "irritable to compression and rotation." Based on the clinical examination Dr. Davis opined the

claimant's lumbar spine was not the pain generator. Rather, Dr. Davis was more "impressed" with the findings about the right hip. Dr. Davis opined that Claimant's "pain generator" had not yet been determined. He recommended Claimant undergo an MRI arthrogram of the hip and pelvis and a bone scan.

15. On October 22, 2013 Dr. Martin noted Claimant had a favorable response to a hip joint injection performed on October 8, 2013. Dr. Martin recommended Claimant undergo a right hip MRI with contrast to determine if a labral tear was present.

16. On December 2, 2013 Claimant underwent a right hip MRI with contrast. The radiologist's impression was a nondisplaced tearing of the anterosuperior acetabular labrum.

17. On December 30, 2013 Dr. O'Connell assessed Claimant with a right hip acetabular tear and lumbar degenerative discs at L3-4 and L4-5. Dr. O'Connell referred Claimant to "hip specialist" Brian White, M.D., for an orthopedic consultation.

18. On January 8, 2014 Claimant was examined by Dr. White and Physician's Assistant Shawn Karns. Claimant's chief complaint was "right hip pain." Claimant gave a history that she injured her back on May 18, 2013 while standing on a ladder and pushing some items onto a top shelf. Claimant also reported that while she was stretching her hip in PT she "felt a sharp pain deep in the groin." PA Karns noted Claimant was 5 feet 4 inches tall and weighed 210 pounds. Claimant reported that she had gained 30 pounds because the hip problems prevented her from being active.

19. In his office note of January 8, 2014 Dr. White commented that Claimant's hip pain was affecting her "quality of life" and that her function was "becoming more restricted." Dr. White noted that x-rays of Claimant's hip showed "reasonably well-preserved joint space" and that the MRI confirmed there was a "significant" labral tear. Dr. White recommended the Claimant undergo a total hip replacement (THR) as opposed to arthroscopic debridement of the labral tear. Dr. White opined that arthroscopic debridement was not the "ideal" treatment for Claimant because of her "body habitus" and age of 71 years. Dr. White further stated that a THR would "last for as long as" Claimant needed it and that a THR would be a more "predictable" surgery than arthroscopic debridement.

20. On January 8, 2014 Dr. White wrote a letter to Dr. O'Connell explaining his recommendation that Claimant undergo a THR. Dr. White acknowledged that Claimant had "preserved joint space with minimal arthritis." However Dr. White stated that Claimant was "probably a little bit older than someone who should undergo" hip arthroscopy and that a THR is the "more predictable longer-lasting surgery."

21. On January 23, 2014 Dr. O'Connell stated that he concurred with Dr. White's recommendation for a THR.

22. The Insurer requested Gwendolyn Henke, M.D., to conduct a "Rule 16 review" of Dr. White's request for prior authorization to perform a THR. Dr. Henke is

board certified in orthopedic surgery and level II accredited. On February 20, 2014 Dr. Henke issued a report setting forth her findings and opinions. Dr. Henke assessed Claimant as suffering the following conditions as a result of the May 18, 2013 industrial injury: (1) Acute low back strain; (2) Aggravation of pre-existing lumbar spondylosis with intermittent L5 radicular symptoms; (3) Aggravation of pre-existing, asymptomatic tear of the right acetabular labrum. Dr. Henke opined that Claimant suffered the aggravation of the pre-existing labral tear while undergoing PT to treat the work-related low back strain.

23. Dr. Henke opined that the THR proposed by Dr. White is not reasonable and necessary medical treatment for Claimant's torn labrum. Dr. Henke noted that there is a "high incidence of asymptomatic labral tears associated with age of greater than 60 years, suggesting that they occur as a result of the degenerative process." She further noted that untreated symptomatic labral tears are "thought to contribute to early osteoarthritis." Dr. Henke opined that the recommended treatment for labral tears is arthroscopic repair or debridement of the tear. Dr. Henke explained that she did not "encounter any recommendations" that a labral tear be treated with THR. Rather, Dr. Henke stated that THR is indicated for symptomatic advanced hip osteoarthritis and specific hip fractures in elderly patients. Dr. Henke opined it is not medically necessary to replace electively a hip joint in which there is little or no arthritis.

24. On March 10, 2014 Dr. White wrote a "to whom it may concern" letter requesting that he be allowed to proceed with the THR. Dr. White stated Claimant was getting progressively worse and could not "function well at all." Dr. White reported Claimant could not work, had difficulty with activities of daily living and could walk only short distances. Dr. White reiterated that a THR is the "most predictable surgery" for Claimant. Dr. White also stated that a THR is the "most predictable way to get her fixed for now and for the longest period of time." Dr. White opined that arthroscopy to treat the labrum would be "fraught with multiple problems" and is not likely to help Claimant's "overall condition."

25. On March 27, 2014 Dr. O'Connell noted that the THR had been denied and that Dr. White would appeal the denial. Claimant reported that her symptoms improved after Dr. Martin performed another intraarticular injection on March 4, 2014.

26. On June 20, 2014 Dr. Davis performed a follow-up independent medical evaluation at the request of Insurer. Dr. Davis took additional history, reviewed additional medical records and performed a PE. Regarding the right hip Dr. Davis noted irritability with compression and rotation. He also noted positive impingement signs. Dr. Davis performed x-ray studies of the pelvis and right hip that revealed "minimal arthritic change" without cam or pincer deformity and without evidence of femoral acetabular impingement. Dr. Davis agreed that the MR arthrogram revealed a labral tear.

27. In the June 20, 2014 report Dr. Davis opined that the May 18, 2013 incident caused a lumbar spine injury and a right hip labral tear. Dr. Davis also opined that the symptoms of the labral tear were later aggravated during a PT session. Dr.

Davis recommended that Claimant undergo a right hip arthroscopy with debridement and/or repair of the labral tear. He "favored" Dr. Henke's opinion that the THR procedure recommended by Dr. White is not indicated. Dr. Davis explained that it is not reasonable or necessary to proceed with a THR to treat a labral tear.

28. On September 25, 2015 Claimant told Dr. O'Connell her right hip pain was "recurring" and she felt like her hip was going to give out. Dr. O'Connell noted Claimant was restricted from work at his direction and had not worked for many months. Dr. O'Connell assessed right hip labral tear with impingement syndrome and lumbar pain with exacerbation of lumbar degenerative disk disease. He referred Claimant for another hip injection. Dr. O'Connell also referred Claimant to Kirk Kindsfater, M.D., for an "assessment of whether [Claimant] would be a candidate for labral repair, versus a total hip arthroplasty, and which would be the preferred approach."

29. On October 2, 2015 Dr. Martin performed another right hip intraarticular joint injection.

30. On October 15, 2014 Dr. Kindsfater, M.D., evaluated Claimant for a "second opinion" regarding the proposed THR. Dr. Kindsfater took a history from Claimant, reviewed medical records, performed a PE and reviewed radiographs. Claimant complained primarily of right-sided anterior groin pain and deep groin pain. On PE Claimant experienced the most pain with abduction of the hip. Dr. Kindsfater opined Claimant's MRI revealed a "small labral tear anterosuperiorly" without evidence of "significant chondrosis." Dr. Kindsfater recommended Claimant undergo a hip arthroscopy to address the labral tear and visualize the hip. Dr. Kindsfater further stated that if the hip arthroscopy reveals "advanced chondrosis" and Claimant does poorly after the procedure she would be a candidate for THR. Dr. Kindsfater concluded that if the arthroscopy reveals minimal chondrosis he would "hesitate to consider arthroplasty in this otherwise relatively normal appearing hip."

31. Dr. Kindsfater opined that it is "difficult to surmise from [Claimant's] studies" whether the labral tear is related to her injury at work or to "early degenerative change." He stated that the "timing of her pain" suggests that the labral tear is related to employment. However, Dr. Kindsfater added that he frequently sees "asymptomatic labral tears in many of [his] patients when we do obtain MRIs so there is no guarantee that the labral tear is causing her symptoms."

32. On October 28, 2015 Dr. O'Connell noted that the recent hip joint injection did not provide as much relief as the previous injections. Dr. O'Connell stated he would "identify a hip specialist to evaluate [Claimant] for arthroscopy."

33. On November 12, 2014 Dr. White wrote a letter to the Insurer. Dr. White stated he was "quite surprised" by the opinions of Dr. Davis and Dr. Henke that a THR is not indicated. Dr. White stated that he does not agree with Dr. Davis and Dr. Henke because Claimant's age of 71, soon to be 72, is "simply too old for hip arthroscopy." He explained Claimant will have some cartilage wear adjacent to the torn labrum and that the long-term results of labral debridement are not known. Conversely, Dr. White

stated that the long-term results of a THR are known. He explained that THR is a "definitive solution" that will alleviate Claimant's pain and "will be very durable, and will outlive her." Dr. White stated he loves "doing a hip arthroscopy" and recommends arthroscopy for the "vast majority of [his] patients who have a joint space that looks like" Claimant's. However, Dr. White emphasized that in his opinion there is "no question" Claimant's pain was coming from her hip joint and again reiterated that a THR is the "best procedure for [Claimant] in the long run."

34. On November 17, 2014 Michael B. Ellman, M.D., performed another orthopedic surgical evaluation of Claimant. Claimant reported a one and one-half year history of acute onset right hip and back pain secondary to a work related injury. Claimant reported her pain was quite debilitating and caused her to wake up throughout the night. Dr. Ellman reviewed multiple radiographic studies and the MRI studies. He opined the MRI studies demonstrate a "nondisplaced tearing of [Claimant's] right anterosuperior acetabular labrum." He noted there was no "significant arthritis and [a] relatively normal-appearing MRI for somebody her age." Dr. Ellman stated it was difficult to determine "how much of [Claimant's] pain is secondary to intraarticular versus extraarticular etiologies." Dr. Ellman explained Claimant likely "has greater than one issue going on." Specifically, she likely has pain that emanates from her labral tear and mild degenerative changes about the hip joint." She also likely has "some imbalance about the muscles around her hip." Dr. Ellman also opined Claimant likely has some paraspinal spasm secondary to lumbar spondylosis. Dr. Ellman recommended Claimant undergo another course of PT to alleviate "hip imbalance" and improve function with activities of daily living. Dr. Ellman stated that if Claimant failed PT then the "only other option in [his] opinion would be a total hip arthroplasty despite the lack of objective arthritis on her imaging findings." Dr. Ellman explained that Claimant would not be "an ideal candidate for labral repair given her age and body habitus."

35. On November 25, 2014 Dr. O'Connell wrote a letter to the Insurer concerning his reasons for recommending a THR. Dr. O'Connell stated he recently referred Claimant for a brief course of PT pursuant to Dr. Ellman's suggestion. However, Dr. O'Connell stated that if the PT failed it was his opinion Claimant would be best served by undergoing a THR. In support Dr. O'Connell expressed agreement with the opinions of Dr. White and Dr. Ellman. Dr. O'Connell opined that although THR is not in the "treatment guidelines" to treat a labral tear "not every case fits neatly into protocols of treatment guidelines" and guidelines "are by their nature guidelines."

36. On April 1, 2015 a physical therapist reported that Claimant had undergone 8 visits and was being discharged from treatment. The therapist noted that Claimant had not reported any change in functional abilities.

37. Dr. Davis testified at the July 31, 2015 hearing as an expert in the field of orthopedic surgery. Dr. Davis has performed many THR's and many arthroscopic hip debridement/repairs. However, he has not performed orthopedic operations since 2006.

38. Dr. Davis contrasted a THR procedure with an arthroscopic debridement/repair procedure. Dr. Davis explained that a THR requires the surgical insertion of metal devices to form an artificial hip joint. In contrast arthroscopic debridement/repair involves making small holes in the hip to insert the "scope," which is "smaller than a pen," and the tools needed to operate on the labrum. Dr. Davis opined that the risks associated with THR far outweigh the risks associated with an arthroscopic labral debridement/repair.

39. Dr. Davis testified that he did not see evidence of acetabular impingement. Dr. Davis opined that performance of a THR would constitute "over-treatment" because Claimant's pathology is a torn labrum, not arthritis. Dr. Davis testified he is familiar with the "medical treatment guidelines" (MTG) and the MTG do not recommend THR as treatment for a torn labrum.

40. Dr. Davis testified that he is unaware of any "literature" indicating that age and body habitus are factors to be considered when determining whether to perform an arthroscopic procedure or a THR.

41. Respondents' "Exhibit M" is a copy of portions of WCRP 17, Exhibit 6, Lower Extremity Injury Medical Treatment Guidelines. The Lower Extremity MTG state that the "Operative Procedures" for a torn hip labrum are: "Debridement or repair of labrum and removal of excessive bone." The MTG for labral tears further state that where "surgery is contraindicated due to obesity, it may be appropriate to recommend a weight loss program if the patient is unsuccessful losing weight on their own."

42. The Lower Extremity MTG for hip arthroplasty state that the "Surgical Indications/Considerations" are: "Severe osteoarthritis and all reasonable conservative measures have been exhausted and other reasonable surgical options have been considered or implemented." The Lower Extremity MTG for hip arthroplasty further state that "possible contraindications" to the procedure include obesity and "it may be appropriate to recommend a weight loss program if the patient is unsuccessful losing weight on their own." The MTG for hip arthroplasty also indicate that "patients may be assessed for any mental health or low back pain issues that may affect rehabilitation."

43. At Claimant's request, the ALJ notices that WCRP 17-5 (C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers." However, the rule also provides that the "Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

44. Claimant testified that she would like the right hip arthroplasty so she can become more productive with her life. Claimant testified that she has been in continuous pain since May 18, 2013 and she has problems going up or down stairs. She testified that she is unable to do many of the things she was able to do before her injury. Before the injury she performed physical activities such as farming, taking care of her yard and gardening. She testified that her sleep has been affected and she must get up every one and one half hours. Her pain has affected her ability to work and she

is unable to take pain medications due to a gastrointestinal problem. Claimant testified that she received immediate relief from the intraarticular hip injections but the relief gradually wears off. Claimant testified that the PT has been more harmful then helpful.

45. Claimant failed to prove it is more probably true than not that THR constitutes reasonable and necessary medical treatment for her right hip.

46. The credible and persuasive evidence establishes that Claimant has a torn right hip labrum. The presence of the torn labrum is proven by the results of the MRI arthrogram and the opinions of numerous medical experts including Dr. White, Dr. Henke, Dr. Davis, Dr. Kindsfater and Dr. Ellman.

47. There is a sharp division between the medical experts concerning whether or not THR or arthroscopic debridement/repair is the reasonable and necessary treatment for Claimant's torn labrum.

48. Dr. White, an orthopedic surgeon, recommends the THR procedure. He explained that Claimant's advanced age, her "body habitus" and the "predictability" of the THR procedure makes Claimant an ideal candidate for THR. The ALJ infers from Dr. White's reports that he believes Claimant's age and body habitus make it more likely than usual that arthroscopic repair of the labrum will fail and Claimant would then require another procedure. The ALJ further infers that Dr. White believes this risk can be avoided by performing a THR which is likely to remain intact and "outlive" the Claimant. Dr. White acknowledged in his January 8, 2014 report that Claimant has a "preserved joint space with minimal arthritis."

49. In light of Claimant's failure successfully to complete the recent course of PT, the ALJ infers from Dr Ellman's November 17, 2014 report that he agrees with Dr. White's recommendation for a THR. Dr. Ellman also believes Claimant is not an "ideal candidate for labral repair given her age and body habitus." Dr. Ellman is an orthopedic surgeon. Dr. Ellman acknowledged in his November 17 report that Claimant has a "relatively normal-appearing MRI" and no significant arthritis.

50. Dr. O'Connell, who is not an orthopedic surgeon, agrees with the recommendations of Dr. White and Dr. Ellman. In so doing Dr. O'Connell admitted that the MTG do not provide for THR as a treatment for a torn labrum. Rather, Dr. O'Connell argued that Claimant presents an exceptional case that does not fit within the treatment protocols of the MTG.

51. Dr. Henke, Dr. Davis and Dr. Kindsfater, all of whom are orthopedic surgeons, opined that the appropriate treatment for Claimant's torn labrum is arthroscopic debridement/repair. These physicians further agree that the THR procedure is reserved for cases involving advanced arthritis of the hip joint, which has not been shown to exist in Claimant's hip.

52. Considering the substantial conflict between qualified medical experts, the ALJ concludes it is appropriate to give substantial weight to the treatment protocols

contained in the Lower Extremity MTG. Dr. Davis credibly and persuasively testified that the MTG do not recognize THR as a treatment for a torn labrum. Dr. Davis's testimony is corroborated by reference to the MTG themselves, which indicate that arthroscopic debridement/repair is the appropriate surgical treatment for a torn labrum and that THR is indicated in cases of "severe arthritis" where conservative treatments have failed. (Findings of Fact 41 and 42).

53. In this case not even Dr. White or Dr. Ellman alleges that Claimant has "severe arthritis" in her hip joint. Rather there is near unanimous agreement among the various physicians that Claimant does not have "significant" arthritis in her hip.

54. The ALJ is not persuaded that the weight of the evidence establishes a reason to depart from the treatment protocols of the MTG when choosing a surgical procedure to treat Claimant's torn labrum. Dr. White, Dr. Ellman and Dr. O'Connell have not credibly and persuasively pointed to any part of the MTG that specifies a patient's "age" as an appropriate factor to consider when determining whether to perform arthroscopic surgery or THR. This is true despite the fact that the MTG identify various "contraindications" to performing both procedures.

55. The MTG indicate that "obesity," a type of "body habitus," may constitute a contraindication for arthroscopic debridement/repair of a labral tear. However, the MTG also indicate that obesity may be a contraindication for THR. (Findings of Fact 41 and 42). Thus, to the extent that doctors White, Ellman and O'Connell rely on Claimant's "body habitus" as a basis for performing THR instead of arthroscopic debridement/repair, their opinions are undermined by the MTG. None of these physicians has offered a persuasive, scientific explanation of why Claimant's "body habitus" indicates that THR should be favored over the arthroscopic procedure.

56. In contrast, Dr. Davis credibly and persuasively opined that the MTG do not recommend THR for treatment of a torn labrum. Dr. Davis credibly and persuasively opined that the MTG recommend arthroscopic debridement/repair of a torn labrum. Dr. Davis credibly and persuasively opined that performing a THR on Claimant would constitute "over-treatment" in the absence of significant arthritis. Dr. Davis's opinion is corroborated by the specific provisions of the MTG. (Findings of Fact 41 and 42).

57. Dr. Davis's opinions are also corroborated by Dr. Henke who reported that arthroscopic debridement/repair is the "recommended treatment for labral tears" and that she has not "encountered" any recommendations that labral tears be treated with THR. Further, Dr. Henke credibly opined that it is "not medically necessary to replace electively a hip joint in which there is little or no arthritis."

58. Dr. Davis's opinions are also corroborated by the persuasive opinions of Dr. Kindsfater. Dr. Kindsfater recommended the Claimant undergo arthroscopic repair of the torn labrum. He further opined that Claimant could undergo THR if the arthroscopy showed "advanced chondrosis" and she recovered poorly from the arthroscopic procedure. Dr. Kindsfater expressed "hesitation" to perform THR on

Claimant's "normal appearing hip" if the arthroscopy does not reveal more than "minimal chondrosis."

59. Evidence and inferences not consistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF TOTL HIP PREPLACEMENT SURGERY

Claimant contends that she proved by a preponderance of the evidence that a THR constitutes reasonable and necessary medical treatment for the torn labrum in her right hip. The ALJ disagrees.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Section 8-42-101(3)(b), C.R.S. provides that the MTG "shall be used by health care providers for compliance with this section."

Section 8-43-201(3) C.R.S., provides that it is "appropriate" for an ALJ to consider the MTG "in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury." However, the statute further provides that the ALJ "is not required to utilize the medical treatment guidelines as the sole basis for such determinations." As demonstrated by WCRP 17-5 (C) the MTG themselves recognize that deviations from the guidelines are reasonable in individual cases. *Madrid v. TRTNET Group, Inc.*, WC 4-851-315-03 (ICAO April 1, 2014). Consequently, evidence of compliance or non-compliance with the treatment protocols of the MTG has not been considered dispositive when determining whether medical treatment is reasonable and necessary. *Madrid v. TRTNET Group, Inc.*, *supra*. The ALJ may weigh evidence of compliance or non-compliance with the MTG and assign such evidence an appropriate weight considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

For purposes of this order the ALJ assumes without deciding that the need for treatment of the Claimant's torn labrum is causally related to the industrial injury.

As determined in Findings of Fact 45 through 58, Claimant failed to prove it is more probably true than not that a THR constitutes reasonable and necessary medical treatment for the torn labrum. As found, there is a significant conflict between several qualified medical experts concerning whether or not THR is an appropriate treatment for Claimant's torn labrum. Considering this conflict the ALJ places significant weight on the treatment protocols contained in the Lower Extremity Injury MTG. The Lower Extremity Injury MTG recommend arthroscopic debridement/repair for treatment of a torn labrum. The Lower Extremity MTG do not recommend THR for treatment of a torn labrum, but instead recommend THR for treatment of severe arthritis. The credible and persuasive evidence establishes that Claimant does not have severe arthritis of the hip.

As found Dr. Davis, Dr. Henke and Dr. Kindsfater persuasively opined that THR is not a recommended treatment for a torn labrum and is only appropriate in cases of severe arthritis. To the extent Dr. White, Dr. Ellman and Dr. O'Connell opined to the contrary, the ALJ does not find their opinions persuasive for the reasons stated in Findings of Fact 53 through 55. For the reasons stated in Findings of Fact 54 and 55 the ALJ concludes that Claimant has not proved a persuasive justification for deviating from the treatment protocols of the MTG.

The request for an order requiring Respondents' to pay for a THR is denied because such treatment is not reasonable and necessary to treat Claimant's condition.

ORDER

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

1. The claim for medical treatment in the form of THR is denied.

2. 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: December 8, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

I. Whether Claimant's average weekly wage is $1,397.69.

II. Whether Claimant established by a preponderance of the evidence, that his 16% scheduled right knee impairment rating should be converted to whole person impairment.

FINDINGS OF FACT

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

1. Claimant works as a millwright for Respondent-Employer. As a millwright Claimant erects, services and maintains Respondent-Employer's heavy industrial equipment. Completion of his work duties requires Claimant to engage in substantial amounts of bending, stooping, kneeling, ladder and stair climbing and heavy lifting, sometimes up to 100 pounds. The job also requires that Claimant assume and maintain awkward positions for prolonged periods of time to weld and clean equipment. The ALJ finds Claimant's job physically demanding.

2. Claimant testified that he often has aches, pains, bruises, and contusions that he simply works through. He testified that he does not report every ache and pain as work-related and he generally does not seek medical treatment. Nonetheless, Claimant testified that, prior to the injury in this case, he would occasionally experience stiffness in his back and neck from the physical nature of his job. Consequently, Claimant has sought chiropractic treatment predating the injury in this case. The chiropractic records reflect that Claimant was seen two times in the two years leading up to the injury in this case, once on December 8, 2011 and once on May 2, 2013. At his December 8, 2011, appointment Claimant reported that his low back was "tight, sore". Adjustments to the thoracic, and cervical spine were provided. Although he complained of a tight, sore low back, it does not appear that Claimant's lumbar spine, identified as [L] 5 4 3 2 1 in Dr. Pratt's December 8, 2011 report, was adjusted. On May 02, 2013, Claimant again complained of low back soreness and again the record fails to document treatment focused to the lumbar spine. Based upon the evidence presented, including the chiropractic records documenting a lack of any treatment to the segmental levels of the lumbar spine, the ALJ finds that Claimant would, on occasion, suffer from low back pain likely of a muscular nature caused by the physical demands of his employment as a millwright.

3. Claimant was in his usual state of health prior to July 21, 2013, when he suffered

a right knee injury. Liability for the injury was denied but, on March14, 2014, Respondents accepted the injury as work-related and Claimant began treating. An MRI of the right knee was obtained September 13, 2013. The MRI demonstrated medial meniscal and anterior cruciate ligament (ACL) tears for which surgery was recommended. Consequently, Claimant underwent an ACL reconstruction and partial medial meniscectomy procedure, performed by Dr. Alex Romero on July 25, 2014.

4. Claimant worked light duty for approximately one year between the date of injury and his July 25, 2014 surgery. During this period, Claimant testified that he performed his light duty work activities with a significant limp caused by pain in the right knee. Claimant was not limited in the performance of his light duty work by his alleged limping. Claimant also testified that during this time he began to experience low back and right hip pain which he connected to walking with a limp due to his right knee injury.

5. Review of the medical records between the date of injury and the time of Claimant's surgery fails to support his assertions. Rather, the medical records in the days, weeks and months following Claimant's injury are devoid of references to Claimant ambulating with a limp. To the contrary on July 22, 2013 a medical report from Respondent-Employers medical clinic indicates that Claimant was ambulatory without a limp. Similar references to Claimant's ambulatory status were documented in clinic notes dated July 24 and July 29, 2013.

6. On July 29, 2013, while at Employers clinic, Claimant expressed a distrust of "company doctors". Thus, Claimant scheduled an appointment to be seen at Pueblo Community Health Centers, the offices of his personal care provider (PCP) the next day, July 30, 2013. During this visit Claimant reported right knee pain and his associated right knee symptoms were documented as crepitus, joint tenderness, locking, popping and swelling Negatives associated with the right knee included, among other things, "decreased mobility", "joint instability", and **"limping"** (Claimant's Hearing Exhibits (CHE), Tab 2, Bate Stamp pg. 23)(emphasis added). The same was noted on a follow-up visit approximately 2 ½ months later on October 18, 2013.

7. Moreover, careful review of the records from Claimant's authorized treating provider (ATP), Daniel Olson, at Centura Centers for Occupational Medicine (CCOM) fails to support Claimant's assertion of limping and/or the development of back pain as a consequence. Between August 30, 2014 and June 4, 2014, there is no mention in the CCOM records of Claimant limping or complaining of back pain. Rather, the records support the following: On September 5, 2013, Claimant was advised that he could wear a knee brace for comfort if he chose. On September 18, 2013, Claimant was noted to have full right knee range of motion without the need for walking restrictions.

8. Finally, review of the orthopedic records from Dr. Romero directly contradicts Claimant's assertions of limping. On June 24, 2014, approximately one month prior to the arthroscopic surgery, Dr. Romero noted "examination of the patient's gait demonstrates that is non-antalgic in nature. He has neutral alignment of the lower extremity with good stance and coordination" (CHE, Tab 4, Bate Stamp pg.53).

9. Claimant did not seek treatment with his chiropractor for back pain during the approximate one year time period between the date of his injury and his surgery despite having, what he testified was hip and low back pain from limping the entire time. Rather, Claimant testified that the symptoms were not severe enough at that time to seek medical treatment.

10. Based upon the totality of the evidence presented, the ALJ finds Claimant's assertions that his right knee injury caused him to limp for approximately one year before he had surgery on July 25, 2014 unreliable. The content of the medical records does not support this claim. In fact, Dr. Romero's report of June 24, 2014, approximately one month before Claimant's surgery, directly contradicts this allegation. As there is no reference to an altered gait before this note, the ALJ is not convinced that Claimant was limping as he claims. Even if Claimant's testimony that his injury caused him to limp for the 12 months prior to his surgery credited, his testimony that the symptoms caused by his alleged limping were not significant enough to warrant medical treatment combined with the fact that his alleged limping did not preclude him from the performance of his modified work duties persuades the ALJ that any purported limping, causing back pain was not functionally impairing to Claimant between the date of injury and his July 25, 2014 surgery.

11. Claimant missed six weeks of work and returned to light duty following his July 25, 2014 surgery. Claimant returned to and worked light duty from September 5, 2014 to January 9, 2015. During this period of light duty, Claimant again testified that he performed his light duty work with a significant limp caused by pain in the right knee. He also testified that during this time, he continued to experience low back and right hip pain that he associated his limp caused by the right knee injury. While the medical records during this time frame document a loss of extension in the right knee, thereby establishing an objective basis for Claimant's assertion that he was limping post-surgery, he once again testified that his low back and right hip symptoms were not severe enough to seek medical treatment. Moreover, there is a dearth of evidence to suggest that any limp was functionally impairing Claimant's ability to carry out his activities of daily living or his modified work duties.

12. On January 9, 2015, Claimant was released to return to unrestricted full duty by Dr. Romero. Claimant also saw Dr. Olson on this date. Dr. Olson noted full range of motion for extension of the right knee at 0° where as at the September 15, 2014 appointment Claimant was lacking 6-7° of extension. Nonetheless, Dr. Olson documented range of motion limitations in the right knee for flexion at 114° when compared to the left knee which measured 130°. Consequently, the ALJ finds that while Claimant's right knee extension had improved, he likely had an altered gait at the time of release to full duty work. Claimant's post surgical rehabilitation to strengthen is quadriceps was continued and he was instructed to return for a follow-up visit in one month.

13. Claimant testified that as he resumed his pre-injury full duties, he began to notice

that some days the right knee tolerated full duty work activities and some days it did not. Claimant testified that when his knee was not tolerating the work activities, he developed increased knee pain causing him, to limp significantly. As a consequence, Claimant testified that his altered gait, combined with his work activities, significantly increased his low back and right hip pain. The claimant testified that the low back and right hip pain got so bad he sought treatment from his chiropractor. The chiropractic notes reflect that Claimant was treated on February 2, 2015.

14. Dr. Pratt's notes form the February 2, 2015 visit indicate that Claimant had a "knot in neck" / right shoulder blade area, along with "some" low back tightness. Dr. Pratt did adjustments to the cervical, thoracic, and hip area similar to his adjustments in 2011 and 2013. There is no indication in this chiropractic note that Dr. Pratt did any adjustment to the lumbar spine segments, identified in the note as [L] 5 4 3 2 1. Rather, the treatment appears focused to the left and right hips, in addition to the thoracic and cervical spine. Furthermore, there is no mention in Dr. Pratt's notes of any relationship between Claimant's right knee injury and his asserted low back tightness (CHE, Tab 6).

15. On March 2, 2015, the workers' compensation physician placed the claimant at MMI. During this visit, Dr. Olson documented that Claimant was "back at regular duty and does notice that he fatigues when he does ladders and stairs". He also noted that Claimant was not taking pain medication for his knee. The ALJ interprets these references to indicate that Claimant had become deconditioned regarding the amount of ladder and stair climbing required in his job, but that he did not have pain sufficient to warrant the use of pain medication. Moreover, there is no notation or mention of Claimant having back or hip pain in Dr. Olsen's MMI report and the report contains no reference to any treatment with Dr. Pratt.

16. On March 19, 2015, the ATP completed the claimant's impairment rating. The ATP provided 11% impairment for range of motion deficit in the right knee and an additional 6% for the ACL and meniscus tears for a total scheduled impairment of 16%. This converts to 6% whole person impairment. There is no reference in Dr. Olsen's impairment rating report of Claimant having back or hip problems. (Respondent's Hearing Exhibits (RHE), Tab J, Bate Stamp pg. 74-75). Dr. Olsen made no recommendation for future medical treatment that would involve the low back or hip.

17. Based upon the evidence presented, the ALJ finds Claimant's testimony that he did not mention his hip or his low back pain to the workers' compensation physicians because "he did not believe it was their problem" unpersuasive. Rather the ALJ finds, more probably than not, that if Claimant believed his low back and right hip condition was functionally impairing his ability to carry out his ADL's or work duties and was related to his work injury, he would have mentioned it to Dr. Olson at either his MMI or impairment rating appointments.

18. Respondents sought an independent medical examination (IME) opinion from Dr. Eric Ridings regarding the issue of converting Claimant's scheduled impairment to impairment of the whole person on August 24, 2015. In reaching his opinion that

Claimant had not suffered impairment beyond the lower extremity, Dr. Ridings noted that "Dr. Olsen did not document any complaints of right buttock or hip or low back pain during the pendency of his treatment. Nor did he document any limping." Dr. Ridings further noted that on examination during the IME Claimant's antalgic gait was only present part of the time. Dr. Ridings also documented that Claimant reported an ability to leg press 400 pounds with his left extremity and 325 pounds with his right leg.

19. Claimant admitted during cross examination that he is not impaired in any way in doing his job although he reported that his low back and right hip symptoms cause him pain and limit how he can go about doing certain tasks.

20. Based upon the evidence presented, the ALJ finds that while Claimant had a serious right knee injury, his claims of suffering a related low back and right hip condition as a consequence of limping are not supported by the record evidence when viewed in its totality. Rather, the ALJ finds that the record supports an inference that Claimant, who is a large, physically imposing and stoic young man, likely suffers from occasional low back muscle soreness/stiffness as a consequence of his job as a millwright. The ALJ also finds that the persuasive record evidence supports an inference that once Claimant injured his right knee and was placed on modified duty, he deconditioned while waiting for surgery preformed approximately one year later. Following that surgery, Claimant deconditioned further. Consequently, when Claimant returned to his job in a full duty, unrestricted capacity approximately 17 months after his original injury, he simply was not in shape to perform the physically demanding aspects of his work without suffering adverse effects, including low back tightness/soreness. This is borne out by Claimant's report to Dr. Olson that he would fatigue quickly when climbing ladders and stairs as required in his position. Moreover, the inference is supported by the fact that Claimant's chiropractic was unchanged from that which he had prior to his industrial injury and which prior chiropractics treatment he testified was due to the physical nature of his job. Consequently, the ALJ credits the opinions of Dr. Ridings to find that Claimant's low back and right hip condition is not related to limping as a consequence of his right knee injury. Even if Claimant's low back and right hip condition were related to limping caused by his right knee injury, the evidence presented, including Claimant's own testimony, persuades the ALJ that it, i.e. the low back and right hip condition is not functionally impairing. Accordingly, Claimant has failed to establish that he has a "functional impairment" beyond the schedule which would entitle him/her to "conversion" of his scheduled impairment to impairment of the whole person.

21. Claimant presented evidence which establishes an average weekly wage of $1,397.69. Documentation entered into evidence regarding this issue consists of the wage report showing Claimant's gross wages from September 1, 2012 through July 19, 2013. The injury in this case occurred on July 21, 2013. Consistent therewith, the wage documents evidence the Claimant's earnings for 46 weeks leading up to the injury. In the 46 weeks leading up to the injury, the claimant earned a gross wage of $64,293.60. When the gross earnings are divided by 46 weeks, the calculation yields a value of $1,397.69. Therefore, Claimant has established that his average weekly wage,

for purposes of this claim, is $1,397.69.

CONCLUSIONS OF LAW

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

A. Claimant's request for conversion of his scheduled lower extremity impairment to impairment of the whole person is denied and dismissed. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a knee injury, the question is whether the claimant has sustained functional impairment beyond the leg at the hip.

B. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Furthermore, as pointed out by Claimant's counsel, functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Alberston's LLC, W.C. No. 4-692-947 (June 30, 2008*). Consequently, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence

that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the knee is similar to an injury to structures of the shoulder and may or may not result in functional impairment beyond the leg at the hip. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996)

C. In this case the ALJ concludes that conversion of Claimant's scheduled lower extremity impairment to impairment of the whole person is not warranted. While the Claimant's knee injury may have caused a limp, Claimant himself admitted during his testimony that his limp "comes and goes". Based upon the evidenced presented, the ALJ is not persuaded that Claimant's low back and right hip pain is a consequence of an asserted limp. Rather, the evidence presented supports a conclusion that Claimant's intermittent low back and right hip pain is similar to that which he experienced periodically as consequence of the physically demand nature of his job. Here, the evidence presented persuades the ALJ that Claimant's low back and hip pain is likely a consequence of being substantially deconditioned and having to suddenly return to full duty, unrestricted work as a millwright. Indeed, the chiropractic treatment Claimant received following his return to full duty work was substantially the same as the treatment he received prior to his work related right knee injury, which prior treatment Claimant attributed to the physical demands of his work.

D. Regardless, as found above, Claimant has returned to work full duty as a millwright. As a millwright Claimant must engage in substantial amounts of bending, stooping, kneeling, ladder and stair climbing and heavy lifting, sometimes up to 100 pounds. During hearing, Claimant admitted he performed the full range of duties required of a millwright. He reported a capacity to push 400 pounds with his left leg and 325 pounds with the right to Dr. Ridings during his IME. In this case, Claimant's demonstrated functional capacity substantially erodes his claims that he has pain in his low back and hip which has resulted in a functional loss beyond the leg. Furthermore, the persuasive evidence demonstrates that Claimant's complaints and treatment were associated with and directed to his right knee. Claimant did not testify and the medical records do not support that his right knee injury has resulted in a decreased capacity to meet his personal, social or occupational demands. Because Claimant has failed to sufficiently connect his back and hip pain to his right knee injury and because the evidence presented establishes that Claimant's low back/right hip pain has not resulted in any decreased capacity in Claimant to meet his personal, social or occupational

demands, the ALJ is persuaded that the situs of Claimant's impairment does not extend beyond the leg at the hip. Consequently, the ALJ concludes that Claimant does not have functional loss that would support an award of permanent disability benefits as a whole person.

E. 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).*

F. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), gives 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 comes from the wage records submitted into evidence. In this case, the ALJ concludes that Respondent's methodology in utilizing 16 weeks to calculate Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's earnings over time. The ALJ adopts Claimant's calculation of his AWW as this figure accounts for his average weekly earnings over a forty-six week period leading up to the injury in this case. Accordingly, the ALJ determines that Claimant's average weekly wage is $1,397.69. The ALJ finds that this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his July 21, 2013 compensable work related injury.

ORDER

It is therefore ordered that:

1. Claimant's request for conversion of his 16% scheduled right knee impairment to the corresponding 6% whole person impairment is denied and dismissed.

2. Claimant's average weekly wage is $1,397.69.

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: December 3, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-933-544-01

PRELIMINARY PROCEDURAL ORDER

On October 23, 2015, Claimant filed an opposed motion to take the evidentiary post hearing deposition of Dr. Vikas Patel. As a response to the motion was not due prior to the commencement of hearing, the ALJ elected to allow counsel an opportunity to argue the motion prior to the presentation of evidence at hearing. Following oral argument, the ALJ denied Claimant's request for the deposition of Dr. Patel citing a lack of good cause shown for the deposition.

ISSUE

The issue addressed in this decision involves Claimant's entitlement to medical benefits. The question to be answered is:

I. Whether bilateral CT guided sacroiliac (SI) joint injections as requested by Dr. Patel are reasonable, necessary, and causally related to Claimant's admitted October 24, 2013 low back and hip injury.

FINDINGS OF FACT

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

1. Claimant suffered a work related injury to her back while working for the employer on October 24, 2013.

2. Claimant had a significant pre-existing history of treatment for low back pain, hip pain and chronic sciatic pain dating back to 2005, when she was 21 weeks pregnant. (R. Exh. H & I, Bate Stamp ("BS") 298). According to Dr. Manning's and Helm's reports, bilateral SI injections were administered by Dr. Helm on December 6, 2011, for this pain. (R. Exh. J, BS 162). Claimant continued to report left hip and SI joint pain in May 2013, and advised Dr. Manning that she was getting injections, but that she had joint pain all over her body as reflected in his report of May 16, 2013. (R. Exh. H, BS 302).

3. Medical reports from Accelerated Recovery Specialist, mostly authored by Dr. Sparr date back to November 5, 2011. These reports contain an initial history of claimant' suffering from chronic sciatic pain since 2005, to include treatment involving SI joint injections on the left (three times a year for past three years), with no relief reported. On this date, claimant rated her typical pain as a 7/10, reporting that her primary pain location was the SI joint area. The doctor prescribed Vicodin, 5/500 three

times a day, along with a trial of Celebrex and Lyrica. On this date, Dr. Sparr administered a bilateral trochanteric bursa/lateral piriformis injection. (BS 291-293). Claimant completed her first Pain Diagram on this date, noting pain in the left buttock area, left IT band area with radiation down the left hamstring. (BS 298).

4. Dr. Sparr noted minimal relief from the injection in his report of November 30, 2011. (BS 285). Then as noted above, Claimant then underwent bilateral SI injections as performed by Dr. Helm on December 6, 2011. (R. Exh. J, BS 162). Claimant reported significant relief from this injection; and as such, on December 21, 2013, Dr. Sparr administered a left lateral piriformis muscle and trochanteric bursa injection. (BS 281-282). On January 18, 2012, claimant reported to Dr. Sparr that she fell roller skating two weeks prior and was experiencing increased pain. (BS 278). As such, Dr. Sparr prescribed another round of bilateral SI joint injections. (BS 278-279). These injections were administered by Dr. Helm on February 5, 2013, along with an L-5 interlaminer lumbar ESI, on the left. (BS 159).

5. Claimant returned to Dr. Sparr reporting 60% improvement from the above injections that targeted both her SI joints and the lumbar spine at the L5 segment. The doctor noted that "she has now a new complaint of left leg and plantar foot cramping… She continues to have left lateral hip severe pain that she describes as someone is cutting my muscles, even with any light touch or pressure over that area." She continues to have exquisite discomfort over the pubic symphysis somewhat improved with SI injection. Dr. Sparr recommended securing MRI scans of the left hip and pelvis, and an orthopedic consult with Dr. Tim O'Brien. (BS 273).

6. Dr. O'Brien examined claimant on May 1, 2012, for her complaints of left hip Pain, which he noted she had been experiencing since delivering her son. He also noted her pain could be in the low back on the left side, and that nothing relieves her pain. He noted the administration of injections outside the hip, spine and buttock and that she reported that she was in as much pain now as prior to any treatment. He reviewed the MRI scan of the lumbar spine, noting that it demonstrated multi-level degenerative disc disease with diffuse bulging and no significant canal or neuroforaminal narrowing. His impression was: Diffuse hip pain. He advised that there was nothing that could be done from a surgical standpoint, and recommended a fitness regimen and core strengthening. (R. Exh. L, BS 134-139).

7. On June 20, 2012, Dr. Sparr noted Dr. O'Brien's opinion and recorded that she suffers from "some underlying hip joint pathology, but that her greatest problem appeared to be piriformis myofascitis". Hence, he administered a left mid-belly piriformis muscle and trochanteric bursa injection on this date. (BS 262). On September 7, 2012, claimant returned reporting that she had slipped on a step at home with severe increased pain on the left side of the mid back. As such, Dr. Sparr administered another left mid-belly piriformis muscle and trochanteric bursa injection. Claimant prepared a Pain Diagram on this date. (BS 261). According to Dr. Sparr, claimant did well until November 9, 2012, when she reported with increased pain at a level of 7/10, reporting that she did not know why her pain had increased.

Consequently, Dr. Sparr administered another left mid-belly piriformis muscle and trochanteric bursa injection. (BS 255).

8. Claimant returned to Dr. Sparr again on January 9, 2013, noting that she had just returned from a road trip to Oklahoma and was experiencing severe left sided buttock pain. Dr. Sparr administered a left piriformis muscle and trochanteric bursa injection. (BS 252). On February 2, 2013, Dr. Helm administered bilateral SI joint injections as well as a L5-S1 interlaminer lumbar ESI injection on the left. (BS 159). Claimant returned to Dr. Sparr on April 17, 2013, he noted the prior injections and claimant's report of unexplained worsening symptoms over the past few weeks on the left side of her back and buttock. On this date, Dr. Spar's diagnosis was: Chronic sacroilitis causing piriformis syndrome and trochanteric bursitis, with some iliotibial myofascitis as well. As such, Dr. Sparr administered another left trochanteric bursa, piriformis muscle and proximal iliotibial band injection. (BS 248). As noted above, when claimant returned to her primary care doctor, Dr. Manning on May 16, 2013, she advised that she was getting injections, and that she had joint pain all over her body. (R. Exh. H, BS 302).

9. According to the above reports, claimant had undergone approximately thirteen (13) separate injections prior to the work related injury of October 24, 2013, with at least four (4) of them comprising bilateral SI joint injections.

10. Claimant was then involved in the work related lifting incident on October 24, 2013. On this date, claimant reportedly climbed on a bed to assist a patient onto the bed, and while pulling the patient onto the bed, she reported to Dr. Liggett that she felt immediate sharp pain across the pelvis, which soon traveled to her back and down left greater than right gluteal muscles. (R. Exh. I, BS 240). Upon examination, Dr. Liggett's diagnosis was: 1) Acute on chronic bilateral trochanteric bursitis with gluteus medius myofascitis and piriformis syndrome; 2) acute on chronic bilateral, left greater than right sacroiliac joint dysfunction, and 3) Thoracolumbar sprain/strain with associated myofascitis.

11. At the October 29, 2013 consult, Dr. Liggett noted that claimant had previously treated at their clinic in the past for left buttock pain and sacroiliac dysfunction for which she had been maintained on baclofen and Vicodin. Upon examination, the doctor recorded that provocative testing of the SI joints was positive. A large amount of myofascial tightness was noted, left greater than right iliotibial bands, and that palpation over the lumbar facets as well as facet loading was equivocal as claimant was diffusely sensitive during the exam. Due to her reported complaints of increased pain, the doctor administered bilateral trochanteric bursa, gluteus medius and piriformis Injections. On the date of this examination, as she had on previous examinations, claimant completed a pain diagram, which depicts pain in the left buttock, left leg to the knee, and new pain in the thoracic spine area. (R. Exh. I, BS 247).

12. On November 4, 2013, claimant reported that she felt good for a short time

after the last injection. Dr. Sparr administered a mid-belly lateral piriformis muscle injection. (BS 236). On November 26, 2013, claimant's reported pain level was a 7-8/10. Dr. Sparr's diagnosis was: persistent left greater than right lumbosacral pain, predominantly sacroiliac in origin with secondary diffuse myofascial component unresponsive to targeted injections. Hence the doctor recommended another bilateral SI joint injection. (BS 232-233). These injections were administered November 26, 2013. On this date, claimant completed another pain diagram, which when compared to the diagram she completed on November 5, 2011, two years prior, appears almost identical. (BS 228-231 & BS 298).

13. Claimant returned on December 11, 2013, with reported increased pain of 8/10; at which time, the doctor recommended a sacral MRI scan. Thereafter, Dr. Sparr reviewed the Coccyx MRI scan and corresponded with the insurance adjuster and advised that claimant suffered from an anatomic abnormality of the coccyx which was aggravated by the work injury. He therefore began administering coccygeal injections in December 2013and January 2014. (BS 216-222). Thereafter, on February 24, 2014, Dr. Leggett noted that all of the prior injections yielded only short term or very limited relief; and as such, he had exhausted all physiatric options. He thus recommended a referral to a pain specialist. He then administered trigger point injections into the gluteus maximus, piriformis and obliques on this date. (BS 204-205).

14. Claimant was examined by Dr. Scott Ross on April 16, 2014. After examination, Dr. Ross noted non-organic findings. His impressions were: Low back and buttock pain of unclear etiology. Normal MRI scan of lumbar spine, MRI of coccyx suggestive of developmental etiology and 4/5 Waddells signs. He found no specific cause for claimant's buttock pain, and found her exam complicated by non-organic features. He did not recommend any additional interventional procedures. (R. Exh. p. BS 19-21).

15. Despite requesting this opinion, Dr. Leggett never mentions Dr. Ross' Opinions. Instead he refers claimant for an L3-4 selective nerve block which was performed by Dr. Helm on June 3, 2014. (BS 157-158). This was followed by an L5-S1 interlaminar left ESI and left SI joint injection and Left L5 paraspineous trigger point injections (X3), all administered by Dr. Helm on June 10, 2014. (BS 155-156). Claimant next returned to Dr. Scheper July 28, 2014, reporting severe left pelvic pain causing her to report to the emergency room, where a CT of her pelvis was secured, and proved unremarkable. The doctor's impressions were: 1) Acute exacerbation of chronic recurrent sacroilitis; 2) secondary diffuse lumbar myofascial dysfunction, and 3) coccydinia stable. (BS 193-194). On August 19, 2014, Dr. Helm performed three more injections to include: L5-S1 interlaminar Left ESI, Left SI joint injection and Left piriformis injection. (BS 153).

16. On September 9, 2014, claimant returned to Dr. Scheper and advised that the injections only provided temporary relief and that she was unsure as to what was causing her pain and that it may have something to do with the weather changes. On examination, the doctor noted that her pain was diffuse and severe. (BS 184).

Importantly, on October 6, 2014, the claimant advised Dr. Leggett that she feels just as painful as the day the incident happened. She rated her pain a 7-8/10. Dr. Leggett recommended one last trial of a lumbar sympathetic block. (BS 181-183). On October 21, 2014, Dr. Helm administered the Left side L3 sympathetic block. (BS 151-152).

17. On November 26, 2014, claimant was evaluated by a Dr. Vikas Patel. Dr. Patel secured x-rays. In this report, the doctor notes that the x-rays of the lumbar spine are essentially normal and that the MRI scan shows no obvious evidence of nerve compression or sacroillitis. Dr. Patel recommended a repeat MRI scan and physical therapy to include core strengthening. (BS 32-34). Claimant returned to Dr. Patel on February 3, 2015. In his report from this date, he records that "claimant did not have severe low back pain until a work injury of October 2013." He goes on to indicate: "after the injury, she is now debilitated." He then that x-rays show a wider SI joint on the left side than the right SI joint, and asymmetry as compared to the right. He noted that he had no prior injection report to review. He referenced a website for claimant to look at sibone.com to determine if her symptoms fit with symptoms of SI joint pain, and requested prior authorization to proceed with a SI joint injection under CT guidance. Dr. Patel also discusses the potential that the results of the injections could lead to a recommendation for an SI joint fusion. (BS 26). This request was timely denied per WCRP 16, resulting in the instant hearing. (R. Exh. Q).

18. On March 31, 2015, Dr. Nanes placed claimant at MMI, and rated her impairment at 15%. He recommended maintenance care. (BS 44-48). Subsequent to the date of injury and prior to the date of MMI, claimant had undergone approximately thirteen (13) additional injections with at three (3) of these comprising of bilateral SI joint injections.

19. The Respondent insurer filed a Final Admission of Liability on April 6, 2015, admitting to the 15% rating provided by Dr. Nanes, while also admitting for maintenance medical care per Dr. Nanes recommendation. (R. Exh., B, BS 325).

20. Claimant returned to Dr. Leggett on June 2, 2015, reporting a pain level of 6/10. (BS 164). Of import is the improvement in intensity and location of claimant's pain as reflected by the claimant in the pain diagram she completed on this date. On this date, claimant noted on her follow-up questionnaire, that she was taking Vicodin, 3x/day, baclofen, 1-2x/day and Ibuprofen. (BS 168).

21. Dr. Brian Reiss, a board certified orthopedic surgeon, conducted an independent medical Examination IME) as Respondents' request on September 2, 2015. Dr. Reiss was asked to examine the claimant and review the entire packet of medical reports and address the critical issues of: A) whether the CT guided SI joint injections were reasonable and necessary; and if so, B) whether the injections were causally related to the industrial lifting incident of October 24, 2013? Dr. Reiss opined that the requested CT guided SI joint injections are not reasonable, necessary or causally related to the industrial injury. (R. Exh. R., BS 1-14).

22. In his report, Dr. Reiss opines that his diagnosis for the work related injury of October 23, 2013, is lumbosacral strain with pain. He further opined that her symptoms prior to the date of injury and after are very similar as were her responses to the numerous varied injections administered both before and after the October 24, 2013 work related strain. He concludes that she likely returned to her baseline of function and MMI, in January 2014 or in March 2014, as suggested by Dr. Nanes. He further opined that he personally reviewed the actual lumbar MRI scan noting that it failed to demonstrate any sacroiliac abnormality in his opinion. He finds support in his opinion against the reasonableness and necessity for any additional SI joint injections in the fact that the previously performed injections have failed to demonstrate diagnostic benefits and claimant had failed to report therapeutic benefit from the multiple prior SI joint injections that she has undergone, both before and after, the industrial lumbar strain. He further opined that an SI joint fusion is not indicated. (BS 8-9).

23. At hearing, Dr. Reiss, testified that at his examination, claimant reported her typical pain level to be a 6-7 out of 10. Claimant completed a pain diagram at his office. When comparing her reported level of pain to that reported back on November 5, 2011, the reported pain levels today appear very similar to those reported four years ago, and prior to the lifting incident. (BS 10 & BS 291). Of import, Dr. Reiss reviewed the pain diagram completed by claimant at his office on September 2, 2015, and compared it to the diagram claimant completed on November 5, 2011. Again, he noted they appear very similar. (BS 14- 298, Hearing Transcript, ("Hrg. Tr.") pages 22-25). In reviewing the pain diagram claimant completed just after the industrial lifting incident, Dr. Reiss does note a new aspect to that diagram, that being markings over the thoracic spine area. (R. Exh. I, BS 247 & Hr. Tr. p. 24, ll. 1-3)

24. Dr. Reiss further testified that it is his opinion the CT guided SI joint injections recommended by Dr. Patel are neither reasonable nor necessary. (Hr. Tr. PP. 26-29). Dr. Reiss bases his opinion on the variability of claimant's responses to multiple injections in multiple different areas of the back and buttock area which make it difficult to formulate a diagnosis based on any response to any of those injections. Hence, it is his opinion; that the correct diagnosis does not involve SI joint pain, as upon his examination, he found diffuse pain, myofascial pain, lumbar pain, back pain, not SI joint pain – on a chronic basis. This diagnosis is consistent with that of Drs. O'Brien and Ross. (Hr. Tr. pages 27-29).

25. Further, Dr. Reiss noted that even though Dr. Patel has indicated that the x-ray show that the SI joint on the left side looks widened as the basis for his request to conduct these injections, this opinion is inconsistent with his review of the x-ray and that of the reading radiologist as set forth in the report, as the radiologist noted no such finding. Also, Dr. Reiss reviewed the MRI scan of the lumbar spine which evidenced no such widening, edema, or any abnormality whatsoever. Dr. Reiss testified that if such widening existed, the MRI scan would show this, and it evidenced no such abnormality. Dr. Reiss further commented that performing the injection under CT guidance does not necessarily make the injection any better. (Hr. Tr. p. 29).

26. Dr. Reiss also opined that the requested CT guided SI injection is not causally related to the October 24, 2013 industrial lumbar strain injury. He believes that on that date, claimant suffered a lumbar strain with some non-specific myofascial pain into her buttock as opposed to an injury to her SI joint; and that at this point, two years post strain, she appears to be suffering from the same symptoms as she had prior to this injury. He noted that claimant appears to be taking the same dosage and quantity of Vicodin to control her pain and he finds it significant that her pain diagrams now are almost identical to those prior to the industrial strain injury. (Hr. Tr. p. 33). Hence, Dr. Reiss concludes that claimant's current pain is no longer related to the industrial strain, in addition to the fact that he does not believe her pain originates at the SI joint. (Hr. Tr. p. 34). Dr. Reiss' diagnosis is consistent with that set forth by Dr. Ross, who diagnosed claimant as suffering from low back pain and buttock pain of unclear etiology. (Hr. Tr. p. 35).

27. Dr. Reiss further noted that that the medical reports contain similar instances of non-work related aggravations of claimant's pain before the industrial strain and after the strain as evidenced by claimant's reports to the doctors of simply waking up with pain, being unsure of what caused her increased pain and consistently reporting both before the strain and after, that none of the injections had helped her pain. (Hr. Tr. pages 40 -41). Hence, Dr. Reiss opined, that at this point, claimant is suffering from the same pre-existing condition and symptoms which continue to wax and wane, as before the industrial lumbar strain. (Hr. Tr. p. 42).

28. The ALJ finds Dr. Reiss testimony to be credible and persuasive. Crediting the opinions of Dr. Reiss and the record as a whole, the ALJ finds that the evidence does not support a finding that the CT guided SI joint injections and/or a subsequent SI joint fusion are reasonable or necessary or causally related to the industrial strain of October 24, 2013. Rather, the persuasive evidence presented at hearing establishes that Claimant sustained an industrial strain injury on the date of injury, and that as of March 2014, she attained MMI from that strain. Furthermore, due to the overwhelming and voluminous medical evidence that establishes the pre-existing state of claimant's back, hip and pelvic area, the evidence further establishes that claimant has returned to her pre-existing baseline of function and that no further medical care is causally related or necessary to maintain her lumbar strain at MMI. Consequently, the ALJ finds Claimant's alleged need for a CT guided SI joint injection and/or any subsequent medical care to be not causally related to her industrial strain injury of October 24, 2013.

29. Claimant has failed to prove by a preponderance of the evidence that the proposed CT guided SI joint injections and potentially subsequent SI fusion are causally related to her October 24, 2013 lifting incident. Even if Claimant had established the requisite causal connection between her lumbar strain and the requested CT guided SI joint injections, the record evidence supports Dr. Reiss' opinion that the proposed injections and potential subsequent SI joint fusion are not reasonable or necessary given Claimant's numerous prior SI joint injections and various non-diagnostic responses thereto, both prior to the industrial strain and subsequent thereto. Hence,

the ALJ finds that the proposed CT guided SI injections are not medically reasonable based upon the totality of the record evidence.

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.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. 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 testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address 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).

Medical Benefits

D. 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).

As found, the evidence in the instant case persuades the ALJ that Claimant has not met her burden in establishing that the October 24, 2013 work injury proximately caused the need for bilateral CT guided SI joint injections. Rather, the persuasive evidence establishes that Claimant's lifting injury is no longer a causative factor precipitating the need for additional medical care to the back, hip, pelvis, or SI joint area. Rather, the totality of the evidence presented establishes that claimant had preexisting low back pain and SI joint dysfunction and that she has now returned to her prior baseline, both in terms of function and pain, as before her industrial lifting injury. Consequently, the ALJ concludes that Claimant's need any additional SI joint injections is no longer reasonable, necessary or related to her October 24, 2013 industrial back strain. Moreover, as found, even if Claimant had proven the requisite causal connection between her need for the requested CT guided SI injections and her October 24, 2013, lifting injury, the ALJ concludes that the requested injections and/or surgery are not reasonable or necessary given Claimant's response to multiple prior SI injections and the persuasive opinion of Dr. Reiss that Claimant's pain generator has not been adequately identified as the SI joint. Because Claimant has failed to prove by a preponderance of the evidence that her need for CT Guided SI injections are reasonably necessary or causally related to her October 24, 2013 industrial injury, Respondents' are not obligated to provide them.

ORDER

It is therefore ordered that:

1. Claimant's request for CT Guided SI joint injections, as recommended by Dr. Patel, is denied and dismissed as the current need for these injections are no longer causally related to claimant's October 24, 2013 workers' compensation injury.

Moreover, the requested injections are not reasonable or necessary given claimant's response to prior numerous SI joint injections administered both before and after the industrial injury in this case.

2. 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 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: December 11, 2015

/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 AND STIPULATION

The following issues were raised for consideration at hearing:

1. Whether Respondents proved by clear and convincing evidence that the impairment rating provided by the Division independent medical examiner (DIME) is most probably incorrect;

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding a whole person impairment;

3. Whether Claimant proved by a preponderance of the evidence the reasonableness and necessity of medications, Norco and Amitiza; and

4. Whether Claimant proved by a preponderance of the evidence that she is entitled to a disfigurement award.

The parties stipulated and agree that Claimant's average weekly wage (AWW) is $1238.80.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to her left shoulder on January 28, 2014, while working as a nurse at Platte Valley Medical Center. A sharps container fell approximately 16 inches striking the top of her shoulder

2. Claimant reported to the emergency room at her place of employment soon after the incident. The physician found no bruising or lacerations and noted mild tenderness to palpation across the superior deltoid. The physician considered the incident a "minor trauma" and provided no work restrictions.

3. Claimant was seen the following day by her authorized treating physician, Gregory Reichhardt, M.D. Dr. Reichhardt found no swelling, bruising, or lacerations in the shoulder region.

4. On February 3, 2014, Dr. Reichhardt documented tenderness over the left shoulder laterally, posteriorly, and anteriorly. By contrast, the emergency room

physician noted tenderness over the superior aspect of the shoulder. Dr. Reichhardt confirmed with Claimant that the sharps container hit the top of her shoulder.

5. On February 10, 2014, Dr. Reichhardt documented that Claimant was doing 95% better and felt she could go back to full duty work. Upon examination, he noted normal strength in the upper extremities, including the supraspinatus and infraspinatus muscles. Dr. Reichhardt did not believe that the mechanism of injury was suggestive of a rotator cuff tear and he released Claimant to full duty.

6. On February 26, 2014, Claimant told Dr. Reichhardt that she was doing worse and her pain was now at a level of 7/10. Dr. Reichhardt noted tenderness to palpation over the anterior and lateral aspect of the shoulder. Dr. Reichhardt looked at a picture of the sharps container provided by Claimant and commented that it did not look like the container fell from a great height.

7. By March 12, 2014, Claimant asked to be seen by a surgeon, although Dr. Reichhardt did not think it was clear that surgery would be recommended.

8. Daniel Hamman, M.D. performed surgery on Claimant's left shoulder on March 25, 2014. The postoperative diagnosis was left shoulder synovitis, medially subluxated biceps tenotomy, posterior labral tear and impingement, plus degenerative type II SLAP tear. Dr. Hamman also resected a 3 mm bone spur at the undersurface of the anterolateral acromion. The DIME physician, Dr. Leggett, and Dr. Reichhardt opined that these conditions were likely degenerative in nature, were caused by wear and tear and were likely asymptomatic prior to the work incident.

9. Dr. Hamman prescribed Norco postoperatively. Norco may also be referred to as Vicodin or hydrocodone.

10. At the time of her discharge from physical therapy on July 28, 2014, Claimant was still experiencing significant pain in her shoulder and was having more nerve pain. Claimant reported that the pain could range from 0 to 10/10.

11. Claimant moved to Texas on August 21, 2014, and started a new job as a nurse at a hospital in Texas on September 8, 2014, which lasted until December 20, 2014. Claimant began a new job as a school nurse on January 5, 2015, in Texas, which is a much less physical job than her job at the hospital.

12. Sometime between July 23 and August 27, 2014, Claimant stopped taking her Vicodin.

13. On or about August 25, 2014, Frederick Scherr, M.D. performed a records review independent medical examination (IME) at Respondents' request. Dr. Scherr opined that it was highly unlikely that the labral tear, tendinosis of the bicep and other abnormalities noted during the surgical procedure was sustained by the described mechanism of injury.

14. By October 21, 2014, Claimant was again taking Vicodin and was increasing the dosage due to her increased level of pain associated with working.

15. Claimant visited Colorado and saw Dr. Reichhardt on November 18, 2014, for maximum medical improvement determination (MMI) and an impairment rating. The pain diagram from that visit indicated pain over the posterior aspect of the shoulder and some pain over the biceps. Claimant informed Dr. Reichhardt that she was having increased pain in her shoulder, often by the second day of her night shift, and noted that on one occasion she was doing a heavy lift in order to slide a patient up in bed and experienced increased shoulder pain.

16. Dr. Reichhardt placed Claimant at MMI on November 18, 2014, with restrictions of limited lifting, pushing, pulling, and carrying to 50 pounds occasionally, 25 pounds frequently. He provided no restrictions for overhead activity or reaching away from the body. He assessed Claimant with a 9% upper extremity impairment which would convert to 5% whole person. The 9% rating consisted of a 7% upper extremity impairment rating for limitations in range of motion of the left shoulder and a 2% upper extremity impairment for axillary sensory nerve involvement. Dr. Reichhardt reviewed with Claimant that it would be best to taper off the Norco as he did not consider it to be a good long-term medication for her condition.

17. Claimant was first seen in Texas by Dr. Camarillo on October 14, 2014, and again on October 21, 2014. Dr. Camarillo referred Claimant to a pain management specialist, Baominh Vinh, M.D., who first saw Claimant on December 11, 2014. Claimant described her symptoms as severe and worsening. Dr. Vinh prescribed Norco along with the other maintenance medications of Naproxen, Flexeril, and Neurontin. A urine drug screen taken on December 11, 2014, was negative for all substances.

18. On April 3, 2015, Dr. Vinh prescribed Amitiza to address Claimant's constipation caused by the Norco. There is no discussion in Dr. Vinh's notes of attempts to manage Claimant's constipation using more conservative methods or nonprescription medication. .Additionally, there was no credible or persuasive evidence that Dr. Vinh reviewed the medical records or had a complete understanding of Claimant's medical condition when initiating his treatment.

19. Amitiza is a prescription medication specifically promoted for the use of opoid-induced constipation. It costs the insurer approximately $380 for a 30 day supply. Dr. Reichhardt discussed the management of constipation with the claimant on April 23, 2014. He generally discusses intake of fruits and vegetables and water, and exercise if tolerated. If that does not work, he recommends a fiber supplement and then add a stool softener if needed. If the problem remains, he recommends adding Senokot or a senna preparation. Given the small dosage of hydrocodone that Claimant is taking, he felt it would be unusual for that protocol to not be adequate.

20. Dr. Reichhardt was also concerned about the side effects of long-term opoid use, particularly for Claimant who has a history of migraine headaches, as opoid's can contribute to worsened headache problems. Other side effects may be decreased

mental status, including effects on memory, attention, and concentration, sleep apnea, and lowered testosterone levels.

21. There is no discussion in Dr. Vinh's notes of attempts to manage the constipation using more conservative methods or nonprescription medication.

22. As of the date of the December 11, 2015, hearing, Claimant continued on the Norco and Amitiza for pain relief and constipation, although she had recently been prescribed Opana in place of the Norco. Claimant's use of narcotic pain medication and Amitiza for constipation was not established by a preponderance of the evidence to be reasonable or necessary. Claimant risk adverse side effects from narcotic pain medication for chronic pain relief and without narcotic pain medication Claimant does not require Amitiza. Use of these medications is also contrary to Medical Treatment Guidelines regarding treatment of chronic pain and constipation.

23. On April 14, 2015, Dr. Leggett performed the DIME. Dr. Leggett found tenderness with both light and deep touch and hypersensitivity over the biceps tendon and acromioclavicular joint. He commented that it was difficult to differentiate between the overlying soft tissue pain and the deeper structural pain. He noted that the decrease in sensation into the forearm and hand did not seem to follow any specific dermatomal pattern. He found that Claimant exhibited a large amount of pain behavior throughout the examination and was found to have breakaway weakness. He noted two positive Waddell signs of regional weakness and overreaction. Upon examination, Dr. Leggett found minimal tenderness with palpation in the cervical region and full range of motion of the cervical region with tightness reported at the end range of rotation. Claimant reported to Dr. Leggett that her cervical region was doing "okay," but that she had some intermittent tightness with movement. Dr. Leggett commented that the cervical region seemed to be doing well and there was minimal support for relationship to neck impairment given the mechanism of injury.

24. Dr. Leggett concurred with Dr. Reichhardt's conclusion that Claimant reached MMI on November 18, 2014, and with Dr. Reichhardt's permanent restrictions. Dr. Leggett also concurred with Dr. Reichhardt's recommendation to taper Claimant off the medication, Norco, based on the Medical Treatment Guidelines (Exhibit A, page 7), case reports, and his own experience. He testified that both high and low use of opiates can lead to problems. Dr. Leggett concurred with Dr. Reichhardt's impairment rating based on the range of motion deficit and axillary sensory nerve involvement. However, Dr. Leggett also assigned a 10% upper extremity impairment using table 19 on page 50 of the *AMA Guides*, 3rd edition, revised. Dr. Leggett found the total impairment to be 18% upper extremity impairment, which would convert to an 11% whole person impairment. (Exhibit A, page 8).

25. Dr. Reichhardt credibly testified at hearing that Dr. Leggett's use of table 19 to assign a 10% extremity rating was a mistake. Dr. Leggett attempted to explain his rationale for using this table that applies only to arthroplasty. He explained that on page 5 of the impairment rating tips that a rating can be assigned for resection of the humeral head, but this was not done in this case. He also stated that the rating tips allow distal

clavicular resections to be assigned a 10% extremity rating. Again, this procedure was not done in this case. Dr. Reichhardt testified that the table used by Dr. Leggett does not address the issues that Dr. Leggett was testifying about. The table references only arthroplasty, not synovectomy, acromioplasty, or Popeye deformity. Dr. Reichhardt's own familiarity with the level II accreditation course materials and impairment rating tips led him to conclude that this part of Dr. Leggett's rating was most probably incorrect.

26. The ALJ finds that as a result of her January 28, 2014, work injury, Claimant has a visible disfigurement to the body consisting of three arthroscopic left shoulder scars, each one a half inch in diameter with keloids. Claimant's left shoulder slopes downward and the left arm lacks muscle tone.

CONCLUSIONS OF LAW

GENERAL LEGAL AUTHORITY

1.The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessary of litigation. Section 8-40-102(1), C.R.S. 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 the respondents and a workers' compensation case shall be decided on its merits. Section 8-43-201(1), 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 Ins. Co. v. Cline, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

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

PERMANENT PARTIAL DISABILITY BENEFITS

4.The parties raise interrelated issues regarding PPD. First, it is found and concluded that Respondents proved by clear and convincing evidence that the impairment rating provided by the DIME physician was most probably incorrect. Then, it is concluded that Claimant failed to establish by a preponderance of the evidence that

her impairment rating should be converted to a whole person impairment because the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder.

5.The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. 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 is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). 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.

6.In reviewing the rating given by Dr. Reichhardt, the authorized treating physician, and Dr. Leggett, the DIME physician, there is agreement that there was a 7% extremity impairment for range of motion deficit and a 2% impairment for axillary sensory nerve involvement, which totals to a 9% impairment of the upper extremity. Where the physicians differ is Dr. Leggett's additional 10% extremity rating using table 19 of the *AMA Guides*.

7.Table 19 covers impairments of the upper extremity following arthroplasty. (Exhibit O, page 3). A resection arthroplasty at the shoulder level is valued at 24% upper extremity and an implant arthroplasty is valued at 30% upper extremity. The claimant did not undergo an arthroplasty and there is nothing in the *AMA Guides* that provide an impairment rating for arthroscopic surgery.

8.Dr. Leggett relied upon page 5 of the impairment rating tips, reproduced below from the Division's website:

> **Shoulder Surgery:** Resection arthroplasty referred to in the *AMA Guides 3rd Edition (rev.)* is to be used only for partial resection of the humeral head, a procedure rarely performed currently. Neither resection nor implant arthroplasty values should be used for a distal clavicular resection. If providing a rating for a distal clavicular resection, the upper extremity value is 10%.
>
> https://www.colorado.gov/pacific/sites/default/files/Desk_Aid_11_Impairment_Rating_Tips.pdf

9.The rating tips provide that: "Resection arthroplasty… is to be used *only* for partial resection of the humeral head." (Emphasis added). If a distal clavicular resection is involved, a rating of 10% extremity can be provided. A distal clavicular resection was not performed in this case.

10.The use of table 19 by the DIME makes his opinion regarding impairment rating most probably incorrect. Table 19 of the *AMA Guides* apply only to arthroplasty, which did not occur in this case, and the rating tips specifically state that the use of table 19 for resection arthroplasty is to be used only for a partial resection of the humeral head, which also did not occur. Accordingly it is concluded that Claimant's impairment rating is 9% to the upper extremity, or 5% whole person.

11.Claimant argues that the situs of her functional impairment is not listed on the schedule and therefore should be converted to a whole person impairment. Section 8-42-107(1), C.R.S. limits a claimant to a scheduled disability award if the injury results in permanent medical impairment enumerated on the schedule of disabilities in Section 8-42-107(2). Where the claimant suffers functional impairment that is not listed on the schedule, the claimant is limited to medical impairment benefits for whole person impairment calculated in accordance with Section 8-42-107(8)(c), C.R.S.

12.The claimant bears the burden of establishing by a preponderance of the evidence that her functional impairment extends beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under Section 8-42-107(8)(c), C.R.S. The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of Section 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S., is one of fact for determination by the ALJ.

13.In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App.1996). The Court of Appeals has specifically stated that the determination whether a claimant sustained a scheduled or nonscheduled injury is a question of fact for the ALJ, not the rating physician. *City Market, Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

14.Here, Claimant's impairment should be limited to the schedule of disabilities. The claimant did not sustain a rotator cuff tear and, as testified by the physicians, the damage found within the structure of the shoulder was pre-existing. Further, it was unclear what structures, if any, were causing Claimant's pain. Dr. Reichhardt credibly testified that the mechanism of injury would not necessarily suggest a significant underlying structural problem. Dr. Leggett did not find any issues at the time of his examination with the cervical region.

15.The situs of Claimant's functional impairment is the arm at the shoulder. Several providers, including the DIME physician, found full range of motion of the cervical region. The limitations described by Claimant at hearing involve limitations to the use of her arm caused by her shoulder pain. This is covered by the schedule of disabilities.

MAINTENANCE MEDICAL BENEFITS

16.In cases such as this, where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment, the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* WC 4-309-217 (ICAO February 12, 2009).

17.Here, Claimant continues the use of narcotic pain medication and a prescription laxative prescribed to counteract the constipating effect of narcotic pain relievers. Respondents challenge the use of these medications arguing that the medications are not reasonable and necessary. Respondents contend that the use of opiod pain medications in Claimant's case is not advised by the Medical Treatment Guidelines. It is concluded that Claimant failed to sustain her burden of proof to prove that opiate pain medication and a prescription drug for constipation, Amitiza, is reasonable and necessary

18.The use of the Medical Treatment Guidelines is contained in W.C.R.P. 17-2(A), and provides as follows: "All health care providers shall use the medical treatment guidelines adopted by the Division." The medical treatment 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). The guidelines may be considered as evidence of accepted professional standards for treatment of workers' compensation injuries. See also § 8-43-201(3), C.R.S.

19.With regard to the use of opiods, the Medical Treatment Guidelines state the following:

> **Opoids:** are the most powerful analgesics. Their use in acute pain and moderate-to-severe cancer pain is well accepted. Their use in chronic nonmalignant pain, however, is fraught with controversy and lack of scientific research.
>
> Rule 17, Exh. 9, Part F.7.g. (p.68)

20.Dr. Leggett reproduced another section from the Medical Treatment Guidelines, section H-6, in his DIME report. Based on the guidelines, case studies, and his own experience, he recommended that Claimant taper off narcotics and transition to a non-narcotic. He was concerned that a prolonged use of opiates usually leads to tolerance, which decreases the effectiveness of the medication. Given the small dosage taken by Claimant, Dr. Leggett felt that the medication could be stopped immediately without any side effects or withdrawal.

21.Dr. Reichhardt, who treated Claimant until she moved to Texas just before reaching MMI, also recommended that Claimant discontinue opiates. He testified that

there was no good data on the safety and efficacy of opoids over the long term, consistent with what is stated in the Medical Treatment Guidelines. The risk is that the patient may become dependent on the opoids or have dosage escalation over time and, even possibly addiction. He testified that the use of opoid's for nonmalignant pain is not as safe as previously thought. He also did not believe that 5 mg of hydrocodone was going to do much in terms of improving Claimant's function or quality of life.

22.Dr. Reichhardt was also concerned about the side effects of long-term opoid use, particularly for Claimant who has a history of migraine headaches, as opoid's can contribute to worsened headache problems. Other side effects may be decreased mental status, including effects on memory, attention, and concentration, sleep apnea, and lowered testosterone levels.

23.It is not clear that Claimant's problem with constipation is opiate-induced. Dr. Leggett testified that the dosage Claimant is taking would usually not lead to constipation. Nonetheless, none of the other medications the claimant is using is likely to lead to constipation. If the claimant discontinued the opiates, as recommended by Dr. Leggett and Dr. Reichhardt, the Amitiza would become a non-issue. If the claimant continues on the opiates and continues with constipation problems, the use of Amitiza at the cost of $380 a month, without exhausting other measures, is unreasonable. For constipation associated with long-term opoid use, the Medical Treatment Guidelines state that "stool softeners, laxatives and increased dietary fluid may be prescribed." Rule 17, Exh. 9 "Chronic Pain Disorder," Part F.7.g.vii. (p.77). As stated by Dr. Reichhardt, it is questionable to provide a medication to treat the side effects from a medication that has dubious benefits to begin with.

DISFIGUREMENT

24.The ALJ concludes that as a result of her January 28, 2014, work injury, Claimant has a visible disfigurement to the body consisting of three arthroscopic left shoulder scars, each one a half inch in diameter with keloids. Claimant's left shoulder slopes downward and the left arm lacks muscle tone. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Respondents overcame the opinion of the DIME physician with regard to impairment rating by clear and convincing evidence . Respondents shall be liable for PPD based on a 9% scheduled impairment.

2. Claimant failed to prove by a preponderance of the evidence that she is entitled to a whole person impairment rating.

3. Claimant failed to prove by a preponderance of the evidence that opiod pain medication and Amitiza for constipation is reasonable and necessary.

4. Insurer shall pay Claimant $2500.00 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

All matters not determined herein are reserved for future determination.

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: December 17, 2015__

DIGITAL SIGNATURE:

Margot W. Jones

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

#JFA1QPD70D1HCPv 2

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the recommended physical therapy is reasonable and necessary medical treatment related to her January 21, 2014 work injury?

FINDINGS OF FACT

1. Claimant is employed as a Driver Trainer for employer. Claimant sustained an admitted injury on January 21, 2014 when she was walking to her pickup truck, when something caught her left toe causing her to fall approximately 12 feet off a retaining wall and landing on her head.

2. Claimant initially sought medical treatment from the Mercy Regional Hospital Emergency Room. Claimant was diagnosed with a possible intracranial injury, cervical injury, thoracic injury, wrist fracture, clavicular fracture, and occult intra-abdominal injury. Claimant underwent x-rays and a computed tomography of her head.

3. Claimant was referred by employer to Dr. Jernigan for medical treatment related to her work injury. Dr. Jernigan testified at hearing that claimant was not knocked unconscious in her fall, but did sustain a closed head injury in addition to a number of fractures and a laceration of her liver. Dr. Jernigan testified that claimant's case is complex due to the nature of her injuries and testified that he felt the physical therapy he had prescribed had significantly helped claimant.

4. Dr. Jernigan testified that without the physical therapy he has noticed claimant has decreased strength in her neck and decreased range of motion of her neck. Dr. Jernigan testified he believed claimant would continue to progress with continued physical therapy and opined that the physical therapy was reasonable, necessary and related to her compensable work injury. Dr. Jernigan testified he most recently wrote another prescription for physical therapy on September 29, 2015.

5. Dr. Jernigan testified on cross examination that the physical therapy in this case exceeds the recommended number of treatments set forth in the Colorado Medical Treatment Guidelines. Dr. Jernigan testified that during the course of her treatment he had claimant receiving physical therapy 2 times per week, then tried claimant at 1 physical therapy appointment per week, but claimant's condition worsened. Dr. Jernigan then recommended claimant again increase her physical therapy to 2 times per week.

6. Mr. Alexander, the physical therapist, testified at hearing in this matter. Mr. Alexander testified that he has been providing physical therapy to claimant since

2014. Mr. Alexander testified he has seen claimant's improvement when receiving physical therapy and noticed that when claimant is not receiving physical therapy, it has resulted in claimant having a loss of her range of motion. Mr. Alexander testified claimant has undergone approximately 130 physical therapy sessions with the clinic where Mr. Alexander works. Mr. Alexander testified he believed the physical therapy of two times per week would help cure and relieve claimant from the effects of her work injury. The ALJ finds the testimony of Mr. Alexander to be credible and persuasive.

7. Respondents obtained a utilization review from Dr. Hoffeld on September 28, 2015. Dr. Hoffeld noted that claimant had completed 137 sessions of physical therapy related to her work injury. Dr. Hoffeld noted that there was a recommendation for an additional 12 physical therapy visits. Dr. Hoffeld noted that claimant's medical records documented limited evidence of objective and functional improvement with the physical therapy and recommended denying additional requests for physical therapy as the treatment exceeded the recommendations set forth by Rule 17, Exhibit 8 of the Colorado Medical Treatment Guidelines.

8. Claimant testified at hearing that she believes the physical therapy is helping her condition. Claimant testified that when she isn't receiving physical therapy, her physical condition gets worse. Claimant testified that she performs a home exercise program that she discussed with her physical therapist. The ALJ finds the testimony of claimant to be credible and persuasive.

9. The ALJ credits the opinions expressed by Dr. Jernigan and Mr. Alexander as credible and persuasive and finds that claimant has demonstrated that it is more likely than not that the ongoing requests for physical therapy are reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. The ALJ credits that testimony of Dr. Jernigan and Mr. Alexander and finds that claimant's range of motion and strength continue to improve with the physical therapy and get worse when claimant does not have the physical therapy. The ALJ credits the opinions expressed by Dr. Jernigan on Mr. Alexander and finds that the ongoing physical therapy, while exceeding the recommended Colorado Medical Treatment Guidelines, continues to be curative in nature regarding claimant's condition and is reasonable medical treatment necessary to cure and relieve claimant from the effects of her January 21, 2014 work injury.

10. Claimant testified she has paid out of pocket for her physical therapy following the denial of her physical therapy. Claimant entered into evidence a patient payment log indicating claimant has paid $306 for six physical therapy sessions dated October 13, 2015, October 20, 2015, October 29, 2015, November 3, 2015, November 10, 2015 and November 17, 2015. The ALJ finds these physical therapy visits to be reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. As found, the recommendation for ongoing physical therapy is found to be reasonable and necessary to cure and relieve claimant from the effects of her work related injury. As found, respondents are liable for the cost of claimant's recommended physical therapy treatment.

5. Section 8-42-101(6)(b), C.R.S. states in pertinent part:

> If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the claimant for the full amount paid. The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

6. As found, claimant paid $306.00 out of pocket for her physical therapy treatment. As found, respondents are required to pay the full amount paid by claimant and, if necessary, seek reimbursement from the medical provider if the amount paid is in excess of the fee schedule.

ORDER

It is therefore ordered that:

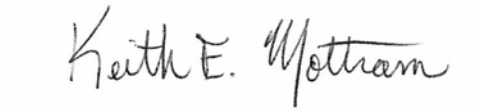
1. Respondents shall pay for the reasonable medical treatment including physical therapy necessary to cure and relieve claimant from the effects of the work injury.

2. Respondents shall reimburse claimant $306.00 for out of pocket expenses related to claimant's physical therapy.

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: December 8, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether respondents have overcome the opinion of the Division-sponsored Independent Medical Exam ("DIME") physician regarding the issue of permanent partial disability ("PPD") benefits by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of and in the course and scope of his employment with employer on January 27, 2014 when he was involved in a motor vehicle accident. Claimant testified he was employed as a pastor and was driving through Glenwood Canyon when a rockslide occurred causing the motor vehicle accident. Claimant testified the airbags deployed as a result of the accident and he injured his neck and burned his arms (from the airbags). Claimant testified he was asked to go in the ambulance at the scene of the accident, but denied this request. Claimant testified the next morning he knew he was more injured than he originally thought.

2. Claimant sought medical treatment with Dr. Findley following the accident. Dr. Findley evaluated claimant on February 3, 2014 and noted claimant was complaining of neck pain on the right side radiating into the upper trapezius and on the left side in the cervical and scalene areas. Dr. Findley diagnosed claimant with a cervical sprain/strain and recommended physical therapy.

3. Claimant returned to Dr. Findley on March 4, 2014. Dr. Findley noted that the x-rays of claimant's cervical spine brought some concern regarding a compression fracture and referred claimant for a computed tomography ("CT") scan for further evaluation. The CT scan showed no fracture and claimant was referred to Dr. Dickstein for further evaluation as of March 21, 2014.

4. Dr. Dickstein evaluated claimant and referred claimant for a magnetic resonance image ("MRI") of the cervical spine along with flexion/extension x-rays. The MRI showed severe degenerative disk disease as well as a broad based disc bulge at the C4-5 level. Dr. Dickstein noted claimant had moderate canal stenosis with mild cord compression and severe bilateral foraminal stenosis, but also noted that claimant was nt complaining of radicular symptoms.

5. Claimant was evaluated by Dr. Miller on June 12, 2014. Dr. Miller noted claimant was complaining of significant pain in his cervical spine on both sides with radiation into either shoulder that was increased with head tilting. Dr. Miller found poor range of motion of the cervical spine, but no evidence of a myelopathy. Dr. Miller

recommended a series of epidural steroid injections ("ESI's") and noted that claimant may need surgery later in life.

6. Claimant underwent a series of ESI's in June and August 2014 under the auspices of Dr. Dickstein. Claimant reported pain relief following the first injection, but noted that it returned over the next few weeks. Claimant again reported pain relief following the second injection, but the pain again returned and the length of relief was not as long as the first injection.

7. Claimant returned to Dr. Spence on October 27, 2014. Dr. Spence noted claimant's injections and ongoing complaints and placed claimant at maximum medical improvement ("MMI") as of October 27, 2014. Dr. Spence noted that he discussed the case with claimant and noted that claimant wanted to bring his case to a close. Dr. Spence noted that claimant indicated that he didn't feel that he has any significant disability and did not want to pursue further treatment. Dr. Spence noted he talked with claimant about referring him for a disability rating, but he feels like there is no disability and prefers not to have any further evaluation or treatment regarding this injury. Therefore, Dr. Spence opined that claimant had no permanent impairment as a result of the work injury.

8. Respondents filed a final admission of liability ("FAL") on December 1, 2014 admitting for the 0% impairment. Claimant objected to the FAL and requested a DIME. Claimant eventually underwent the DIME with Dr. Parry on April 23, 2015.

9. Dr. Parry reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her DIME evaluation. Dr. Parry noted claimant continued to complain of pain in his cervical spine and noted that claimant reported he has not been skiing and no longer plays softball after his work injury. Dr. Parry noted claimant was currently depressed and recommended claimant seek counseling to deal with his emotional issues.

10. Dr. Parry agreed that claimant was at MMI as of October 27, 2014. Dr. Parry provided claimant with a PPD rating for the cervical spine of 15% whole person. This impairment rating was comprised of an impairment rating of 6% whole person for a unoperated cervical spine disorder with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative chances on structural tests. Dr. Parry also provided claimant with an additional 10% impairment for range of motion deficits of claimant's cervical spine. Dr. Parry combined the 6% specific disorder with the 10% range of motion to come to the 15% whole person impairment rating.

11. Respondents obtained a records review independent medical examination ("IME") of claimant's case with Dr. Fall on June 14, 2015. Dr. Fall reviewed claimant's medical records, including the DIME report, and issued a report outlining her opinions regarding claimant's case.

12. Dr. Fall noted that it was her opinion that the 15% impairment rating was incorrect because the degenerative findings on the MRI were not caused by the accident nor were they found to be the main symptomatic issue. Dr. Fall further noted that the impairment rating from Dr. Parry was inconsistent with the report of Dr. Spence that indicated claimant did not feel he had any disability. Dr. Fall noted that this was consistent with the mechanism of injury and the minimal objective findings and further noted that loss of range of motion would be expected with this amount of underlying degenerative changes. Dr. Fall therefore opined that the DIME report from Dr. Parry was internally inconsistent.

13. The ALJ finds that the IME report from Dr. Fall does not demonstrate that it is highly probable and free from substantial doubt that opinion of Dr. Parry regarding claimant's PPD rating is incorrect. While Dr. Fall notes in her report that claimant felt he reported to Dr. Spence did not feel he had any disability, this had obviously changed as claimant then requested a DIME evaluation to assess this specific issue. Moreover, Dr. Parry opined that claimant was entitled to an impairment rating for the underlying degenerative changes in his cervical spine. Dr. Fall, in her report, noted that Dr. Parry indicated that the underlying degenerative changes were not causing claimant's symptoms, and if she were provided claimant an impairment rating for a soft tissue injury, the appropriate rating would have been 4%.

14. The ALJ finds that this demonstrates a mere difference of opinion between Dr. Fall and Dr. Parry as to whether the appropriate rating in this case could be the 6% under Table 53(II)(C) or the 4% impairment rating provided under Table 53(II)(B) involving the cervical spine. Moreover, the ALJ finds that the impairment rating that included the 10% loss of range of motion is appropriate in this case.

15. While Dr. Fall indicates that the range of motion was likely related to the underlying arthritic condition and not necessarily caused by the accident, this opinion is not supported by credible documented medical evidence. The ALJ refuses to find that claimant's loss of range of motion should be apportioned to a pre-existing condition in this case, or simply found to be not related to the injury, without any credible evidence to support this finding.

16. The ALJ credits claimant's testimony at hearing as being credible and persuasive. The ALJ notes claimant testified he still has neck pain "all the time" and experiences pain with range of motion of his neck. The ALJ credits the reports from Dr. Parry and rejects the contrary findings in the report of Dr. Fall and finds that respondents have failed to overcome the opinion of the DIME physician by clear and convincing evidence regarding the issue of permanent impairment related to the industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

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

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & 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 of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the findings of the DIME physician by clear and convincing evidence regarding the issue of permanent impairment. As found, the DIME physician's findings that claimant sustained a 15% whole person impairment rating as a result of the compensable industrial injury is substantiated by the records entered into evidence. Insofar as Dr. Fall disagreed with Dr. Parry's PPD rating, the ALJ finds that this opinion does not arise to the clear and convincing evidence standard applied to the opinions of the DIME physician on this issue.

ORDER

It is therefore ordered that:

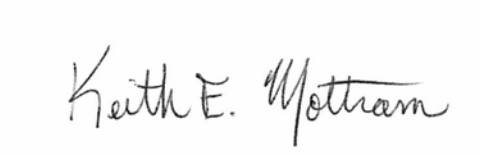
1. Respondents shall pay claimant PPD benefits based on the 15% whole person impairment rating provided by the DIME physician.

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: December 21, 2015



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Administrative Law Judge
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Grand Junction, Colorado 81501

ISSUES

The issues presented for determination are whether the claim should be reopened based upon a change in the Claimant's condition. If the claim is reopened, whether the Claimant is entitled to surgery recommended by Dr. Bryan Castro. Respondents contend that Claimant's condition has not worsened, and even if the claim were to be reopened, the surgery is not reasonable, necessary or related to the industrial injury.

FINDINGS OF FACT

1. The Claimant worked for the Employer as a truck driver. On April 16, 2013, he sustained an admitted injury to his low back after being rear-ended by another truck.

2. The Claimant initially received medical treatment through Concentra. The treatment consisted mostly of physical therapy and medications. After his symptoms did not improve, Concentra physician, Dr. Parsons, referred Claimant to Dr. John Sacha who began treating the Claimant on July 17, 2013.

3. Prior to his first visit with Dr. Sacha, Claimant had undergone an MRI scan. According to Dr. Sacha's July 17, 2013 report, the MRI showed: "evidence of L5-S1 degenerative disc disease with a disc bulge with some bilateral foraminal narrowing and some modest foraminal narrowing at L4-5 secondary to facet spondylosis and degenerative changes. The Claimant received medical treatment, consisting primarily of injections and physical therapy.

4. Dr. Sacha referred the Claimant to Dr. Castro for a surgical evaluation. On October 16, 2013, Dr. Castro evaluated the Claimant as well as Claimant's MRI scan. Dr. Castro felt the MRI was of poor quality and requested that Claimant have a repeat MRI and undergo an EMG.

5. Following the repeat MRI and EMG, Claimant returned to see Dr. Castro on November 20, 2013. Dr. Castro concluded Claimant had a normal EMG, and that the MRI showed advanced disc space collapse, particularly at L5-S1, and that it is causing advanced stenosis with neural foraminal narrowing, and some disc bulging into the foramen which does seem to be compressing the existing L5 nerve roots at the L5-S1 level. Dr. Castro discussed both surgical and non-surgical treatment options with the Claimant, and concluded that non-operative treatment would be most appropriate. Dr. Castro stated that because of the advanced disc space collapse, Claimant would need a lumbar fusion of the L5-S1 level. Dr. Castro, however, recommended avoidance

of surgery “at all cost” and to continue conservative treatment. Claimant agreed with Dr. Castro’s plan.

6. Claimant continued with the conservative treatment until Dr. Sacha determined that he reached maximum medical improvement (MMI) on January 15, 2014.

7. The Respondents filed a Final Admission of Liability on February 28, 2014, and admitted for maintenance medical care. Thereafter Claimant received periodic maintenance medical treatment with Dr. Sacha.

8. On September 10, 2014, Claimant reported to Dr. Sacha a significant flare up in the pain in his low back and legs. He stated the pain has made it more difficult to do his new job. Dr. Sacha noted that Claimant has had to try new jobs because of his increased leg symptoms. On physical exam, Dr. Sacha noted pain with extension and extension rotation localized to the back with radiation into the leg; borderline positive straight leg raise and neural tension test on the left side. Claimant had slightly decreased sensation in left L5 distribution and motor strength at 5/5. As part of the treatment plan, Dr. Sacha stated that surgical intervention remains a possibility especially in light of Claimant’s recurrent lumbar radicular symptoms.

9. On September 25, 2014, Dr. Sacha performed a transforaminal epidural injection/spinal nerve block at the L5-S1 level of Claimant’s spine as maintenance treatment.

10. Claimant returned to Dr. Sacha’s office on October 22, 2014. Claimant reported increased back and leg pain, especially on his left side. On physical exam, Dr. Sacha noted decreased sensation in a patchy distribution in the left leg; motor strength 5/5; paraspinal muscle spasms; pain with straight leg raise and neural tension on the left side; and pain with extension and extension rotation causing radiation of pain into the left leg. Claimant indicated that he wanted to move forward with surgical intervention so Dr. Sacha referred him back to Dr. Castro for reevaluation.

11. Claimant had another MRI on December 2, 2014. The radiologist’s impression was: “Multilevel degenerative disc disease, most severely affecting L3-4 and L5-S1 as described above. No evidence of focal disc bulge or severe canal stenosis. Overall, the appearance of the lumbar spine is quite similar [to] the prior study.” The radiologist noted several disc bulges, but he did not observe any definitive nerve root contact.

12. On December 17, 2014, Dr. Castro reevaluated the Claimant. He noted that the findings on the December 2, 2014 MRI seemed worse than the previous MRI. Dr. Castro stated, “There is quite significant foraminal narrowing at the L5-S1 level secondary to disk space narrowing and a slight retrolisthesis, quite severe foraminal compromise the exiting L5 nerve roots with some moderate recess encroachment traversing the S1 nerve root as well.” Dr. Castro recommended that a “lumbar

decompression at the L5-S1 level, left sided, to affect decompressive laminotomy and to affect decompression of the L5 and S1 nerve roots."

13. On March 26, 2015, Claimant filed a petition to reopen to pursue the surgery recommended by Dr. Castro. The Insurer had denied the request for surgery by that time.

14. The Respondents referred the Claimant to Dr. Carlos Cebrian for an independent medical evaluation. Dr. Cebrian examined the Claimant on June 1, 2015, and he also reviewed Claimant's medical records, including the MRI films. Dr. Cebrian opined that Claimant had not sustained a worsening of condition since being placed at MMI on January 15, 2014. Dr. Cebrian explained that there were subjective pain complaints but no objective evidence of a worsening of condition. Dr. Cebrian noted that the Claimant had severe underlying degenerative disc disease particularly at L5-S1 that was not an acute finding.

15. Dr. Cebrian noted that the findings on Claimant's MRIs were not the result of work exposures but rather, was a natural progression of his underlying degenerative condition. Ultimately, Dr. Cebrian opined that the proposed surgery, although different from what Dr. Castro had original recommended, (i.e. fusion versus decompression), was to correct Claimant's degenerative changes in Claimant's spine that pre-existed the work injury.

16. On July 14, 2015, Jorge Klajnbart, D.O., an orthopedic surgeon, reviewed the Claimant's medical records and MRI films. Dr. Klajnbart noted that Claimant's MRIs showed multilevel degenerative disc disease, most severely affecting L3-4 and L5-S1, with no evidence of focal disc bulge or severe canal stenosis. Dr. Klajnbart further stated that when comparing the December 2014 MRI to the November 2013 MRI, the findings are similar and demonstrate severe bilateral neural foraminal narrowing, and compression of bilateral exiting L5 nerve roots.

17. Dr. Klajnbart explained that based upon his review of the MRI films, the Claimant had a natural progression of the degenerative process. Dr. Klajnbart noted that the claimant's ongoing pain complaints were a continued evolution of the established degenerative process not attributable to the original April 16 2013 accident. Dr. Klajnbart based his opinion, in part, on Claimant's ability to continue working after the accident and on Claimant's initial response to chiropractic care and acupuncture. Dr. Klajnbart concluded that Claimant's current pain flare-ups into this left leg are suggestive of an "evolution of his established significant disease process, to include his congenital short pedicles, which are noted on the MRI and are not attributable to the motor vehicle collision."

18. Claimant continued to work for the Employer until September 2014 when his symptoms worsened such that he could not continue the type of work he had been performing. Claimant testified, and the ALJ finds, that Claimant sought other similar employment with other employers that was less physically demanding. Claimant

worked for two other transportation companies both of which required that he merely drive and deliver construction materials without the need to unload a flat bed truck or place and strap tarps.

19. The Claimant testified, and the ALJ finds, that he has not sustained any new injuries to his low back since April 16, 2013.

20. Claimant had a prior back injury sometime in the 1990s, but he has not received any medical treatment for his low back since that time.

21. During the hearing, the Claimant provided a description of his pain. He testified that it starts in the left side of his back and radiates into the left side of his buttocks and down his left leg. He stated that it can be unbearable at times such that he must shift his weight to his right side when driving long distances. One year prior to the hearing, he rated his pain at 4-5 out of 10, and at the hearing he rated his pain at 7-8 out of 10.

22. The Claimant testified that his pain now is worse than it was in January 2014 when Dr. Sacha first found that he reached MMI. Claimant did not want surgery in January 2014, but because of his worsening pain, he wants to undergo the surgery recommended by Dr. Castro.

23. Dr. Cebrian testified during the hearing that there was no objective evidence to demonstrate an overall worsening of Claimant's condition. Dr. Cebrian explained that the three MRIs of the Claimant's lumbar spine from 2013 through 2014 demonstrated degenerative changes in the lumbar spine. Most notably, Dr. Cebrian explained that the December 2, 2014 MRI was similar to the MRIs taken on 2013 and showed multi-level changes to the lower lumbar spine and ongoing degenerative congenital stenosis. Dr. Cebrian also testified when he examined the Claimant, he had a negative straight leg test, tight hamstrings and normal motor strength in his lower extremities. Dr. Cebrian explained that these objective findings demonstrated that the Claimant's overall condition had not worsened. Instead, Dr. Cebrian noted that the Claimant was experiencing a gradual worsening of his overall degenerative condition. Dr. Cebrian agreed with Dr. Klajnbart's findings that Claimant's flare-ups of pain were typical of what would clinically be seen from most patients experiencing the same symptoms with similar MRI findings.

24. Dr. Cebrian also testified with regard to the proposed surgery from Dr. Castro and the Medical Treatment Guidelines. Specifically, Dr. Cebrian noted that the surgery proposed from Dr. Castro that was the subject of hearing was a decompression at L5-S1. This was a different surgery than had been proposed prior to MMI. Notably, Dr. Castro proposed a lumbar fusion in 2013 and that the Claimant did not meet the requirements under the Medical Treatment Guidelines for a decompression surgery. Dr. Cebrian explained that according to the Medical Treatment Guidelines, Claimant had to have pain in the legs greater than the low back pain. Claimant also had to have physical exam findings of abnormal reflexes and motor weakness coupled with objective

evidence of nerve root impingement upon MRI. Dr. Cebrian explained that Dr. Sacha had noted 5/5 motor strength as recently as June 10, 2015 and that the MRIs did not show any definitive nerve root contact. Ultimately, Dr. Cebrian testified that the surgery proposed by Dr. Castro was not reasonable or necessary as it was aimed to correct a degenerative condition and was not supported by the Treatment Guidelines.

25. Claimant has proven that his condition has changed/worsened since Dr. Sacha placed him at MMI in January 2014. Claimant credibly testified that his subjective pain has increased since January 2014, making it more difficult to perform his job duties and causing him sleep deprivation. In addition, Dr. Castro's interpretation of Claimant's most recent MRI supports that Claimant has experienced a worsening of his condition. Dr. Sacha's physical examination findings also support Dr. Castro's recommendation for surgery.

26. The ALJ rejects the opinions of Drs. Cebrian and Klajnbart. Dr. Cebrian examined the Claimant one time and concluded that Claimant's clinical presentation combined with the MRI findings did not meet the criteria for the surgery recommended by Dr. Castro. In addition, Dr. Cebrian testified that the findings on Claimant's December 2014 MRI showed degenerative changes and the natural progression of Claimant's degenerative condition, and that the surgery recommended by Dr. Castro would be directed toward the MRI findings, but that surgery is not reasonable. Dr. Cebrian's testimony is confusing. Either the surgery is unreasonable or it would be reasonable, but only to treat the pre-existing degenerative condition. Regardless, the ALJ is not persuaded by Dr. Cebrian's opinions.

27. Dr. Klajnbart performed only a records review and never examined the Claimant making his opinions less persuasive.

28. The Claimant had no ongoing low back or leg complaints prior to the industrial injury. Since the injury, he has had ongoing low back and left leg complaints despite conservative treatment. His pain has worsened since placement at MMI, and the objective findings per Drs. Castro and Sacha support the need for the surgery recommended by Dr. Castro.

CONCLUSIONS OF LAW

General Provisions

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).

Reopening – Change in Condition

4. Section 8-43-303(1), C.R.S., provides:

> At any time within six years after the date of injury, the director or an administrative law judge may … review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

5. Claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *see 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 change in claimant's physical or mental condition which can be causally connected to the original injury. *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002).

6. As found above, the Claimant has proven that his work-related medical condition has worsened. In addition to the subjective increase in his pain in both his low back and left leg, Claimant's function has been impacted. He has had to secure new employment due to his work-related condition and he has experienced sleep deprivation due to his pain. The opinions of Dr. Castro also support a worsened condition.

Medical Benefits

7. 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.

8. 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.

9. The Claimant has proven that he is entitled to the surgery recommended by Dr. Castro. As found above, the Claimant's pain has worsened since placement at MMI, and the objective findings per Drs. Castro and Sacha support the need for the surgery recommended by Dr. Castro. The ALJ is not persuaded by the contrary opinions offered by Drs. Cebrian and Klajnbart for the reasons stated above.

ORDER

It is therefore ordered that:

1. The Claimant's workers' compensation claim is reopened.

2. Claimant is entitled to undergo the surgery recommended by Dr. Castro.

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

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

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

DATED: December 6, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK

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ISSUES

1. .Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period February 20, 2014 until terminated by statute.

2. Whether Claimant has made a "proper showing" for a change of physician to Kristin Mason, M.D. pursuant to §8-43-404(5)(a), C.R.S.

FINDINGS OF FACT

1. On January 7, 2014 Claimant suffered admitted industrial injuries to his back, neck, left knee and left shoulder. He slipped on ice and snow while attempting to dislodge a large tarp that was stuck on concrete.

2. Claimant continued to perform his regular job duties for several weeks after the January 7, 2014 incident. He explained that by February 20, 2014 he was no longer able to perform his regular job duties because of increasing symptoms in his back, neck, left knee and left shoulder. Claimant sent a message through a co-worker to inform his supervisor that he would be unable to work because of his pain. When Claimant arrived at work on February 21, 2014 he was terminated due to a reduction in work force.

3. On February 26, 2014 Claimant visited the Denver Health Medical Center because of continuing left shoulder, neck and back pain. He received advice on how to proceed with his Workers' Compensation claim and staff at the Denver Health Medical Center contacted Insurer. Insurer then instructed Claimant to contact Travis Kauffman at Employer. Claimant spoke with Mr. Kauffman and was informed that he had a medical appointment at Concentra Medical Centers scheduled for March 7, 2014.

4. On March 7, 2014 Claimant visited Authorized Treating Physician (ATP) Darla Draper, M.D. at Concentra for an examination. Dr. Draper diagnosed Claimant with a left knee strain/sprain, a left shoulder contusion, a left knee contusion, a back strain and a cervical strain. She prescribed medications, referred Claimant to physical therapy and recommended an orthopedic evaluation of Claimant's left knee. Dr. Draper also assigned Claimant work restrictions including no lifting, no pushing or pulling in excess of 10 pounds with the right upper extremity, no use of the left upper extremity except for light use of the left hand, sitting 80% of the time, no climbing stairs or ladders and no kneeling or squatting.

5. On April 15, 2014 Respondents filed a General Admission of Liability (GAL) but denied responsibility for lost wages.

6. On April 23, 2014 Dr. Draper continued Claimant's work restrictions to include no lifting, pushing or pulling in excess of 10 pounds, no squatting and/or kneeling and no use of the left upper extremity except for light use of the left hand. She also noted that Claimant should sit 80% of the time, wear a brace and use crutches 100% of the time.

7. On May 14, 2014 Claimant returned to Dr. Draper for an examination. She noted that Claimant had visited Mark Failinger, M.D. on May 1, 2014 for his left shoulder condition. Dr. Failinger had administered a left shoulder steroid injection that only helped for 2-3 days. Diagnostic testing of the left knee revealed that it was essentially normal. Dr. Draper continued Claimant's work restrictions and anticipated that he would reach Maximum Medical Improvement (MMI) by August 1, 2014. She referred Claimant to a delayed recovery specialist for an evaluation.

8. On June 4, 2015 Claimant returned to Dr. Draper for an examination. She remarked that Claimant would be visiting delayed recovery specialist John Burris, M.D. at the end of the month. She specifically noted that Claimant's care would be transferred to Dr. Burris at his first available appointment on June 27, 2014. Dr. Draper continued Claimant's work restrictions to include no repetitive lifting in excess of 10 pounds, no pushing or pulling.with greater than 10 pounds of force, no squatting, no kneeling and no climbing. She again anticipated that Claimant would reach MMI by August 1, 2014.

9. On June 27, 2014 Claimant visited ATP Dr. Burris for an evaluation. Dr. Burris diagnosed Claimant with a left knee strain and a left shoulder strain. He remarked that Claimant had a benign examination with no objective findings and negative diagnostic testing. Dr. Burris commented that Claimant exhibited a somatic overlay and was very pain averse. He did not note any objective basis for work restrictions. Dr. Burris commented that Claimant could assume his normal activities at work and home. He did not place Claimant at MMI pending additional evaluation with John Papilion, M.D.

10. On July 3, 2014 Claimant visited Dr. Papilion for an examination. Dr. Papilion noted that Claimant exhibited instability and pathology in his ACL. Dr. Papilion stated "I believe it is reasonable to proceed with exam under anesthesia, arthroscopy in the left knee with electrothermal shrinkage of his partial ACL tear." Dr. Papilion restricted Claimant to no squatting, kneeling, climbing or overhead work.

11. On August 8, 2014 Claimant returned to Dr. Burris for an examination. Dr. Burris noted that Claimant continued to exhibit a benign examination with no objective findings and an essentially negative diagnostic work-up. Dr. Burris explained that all treating providers had noted a significant somatic overlay to Claimant's presentation. Seven months of conservative care had not caused significant changes in Claimant's subjective complaints. He specifically enumerated that Claimant had received physical therapy with transition to a home program, massage therapy, chiropractic treatment, acupuncture and medication management. There was no objective basis to assign impairment or permanent work restrictions and Dr. Burris released Claimant to regular

employment. Dr. Burris concluded that Claimant had reached MMI with no impairment or restrictions.

12. On August 26, 2014 Insurer filed a Final Admission of Liability (FAL). The FAL specified that Claimant had reached MMI on August 8, 2014 with no impairment or work restrictions.

13. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME). On December 18, 2014 Claimant underwent a DIME with Edwin M. Healey, M.D. Dr. Healey concluded that Claimant had not reached MMI and required further evaluation and treatment. He recommended that Claimant visit a Spanish-speaking psychologist, undergo psychological counseling and receive antidepressant medications. He also recommended a change of physician "especially Dr. Burris." He suggested a referral to a physiatrist for additional evaluation and treatment.

14. On January 13, 2015 Insurer filed an Amended FAL. The FAL acknowledged reasonable and necessary medical treatment for Claimant's left knee, left shoulder, neck and back. Dr. Draper and referrals were listed as the designated providers. Respondents denied TTD benefits because Claimant was terminated for cause on February 26, 2014. However, Respondents did not raise the termination for cause defense at the hearing in this matter.

15. During February and March 2015 Dr. Papilion continued Claimant's work restrictions. On March 2, 2015 Claimant underwent left knee surgery.

16. On March 11, 2015 Claimant was referred to physiatrist John J. Aschberger, M.D. as recommended by Dr. Healey. Dr. Aschberger remarked that Claimant had undergone left knee surgery. He commented that Claimant exhibited left upper quarter myofascial pain and left lumbosacral inflammation. He reviewed Dr. Healey's DIME recommendations and began Claimant in therapy that included postural exercises and appropriate stretches. Dr. Aschberger also mentioned massage therapy and possible trigger point injections. He remarked that he would be glad to assume Claimant's medication management care. Dr. Aschberger did not assign work restrictions.

17. Dr. Aschberger referred Claimant for a psychological evaluation. On August 5, 2015 Claimant visited Walter J. Torres, PhD. for a psychological consultation. Dr. Torres remarked that Dr. Aschberger had initially referred Claimant to him in late May 2015. However, Claimant did not attend the evaluation. After speaking to Claimant about the matter, Dr. Torres documented that Claimant declined the appointment because of transportation difficulties and problems with his previous attorney.

18. Dr. Torres determined that Claimant exhibited paranoid personality features that were aggravated by his Workers' Compensation injury and associated depression. He commented that it had become very difficult to medically assist

Claimant and "attempts to aggressively treat his condition can be expected to be fruitless." Dr. Torres remarked that reaching MMI might aggravate Claimant's depression and hostile behavior. He recommended anti-depressant medications "to lessen the potential for acute instability."

19. On August 18, 2015 Claimant underwent an examination with Kristin Mason, M.D. Dr. Mason recommended additional diagnostic testing including an MRI arthrogram of the left shoulder, an MRI of the left knee and second orthopedic opinions for both the shoulder and the knee. She also suggested an EMG study of Claimant's left upper extremity and additional physical therapy.

20. On September 15, 2015 Claimant underwent an MRI arthrogram of his left shoulder. The MRI revealed a superior labral tear with anterior and posterior extension as well as a partial thickness tear of the superior and middle glenohumeral ligaments. On October 19, 2015 Claimant underwent left shoulder surgery with Dr. Papilion.

21. Claimant testified at the hearing in this matter. He explained that he became unable to perform his job duties for Employer by February 20, 2014. Claimant remarked that he could not return to his job because of the work restrictions assigned by his treating physicians.

22. Claimant requested a change of physician because he did not trust Dr. Burris or any of the medical providers at Concentra. He noted that the doctors at Concentra were uncaring and sought a transfer of care to Dr. Mason because she was considerate and listened to his concerns.

23. Dr. Healey testified at the hearing in this matter. He explained that he performed a DIME and determined that Claimant required significantly more medical treatment. Dr. Healey remarked that Claimant should not return to Dr. Burris or Concentra. He commented that Claimant was unable to perform more than sedentary work until his surgeon released him or changed his restrictions. Dr. Healey acknowledged that Claimant's care had been transferred to physiatrist Dr. Aschberger and he had undergone a psychological evaluation.

24. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute. On January 7, 2014 Claimant suffered admitted industrial injuries to his back, neck, left knee and left shoulder. He credibly explained that by February 20, 2014 he was no longer able to perform his regular job duties because of increasing symptoms. On March 7, 2014 Dr. Draper assigned Claimant work restrictions including no lifting, no pushing or pulling in excess of 10 pounds with the right upper extremity, no use of the left upper extremity except for light use of the left hand, sitting 80% of the time, no climbing stairs or ladders and no kneeling or squatting. By June 4, 2015 Dr. Draper continued Claimant's work restrictions to include no repetitive lifting in excess of 10 pounds, no pushing or pulling with greater than 10 pounds of force, no squatting, no kneeling and no climbing. Because of his work restrictions and ongoing symptoms, Claimant has been off of work

and has not earned any wages since February 20, 2014. Claimant's industrial injuries caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

25. Dr. Draper subsequently transferred Claimant's care to ATP Dr. Burris. She specifically noted that Claimant's care would be transferred to Dr. Burris at his first available appointment on June 27, 2014. Dr. Burris thus became "the attending physician" for purposes of §8-42-105(3)(c) C.R.S. At Claimant's June 27, 2014 visit with Dr. Burris he stated that Claimant could assume normal activities at work and home. He did not place Claimant at MMI pending additional evaluation with Dr. Papilion. Although Dr. Burris mentioned that Claimant could resume normal activities, his reservations regarding MMI suggest that it was equivocal for purposes of §8-42-105(3)(c) C.R.S.

26. On August 8, 2014 Claimant returned to Dr. Burris for an examination. Dr. Burris enumerated that Claimant had received physical therapy with transition to a home program, massage therapy, chiropractic treatment, acupuncture and medication management. There was no objective basis for impairment or permanent work restrictions and Dr. Burris released Claimant to regular employment. Dr. Burris concluded that Claimant had reached MMI with no impairment or restrictions. The August 8, 2014 report constitutes a written release to return to regular employment by the attending physician pursuant to §8-42-105(3)(c) C.R.S. Accordingly, Claimant's entitlement to TTD benefits terminated on August 8, 2014.

27. On March 2, 2015 Claimant underwent left knee surgery. Respondents thus resumed paying Claimant TTD benefits. Accordingly, Claimant is entitled to receive TTD benefits for the periods February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute.

28. Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. On December 8, 2014 DIME Dr. Healey recommended a change of physician "especially Dr. Burris." He suggested a referral to a physiatrist for additional evaluation and treatment. Claimant requested a change of physician because he did not trust Dr. Burris or any of the medical providers at Concentra. He noted that the doctors at Concentra were uncaring and sought a transfer of care to Dr. Mason. However, on March 11, 2015 Claimant was referred to physiatrist Dr. Aschberger as recommended by Dr. Healey. Moreover, Dr. Healey acknowledged that Claimant's care had been transferred to physiatrist Dr. Aschberger and he had undergone a psychological evaluation. Because Claimant has already received a change of physician to Dr. Aschberger, he has failed to make a "proper showing" that his care should again be transferred to Dr. Mason. Accordingly, Claimant's request for a change of physician to Dr. Mason is denied and dismissed.

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).

TTD Benefits

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). 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.

5. "Attending physician" as used in §8-42-105(3)(c) C.R.S. "includes only those physicians who are authorized to provide treatment." *Popke v. Industrial Claim Appeals Office,* 944 P.2d. 677, 680 (Colo. App. 1997). An "attending physician" thus is one within the chain of authorization. *Id.* However, §8-42-105(3)(c) C.R.S. does not

include all attending physicians but is limited to the health care provider determined to be "the attending physician." *Id.* Resolution of a doctor's status as "the attending physician" is a question of fact for resolution by the ALJ. *Id.* The attending physician's opinion concerning the claimant's ability to perform regular or modified work is dispositive for purposes of terminating temporary disability benefits under §8-42-105(3), C.R.S. unless there are multiple attending physicians with conflicting opinions. See *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d. 680 (Colo. App. 1999).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute. On January 7, 2014 Claimant suffered admitted industrial injuries to his back, neck, left knee and left shoulder. He credibly explained that by February 20, 2014 he was no longer able to perform his regular job duties because of increasing symptoms. On March 7, 2014 Dr. Draper assigned Claimant work restrictions including no lifting, no pushing or pulling in excess of 10 pounds with the right upper extremity, no use of the left upper extremity except for light use of the left hand, sitting 80% of the time, no climbing stairs or ladders and no kneeling or squatting. By June 4, 2015 Dr. Draper continued Claimant's work restrictions to include no repetitive lifting in excess of 10 pounds, no pushing or pulling with greater than 10 pounds of force, no squatting, no kneeling and no climbing. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and has not earned any wages since February 20, 2014. Claimant's industrial injuries caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

7. As found, Dr. Draper subsequently transferred Claimant's care to ATP Dr. Burris. She specifically noted that Claimant's care would be transferred to Dr. Burris at his first available appointment on June 27, 2014. Dr. Burris thus became "the attending physician" for purposes of §8-42-105(3)(c) C.R.S. At Claimant's June 27, 2014 visit with Dr. Burris he stated that Claimant could assume normal activities at work and home. He did not place Claimant at MMI pending additional evaluation with Dr. Papilion. Although Dr. Burris mentioned that Claimant could resume normal activities, his reservations regarding MMI suggest that it was equivocal for purposes of §8-42-105(3)(c) C.R.S.

8. As found, on August 8, 2014 Claimant returned to Dr. Burris for an examination. Dr. Burris enumerated that Claimant had received physical therapy with transition to a home program, massage therapy, chiropractic treatment, acupuncture and medication management. There was no objective basis for impairment or permanent work restrictions and Dr. Burris released Claimant to regular employment. Dr. Burris concluded that Claimant had reached MMI with no impairment or restrictions. The August 8, 2014 report constitutes a written release to return to regular employment by the attending physician pursuant to §8-42-105(3)(c) C.R.S. Accordingly, Claimant's entitlement to TTD benefits terminated on August 8, 2014.

9. As found, on March 2, 2015 Claimant underwent left knee surgery. Respondents thus resumed paying Claimant TTD benefits. Accordingly, Claimant is entitled to receive TTD benefits for the periods February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute.

Change of Physician

10. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

11. As found, Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. On December 8, 2014 DIME Dr. Healey recommended a change of physician "especially Dr. Burris." He suggested a referral to a physiatrist for additional evaluation and treatment. Claimant requested a change of physician because he did not trust Dr. Burris or any of the medical providers at Concentra. He noted that the doctors at Concentra were uncaring and sought a transfer of care to Dr. Mason. However, on March 11, 2015 Claimant was referred to physiatrist Dr. Aschberger as recommended by Dr. Healey. Moreover, Dr. Healey acknowledged that Claimant's care had been transferred to physiatrist Dr. Aschberger and he had undergone a psychological evaluation. Because Claimant has already received a change of physician to Dr. Aschberger, he has failed to make a "proper showing" that his care should again be transferred to Dr. Mason. Accordingly, Claimant's request for a change of physician to Dr. Mason is denied and dismissed.

ORDER

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

1. Claimant shall receive TTD benefits for the periods February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute.

2. Claimant's request for a change of physician to Dr. Mason is denied and dismissed.

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: December 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he suffered a work injury in the course and scope of his employment for the Employers, David Cruz and Barlo Inc.;

b. Whether Claimant established by a preponderance of the evidence that he is entitled to an order awarding authorized, reasonably necessary and related medical benefits;

c. What is Claimant's employee status as to Barlo, Inc./Interstate and Pinnacol Assurance;

d. Whether Barlo, Inc./Interstate is entitled to an award of penalties against Claimant;

e. Whether the doctrine of estoppel should be applied as against Barlo, Inc./Interstate's subcontractor David Cruz and/or Texas Mutual Insurance for denial of coverage based upon a certificate of insurance provided to Barlo, Inc./Interstate dated November 1, 2013; and

f. Whether Claimant is entitled to an order awarding penalties as against David Cruz.

FINDINGS OF FACT

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

1. All parties to this claim were provided notice of hearing, dated June 16, 2015, consistent with the provisions of Section 8-43-211(1). Respondent David Cruz made no appearance at hearing. Respondent Texas Mutual Insurance Company made no appearance at hearing.

2. At hearing on July 7, 2015, Claimant was granted leave to obtain evidence in support of the admission of Exhibit 7. At hearing, Exhibit 7 was not admitted into evidence as it was determined to be hearsay, to lack foundation and to be neither an employment record nor a medical record. On August 10, 2015, Claimant offered Exhibit

10. Again, Exhibit 10 is hearsay, lacks foundation and is neither an employment record nor a medical record. Exhibits 7 and 10 are intend to address the issue raised in this proceeding of statutory employer. Exhibit 10 purports to establish through the affidavit of "an agent, office manager and custodian of records" in a Texas insurance agency, which is not a party to these proceedings, that Respondent Texas Mutual Insurance cancelled the workers' compensation insurance coverage of Respondent David Cruz on September 12, 2013. Exhibits 7 and 10 are not made part of the record in this proceeding because the evidence contains hearsay, lacks foundation and is neither an employment record or medical record as provided by Section 8-43-210, C.R.S.

3. Claimant is a 36 year old man who was an employee of David Cruz as a laborer for roofing work. Claimant alleges that he was injured on January 21, 2014, when he fell from a roof at a home with the address of 8 Mountain Laurel in Littleton, Colorado. Claimant was one of six workers on the roof.

4. Claimant testified that late in the afternoon, close to 5:00 pm or about 30 minutes before it was dark, David Cruz, who was on the roof working with him, told Claimant to cut a piece of shingle near the edge of the roof. As he bent to cut the shingle, he slipped and fell off the edge of the roof. He tried to hold onto the gutter but fell anyway, landing on his heels, and then falling back, striking his buttocks, back and head on grass.

5. On January 25, 2014, Claimant first sought treatment. At that time, he was treated by Heuser Chiropractic South, PC, which he chose from a billboard advertisement. He complained of pain all over his body, especially on his right side, arm, elbow and his highest concern was his lower back pain but he was also experiencing pain in his neck, arm, mid-back, shoulder and hip, together with dizziness and inability to sleep. Claimant reported on the intake form that he had treated himself by taking pills and applying heating patches, but after about five minutes of walking, he was experiencing extreme pain. He felt like his body was jammed at this lower back.

6. Claimant treated with that chiropractor through February 7, 2014. He went to Memorial Hospital in Colorado Springs on February 7, 2014. Those records state that it was "unclear" why Claimant came in. Memorial Hospital records say that Claimant complained of pain in his bottom and his rectum. He was prescribed medication. Claimant next sought treatment on October 13, 2014, at Penrose Community Urgent Care. The Penrose assessment was abdominal pain and coccyx injury. He was prescribed Ranitidine, Tramadol and told to use ice. Claimant testified that he has since bought natural medicine of his choice, has not received any medical treatment since his October 13, 2014 urgent care visit and has not used any prescription medicine. Claimant testified at the hearing that since his injury, his neck, shoulder and arm pain originally documented at the chiropractor had resolved but he still suffered from a painful coccyx, lumbar spine and head pain. He continues to feel dizziness.

7. Claimant provided varied reports of the mechanism of his injury. Claimant has reported that David Cruz saw him fall from the roof, knew he fell, and did not even look over the side when he fell. Claimant has offered varied and contradictory

explanation of Mr. Cruz's actions following Claimant's fall. Claimant's differing statements cast doubt on his overall credibility.

8. Dr. Jeffrey Raschbacher evaluated Claimant on November 17, 2014, and testified as an expert at hearing. His conclusion after evaluation of Claimant and review of the records is that Claimant did not sustain an injury at work on January 21, 2014, that lead to the need for medical treatment or to disability. Dr. Raschbacher testified that he did not see evidence of a fall. He testified that there was no objective basis to indicate there was an injury. Dr. Raschbacher testified that Claimant's Waddells signs were positive, which indicated that the manner in which Claimant was presenting does not make medical sense. Although a MRI shows a disc bulge, Dr. Raschbacher testified that it is not significant that Claimant has a disc bulge. He testified that this is a normal variant in the disc, is not pathology showing injury and explained studies that supported this medical fact. Dr. Raschbacher opined that a diagnosis of malingering must be entertained for Claimant.

9. Dr. Wunder evaluated Claimant on May 27, 2015. He reported that Claimant had a disc herniation. His impression was right L5-S1 radiculopathy and disc abnormality at L5-S1. He felt that Claimant did experience a work injury. He provided an impairment rating for the back. Dr. Wunder did not address the absence of objective evidence of a fall from the top of a roof in the records, and mischaracterized or misunderstood Claimant's MRI result.

10. To the extent Dr. Wunder's opinion differs from that of Dr. Raschbacher, Dr. Raschbacher is found more credible.

11. David Cruz was Claimant's Employer. David Cruz was a subcontractor of Barlo, Inc./Interstate. Mr. Cruz signed various documents including a contract with Barlo, Inc./Interstate on November 1, 2013. This Master Subcontract Agreement includes a clause that states that Mr. Cruz shall maintain workers compensation insurance during the term of the agreement. A certificate of insurance was provided to Barlo, Inc./Interstate on November 1, 2013, declaring there was a workers' compensation policy for Mr. Cruz in effect at that time through Respondent Texas Mutual. The workers' compensation policy had an effective period of June 5, 2013 through June 5, 2014, and therefore covered the alleged date of injury in this matter. There is no dispute that Mr. Cruz purchased a workers' compensation policy. The Certificate of Insurance states, "Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions." It is undisputed that Barlo, Inc./Interstate was provided this documentation showing ongoing insurance coverage at the time of the claimed fall, which post-dates any documentation to the contrary.

12. Operations manager for Employer, Danielle Riopelle, credibly testified at hearing. She testified that the company obtained the Certificate of Insurance as a matter of course when hiring Mr. Cruz as a sub-contractor in November 2013. She testified that her company obtains these certificates when they hire sub-contractors, verifies with the insurance company that insurance is in place and that it is valid and up to date, and then

submits this to Pinnacol. She testified this was done in this case. She testified that she and the company relied upon this Certificate of Insurance, and that such certificates of insurance are required of all sub-contractors. She testified that if there was not a workers' compensation policy active during the time period of their contract with Mr. Cruz, Barlo, Inc./Interstate would not continue their relationship with him. She testified that Mr. Cruz would not have been allowed to move forward with his work for Barlo, Inc./Interstate if there was no confirmation that he had valid and up to date workers' compensation insurance in place. She testified that Barlo, Inc./Interstate relied up the promised notice of any cancellation in proceeding to use Mr. Cruz as a sub-contractor, and continuing to use him for work during their contracted period. During the time that Mr. Cruz was working for Barlo, Inc./Interstate she received no notice from anyone that there was cancellation of Respondent Mr. Cruz's policy with Respondent Texas Mutual. She testified that she has never received a notice that the policy was cancelled after the certificate of insurance was issued on November 1, 2013. Mr. Cruz never indicated to Barlo, Inc./Interstate that his policy had been cancelled when he was asked about this claim, and he provided another certificate of insurance three or four months after this claim, showing that he had insurance. She testified that Barlo, Inc./Interstate did not learn of the claim against them as a statutory employer until March of 2014. She learned of the claim that there was no insurance asserted by Claimant at that time. She testified that it was and continues to be her belief that there was workers' compensation insurance for subcontractor David Cruz on the date of injury. At the time of the claim against Barlo, Inc./Interstate, a first report was completed by her and Ms. Riopelle investigated the claim. She learned that no fall was reported at the time of the claimed fall. She testified that Respondent Cruz was asked about the claim and told Barlo, Inc./Interstate that there was never any fall on any of his jobs while working for Barlo, Inc./Interstate.

13. Steve Angelo, senior project manager for Barlo, Inc./Interstate, offered credible testimony that, by virtue of his constant presence and communication with those on site, and the number of people around at the time of the claimed fall, he was certain he would know of Claimant's fall, if it occurred. Mr. Angelo speaks fluent Spanish. Mr. Angelo credibly testified that such a fall could not be entirely unwitnessed by the many present and it was not possible that no action to provide assistance to Claimant or report the fall was taken by anyone in the vicinity of the fall.

14. Claimant testified that he had a wage dispute with Mr. Cruz, starting on January 21, 2014. Claimant testified that after he discontinued work with Mr. Cruz, he sought medical treatment from a chiropractic for 16 visits. He testified that he told the chiropractor that he was going to get an attorney because Claimant expected the chiropractic treatment to be free and they subsequently charged him.

15. Claimant is found not credible because his presentation at Dr. Raschbacher's examination showed no clear objective basis for the findings on physical examination and did not serve as an explanation for the degree of subjective symptomology.

16. Respondents Barlo, Inc./Interstate learned of Claimant's claim for compensation after Claimant's attorney filed a first report of injury on March 27, 2014. Barlo, Inc./Interstate is insured by Respondent Pinnacol Assurance. A notice of contest was filed by Barlo, Inc./Interstate and Pinnacol Assurance on April 21, 2014, noting, "Injured worker is not an employee of this policyholder." All treatment in dispute aside from the October 13, 2014, Penrose Urgent Care visit was undertaken by Claimant prior to his report to Barlo, Inc./Interstate.

17. Claimant alleges that there was a cancellation of Mr. Cruz's workers' compensation policy and that Barlo, Inc/Interstate and its insurer Pinnacol Assurance are therefore responsible as his statutory employer. It is found that the persuasive evidence shows there was a policy in force for Claimant's employer, David Cruz, as of November 1, 2013, and there is no evidence of cancellation of that policy after that date.

18. Claimant failed to sustain his burden of proof to establish by a preponderance of the evidence that he sustained a compensable workers' compensation injury in this matter. He has not shown that the need for medical treatment or disability resulted from a fall off a roof on January 21, 2014. Dr. Raschbacher credibly testified that there is no objective medical evidence of injury from a fall as described by Claimant. There is no documentation of any outward physical evidence of trauma that one would expect to see after the described fall. Claimant admitted that he had a financial dispute with Cruz. Claimant's assertion that he fell from the roof of a house on January 21, 2014, and sustained a compensable work injury is therefore found not found credible.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *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); *People v. M.A.,* 104 P3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. 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 and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions, and has rejected

evidence contrary to the findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 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 a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 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 the determination of the Judge. *Faulkner*, 12 P.3d. at 846.

5. The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

6. Claimant alleges that there was a cancellation of Mr. Cruz's workers' compensation policy and that Respondent Barlo, Inc/Interstate and its insurer Pinnacol Assurance are therefore responsible as his statutory employer. It is found that the persuasive evidence shows there was a policy in force for Claimant's employer, David Cruz, as of November 1, 2013, and there is no evidence of cancellation of that policy after that date.

7. Claimant has not proven by a preponderance of the evidence that he sustained a compensable workers' compensation injury in this matter. He has not shown that the need for medical treatment or disability resulted from a fall off the roof on January 21, 2014. Dr. Raschbacher credibly testified that there is no objective medical evidence of injury from a fall as described by claimant. There is no documentation of any outward physical evidence of trauma that one would expect to see after the described fall.

8. Claimant's assertion that contrary evidence in the record, as provided by Claimant's own testimony and Dr. Wunder's report, should be relied upon. However, Claimant's testimony and Dr. Wunder's report did not overshadow the fact that there is

an absence of objective evidence and Dr. Wunder's opinions mischaracterize or misunderstood Claimant's MRI result. Other than his own inconsistent testimony, Claimant has not provided evidence that he fell from the roof. Claimant admitted that he had a financial dispute with Mr. Cruz and his chosen chiropractor. Claimant's assertion that he fell from the highest point of the roof on January 21, 2014 and sustained a compensable work injury is therefore found not found credible.

9. Claimant's claim for workers' compensation benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim is denied and dismissed.

2. Respondents Barlo, Inc./Interstate and Pinnacol Assurance are dismissed as parties to this claim.

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, 80202. 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: December 30, 2015

DIGITAL SIGNATURE:

Margot W. Jones, Administrative Law Judge
Office of Administrative Court
«Venue_Filing_Address»
«Venue_Filing_CT_ST_ZIP»

#JVTS1Z340D11VYv 2

ISSUES

- Whether Respondents have overcome the DIME Dr. Christopher Ryan's 19% whole person rating by clear and convincing evidence.
- Whether Claimant has permanent impairment under the AMA *Guides*.
- What, if any, is Claimant's medical impairment rating under the AMA *Guides*?

FINDINGS OF FACT

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

1. Claimant worked as a firefighter for the Red, White & Blue Fire Protection District.

2. On March 25, 2014, Claimant was performing CPR on a woman who was being transported on a litter/backboard pulled by a snowmobile. The litter hit a rock and Claimant was ejected off the litter and landed on a snow packed trail. He was not sure how he landed but reported neck pain with increasing stiffness down his spine. Claimant reported sustaining a brief loss of consciousness and came to when the snowmobile driver roused him. Claimant then returned to the litter and resumed compressions on the patient for the remaining quarter mile to the parking lot. Claimant reported to his captain that his neck hurt.

3. That same day, Claimant presented for medical treatment at CCOM in Summit Frisco. While medical records from the visit do not indicate the name of the treating provider, the initial Physician's Report of Injury was submitted by Dr. Rosanne D. Shaw. Claimant reported landing face-up, and that he hit his head but did not lose consciousness. Claimant reported feeling immediate pain in his neck. Soon after, his thoracic and lower back began to spasm and hurt. Claimant specifically denied visual changes, dizziness, tinnitus and headache. He had a few moments of balance disturbance at the car but this only lasted a few minutes and he denied any symptoms since. Claimant did not initially report any traumatic brain injury symptoms.

4. On examination, Claimant's head was atraumatic with no abrasions, swelling or tenderness. However, the Physician's Initial Report of Injury included the diagnosis of closed head injury, nonspecific.

5. On March 26, 2014, at his initial physical therapy session, Clamant reported onset of neck pain after hitting his head on the snow. Amanda Gotschall, the licensed

physical therapist noted that Claimant's mental status/cognitive function did not appear impaired.

6. Subsequently, on March 31, 2014, Claimant reported trouble sleeping, headache, numbness, tingling, weakness, and joint and muscle pain. Claimant also reported experiencing "slowing mentation and difficulty with memory since that time." Dr. Fox added post-concussion syndrome and cervical strain as new diagnoses.

7. On April 18, 21, 24 and 28, 2014, Donald Aspergren, D.C., M.S., assessed cervical and upper back strain. Claimant appeared alert, oriented, and in no acute distress.

8. On May 16, 2014, Dr. Carbaugh evaluated Claimant. Claimant reported some continuing cognitive issues such as problems with word finding and losing his train of thought. Claimant noted, though, that his symptoms had improved over time. Dr. Carbaugh assessed that if Claimant's symptoms continued to resolve as expected, neuropsychological assessment and intervention would likely not be needed. Dr. Carbaugh also noted that muscle tension was contributing to Claimant's neck, head, and upper back symptoms.

9. On May 21, 2014, Dr. Fox limited his diagnosis to neck sprain. The post concussive diagnosis no longer appeared by that date.

10. On June 17, 2014, Claimant reported to Dr. Fox that he was still having intermittent headaches. However, "[Claimant] states that his mental status has cleared."

11. On July 23, 2014, Dr. Eric Hammerberg performed a neurological evaluation. He noted neuro symptoms had included neck pain, occipital headaches, impaired cognition, and intermittent vertigo. Dr. Hammerberg's impression was that Claimant was experiencing posttraumatic vertigo. He recommended an MRI study of the brain, brainstem, and internal auditory canals as well as a CT angiogram of the head and neck and, if normal, an ENT evaluation for vestibular testing.

12. On August 1, 2014, the MRI study of the brain, brainstem, and internal auditory canals was read as normal. A CT angiogram of the head and neck were performed and also considered normal.

13. On August 7, 2014, Claimant was evaluated by Dr. Alan Lipkin, ENT. His report noted that "initially dizzy spells occurred randomly four times a week. Episodes lasted a few seconds. Currently the patient only becomes dizzy upon lying down in a supine position."

14. On August 11, 2014, Dr. J. Tashof Bernton performed an independent medical examination. He reviewed medical records and examined Claimant. Claimant reported to Dr. Bernton that he lost consciousness during the incident and experienced immediate dizziness. These reports are at odds with Claimant's first reports of injury. Dr. Bernton noted that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities.

One certainly would not anticipate cognitive difficulties with the history of either no or brief loss of consciousness. At this point in time, cognitive complaints are much more likely a result of some anxiety and depression." Dr. Bernton recommended a vestibular workup which he expected to be normal. He also commented that on a physical basis he expected a full recovery and that Claimant had received extensive care to date.

15. On September 17, 2014, Dr. Lipkin reported after testing that Claimant's vestibular workup was normal and a major vestibular system injury was unlikely. With respect to higher integrative functions, Claimant was noted to have normal orientation, memory, attention span, and concentration, language and fund of knowledge. Dr. Lipkin concluded: "No other particular medical treatment is warranted."

16. Also, on September 17, 2014, Ron Carbaugh, Psy.D. noted Claimant had met with Dr. Kennealy following Claimant's neuropsychological evaluation and Dr. Kennealy did not recommend cognitive treatment. Dr. Kennealy reported that Claimant's cognitive symptomology would resolve spontaneously in the next weeks to months.

17. On November 24, 2014, Dr. Fox discharged Claimant at maximum medical improvement (MMI) without permanent impairment and without restriction. Dr. Fox recommended medical maintenance in the form of 4 – 6 more chiropractic visits if needed, and requested continuing treatment with Dr. Carbaugh as needed. Dr. Fox noted that Claimant presented in no acute distress, had mild diffuse tenderness in his neck with full range of motion and minimal discomfort. Also, Claimant reported he worked full duty with reasonable tolerance. His only concerns were mild neck stiffness and some discomfort, but otherwise he did quite well.

18. On November 26, 2014, Respondents filed a Final Admission based on Dr. Fox's report. Claimant timely objected to the Final Admission and started the Division IME process.

19. Dr. Christopher Ryan was selected to perform the Division IME and examined Claimant on March 17, 2015. Dr. Ryan failed to timely issue a report and the DIME Unit sent "Late Notice" letters to Dr. Ryan on April 28, 2015, May 12, 2015, and a "Notice of Rule Violation" letter on June 18, 2015.

20. Dr. Ryan's prepared a report post-dated March 17, 2015. Dr. Ryan listed the "issues to be endorsed include recommendations for testing needed, maintenance medical treatment, and 'evaluate and physically examine for pain.'" Dr. Ryan's report contained a number of factual inaccuracies. For example, he notes that Claimant first sought treatment one week post injury, when Claimant actually sought medical treatment the day of his injury. Dr. Ryan did not review Dr. Fox's maximum medical improvement report. Dr. Ryan limited his evaluation comments to:

> Mr. Livengood today reports a difficult transition back to work. He felt that he was 'freezing' during the summer of 2014, even though the temperature was quite warm. He

> continues to have right-sided more than left-sided neck pain, in the cervico-occipital region. This extends into the upper thoracic area, and into the right more than left upper scapular region. He at this point is overwhelmed by multiple inputs, as well as intense stimulation.

Dr. Ryan performed a physical examination that primarily focused on limited range of motion in Claimant's cervical spine. Dr. Ryan concluded Claimant had reached MMI as of March 17, 2015. He diagnosed cervical facet dysfunction with persistent loss of range of motion and probable mild traumatic brain injury resulting in mild memory difficulties as well as difficulty with multitasking and hypersensitization. Dr. Ryan rated Claimant with a 19% whole person impairment comprised of 4% cervical per Table 53, 6% cervical range of motion, and 10% brain impairment per Table 1 page 109. The mental impairment was based on "some difficulties with complex integrated cerebral function. He also has emotional disturbance, as well documented in the medical record. He has episodic neurologic disorders in the form of headaches. He also has sleep and arousal disorders, which I would characterize as a hyperarousal, with his sympathetic nervous system dysfunction."

21. Employer's Performance Record and Appraisal for the period June 1, 2014 – May 31, 2015 reflected Clamant met all expectations and that his performance was trending upward.

22. Dr. Nicholas Olsen performed a Respondents' independent medical examination and prepared a report dated August 12, 2015. Dr. Olsen reviewed medical records including Dr. Fox's MMI report. Dr. Olsen took a detailed statement from Claimant and allowed Claimant numerous opportunities to describe his symptoms and whether he suffered from any cognitive problems following the accident. Claimant detailed then-current neck symptoms, a "whole back effect" approximately once a week, headaches twice a week, and dizziness one to two times a week for periods of ten seconds. He reported some dizziness or vertigo occasionally if he turns over to his left side while sleeping. Claimant had not experienced vertigo or dizziness at work.

23. Claimant did not mention any cognitive difficulties to Dr. Olsen. Claimant admitted he had not made mistakes at work, been written up or cited for any errors, or been reprimanded by his supervisors. He felt less motivation at work and stated several times that he would rather fight wildfires for the higher level of excitement.

24. With respect to Claimant's reports of migraines, Claimant denied any associated neurologic and visual disorders including light sensitivity and prodromal characteristics. Dr. Olson opined Claimant's symptoms were more characteristic of cluster headaches, related to the muscular system than migraines which are of neurologic origin. During Claimant's interview, Dr. Olson observed that Claimant demonstrated "full cervical rotation right and left, full lateral bending to both sides, full lateral bending to both sides," and motion was observed to be "full and synchronous without restrictions." Inspection of Claimant's cervicothoracic spine

demonstrated neutral mechanics. Cervical range of motion was measured with dual inclinometers with deficits noted in cervical flexion, right lateral bending, and rotation. However, these limitations were not observed during Claimant's forty-five to fifty minute interview. Dr. Olson noted that Claimant had a normal cervical MRI, and that he would expect normal range of motion. He noted the deficits were inconsistent with Claimant's activities prior to being placed at MMI. Dr. Olson opined that the deficits noted on Claimant's physical examination would not be considered objective. Claimant's neurological examination was normal and intact. Claimant's statements and presentation were consistent with Dr. Fox's reports and with the performance evaluations that showed that Claimant's performance in all areas had improved since the date of the injury.

25. Dr. Olsen also pointed out that no physician prior to Dr. Ryan diagnosed a traumatic brain injury including the two neuropsychologists who had evaluated Claimant. In addition, Claimant initially reported no loss of consciousness or associated symptoms suggestive of a brain injury, and imaging studies of Claimant's brain were all normal. As a result, Dr. Olsen opined that Dr. Ryan was clearly wrong when he rated permanent impairment for a traumatic brain injury.

26. Claimant testified at hearing that he was ejected off the litter and landed on a snow packed trail. He was not sure how he landed but reported neck pain with increasing stiffness down his spine. Claimant returned to the litter and resumed compressions. The incident occurred halfway down the trail and Claimant continued a quarter mile, approximately another 5 to 10 minutes. Claimant reported to his captain that his neck hurt. Claimant, an emergency medical provider himself, understands the importance of accurate reporting of injuries and symptoms. Claimant prepared a written notice of injury a couple of hours after the incident occurred and in that notice reported neck pain with increasing stiffness down his spine.

27. Claimant admitted that Dr. Kennealy performed a neuropsychological evaluation and did not recommend any cognitive treatment.

28. Claimant returned to regular work November 4, 2014. His job duties include fighting fires, EMS response, and transporting patients. The majority of calls are EMS responses that require quick thinking and multitasking. Since Claimant's return to work, his supervisors have not written him up or cited him for any errors nor reprimanded him for any errors or problems. Claimant agreed that his performance evaluations accurately reflected an upward trend. He explained the improvement was due to working in the gym more and trying to get stronger to return to work. Despite his performance evaluation, Claimant testified that occasionally he had a hard time remembering questions when he interviewed patients. Also, on occasion, he did not do his job as well because of headaches that were primarily neck related. The headaches made it difficult to concentrate and evaluate patients due to levels of pain and stress in his neck and down his spine and shoulder into the base of his skull. Also, Claimant testified that he was dizzy for a few moments sometimes when he lay down. After MMI in November 2014, Claimant did not treat for this work injury

for several months. Claimant admitted he would rather fight wildfires for the higher level of excitement.

29. Dr. Ronald Swarsen testified at hearing. Dr. Swarsen reviewed some medical records but did not examine Claimant and did not prepare a report. Dr. Swarsen testified that certain symptoms are expected immediately following a mild traumatic brain injury. Also, symptoms from a mild traumatic brain injury normally resolve within 3 – 6 months. Dr. Swarsen reviewed Dr. Fox's June 17, 2014, report in which Dr. Fox noted that Claimant reported that his mental status had cleared. Dr. Swarsen admitted that, if correct, Claimant's symptoms would have resolved within the expected 3 – 6 month time period. Dr. Swarsen testified that once symptoms cleared, they should not return. Dr. Swarsen agreed that a rating for mild traumatic brain injury should be based on a claimant's presentation at the time of MMI and not on medical records prior to MMI that may reflect resolved symptoms. Initially, Dr. Swarsen testified that Dr. Ryan addressed the issues of MMI and permanent impairment presented to him. During cross examination, however, Dr. Swarsen reviewed the *AMA Guides 3rd ed. rev*. and conceded that, even though Dr. Ryan based his 10% brain impairment rating in part on complex integrated cerebral function, Dr. Ryan did not identify in his report any element or impairment to support a rating under that category. Dr. Swarsen admitted that Dr. Ryan's reliance on the complex integrated cerebral function section to support a rating was incorrect. Also, Dr. Swarsen testified that the *AMA Guides* require doctors to prepare reports that provide sufficient information to allow another doctor to understand the basis of the first doctor's rating and, in this case, Dr. Ryan's report was insufficient. Dr. Ryan failed to include a detailed history section and Dr. Ryan failed to sufficiently explain the basis or support for his brain impairment rating.

30. Dr. Olsen testified at hearing that a rating of permanent impairment occurs at the time of MMI. In this case, the medical records reflected that Claimant sporadically reported some cognitive difficulties. When Dr. Olsen interviewed Claimant, post MMI, however, Claimant failed to report any cognitive issues during the evaluation. Claimant did not report any cognitive symptoms other than a few moments of minor dizziness when he rolled over during sleep. Dr. Olsen considered that amount of dizziness – ten seconds once or twice a week – insufficient to support a rating for mild traumatic brain injury. Claimant reported no work problems to Dr. Olsen. Also, Dr. Olsen reviewed Claimant's employment records noting that Claimant performed his job well and without problems.

31. Claimant discussed motivation and anxiety issues that appeared more to do with career changes to accommodate Claimant's family status rather than with cognitive issues. Dr. Olsen agreed with Dr. Bernton that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities… At this point in time, cognitive complaints are much more likely a result of some anxiety and depression." Dr. Olsen testified that Claimant's reported cognitive issues did not follow the expected pattern: Claimant failed to mention traumatic brain injury symptoms in his initial report of injury and in other initial

medical reports.

32. Dr. Olsen testified that Dr. Ryan erred when he rated permanent impairment for a mild traumatic brain injury.

    - Dr. Ryan's discussion of cognitive issues of mild memory difficulties as well as difficulty with multitasking and hypersensitization was very brief and inconsistent with other medical records. Specifically, Dr. Ryan reported that Claimant is forgetful. However, rather than accept a patient's report of forgetfulness, a physician should observe the patient being forgetful. Claimant was not forgetful during the DIME or during his hearing testimony.

    - Claimant performed well at work including multitasking. Traumatic brain injury symptoms make it difficult to perform work duties. Claimant's employment records bear no indication of any work problems.

    - Dr. Ryan simply stated Claimant presented with some difficulties but did not explain what the symptoms were or provide support for why the symptoms warranted a rating.

    - Dr. Ryan's conclusions are contrary to those of the treating physicians.

        - Dr. Lipkin concluded that testing was normal and a major vestibular system injury unlikely.

        - Dr. Kenneally, a neuropsychologist, did not recommend treatment for any cognitive complaints.

        - Dr. Hammerberg, a neurologist, did not diagnose a mild traumatic brain injury.

        - Dr. Carbaugh did not make a diagnosis of mild traumatic brain injury.

        - The MRI of the brain was normal as was the CT angiogram of the head and neck.

33. Claimant's symptoms do not support a diagnosis of migraines.

    - Claimant denied light sensitivity or any neurologic symptoms associated with migraines.

    - Claimant's headaches arose from muscle tension in his neck.

34. Dr. Ryan did not properly use the *AMA Guides* and the categories that allow a rating nor did he explain in his report the basis for the rating. There was no persuasive evidence to support a diagnosis or rating of complex integrated cerebral function. The neuropsychologist did not identify a need for cognitive treatment and no symptoms were present at the time of MMI.

35. There was no persuasive evidence of emotional disturbance. The evidence supported that Claimant was returned to work without problems and there were no medical referrals for treatment.

36. There was no persuasive evidence of neurologic disorders. While episodic neurologic disorders can include headaches, Claimant's headaches were not neurologic but rather were muscular. There was no persuasive evidence of sleep and arousal problems. While Claimant had been diagnosed with dizziness or vertigo, the episodes lasted only moments and all objective testing was normal or negative. Dr. Olsen concluded that Claimant's 20 seconds of dizziness was more likely due to anxiety and stress than due to his injury.

37. Dr. Olsen concluded that Dr. Ryan's report contained more than simply a difference of opinion. Dr Ryan erred by giving Claimant a 10% brain impairment per Table 1 page 109.

38. The ALJ finds the opinions and testimony of Dr. Olsen to be credible and persuasive.

39. Respondents have met their burden of proving by clear and convincing evidence that Dr. Ryan erred by giving Claimant a 10% brain impairment per Table 1 page 109.

40. Dr. Olsen acknowledged that Claimant suffered a cervical strain with loss of range of motion as a result of this injury which supports a permanent impairment rating for the cervical spine. That rating is not challenged. As a result, the cervical impairment rating of 4% cervical per Table 53 and 6% cervical range of motion stands.

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. *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*, 592 P.2d 792 (Colo. 1979).

Respondents have the burden of overcoming the Division sponsored independent medical examiner's determination of permanent impairment by clear and convincing evidence. *See* § 8-42-107(8), C.R.S. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's findings must present evidence showing it highly probable that the DIME physician is incorrect. *Metro Moving & Storage Company v. Gussert,* 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier of fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Company v. Gussert*, supra.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness'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). 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).

As found, Respondents have met their burden in this case and have established by clear and convincing evidence that the DIME physician, Dr. Ryan, erred by assigning Claimant a permanent impairment for a traumatic brain injury.

The opinions and testimony of Dr. Olsen are found credible and persuasive. Dr. Olsen's overall opinion was detailed and supported by the medical records, employment records, the opinions of Dr. Bernton, and, to a large extent, the opinions of Claimant's expert, Dr. Swarsen.

Claimant's medical history did not support a traumatic brain injury rating. Dr. Swarsen testified that immediate symptoms are expected following a mild traumatic brain injury. Claimant, an emergency medical provider, understood the importance of accurately reporting injuries and symptoms. In this case, Claimant did not initially report any traumatic brain injury symptoms. Claimant returned to the sled and resumed compressions on the patient. Claimant reported to his captain that his neck hurt. Claimant prepared a written notice of injury a couple of hours after the incident occurred and reported neck pain with increasing stiffness down his spine. Claimant presented for medical treatment at CCOM and reported pain in his neck and his thoracic and lower back. Claimant specifically denied neurologic or cognitive symptoms including visual changes, dizziness, tinnitus or headache other than a few minutes of balance issue at the car that resolved. Claimant reported to the physical therapist his neck hurt. The mental status/cognitive function line indicated Claimant did not appear impaired.

Dr. Olsen and Dr. Swarsen agreed that symptoms from a mild traumatic brain injury normally resolve within 3 – 6 months. Dr. Swarsen reviewed Dr. Fox's June 17, 2014, report in which Dr. Fox noted that Claimant reported that his mental status had cleared. Dr. Swarsen admitted that, if correct, Claimant's symptoms would have resolved within the expected 3 – 6 month time period. Dr. Swarsen testified that once symptoms cleared, they should not return.

On November 24, 2014, Dr. Fox discharged Claimant at MMI without permanent impairment and without restriction. Dr. Fox noted that Claimant presented in no acute distress, had mild diffuse tenderness in his neck with full range of motion and minimal discomfort. Also, Claimant reported he worked full duty with reasonable tolerance. His only concerns were mild neck stiffness and some discomfort but otherwise he did quite well. Dr. Fox did not reference any traumatic brain injury symptoms at the time of maximum medical improvement.

Claimant's presentation in court was consistent with Dr. Fox's MMI report and with the performance evaluations that showed that Claimant was discharged without impairment and returned to work without problem.

Rating permanent impairment occurs at the time of MMI. Dr. Olsen and Dr. Swarsen agreed that rating permanent impairment of a mild traumatic brain injury should occur at the time of MMI and be based on Claimant's presentation at the time of MMI. The rating should not be based on past medical findings or that certain treatment occurred prior to MMI. In this case, the medical records reflect that Claimant sporadically reported some cognitive difficulties and received treatment. Records also reflect that Claimant reported that those symptoms cleared on June 17, 2015. In any event, on November 24, 2014, Dr. Fox discharged Claimant at MMI without permanent impairment and without restriction. Dr. Fox noted that Claimant presented in no acute distress and his only concerns were mild neck stiffness and some discomfort. Dr. Fox did not reference any traumatic brain injury symptoms. Dr. Ryan did not review the MMI report.

When Dr. Olsen interviewed Claimant, after MMI, Dr. Olsen gave Claimant the opportunity to report cognitive issues. Claimant did not report any problems other than a few moments of minor dizziness when he rolled over during sleep. Dr. Olsen did not consider a few moments of dizziness to be relevant or able to support a rating for mild traumatic brain injury especially because Claimant reported no problems at work.

Claimant's work history did not support a traumatic brain injury rating. According to Dr. Olsen, symptoms of a traumatic brain injury make it difficult to perform work duties. Claimant's job duties include fighting fires, EMS response, and transporting patients. The majority of his calls were EMS responses which require quick thinking and multitasking. Claimant returned to work and performed well. He was not written up, cited, or reprimanded for any errors or mistakes. Claimant agreed with his performance evaluation and that it accurately reflected satisfactory performance and an upward trend. He attributed his improvement to working out more in the gym and getting stronger. Despite the high and improving performance evaluation, Claimant testified that occasionally he had a hard time remembering sequential questions when he interviewed patients. Also, on occasion, he did not do his job as well because of headaches that were primarily related to muscular neck pain. The headaches made it difficult to concentrate and evaluate patients due to levels of pain and stress in his neck and down his spine and shoulder into the base of his skull. Also, Claimant testified that he was dizzy for a few moments in bed at night.

Dr. Olsen credibly related Claimant's symptoms to motivation and anxiety issues that appeared more to do with career change due to family status rather than with cognitive issues. Dr. Olsen agreed with Dr. Bernton that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities … At this point in time, cognitive complaints are much more likely a result of some anxiety and depression."

Dr. Ryan's report did not comply with the *AMA Guides*. Dr. Ryan failed to timely prepare his report. When he finally submitted his report, Dr. Ryan summarized medical records but provided very limited information concerning Claimant's current traumatic brain injury symptoms or his reasoning to support a traumatic brain injury rating. Dr. Swarsen testified that the *AMA Guides* require doctors to prepare reports that provide

sufficient information to allow another doctor to understand the basis of the first doctor's rating and, in this case, Dr. Ryan's report was insufficient. Dr. Ryan failed to include a detailed history section and Dr. Ryan failed to sufficiently explain the basis or support for his rating.

Dr. Ryan's traumatic brain injury impairment is not supported by the *AMA Guides*. Dr. Ryan's report reflects that he performed a physical examination that focused on Claimant's neck. Dr. Ryan did not perform a neurologic exam. Nevertheless, Dr. Ryan diagnosed probable mild traumatic brain injury resulting in mild memory difficulties as well as difficulty with multitasking and hypersensitization in addition to cervical facet dysfunction with persistent loss of range of motion. Dr. Ryan rated Claimant with 19% whole person impairment; 4% cervical per Table 53, 6% cervical range of motion, and 10% brain impairment per Table 1 page 109. The mental impairment was based on "some difficulties with complex integrated cerebral function. He also has emotional disturbance, as well documented in the medical record. He has episodic neurologic disorders in the form of headaches. He also has sleep and arousal disorders, which I would characterize as a hyperarousal, with his sympathetic nervous system dysfunction."

Dr. Ryan's conclusions are contrary to the great weight of evidence which supports a contrary conclusion. Dr. Lipkin concluded that testing was normal and a major vestibular system injury unlikely. Dr. Kenneally, a neuropsychologist, did not recommend treatment for any cognitive complaints. Dr. Hammerberg, a neurologist, did not diagnose a mild traumatic brain injury. Dr. Carbaugh did not make a diagnosis of mild traumatic brain injury. The MRI of the brain was normal as was the CT angiogram of the head and neck.

According to the *AMA Guides*, evidence of complex integrated cerebral function includes defects in orientation; ability to abstract or understand concepts; memory; judgment; ability to initiate decisions and perform planned action; and acceptable social behavior. Dr. Swarsen reviewed the *AMA Guides 3rd ed. rev*. and, even though Dr. Ryan based his 10% brain impairment rating in part on complex integrated cerebral function, Dr. Swarsen did not identify in Dr. Ryan's report any element or impairment to support a rating under that category. Dr. Swarsen admitted that Dr. Ryan's reliance on the complex integrated cerebral function section to support a rating was incorrect.

Also, Dr. Olsen credibly testified that Dr. Ryan failed to note any evidence of complex integrated cerebral function to support an impairment rating. The neuropsychologist did not identify a need for cognitive treatment. Symptoms were not present at the time of maximum medical improvement. Claimant alleged slight memory issues or processing issues at work. But a physician should not simply accept a report of forgetfulness but rather should observe the patient being forgetful. Claimant was not forgetful during Dr. Olsen's examination or when he testified at hearing and his employment reviews do not support any memory problems. Also, Claimant's report to Dr. Ryan of symptoms of significant cognitive problems that affected his ability to perform his job was not consistent with Employer's performance records that reflect

Clamant returned to regular work, met all expectations, and that his performance trended upward.

According to the *AMA Guides*, evidence of emotional disturbances may range from irritability to outbursts of severe rage and aggression to an absence of normal emotional response. Abnormalities include inappropriate euphoria, depression, fluctuation of emotional state, impairment of normal emotional interactions with others, involuntary laughing and crying, etc. Dr. Olsen credibly testified there was no evidence of emotional disturbance to support an impairment rating. Claimant returned to work without problem. Dr. Olsen credibly related Claimant's emotional symptoms to motivation and anxiety issues that appeared more to do with career change due to family status rather than anything to do with cognitive issues. Dr. Olsen agreed with Dr. Bernton that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities… At this point in time, cognitive complaints are much more likely a result of some anxiety and depression."

According to the *AMA Guides*, evidence of episodic neurological disorders includes syncope, epilepsy, and the convulsive disorders. Dr. Olsen credibly testified there was no evidence of neurologic disorders. Episodic neurologic disorders may include headaches; however, Claimant testified that his headaches were primarily in his neck and moved down his spine and shoulder into the base of his skull. Claimant denied light sensitivity or any neurologic symptoms associated with migraines. Dr. Olsen credibly testified that Claimant's headaches were cluster headaches with a muscular base and not migraines or neurologically based.

According to the *AMA Guides*, evidence of sleep and arousal disorders include problems initiating and maintaining sleep, or insomnia, excessive somnolence, disorders of the sleep-wake schedule, and dysfunctions associated with sleep that lead to reduced daytime attention, concentration, and other cognitive capacities and/or mental and behavioral factors, and/or cardiovascular problems. When assessing permanent impairment due to sleep and arousal disorder, the physician must complete a thorough diagnostic evaluation. Dr. Olsen credibly testified there was no evidence of sleep and arousal problems. Claimant reported some dizziness or vertigo occasionally if he turns over to his left side while sleeping. Claimant did not experience vertigo or dizziness at work. The doctors included a diagnosis of dizziness or vertigo based on Claimant's reports, but all objective testing was normal or negative. Dr. Olsen concluded that Claimant's 10 to 20 seconds of dizziness when he turned over while sleeping was not sufficient to rate an impairment and was more likely due to anxiety and stress resulting from his change in occupation than any sleep or arousal disorder. Claimant felt less motivation at work and would rather fight wildfires for the higher level of excitement.

The ALJ finds and concludes that Dr. Olsen's opinions that Dr. Ryan erred by finding Claimant suffered a traumatic brain injury and impairment are credible and persuasive. Respondents have proven by clear and convincing evidence that Dr. Ryan did not properly use the *AMA Guides.*

Dr. Olsen acknowledged that Claimant suffered a cervical strain with loss of range of motion as a result of this injury which supports a permanent impairment rating for the cervical spine. That rating is not challenged. As a result, the cervical impairment rating of 4% cervical per Table 53 and 6% cervical range of motion stands.

ORDER

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

1. Respondents have overcome Dr. Ryan's opinion by clear and convincing evidence, thus Claimant is not entitled to a traumatic brain injury permanent impairment rating.

2. Claimant is entitled to a cervical impairment award of 10%.

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: December 10, 2015

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

ISSUES

- Whether respondents have overcome the Division-sponsored Independent Medical Examination ("DIME") physician's finding that claimant's neck condition is causally related to claimant's admitted March 6, 2014 workers' compensation injury by clear and convincing evidence?

- The parties stipulated at the commencement of the hearing that if respondents are successful in overcoming the DIME physician's finding regarding the causal connection of claimant's neck condition to his work injury, claimant would be at maximum medical improvement ("MMI") as of March 17, 2014 with a 0% impairment for the admitted injuries to claimant's lumbar spine and right wrist.

FINDINGS OF FACT

1. Claimant was employed by employer as a recreational basketball referee. Claimant testified that in addition to his work as a basketball referee, he also works as a baseball and softball umpire. Claimant testified that while working as a basketball referee for a youth game on March 6, 2014, he tossed the ball to begin the basketball game, back up and tripped over a child that was on one of the teams playing. Claimant testified he fell to the ground on his back and fell on his right wrist.

2. Claimant sought treatment following his injury with Dr. Lorah on March 7, 2014. Claimant reported he tripped over a child while refereeing a basketball game and fell. Claimant was diagnosed with a right wrist sprain and a low back sprain. Dr. Lorah recommended claimant use a splint for his wrist and treat with ice and rest. Dr. Lorah prescribed medications for claimant' back including naprosyn, flexeril, and vicodin.

3. Claimant testified he then went to California for a previously planned trip to visit his son, leaving the evening on March 7, 2014.

4. After claimant returned from his trip, he was evaluated by Dr. Faught on March 17, 2014. Dr. Faught noted claimant's right wrist sprain and low back strain had resolved and discharged claimant from further care.

5. Claimant returned to Dr. Faught on April 1, 2014 with complaints of pain between his shoulders and right triceps pain. Dr. Faught noted that claimant noticed this pain 5 days ago upon wakening and that his pain was worse with tilting his head back. Claimant also reported left triceps pain while shaving. Dr. Faught provided claimant with work restrictions that included no heavy lifting above his shoulders and continued claimant's prescriptions, including the naprosyn, flexerial and hydrocodone.

6. Claimant testified at hearing that when he went to Dr. Faught on March 17, 2014 he was doing great and did not believe he had a neck problem. Claimant testified that he didn't recall specifically if he struck his head on the ground when he fell, but believed that he had. Claimant testified that his medical history of developing pain in his shoulders and left tricep that he reported to Dr. Faught on April 1, 2014 was correct based on his recollection. Claimant testified he felt things were going well with his treatment up until he work up with pain in his shoulders and left arm.

7. Claimant continued to treat with Dr. Faught and was eventually referred for a cervical spine magnetic resonance image ("MRI") on April 15, 2014. The MRI was performed on April 28, 2014 and demonstrated midline protrusion at the C3-C4, C4-C5 and C5-C6 levels with foraminal narrowing on the right at C4-C5 due to bony encroachment.

8. Claimant returned to Dr. Lorah on April 29, 2014 for re-evaluation. Dr. Lorah noted that despite claimant reporting symptoms into his left upper extremities, the MRI did not show significant neural impingement on the left. Dr. Lorah referred claimant to Dr. Hahn for evaluation.

9. Dr. Hahn evaluated claimant initially on May 9, 2014. Dr. Hahn noted that claimant had fallen on March 6, 2014 while refereeing a basketball game and had developed left sided neck pain shortly thereafter. Dr. Hahn noted claimant's symptoms included arm symptoms including pain into claimant's left triceps down in to his arm and including his 4th and 5th digit. Dr. Hahn reviewed the MRI and opined claimant had a C7-T1 disc herniation on the left. Dr. Hahn diagnosed claimant with a C8 radiculopathy secondary to C7 T1 disc herniation. Dr. Hahn recommended an intralaminar epidural steroid injection ("ESI") on the left at the C7-T1 level.

10. Claimant returned to Dr. Lorah on May 14, 2014. Dr. Lorah noted that based on the revised MRI reading, claimant does have an anatomic lesion at the C7-T1 level that would correspond with his symptoms. Dr. Lorah refilled claimant's medications and noted that Dr. Hahn was recommending an injection. Claimant returned to Dr. Lorah on June 4, 2014. Dr. Lorah noted he was again recommending claimant proceed with the ESI and noted claimant had a positive Spurling test on his left. Dr. Lorah refilled claimant's prescription medications

11. The injection was eventually performed on June 10, 2014.

12. Following the ESI, claimant returned to Dr. Lorah on June 27, 2014. Dr. Lorah noted some improvement with regard to his numbness and weakness following the injection. Dr. Lorah recommended claimant consult with Dr. Krauth regarding a neurosurgical consultation.

13. Claimant was evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth noted that claimant reported he fell during a basketball game resulting in some pain in the base of his neck. Dr. Krauth noted that over the ensuing 24-48 hours, his pain localized under his left scapula and was piercing and radiating down the left arm into the fourth

and fifth fingers of the left hand. Dr. Krauth noted claimant reported that over the next several weeks he was almost incapacitated by constant, boring, interscapular pain radiating down into the arm and hand. Dr. Krauth further noted that he had reviewed the MRI scans and opined that they showed without question a small free fragment of disc in the C8 neuroforamen on the left impinging on the C8 nerve root. Dr. Krauth recommended claimant undergo a second ESI and, if claimant's radicular symptoms persisted, claimant could be a candidate for decompression of the nerve root.

14. Claimant underwent a second ESI on July 8, 2014 and returned to Dr. Krauth on July 15, 2014. Claimant reported the ESI did not help him at all and felt the pain could be worse than when he was initially evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth performed a physical examination and recommended claimant undergo a lateral C7-T1 foraminotomy to decompress his C8 nerve root.

15. Respondents referred claimant for an independent medical examination ("IME") with Dr. Raschbacher on October 27, 2014. Dr. Raschbacher reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Raschbacher noted that when claimant was examined on March 17, 2014, 11 days of the injury claim date, claimant had no complaints at the lumbar spine, the right wrist and presumably no symptoms in his neck. Dr. Raschbacher also noted that the initial radiologic interpretation of the MRI was negative for any herniated disc.

16. Dr. Raschbacher took issue with the report of symptoms noted in Dr. Krauth's records that claimant developed symptoms within 24-48 hours of the fall and recommended denying treatment for the cervical spine as it was not related to claimant's fall on March 6, 2014.

17. Respondents obtained a records review IME with Dr. Rauzzino on December 15, 2014. Dr. Rauzzino reviewed the MRI study and agreed that there was a focal disc protrusion between C7 and T1 on the left which could affect the exiting nerve root. Dr. Rauzzino noted claimant's history of reporting no pain in his neck or arm until his examination on April 1, 2014 and opined that the disc herniation shown on the MRI was not related to claimant's work injury on March 6, 2014.

18. Respondents' filed a final admission of liability ("FAL") on December 23, 2014 admitting for a 0% impairment rating and denying further maintenance medical treatment. Respondents attached a copy of Dr. Faught's March 17, 2014 medical report to the FAL. Claimant objected to the FAL and requested a DIME.

19. Dr. Krauth issued a letter on February 17, 2015 to claimant's counsel in connection with this case. Dr. Krauth noted that he saw claimant in church on Sunday March 16, 2014 and noted that in speaking with claimant following the church service, claimant complained of pain in his neck and left arm. Dr. Krauth indicated in his report that as of March 16, 2014 he came to the realization that claimant was suffering from an acute cervical radiculopathy on the left.

20. Claimant underwent a DIME with Dr. Shea on April 14, 2015. Dr. Shea reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Shea noted in his report that when he was seen at Glenwood Medical Associates on March 17, 2014, he did not mention any neck or arm symptoms. Dr. Shea's report further notes claimant developed neck pain, according to the medical records, five days prior to the April 1, 2014 medical appointment.

21. Dr. Shea reviewed the IME reports from Dr. Raschbacher and Dr. Rauzzino that called into question the temporary relationship of claimant's neck symptoms and recommended no further medical treatment to the neck as the symptoms were not related to the March 6, 2014 work injury. Dr. Shea indicated in his report, however, that he considered the cervical injury as part of the original workplace injury for the following reasons: (1) claimant had a very awkward fall on March 6, 2014 when he fell backwards, twisting and landing hard on the right arm; (2) in Dr. Shea's clinical experience, when there is an awkward fall, there can be a delay of symptomatology onset of significant proportions (up to 4-6 weeks after the original accident); (3) Dr. Lorah, who treated claimant immediately after the incident and watched the whole sequence unfold from the day after claimant's falling incident concluded that the neck condition was causally related to claimant's work injury; and (4) Dr. Krauth mentioned seeing claimant on March 16, 2014 and noting that claimant was having difficulty with his left arm on that date.

22. Dr. Shea opined that claimant was not at MMI and recommended further medical treatment to include a return to Dr. Krauth and consideration of a microdiskectomy. Dr. Shea provided claimant with a provisional impairment of 11% whole person and noted that if surgery was not an option, claimant would need maintenance medical treatment including physical therapy and massage.

23. Dr. Rauzzino testified by deposition in this matter consistent with his medical report. Dr. Rauzzino noted that pursuant to the medical records, claimant's symptoms involving his left arm and neck did not develop until approximately March 25, or March 26, 2014. Dr. Rauzzino opined that in his practice, most disc herniations result spontaneously and noted that there does not need to be a traumatic injury for a disc to become herniated. Dr. Rauzzino noted that according to the medical records, claimant did not have symptoms in his left arm and neck as of March 17, 2014 when he was released from care by Dr. Faught. Dr. Rauzzino opined that if claimant's fall had resulted in an acute herniation of his cervical disk, claimant would have presented with symptoms to Dr. Lorah or Dr. Faught in the medical appointments he received after his injury. Dr. Rauzzino opined that claimant's fall on March 6, 2014 did not result in an injury to his cervical spine.

24. The ALJ credits the opinions expressed by Dr. Shea in his DIME report as being reasonable and supported by the medical records entered into evidence. The ALJ finds that the contrary opinions expressed by Dr. Rauzzino and Dr. Raschbacher do not overcome the opinion of Dr. Shea that claimant's cervical spine condition is related to the March 6, 2014 fall at work.

25. The ALJ credits the testimony of claimant at hearing regarding his work injury and the onset of his symptoms to be credible and persuasive and finds that this testimony is consistent with the accident history he provided to Dr. Shea and relied upon by Dr. Shea in formulating his opinions regarding the cause of claimant's cervical spine condition.

26. The ALJ therefore determines that respondents have failed to overcome the finding of Dr. Shea that claimant's cervical condition is related to his March 6, 2014 work injury by clear and convincing evidence.

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.

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

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & 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 of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence that claimant's neck condition is causally related to the admitted March 6, 2014 work injury. As found, Dr. Shea's opinion that

claimant sustained a compensable injury to his neck and that claimant is not at MMI for his work injury is found to be credible and persuasive.

6. The ALJ considers the contrary opinions expressed by Dr. Rauzzino in his report and testimony, but finds the opinions expressed by Dr. Shea to be more credible and persuasive and concludes that respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence.

ORDER

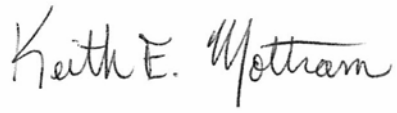
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including the treatment to claimant's cervical spine.

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: December 8, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Respondents prove by clear and convincing evidence that the Division-sponsored Independent Medical Examination physician erred in finding the Claimant had not reached maximum medical improvement?

- If Respondents did not overcome the opinions of the DIME and the Claimant is not at maximum medical improvement, is Claimant entitled to temporary total disability benefits?

- Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

- What was Claimant's average weekly wage at the time of his injury?

- Is Claimant entitled to a change of physician?

- Are Respondents entitled to offsets for Claimant's receipt of unemployment and social security retirement benefits?

FINDINGS OF FACT

1. Claimant began working for Employer in 1998. He was employed as an internal sales person. His job duties in that position included taking care of customers on the phone, assisting those customers that came in to make purchases, pulling stock from the warehouse and taking care of outside salespeople.

2. Claimant generally was not required to lift anything other than lightweight parts. If he had to lift anything heavier, he could request assistance from warehouse employees.

3. Claimant's medical history was significant in that he suffered an industrial injury in 2000 when he was hit by a forklift while working for Employer. He injured his cervical spine and filed a workers' compensation claim for this injury. Claimant testified that he required medical treatment for this injury, which included physical therapy.

4. There was no evidence that Claimant sustained a permanent medical impairment as a result of the 2000 industrial injury.

5. Claimant treated for cervical spine symptoms after the aforementioned injury. The first record detailing that treatment before the ALJ was a report from Stephen Johnson, M.D. (neurosurgeon), dated February 16, 2007. At that neurosurgical evaluation, Claimant complained of neck pain and occasional arm symptoms. He stated he had difficulty sleeping because he awakened frequently due to neck pain. An x-ray showed significant degenerative disc disease at C3-4 through C6-7. Dr. Johnson's diagnosis was probable symptomatic cervical spondylosis present to some degree from C3-4 through C6-7. Dr. Johnson ordered a repeat MRI.

6. Claimant had an MRI on February 28, 2007 and the films were read by Kevin Woolley, M.D. Dr. Woolley's impression was minimal grade 1 anterolisthesis of C7 relative to T1 likely on the basis of facet degenerative changes; reversal of the normal cervical lordosis with apex at C3-C4 level; mild spinal stenosis at C3-4 and C4-5 vertebral levels accentuated by congenital narrowing of the AP dimensions of the spinal canal; bilateral foraminal impingement at these levels.

7. Claimant was reevaluated by Dr. Johnson on March 9, 2007, at which time the results of the MRI were reviewed. Dr. Johnson noted that in the absence of a neurologic deficit, he was "less enthusiastic" about surgery, favoring physical therapy ("PT") and epidural steroid injections. If Claimant failed to improve or developed a focal neurologic abnormality, surgery would be considered.

8. Claimant was seen by Dr. Johnson on April 6, 2007, at which time his cervical symptoms were noted to be about the same. A trial of cervical traction was suggested and a referral for an epidural steroid injection was made.

9. The next record before the ALJ was from 2009. Claimant was examined Douglas Wong, M.D. on September 15, 2009. He reported chronic cervical and left arm pain, as well as difficulty sleeping. X-rays showed endstage DDD at C-6. On examination, Claimant's cervical spine had normal curvature, with strength testing and sensation normal. Dr. Wong's assessment was degenerative disc cervical without myelopathy. Dr. Wong noted Claimant was not interested in any spinal fusion surgery, so he was referred to a physiatrist for non-operative treatment. The ALJ infers that Dr. Wong discussed treatment options with Claimant during this appointment, although it does not appear a surgical recommendation was made.

10. Claimant was evaluated by George Schakaraschwili, M.D. on September 22, 2009 Claimant reported severe neck pain up to a level of 8/10, as well as some episodes of depression and anxiety. Claimant's cervical range of motion ("ROM") was limited at the end ranges of rotation. Pain was noted in the mid-cervical spine with extension and rotation to the right and left. Dr. Schakarashwili's assessment was chronic neck pain. Dr. Schakarashwili discussed treatment options, including injections and prescribed tramadol. Dr. Schakarashwili saw Claimant again on 9/29/09 with essentially the same findings and treatment recommendations.

11. Dr. Schakaraschwili saw Claimant for follow-up on October 20, 2009. Claimant was taking between zero (0) and five (5) tramadol each day. Claimant had restricted cervical range of motion, with pain at the mid cervical spine with extension and rotation. Dr. Schakaraschwili noted that x-rays and an MRI showed Claimant had mild spondylitic changes, mild bilateral foraminal narrowing at several levels and mild degenerative disc disease. Dr. Schakaraschwili opined that Claimant's pain was controlled by the tramadol and the prescription was re-filled.

12. Dr. Schakaraschwili reexamined Claimant on December 15, 2009. Claimant reported jerking movements of the arms and legs, noting that he had previously been diagnosed with restless leg syndrome. Dr. Schakaraschwili felt that this could be a generalized anxiety disorder. He was still taking between zero (0) and five (5) tramadol each day, had tried a single dose of Cymbalta, but felt paranoid. Limited ROM was noted in the cervical spine and Dr. Schakaraschwili's assessment was chronic neck pain. Claimant was not interested in diagnostic/therapeutic spine injections and Dr. Schakaraschwili would see him in two (2) months.

13. Claimant returned to Dr. Schakaraschwili on February 23, 2010, with similar symptoms and findings as the 12/15/09 evaluation. Claimant was examined by Dr. Schakarashwili on October 20, 2010, at which time he was complaining of neck pain and stiffness. Limited cervical ROM was noted and Claimant was not in acute distress. Dr. Schakarashwili's assessment was chronic neck pain, which he described as longstanding. Claimant did not want to undergo treatment and repeat x-rays were ordered.

14. Claimant was seen on August 11, 2011 at Skyline Internal Medicine. At that time, it was noted that he had chronic neck pain from the forklift accident and his tramadol prescription was filled by Dr. "Schack"[1]. Claimant was to have acupuncture treatments.

15. Dr. Schakaraschwili next evaluated Claimant on September 21, 2011. Claimant said he had pain moving his head side to side and often when he woke up in the morning Dr. Schakaraschwili's assessment was longstanding, chronic neck pain. Claimant was reluctant to undergo interventional therapy and could not take off time from work to do PT. Dr. Schakaraschwili said Claimant could return on an as needed basis.

16. Claimant returned to Skyline Internal Medicine on February 29, 2012, complaining of persistent neck pain, mainly at night. He was having spasms and numbness, going down both of his arms. Restrictions in neck ROM was noted on lateral flexion, along with markedly reduced deep tendon reflexes at the elbows bilaterally. A prescription for Flexeril was issued and a repeat MRI was ordered. Claimant was to have acupuncture treatments.

[1] Claimant testified at hearing that this was his nickname for Dr. Schakarashwili.

17. Claimant underwent an MRI on March 6, 2012 and the films were read by Elizabeth Sebestyen, M.D. Dr. Sebestyen's impression was moderate to severe multi-level degenerative disc disease, with mild to moderate stenosis and foraminal impingement.

18. Claimant was evaluated at Skyline Internal Medicine on March 29, 2012, for continuing neck complaints, including muscle cramps and tingling in his arms. Claimant's ROM was noted to have increased to 80 deg. His MRI results were reviewed. Claimant was to follow-up with Dr. Johnson and given a re-fill of the tramadol.

19. Claimant returned to Dr. Johnson on April 11, 2012, who noted that it had been five years since his last office visit. Claimant said he had a constant aching pain. Dr. Johnson's assessment was persistent pain primarily involving the posterior neck, associated with significant cervical spondylosis most marked at C3-4, with a degenerative slip at C6-C7, which was probably not symptomatic. Dr. Johnson noted that Claimant's reflexes were within normal limits, as were other neurological tests. Dr. Johnson recommended PT, ultrasound, traction and massage.

20. Claimant had a PT evaluation at Presbyterian/St. Lukes on May 1, 2012. His original work injury involving the forklift was referenced and it was noted that he had some PT, but his symptoms had worsened. His cervical ROM was noted to be within normal limits, but a small reversal of the lordotic curve was seen. PT was recommended.

21. Claimant returned to Dr. Johnson on May 23, 2012. Dr. Johnson found no focal neurological deficit and because Claimant was continuing to improve, Dr. Johnson noted that he would not favor immediate consideration of surgical intervention for the cervical spine. Dr. Johnson noted, "if, with time, his symptoms persist, I would probably favor anterior cervical disc compression at C3-4 and C4-5".

22. Dr. Schakaraschwili examined Claimant on December 5, 2012. It was noted that Claimant had chronic neck pain and likely facet syndrome secondary to his spondylosis. Claimant was being seen because Dr. Schakaraschwili had renewed his tramadol prescription. Dr. Schakaraschwili noted limited ROM at the end ranges of his cervical spine. Dr. Schakaraschwili's assessment was chronic neck pain and he opined that the only reason Claimant would need a cervical fusion would be if he developed instability in his neck.

23. Claimant also injured his low back on or about April 19, 2013 while working for Employer. He testified this injury occurred while he was lifting a 300 pound bathtub into a truck. Claimant testified that he was diagnosed as suffering a back strain, received some treatment then was discharged.

24. Claimant was examined by Cynthia Kuehn, M.D. at the Denver Health Center for Occupational Safety and Health at OHC on May 9, 2013 for the 4/19/13

injury. Claimant reported that felt some pressure or a pulling sensation in his low back, which persisted and had gotten worse. On examination, Claimant had mild distal parathoracic muscle tenderness for T10-12 and L1-3. Extension was painful. Dr. Kuehn's assessment was distal thoracic and proximal low back strains. Dr. Kuehn prescribed Robaxin and higher dose Ibuprofen. Dr. Kuehn issued work restrictions, which included not bending/stooping/twisting at the waist and occasional 20lb push/pull/lift to waist. Claimant was not to lift to or above shoulder height.

25. Claimant returned to Dr. Kuehn on May 14, 2013, at which time his symptoms had improved. On examination, Claimant had mild proximal paralumbar muscle tenderness at L1-2. Dr. Kuehn's assessment was improved thorocolumbar strain. Since there was limited staffing at work, Claimant asked if he could continue with the medications and be careful with activity, which Dr. Kuehn felt was reasonable. Claimant's work restrictions included 30 lb infrequent push/pull/lift to waist/lift to or above shoulder height; 25 lb occasional push/pull/lift to waist/lift to or above shoulder height.

26. Claimant was evaluated by Ann Dickson, M.D. on May 28, 2013. Claimant's symptoms were worse, as he reported trying to stretch out his back muscles. He had prominent muscle spasms bilaterally in the lower thoracic and lumbar regions. Claimant's pain was exacerbated with flexion and any extension beyond neutral. Dr. Dickson diagnosed lumbar strain and referred Claimant to Dr. Jason Gridley for chiropractic. His same work restrictions were continued.

27. Claimant returned to Skyline Internal Medicine on June 6, 2013 for complaints of chest and abdominal pain, as well as pain in the low back. Tenderness was noted on palpation at T7-8 and L1-3. X-rays were taken of the lumbar spine and Claimant was prescribed Vicodin.

28. A CT scan of Claimant's abdomen and pelvis was done on June 6, 2013. Kim McMillin, M.D. noted degenerative disc disease at L4-S1. No osseous or lytic abnormality was identified.

29. Claimant returned to Dr. Kuehn on June 12, 2013, who noted he had seen Dr. Dickson for an exacerbation of his pain. He was feeling better and his lumbar spine, paralumbar muscles and SI joint were nontender to palpation. His restrictions were changed to 60 lb infrequent push/pull/lift to waist/lift to or above shoulder height; 50 lb occasional push/pull/lift to waist/lift to or above shoulder height; 40 lb frequent push/pull/lift to waist/lift to or above shoulder height.

30. Claimant returned to Dr. Schakaraschwili on July 3, 2013. He had pain/stiffness in the neck and continued to take up to four (4) tramadol per day. On examination, cervical ROM was limited and cervical facet loading maneuvers were positive. Dr. Schakaraschwili's assessment was chronic neck pain (facet syndrome); chest wall pain (myofacial in nature).

31. Claimant was evaluated by Dr. Kuehn on July 11, 2013, at which time he was noted to be doing well, with no pain. On examination, his lumbar spine, thoracic spine, parathoracic muscles and paralumbar muscles were nontender and no spasm was noted. Dr. Kuehn released Claimant to full duty and noted he had no impairment.

32. There was no evidence submitted to the ALJ that any admission (GAL or FAL) was filed to reflect the fact that Claimant was injured or that he reached MMI and had no permanent medical impairment for the April, 2013 industrial injury.

33. Claimant returned to Dr. Schakaraschwili on November 6, 2013 for chronic neck pain. Claimant's symptoms were the same as the July 2013 evaluation, as was Dr. Schakaraschwili's assessment. In particular, Claimant denied radicular symptoms or arm weakness and he did not want interventional treatment. Dr. Schakaraschwili refilled the tramadol prescription.

34. The ALJ notes that from 2009-13, Dr. Schakaraschwili evaluated Claimant approximately every six (6) months for his chronic neck pain. Claimant's condition was generally stable and controlled by the tramadol prescription. Dr. Schakaraschwili discussed various interventional modalities over the course of his treatment of Claimant, who was not interested in interventional treatment, including injections and blocks. Claimant's tramadol prescription was re-filled at regular intervals. The ALJ infers that Claimant's cervical spine symptoms were generally stable during this period and controlled by the tramadol.

35. Claimant was evaluated at Skyline Internal Medicine on November 20, 2013, at which time he was noted to have neck pain. By history, it was noted that he had severe DDD of cervical spine and surgery was recommended by Dr. Johnson. Limitations on flexion/extension were noted, along with muscle spasms. There was a discussion of alternatives for pain management including medications, acupuncture, and physical therapy. It was explained to Claimant that given the severity of his degenerative disc disease, these would likely only provide temporary relief. There is a statement that Claimant would follow up with the surgeon, Dr. Johnson. Claimant's Vicodin was refilled.

36. Claimant suffered an admitted industrial injury on November 21, 2013 while working for Employer. The injury occurred when he slipped and fell in the parking lot on ice while he was going to an employer-mandated medical appointment.

37. Claimant testified that he heard a pop when he fell on 11/21/13. He said he felt very bad neck and back pain as a result of the fall.

38. Claimant continued to work for Employer after the 11/21/13 injury. There was no evidence that Claimant lost time from work up to his termination.

39. Claimant was evaluated on November 22, 2013 by Sara Harvey, M.D. at Concentra Medical Center. Claimant said he slipped on ice and landed on his back.

Claimant reported he heard cracking down his spine from the neck down. Claimant's history of chronic neck pain was noted by Dr. Harvey, who found full range of motion in the neck. Dr. Harvey diagnosed Claimant with a back contusion and treated the Claimant with an ice pack. Claimant was released to regular duty.

40. Claimant returned to Concentra on December 10, 2013 and was examined by Lori Rossi, M.D. Claimant reported he was about the same, with lumbar pain which occasionally radiated. He also noted his current duties aggravated his neck pain. Decreased active range of motion was noted in the lumbar spine on flexion and extension. Pain was noted on left and right side bending. Dr. Rossi's assessment was back contusion and neck pain. No medications were given and Claimant was to return in three (3) weeks.

41. Claimant was evaluated by William Choi, M.D. on January 4, 2014 for pain in the neck, which became worse after falling. Claimant also had arm symptoms and his pain level was reported to be 7/10. Dr. Choi did motor testing of Claimant's upper extremities and reflexes which were normal. Dr. Choi's diagnosis was cervical spondylosis without myelopathy, spinal stenois in the cervical region and degenerative cervical disk. Dr. Choi recommended a C3-6 discectomy and fusion.[2]

42. Claimant was seen by Kirk Holmboe, D.O on January 7, 2014., who reviewed his history. At that time, Claimant had low back and neck pain. In particular, he had pain across the lumbosacral junction on both sides. Dr. Holmboe noted good cervical ROM with minimal pain. Claimant had low back pain, which was greater with extension, side bending and rotation. Dr. Holmboe's assessment was back contusion with chronic cervical strain with recent exacerbation and acute lumbosacral strain. A course of PT 2-3X per week was ordered.

43. An Employer's First Report of Injury was filed on or about January 7, 2014. Claimant's back[3] was listed as the part of body injured, with a contusion noted. Claimant's average weekly wage was $880.00 per week.

44. Dr. Holmboe evaluated Claimant on January 21, 2014, at which time he reported significant neck pain. Dr. Holmboe's diagnosis was acute exacerbation of chronic cervical strain and acute LS strain. PT was continued and Claimant was referred for a physiatry evaluation.

45. Claimant was evaluated by Allison Fall, M.D. (physical medicine consultation) on January 31, 2014. He reported severe neck pain since he was hit by a forklift 13 years ago. Surgery had been considered. Dr. Fall reviewed a cervical MRI from prior to the date of injury which showed severe multilevel degenerative changes and stenosis. Claimant reported that prior to his fall his neck pain was 4/10, but after it

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[2] As noted *infra,* based upon the evidence before the ALJ, it was after the 11/21/13 fall and a worsening of the condition of Claimant's cervical spine that the surgical recommendation was made.

[3] The words "all other" were also included, which may have been a typographical error. The ALJ infers that it probably was meant to read "all over", which makes more sense in this context.

increased to a 7/10. He had current complaints of severe neck pain and isolated low back pain but he had no weakness, numbness or tingling in his upper or lower extremities. He stated his low back pain increased from 3/10 to 6/10 after the slip and fall.

46. Dr. Fall's neurological and straight leg examinations were normal. Decreased lordosis was found in the cervical spine. Claimant had tenderness at L4-5, with increased pain with flexion and extension. Dr. Fall's assessment was chronic neck pain with recommendations for surgery predating injury with increased pain after fall; complaints of low back pain, possibly facetogenic. Dr. Fall recommended a repeat cervical MRI for comparison purposes and acupuncture.

47. A repeat cervical MRI was performed on February 17, 2014 and was read by Benjamin Aronovitz, M.D. Findings included moderate to severe degenerative disc disease, disc bulging, facet arthropathy, and central canal foraminal stenosis at multiple levels.

48. Claimant returned Dr. Fall on February 21, 2014. He reported that the PT was not helping and he continued to have neck pain, mainly on the left side. Dr. Fall noted decreased cervical lordosis and pain just to the left of the spinous process. Dr Fall's assessment was complaints of increased neck pain upon prior chronic neck pain; complaints of low back pain, possibly facetogenic. She recommended acupuncture.

49. Claimant was seen on February 26, 2014 by Don Aspegren, D.C., who noted that Claimant had pain in the cervical and lumbar region. Claimant had cervical pain before the fall, but it was worse. Dr. Aspegren noted Claimant worked at a restricted level and he could perform 50% of his normal activities of daily living. Dr. Aspegren found restrictions in Claimant's trapezius and shoulder region, as well as on compression in the cervical spine. Restriction in the ROM of Claimant's lumbar spine was also found.

50. Dr. Aspegren's assessment was chronic neck pain with recommendations of surgery, predating injury with increased pain after fall; complaints of low back pain, possibly facetogenic. Claimant received acupuncture treatment in his cervical, trapezius and lumbosacral regions, as well as tissue mobilization and exercise for deep core stabilization.

51. Claimant's supervisor, Scott Petitt testified at hearing. In March, 2014, Mr. Pettit was attempting to increase the business with a plumbing supply company called Spectrum. On March 13, 2014, Mr. Petitt approached all of his employees requesting everyone be particularly courteous and helpful to all representatives of Spectrum. These comments were not specific to Claimant. Instead, Mr. Petit was trying to make sure that everyone treated Spectrum well to obtain the additional business.

52. Claimant had previously had a disagreement with one of the Spectrum employees, Nick. Mr. Pettit believed Claimant interpreted his comment as being a reference to his prior dispute with Nick. Claimant became very upset and made several

inappropriate comments including a statement that he would go after Nick if he ever started anything. Mr. Pettit testified that Claimant said he did not care if the police were called because it would take the police to get him off Nick, which caused concern. Mr. Petitt described that during the conversation as Claimant was very volatile and irrational. Mr. Pettit testified he was concerned because the Employer was trying to get new business worth a lot of additional money.

53. Claimant was seen by Dr. Fall on March 14, 2014, at which time his treatments with Dr. Aspegren were noted, however he did not notice any improvement. Claimant developed rib pain after a recent treatment. Decreased cervical lordosis was found by Dr. Fall, but no findings were made with regard to the lumbar spine. Claimant was to continue with PT and chiropractic treatment.

54. Claimant received acupuncture, manipulation and exercise for tissue mobilization from Dr. Aspegren for March 2-April 8, 2014. Claimant's last treatment with Dr. Aspegren was April 8, 20014. At that time Claimant was reporting improvement in his low back, less in his cervical spine. His pain score was 6/10. Dr. Aspegren noted decreased segmental motion in the cervical and lumbar region. Though these treatments, Dr. Aspegren's assessment was chronic neck pain with cervical spondylosis; low back pain, possibly facetogenic.

55. Mr. Pettit made the determination that Claimant should be disciplined for inappropriate conduct. He stated the intent at that time was to address the behavioral issue through a written reprimand and anger management classes. A meeting was held on March 28, 2014 to discuss the written reprimand. Mr. Pettit testified that Claimant agreed he had anger control issues, which were getting worse as he was getting older and he initially agreed to take anger management classes. Claimant became more agitated. Mr. Pettit disengaged from the meeting and then talked to Claimant again after thirty (30) minutes. However, Mr. Pettit testified that Claimant again became upset once they started talking.

56. Claimant testified that he removed himself from a meeting with Mr. Pettit on March 28, 2014 to avoid saying something that might jeopardize his job. Claimant stated that there are only two ways to respond to a confrontation—fight or flight and that he would never flee, which he did not deny on cross-examination. Claimant disputed whether he refused to take the anger management classes.

57. Mr. Petitt described Claimant's statements to be both offensive and scary. He was concerned for the safety of his employees and customers. Mr. Petitt testified that because of Claimant's implicit threats and refusal to take anger management classes, the Employer had no option but to terminate Claimant's employment. The ALJ credits Mr. Pettit's testimony as to the reason for Claimant's termination. The ALJ finds that Claimant's conduct was volitional in his response to Mr. Pettit's concerns and not signing the reprimand. Claimant was responsible for his termination.

58. Claimant was seen by Dr. Fall in follow-up on March 28, 2014 and once again the focus was his cervical spine. He noted his back was doing better. Dr. Fall's

assessment was cervical spondylosis and Claimant was to continue with PT and chiropractic treatment.

59. Claimant was terminated on March 31, 2014. The ALJ notes that an Employer Disciplinary report [Exhibit A, p. 0001] was admitted into evidence at hearing. This document was not signed by Claimant and the "Action to be taken" was listed as "Reprimand".

60. Claimant returned to Dr. Schakaraschwili on April 7, 2014. Dr. Schakaraschwili noted Claimant had a long history of chronic neck pain that was facet mediated. Claimant's new work injury in November 2013 was discussed, as well as his treatment through Concentra, including PT, chiropractic and acupuncture treatments. Claimant felt his condition had not returned to baseline. Dr. Schakaraschwili opined that the fall exacerbated his condition and Claimant still wished to avoid interventional spinal injections, so Dr. Schakaraschwili increased his tramadol from four (4) to six (6) per day, as needed.

61. Claimant was seen by Dr. Fall in follow-up on April 14, 2014 at which time he had continuing pain complaints in his neck. He had good voluntary spontaneous movements in his neck and midline pain at C3. Dr. Fall discussed the fact that surgery had been recommended prior to the work-related injury and therefore "would not be related to the work-related injury"[4]. Dr. Fall was requesting Dr. Choi's records, so she could review when the surgical recommendation was made. The ALJ infers that those records were not received by Dr. Fall, as no further reference to this issue was made by her.

62. Claimant returned to Dr. Choi on April 24, 2014 at which time Claimant was reporting that his cervical pain had worsened and he was having occasional radiculopathy. He had to increase his tramadol dosage to keep ahead of the pain. Dr. Choi's diagnosis was spinal stenosis in the cervical region, degenerative cervical intervertebral disk and displacement disc site uns. w/o myelopathy. Dr. Choi reiterated the recommendation for C3-5 ACDF.

63. Dr. Fall evaluated Claimant on April 28, 2014 and Dr. Choi's surgical recommendations were reviewed. Dr. Fall found decreased cervical lordosis and midline pain, but no radicular symptoms. Dr. Fall's assessment was cervical spondylosis and Claimant indicated he wished to pursue surgery with Dr. Choi, which Dr. Fall said would likely be through private insurance. Dr. Fall had no further recommendations concerning the work-related exacerbation. Dr. Fall made no findings with regard to Claimant's lumbar spine.

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[4] It appears that Claimant related to a number of his treating physicians that surgery had been recommended, including Drs. Holmboe and Fall. In several of the records, when Claimant's history was taken, surgery was noted as an option. However, even the 11/2/13 evaluation at Skyline Medical, which talked about a return to Dr. Johnson, did not constitute a surgical recommendation. The ALJ finds although surgery was discussed during several evaluations before the 11/21/13 fall, these did not constitute recommendations for surgery.

64. Claimant received a Notice of Continuation of Insurance Benefits sometime in April, 2014. The cost of the health insurance premium was $513.77 per month.

65. Claimant's wife covers him under her employer-provided medical insurance policy. Although it is somewhat unclear, it appears the cost of the health insurance premium is $282.00 per month.

66. The ALJ finds that Claimant lost his health insurance coverage as a result of his termination from Employer. This entitled him to an increased AWW. The ALJ is unable to determine how much Claimant's average weekly wage should be increased and is unsure what the parties agreement was on AWW.

67. A Worker's Claim for Compensation was filed on or about May 13, 2014. On this pleading, Claimant stated he was experiencing pain in his neck and back as a result of slipping in the Employer's parking lot.

68. On May 22, 2014, Claimant's counsel faxed a letter to the Sedgwick CMS Claims Adjuster, Kimberly Danneker. Within the letter, Claimant's counsel made a written request to change the Claimant's authorized treating provider from Dr. Holmboe to Caroline Gellrick, M.D. This letter, including the confirmation that the fax was received, was admitted into evidence. Respondents never responded to Claimant's request to change the authorized treating provider.

69. A General Admission of Liability ("GAL") was filed on or about June 4, 2014. Ms. Danneker at Sedgwick Claims Management Services, Inc. filed the GAL on behalf of Respondents, admitting for medical benefits only.

70. Dr. Holmboe examined Claimant on July 8, 2014, at which time it was noted that Claimant was still having neck and low back symptoms. The musculoskeletal exam was deferred. Dr. Holmboe noted that Claimant was seeking authorization for surgery. Dr. Holmboe released Claimant from care, but said that if this was handled through the work comp system, he was willing to act as the PCP. The ALJ finds that there was no evidence that Dr. Holmboe conducted range of motion studies on either Claimant's cervical or lumbar spine when he made the MMI determination.

71. Records from the State of Colorado Department of Labor concerning unemployment benefits for the period 4/5/14-7/19/14 were admitted at hearing. Claimant received unemployment benefits from May 10 through June 22, 2014. Claimant was paid at a rate of $481.00 per week. Claimant was paid for seven (7) weeks and received a total of $3,367.00.

72. However, Claimant testified that he was required to repay the unemployment benefits he received. The ALJ credits Claimant's testimony on this point.

73. On July 23, 2014, Dr. Caroline Gellrick evaluated the Claimant, at the request of his attorney. He complained of neck pain radiating into his arms and low back pain radiating into his legs. The pain was 75% in the neck/low back and 25% in the extremities. Claimant stated his cervical pain increased from a 3 to 3.5/10 to 8/10 after the fall. On examination, Claimant had restrictions in the ROM in both his cervical and lumbar spine.

74. Dr. Gellrick's diagnoses were cervical spine strain with MRI showing multilevel moderate to severe degenerative disk disease (preexistent cervical spine strain but doubled or tripled since fall); lumbosacral strain left-sided with persistent pain; no radiology studies. The ALJ infers that Claimant's symptoms had worsened as of this evaluation. Dr. Gellrick recommended an MRI of the lumbar spine. Dr. Gellrick assigned restrictions of no overhead work, no lifting more than 30 pounds and no pushing/pulling more than 50 pounds.

74. A Final Admission of Liability ("FAL") was filed on or about July 30, 2014, based upon the determination by Dr. Holmboe that Claimant reached MMI and had a 0% impairment rating. Liability for *Grover* medical benefits was denied. Claimant filed a timely Objection to the FAL and request for DIME.

75. Claimant underwent an EMG study on August 4, 2014 with L. Barton Goldman, M.D. Claimant's right median compound motor and sensory nerve action was borderline normal. His right lateral antebrachial cutaneous sensory nerve action potential distal latency was slow. Dr. Goldman concluded this was an abnormal study and Claimant had right neurogenic TOS/upper trunk brachial plexitis.

76. On December 9, 2014, Dr. Justin Green, M.D., who was selected to perform the DIME, evaluated the Claimant. Dr. Green found limitations in Claimant's ROM in the cervical and lumbar spine. Claimant's movement was also limited in the scapular region. At that time, Dr. Green's diagnosis was: status post 11/21/13 fall, with cervical and lumbar pain; lumbar strain syndrome; cervical strain syndrome; pre-existing history of C4-5, C5-6 severe central stenosis; EMG finding noting right neurogenic thoracic outlet syndrome, possible incipient right median entrapment, mononeuritis at the carpal tunnel and no evidence of cervical radiculopathy. Dr. Green found Claimant to be at MMI for his cervical spine. Dr. Green opined that it was medically possible, though not medically probably that the recommended cervical surgery was related to the 11/21/13 injury.

77. Dr. Green opined that Claimant was not at MMI for the low back injury, because he had not had significant evaluation or treatment. Dr. Green opined additional treatment was needed, as well as further diagnostic workup, physical therapy, medication, and imaging.

78. Dr. Fall testified as an expert in physical medicine and rehabilitation at hearing, as well as Level II accredited pursuant to the W.C.R.P. Dr. Fall opined that Claimant's need for cervical surgery was not related to the 11/21/13 injury. Dr. Fall disagreed that Claimant required more treatment or testing for his lumbar spine. On

cross-examination, Dr. Fall agreed that she did not evaluate Claimant's lumbar spine at the last appointments. The ALJ finds that Dr. Fall's opinions constitute a difference of opinion.

79. The ALJ credits Dr. Green's opinion that Claimant was not at MMI with regard to the lumbar spine. Respondents failed to overcome Dr. Green's opinion by clear and convincing evidence.

80. Claimant began regular social security retirement benefits in December, 2014. Claimant's monthly retirement is $1,318.50 per month.

81. Claimant began receiving pension benefits from Employer in the amount of $643.50 per month beginning January 1, 2014. The ALJ did not have information regarding Employer's contribution to the plan.

82. The ALJ finds that the 11/21/13 injury exacerbated the degenerative condition in Claimant's cervical spine, worsened its condition and caused an increase in symptoms. Claimant required medical treatment as a result.

83. The ALJ finds that although Claimant was treated for cervical spine symptoms before the 11/21/13 industrial injury and surgery was discussed, surgery was discussed only as an option and was not recommended by Dr. Johnson, Dr. Schakaraschwili or Dr. Wong. Based upon the evidence admitted at hearing, the ALJ finds that the recommendation for cervical surgery came after the 11/21/13 injury[5]. This recommendation was made by Dr. Choi on 1/4/14.

84. The ALJ finds that the 11/21/13 injury exacerbated the degenerative condition in Claimant's lumbar spine and caused an increase in symptoms, which required medical treatment.

85. Claimant has continued to have symptoms referable to his low back. The ALJ credits Claimant's testimony that his symptoms have worsened over the past year. Claimant also described a reduction in his activities, as well as radiating pain down his legs. The ALJ finds that this worsening of condition has been present at least since the DIME appointment on December 9, 2014. Therefore, despite his termination for cause, Claimant is entitled to TTD from December 8, 2014 until terminated by law based upon this worsening.

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

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[5] As noted *supra*, Claimant discussed the option of surgery with a number of his treating physicians. However, these did not constitute surgical recommendations. It appears that Claimant referenced these discussions with several of his doctors. The first cervical surgery recommendation, which specified was a candidate for an actual procedure was Dr. Choi's 1/4/14 recommendation.

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.

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).

Overcoming the DIME On the Issue of MMI

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).

Respondents contended that Dr. Green, the DIME physician, erred in determining the Claimant was not at MMI for his lumbar spine. Respondents argued that Claimant had multiple modalities of treatment, including PT and chiropractic. This treatment had improved Claimant's condition. Respondents also relied upon the opinion of Dr. Fall.

Claimant argued that Dr. Green's findings were correct and Claimant requires diagnostic testing and/or additional treatment. More particularly, it was noted that no

MRI had been done on Claimant's lumbar spine. Claimant relied upon the reports of Dr. Gellrick and Dr. Goldman, as well as Claimant's testimony.

In this case, Respondents bear the burden of overcoming Dr. Green's findings after he performed the DIME and by clear and convincing evidence. 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. *Metro Moving and Storage Co. v. Gussert*, *supra.*

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).

Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *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. Furthermore, 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).

As determined in Findings of Fact 77 through 79, the Respondents failed to prove by clear and convincing evidence that the DIME physician was incorrect in determining the Claimant is not at MMI.

The ALJ finds the opinions of Dr. Green credible and persuasive. In particular, he reviewed Claimant's course of treatment in detail and opined that additional

diagnostic testing and potentially treatment was needed for the lumbar spine. Dr. Green's rational for determining that Claimant was not at MMI for his lumbar spine was clearly articulated in his report.

Dr. Fall had a differing opinion based on her evaluation of Claimant. However, Dr. Fall admitted on cross-examination that she did not focus on Claimant's lumbar spine in her last evaluations. She also acknowledged the Medical Treatment Guidelines contemplated an MRI in these circumstances. The ALJ found that this constituted and disagreement between physicians and Respondents did not introduce sufficient evidence to overcome Dr. Green's opinions by clear and convincing evidence.

Temporary Total Disability Benefits

The claim for additional temporary disability benefits in the instant case is governed by the termination statutes, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) and its progeny. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Sections 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. 2013. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.;* See also *Apex Trans., Inc. v. Indust. Claim Appeals Office*, 321 P.3d 630, 631 (Colo. App. 2014)

In *Anderson*, the Colorado Supreme Court construed § 8-42-105(4), C.R.S., holding that termination for cause may bar temporary disability benefits. More particularly, the Court noted that the statute bars "TTD wage loss claims when voluntary for-cause termination of modified employment causes wage loss, but not when the worsening of a prior work-related injury causes wage loss." *Anderson v. Longmont Toyota, supra*, 102 P.3d at 325-326. Therefore, where Respondents can establish Claimant engaged in volitional conduct which led to his termination, this can act as a bar to temporary total disability benefits.

Anderson was followed by *Grisbaum v. ICAO,* 109 P.3d 1055 (Colo. App. 2005). In *Grisbaum*, Claimant suffered a compensable back injury in June 2001, but continued to work with no restrictions until he voluntarily resigned in January 2002. In May 2002, the Claimant was completely restricted from working due to his June 2001 injury and underwent two surgeries. The ALJ determined that § 8-42-105(4) barred Claimant from receipt of TTD benefits, which was affirmed by the Industrial Claims Appeals Office and that decision was initially affirmed by the Colorado Court of Appeals. However, the opinion was vacated after *the issuance of Anderson v. Longmont Toyota*. The Colorado Court of Appeals that *Anderson* applied equally to scenarios involving regular or modified employment when there is "a worsening of condition or the development of a disability after the termination." *Grisbaum v. ICAO, supra, 109 P.3d 1056.* Accordingly, the Court remanded the case for an appropriate award of TTD benefits.

Most recently, the Colorado Court of Appeals decided *Apex Trans., Inc. v. Indust. Claim Appeals Office*, *supra*, 321 P.3d at 630. In *Apex*, Claimant worked as a truck driver for Apex for five and a half years before sustaining an injury to his shoulder. Claimant initially did not receive medical treatment for this injury, but self-medicated by obtaining a pain pill from his brother. However, Claimant's symptoms persisted and after reporting the injury, he went to the ATP for the employer. A physician's assistant evaluated Claimant and found that he had no restrictions and could return to work. Claimant was terminated for a violation of the employer's "zero tolerance" drug policy, as he had a positive drug test (from the pain pill he got from his brother). Subsequently, a physician took Claimant off work. Claimant requested a hearing, seeking TTD benefits.

The ALJ found that Claimant's termination from employment was volitional and that Claimant had failed to establish that his condition had worsened after he was terminated. On appeal, the Panel reversed the decision, concluding that the ALJ's factual findings would support the conclusion that Claimant's condition had worsened and he would be entitled to TTD. The Panel remanded the case and on remand, the ALJ awarded TTD benefits. The Court of Appeals then reviewed the Final Order and concluded that the Panel exceeded its authority by re-weighing the evidence.

"We know of no case that has held that an increase in work restrictions is per se evidence of a worsening condition. To the contrary, the Panel itself has previously held that an ALJ may look at several factors when considering whether a condition had worsened to the extent that the worsened condition, and not an intervening termination of employment, caused the Claimant's wage loss." *Apex Trans., Inc. v. Indust. Claim Appeals Office*, *supra*, 321 P.3d at 633. The Court noted that the Panel had rejected the contention that Claimant was entitled to TTD reinstatement because of increased work restrictions [*Encisco v. C.F. Meier Composites, Inc.,* 2009 WL 2520525 (W.C. No. 4-764-288, Aug. 12, 2009)] and rejected the contention that additional restrictions was sufficient to show a causal connection between the injury and wage loss and that there was no requirement to show a worsening of condition [*Hammack v. Falcon School Dist. No. 49,*2006 WL 3146358 (W.C. No. 4-637-865, Oct. 23, 2006)].

Accordingly, the issue of termination for cause requires a two-part analysis. First, the ALJ must determine whether Respondents satisfied their burden of proof on the termination for cause, which is an affirmative defense. Second, the ALJ will evaluate whether Claimant suffered a worsening and was disabled the following his termination.

As found, Claimant acted in a manner which caused a serious concern on the part of his supervisor. In particular, Claimant's conduct concerning Spectrum raised concerns on the part of his supervisor, specifically with reference to his comment that the police would have to be called and it was reasonable for Mr. Pettit to be concerned. Claimant disputed that he refused to take anger management classes as requested by

Employer, but agreed he refused to sign the reprimand. Claimant also did not dispute that he was angry and had a negative reaction to the discussions concerning Spectrum. This left the Employer in the unenviable position of having a potential safety concern, as well as an issue concerning an important customer.

The ALJ finds Claimant's actions were volitional during his exchanges with Mr. Pettit. Claimant chose a course of conduct, which was intentional. As such these actions led to Employer's decision to terminate him and Claimant is responsible for his termination of employment. Accordingly, Claimant is not entitled to TTD benefits from April 1, 2014 through December 8, 2014.

The ALJ turns to the question of whether Claimant's condition has worsened since his termination, which based upon the evidence is answered in the affirmative. Claimant's testimony and the medical records established a worsening in symptoms, in late 2014. The ALJ concluded that this worsening of condition would have prevented him from completing his job duties and constitutes a disability. Accordingly, Claimant is entitled to TTD benefits from 12/9/14 and continuing, until terminated by law.

Average Weekly Wage

As found, Claimant and Respondents indicated that they reached an agreement on AWW, which would includes the loss of Claimant's health insurance benefits. However, it was unclear as to what the final agreement was. Counsel for the parties were ordered to confer on this issue.

Offsets[6]

Respondents contend they are entitled to reduce the Claimant's award of TTD benefits based on his receipt of unemployment and social security retirement benefits. The ALJ agrees.

As a starting point, the ALJ notes that Respondents are entitled to a statutory offset for Claimant's receipt of unemployment benefits. Both Claimant and Respondent submitted the same record for the State of Colorado Department of Labor which Claimant received unemployment benefits from May 10 through June 22, 2014. [Exhibits 30 and B]. Claimant was paid at a rate of $481.00 per week. Claimant received a total of $3,367.00 in unemployment benefits. However, Claimant testified that he was required to repay those benefits.

There was no other evidence before the ALJ on the issue of unemployment benefits. Since the ALJ credited Claimant's testimony regarding the repayment of those

[6] Claimant's Position Statement noted the parties had agreed to hold the question of offsets in abeyance. There was not a corresponding notation in Respondents' Position Statement.

benefits, there would be no offset, since Claimant had to repay the unemployment benefits he received.

As found, Claimant began regular social security retirement benefits in December, 2014. Claimant's monthly retirement is $1,318.50 per month. Respondents are entitled to offset those benefits pursuant to Section 8-42-103(1)(d)(I), C.R.S., which provides that in cases where the employee is receiving "periodic disability benefits" payable under a "pension or disability plan financed in whole or in part by the employer" the "aggregate benefits payable for" TTD shall be "reduced, but not below zero, by an amount equal as nearly as practical to the employer pension or disability plan benefits."

In addition, Respondents are entitled to offset Claimant's TTD benefits by the amount received in pension. However, the ALJ has insufficient information concerning the Employer's contribution to the pension. At this time, the ALJ is unable to determine the exact amount of the offset. Accordingly, the parties are ordered to confer regarding the issue offsets and report to the ALJ.

Change of Physician

The ALJ considered whether Claimant is entitled to a change of physician pursuant to Section 8-43-404(5)(a)(VI), C.R.S.[7] This section provides in relevant part:

"In addition to the one-time change of physician allowed in subparagraph (III) of this paragraph (a), upon written request to the insurance carrier or to the employer's representative, if self-insured, an injured employee may procure written permission to have a personal physician or chiropractor treat the employee. If permission is neither granted nor refused within twenty days, the employer or insurance carrier **shall be deemed to have waived any objection** to the employee's request. Objection shall be in writing and shall be deposited in the United States mail or hand-delivered to the employee within twenty days…" [Emphasis added]

As a starting point, the evidence establishes that a one-time change of physician request was sent to Respondents' adjuster on May 22, 2014. Specifically, the request for change of physician was sent to Kimberly Danneker at Sedgwick. (Exhibit 34). The ALJ notes that Ms. Danneker filed the FAL on behalf of Respondents on or about 7/30/14.

Respondents argued that although the letter requesting a change of physician to Dr. Gellrick was admitted, no evidence or testimony was submitted regarding a lack of response. Respondents also contended that Claimant waived his right to a change of physician by returning to Concentra after the alleged change.

[7] See also W.C.R.P. Rule 8-7

The ALJ found there was no response to the request for change of physician within twenty (20) days. It was uncontroverted that the faxed letter was sent to the adjuster who had acted on behalf of Respondents. A response was required on or before June 11, 2014. Under the statute, the failure to respond to the request for change of physician by Respondents constituted a waiver and by operation of law, Dr. Gellrick became an ATP.

As to the Respondents' other argument, no authority was cited to support the contention that a return to the designated ATP constituted a waiver after a request for change of physician was made and the ALJ determines there was no waiver in this instance. By virtue of the request for change of physician and no response by Respondents, Dr. Gellrick is an authorized treating physician in this case.

ORDER

It is therefore ordered that:

1. Claimant is not at MMI for the injury to his lumbar spine.

2. Since Claimant is not at MMI, Respondents shall provide medical benefits to Claimant.

3. Claimant's request for change of physician is GRANTED.

4. Respondents shall pay medical expenses charged by Dr. Gellrick pursuant to the Worker's Compensation Fee Schedule, after June 11, 2014, as well as all referrals made by Dr. Gellrick.

5. Claimant request for TTD benefits from April 1, 2014 through December 8, 2014 is denied and dismissed.

6. Respondents shall pay Claimant TTD for December 9, 2014, until terminated by law.

7. Respondents shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

8. Since the ALJ was unable to determine what the parties' agreement was on AWW and did not have sufficient facts on the issue of offsets, counsel for Claimant and Respondents shall confer within twenty (20) days on these issues. Counsel for Claimant shall provide a status report to the ALJ regarding the status of any agreement. In the event the parties are unable to agree, Claimant and Respondents may submit evidence concerning the issue of offsets, or in the alternative, the matter may be set for hearing.

9. 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: December 29, 2015

Digital signature

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

ISSUES

The sole issue to be determined is as follows:

1. Whether the Claimant has proven that her request for right hip surgery recommended by Dr. White is reasonable, necessary and related to her work-related injury of July 19, 2014.

All other issues listed in the Claimant's Response to Application for Hearing were reserved without prejudice pending determination of the above issue.

FINDINGS OF FACT

1. The Claimant is a 56 year old woman who worked for Employer on July 19, 2014 as an occupational therapy assistant. Her job duties were assisting with the rehabilitation of ill or injured patients. Her job involved physical contact with patients including helping disabled patients to stand, sit and walk (Hearing Tr., p. 7). She had worked for Employer for approximately 2 years as of the date of her work injury (Hearing Tr., p. 8).

2. On July 19, 2014, the Claimant was assisting a patient with a transfer from the toilet to a wheelchair. The Claimant testified at the hearing that while she was assisting the patient, she injured her right shoulder, lower back and groin area (Hearing Tr., p. 8).

3. On July 25, 2014, a First Report of Injury or Illness was completed by Employer's HR representative noting the Claimant experienced an injury to her lower back and arm when she was transferring a patient (Respondents' Exhibit I, p. 79).

4. The Claimant was seen by Craig Hare, PA-C at Concentra on July 25, 2014. Mr. Hare noted that the Claimant complained of shoulder pain and back pain. The back pain was "located in the low back bilaterally. Onset was gradual immediately after injury. The pain is constant. She describes her pain as dull and aching in nature. She describes this as moderate in severity." There was "catching and clicking" noted for the shoulder, but not for the low back or groin or hip areas. The Claimant was assessed with right shoulder strain and lumbosacral pain. The Claimant was referred to physical therapy (Respondents' Exhibit C, pp. 39-41).

5. The Claimant returned to Concentra again on July 29, 2014 and saw Craig Hare, PA-C who noted that the Claimant reported her "back and shoulder both feel improved but she is still getting clicking and catching sensation, randomly, in right

shoulder." On examination, "bilateral muscle spasms" were noted in the lumbosacral spine with tenderness to palpation. An MRI was ordered for the right shoulder, but none was ordered for the low back or hip at this point (Respondents' Exhibit C, pp. 35-36).

6. The Claimant first went to Concentra for physical therapy on July 31, 2014. In performing the initial assessment for therapy, Jennifer Verwers, PT noted that the patient assessment was consistent with the medical diagnoses of lumbosacral strain and right shoulder strain (Respondents' Exhibit G, pp. 67-70).

7. On August 3, 2014, the Claimant completed an Employee's Report of her July 19, 2014 injury. She stated that the injury occurred in the transfer of a non-weight bearing patient from the toilet to the wheelchair. She listed the following injuries sustained as a result of the work injury, "shoulder burning and locking with movement; lumbar spine burning and shooting sharp pain" (Respondents' Exhibit K, p. 81).

8. On August 5, 2014, an MRI of the Claimant's right shoulder showed supraspinatus, infraspinatus and biceps tendon changes and a large superior labral tear (Respondents' Exhibit H, pp. 76-77).

9. A Worker's Claim for Compensation dated August 8, 2014 lists the Claimant's injuries to her "right shoulder and back" (Respondents' Exhibit J, p. 80).

10. On August 13, 2014, the Claimant saw Dr. Jennifer Huldin at Concentra. Dr. Huldin reported that the Claimant was not working due to restrictions and she was "frustrated at her lack of mobility, gets shooting pains to right groin with steps wrong…" (Claimant's Exhibit 9, p. 17; Respondents' Exhibit C, p. 32). On that same date, the Claimant saw physical therapist David Schnell, who noted that the Claimant was referred for an EMG on the "R hip/LB" (Claimant's Exhibit 8, p. 16).

11. The Claimant was initially evaluated at Western Orthopaedics with an emphasis on the right shoulder condition. The Claimant reported continued and worsening pain in her right shoulder since July 19, 2014. Dr. Bazaz noted that the Claimant had stopped physical therapy once the MRI results were obtained (Respondents' Exhibit D, p. 53).

12. The Claimant saw Dr. Huldin again on August 27, 2014. Dr. Huldin noted that the Claimant notices that when she turns her head to the side, her 4th and 5th fingers go numb on the right side. Dr. Huldin reported that the Claimant would be undergoing shoulder surgery, although it was not yet scheduled. With respect to the Claimant's low back, she continued with physical therapy which the Claimant reported was helpful, but also noted that the Claimant gets stiff and sore if she sits or walks too long. On examination, Dr. Huldin noted "tender lower lumbar paraspinal erectors and right piriformis." Dr. Huldin also reported that a physiatry referral was pending (Respondents' Exhibit G, pp. 28-29).

13. On September 5, 2014, the Claimant saw Dr. John J. Aschberger. On a pain diagram the Claimant completed, she placed an X in the middle of the low back on the body diagram facing backwards. On the body diagram facing forwards, she placed an X on the right shoulder. On the same questionnaire/intake form, she questioned why an MRI has not been performed on her back (Respondents' Exhibit B, p. 16). Dr. Aschberger noted that the Claimant has been treating for her right shoulder and low back pain since her July 19, 2014 work injury. He noted that the Claimant reported "complaints of low back pain predominantly on the right. She notes burning pain at the low back and increasing stiffness with prolonged sit, stand, or walk. She notes increased irritation and tightness when going from sit to stand occurring bilaterally. She has some radiated symptoms into the heel on the right leg. That tends to clear up when she is up walking about." With respect to Dr. Aschberger's assessment of lumbosacral strain, he noted, "findings on examination of SI and facet irritation. Her symptoms and findings are consistent." Dr. Aschberger recommended an MRI of the lumbar spine (Respondents' Exhibit B, pp. 14-15).

14. The Claimant underwent an MRI of the lumbar spine on September 15, 2014. The radiologist made findings that, "lumbar alignment is normal. No acute fracture is seen. No suspicious bone lesion is noted. No marrow edema is seen. There is bilateral facet arthropathy L3-L4, L4-L5 and L5-S1 with minimal disc degeneration and disc bulges at these levels as well" Respondents' Exhibit H, pp. 74-75).

15. On return to see Dr. Bazaz at Western Orthopaedics post-surgery on October 2, 2014, the emphasis of the visit was on the right shoulder recovery. Dr. Bazaz noted that the Claimant was doing well after her right shoulder arthroscopy with subacromial decompression, distal clavicle resection and removal of a calcium deposit, small rotator cuff repair, removal of a loose body and labral debridement (Respondents' Exhibit D, p. 51).

16. The Claimant saw Dr. Aschberger on October 3, 2014 for review of the lumbar MRI performed on September 15, 2014. Dr. Aschberger noted the MRI findings demonstrated "multilevel degenerative changes with facet arthropathy L3 through S1 and some foraminal narrowing at L4-L5 without nerve root encroachment." He found that this correlated with his limited physical examination of the Claimant, noting pain with extension, some restriction of motion and positive facet loading for the lower back. Dr. Aschberger recommended interventional injections for the low back but indicated that these would have to wait for the Claimant's postoperative pain to settle down (Respondents' Exhibit B, p. 13).

17. The Claimant saw Dr. Huldin again on October 8, 2014 after her shoulder surgery on September 25, 2014. Dr. Huldin noted that the MRI of the Claimant's back showed degenerative changes and injections with Dr. Aschberger were planned once the shoulder surgeon released her to obtain those (Respondents' Exhibit G, pp. 24-25).

18. The Claimant saw Dr. Aschberger again on December 5, 2014 and he noted that the Claimant reported "she still has some stabbing pain in the back and she

has a sensation of the right leg wanting to buckle." On examination, Dr. Aschberger noted the Claimant 'is tender at the right sacral sulcus. She has some restriction of motion with forward flexion. Straight leg raise is negative for radicular symptoms or findings. Reflexes are intact and strength is intact" (Respondents' Exhibit B, p. 12).

19. On February 3, 2015, the Claimant underwent an MRI of the right hip that showed an "anterior superior quadrant labral tear with slight extension into the adjacent articular cartilage" (Claimant's Exhibit 1, p. 1; Respondents' Exhibit H, p. 73).

20. On February 5, 2015, the Claimant saw Dr. Huldin at Concentra. The Claimant reported that Dr. Aschberger had ordered an MRI of the right hip which showed a labral tear and the Claimant wondered what she should do about this. Dr. Huldin noted that she would "refer her to ortho for opinion as to whether work related or chronic, and whether surgery will relieve her symptoms of walking stiffly, right hip locking and right groin pains" (Respondents' Exhibit G, p. 21).

21. On February 13, 2015, the Claimant saw Dr. Bazaz at Western Orthopaedics again. The Claimant reported that she was happy with her right shoulder progress and although she continued to have some popping, it was different that the popping with pain she had before. The Claimant's most significant complaints at this visit were related to her low back and hip. The Claimant reported to Dr. Bazaz that, "she might be getting injections for the low back. With regard to her hip pain, she notes specific groin pain. She did not have difficulty before the trauma. She notes mechanical symptoms." On examination, Dr. Bazaz noted that, "examination of the right hip reveals no pain with axial load. She does have maintained range of motion, but there is pain at the extremes of flexion, abduction, external rotation, and extension (FABERE) findings." Based on the examination and the MRI of the right hip, Dr. Bazaz found evidence of labral tearing and recommended evaluation by Dr. White, a specialist from a labral irregularity standpoint (Claimant's Exhibit 2, pp. 2-3; Respondents' Exhibit D, pp. 49-50).

22. On February 13, 2015, the Claimant also saw Dr. Aschberger for review of her hip MRI. He noted the MRI demonstrated a superior labral tear with extension into the adjacent articular cartilage and mild greater trochanter bursitis. Dr. Aschberger noted that Dr. Huldin referred the Claimant back to Dr. Bazaz for an orthopedic evaluation and that Dr. Bazaz, in turn, referred the Claimant for hip evaluation with Dr. White. He noted the Claimant cancelled her SI block after learning of the orthopedic referral. The Claimant reported that she still has pain in the back as well as at the right groin. Dr. Aschberger stated that, "to help differentiate contributions from the SI versus the hip, I did advise [the Claimant] to go ahead and follow through with the SI blocks" (Respondents' Exhibit B, p. 10).

23. On February 18, 2015, Dr. Rick D. Zimmerman performed a bilateral sacroiliac joint steroid injection and noted that the procedure produced a diagnostic response (Respondents' Exhibit E).

24. On March 4, 2015, the Claimant saw Dr. Burris on referral due to delayed recovery issues. Dr. Burris summarized her treatment since the July 19, 2014 injury, which he characterized as, "a relatively minor event." He noted that the Claimant underwent surgery for the right shoulder and her rehabilitation was supervised by Dr. Aschberger. He also noted that the Claimant has received treatment for her lumbar spine including physical therapy, chiropractic manipulation and SI injections. He noted that the Claimant was being evaluated by an orthopedic surgeon regarding hip pathology revealed on the right hip MRI. The Claimant reported that her biggest complaint is "cramping over the front part of her thighs with prolonged standing or walking." Dr. Burris recommended that the Claimant remain active with an aggressive home exercise program with an emphasis on stretching, strengthening and conditioning along with pool therapy (Respondents' Exhibit C, pp. 19-20).

25. The Claimant was also seen on March 4, 2015 by Dr. Brian J. White and Shawn B. Kams, MPA, PA-C for an orthopedic evaluation related to her right hip pain. The Claimant advised that she has had an extensive low back work up with physical therapy and injections which have helped the low back but not the hip. The Claimant advised Dr. White that with the physical therapy she was getting for her back, she kept getting sharp catches and pain within her hip joint and she was never sure if this was coming from her hip or not. She reported that "she never really did well with this and has gotten progressively worse. At this point, she is confused as to where the pain is coming from." On physical examination, Dr. White noted that the Claimant "does have obvious pain with the anterior impingement maneuver. This reproduces pain in her hip. I think that the hip is the main source of pain with regard to rotation and twisting that we reproduced here, but I think she also has a problem with her lower back with some central lower back pain that radiates more to the left side." Dr. White recommended a diagnostic injection to see how much of the pain is coming from her hip. He assessed the situation as follows: "A very complex patient. I think the hip has been part of the problem all along." Dr. White noted that trying to fix this problem will be challenging. He opined that hip arthroscopy could be reasonable" (Claimant's Exhibit 3, pp. 4-6; Respondents' Exhibit D, pp. 46-48).

26. On March 9, 2015, Dr. Jeffrey Guyon performed a therapeutic right hip injection with fluoroscopic guidance. A handwritten note on the typed medical report states, "3/9/15 great relief of pain 6 -> 1/10" (Claimant's Exhibit 4).

27. The Claimant saw Dr. Bazaz again on March 13, 2015 for follow up on the shoulder and he noted that she was at MMI with regard to the shoulder. He also noted that "it sounds like her right hip is an issue. She had a diagnostic injection that made a tremendous difference in her discomfort across that region" (Respondents' Exhibit D, p. 44).

28. On March 13, 2015, a request from Western Orthopaedics from Dr. White was made for right hip surgery with the proposed surgery: right hip; scope labral repair; reconstruction; femoral acetabular osteoplasty (Claimant's Exhibit 5, p. 12).

29. On March 27, 2015, the Claimant saw Dr. Aschberger regarding the hip injection that was performed approximately 3 weeks prior. The Claimant reported "excellent symptom alleviation of the groin and hip pain" which Dr. Aschberger opined would be a positive diagnostic response. Dr. Aschberger noted that Dr. White was recommending surgical intervention and that the Claimant was scheduled for an IME (Respondents' Exhibit B, p. 9).

30. On March 31, 2015, Dr. I. Stephen Davis performed an independent medical examination of the Claimant to address causation issues with regard to the Claimant's right shoulder, lumbar spine and right hip conditions. Dr. Davis reviewed the Claimant's medical records and interviewed and physically examined the Claimant (Respondents' Exhibit A, pp. 1-2). The Claimant reported to Dr. Davis that, as of the date of this IME, the groin was the focus of the Claimant's discomfort with catching and popping sensations and discomfort that limits her walking to 15 minute periods (Respondents' Exhibit A, p. 3). On examination, Dr. Davis notes that the Claimant does walk with a slightly altered gait favoring her right hip. He notes that range of motion of the right hip is restricted in full flexion and with impingement testing, the response is positive. Dr. Davis agrees that the Claimant has documented injuries to her right shoulder and lumbar spine. He opines that "the primary issue is the right groin pain." He notes that this condition is not documented at the time of her incident and he finds that the Claimant has not made right hip complaints until September of 2014, two months following the incident. The Claimant explained to him that "she believes the confusion is related to the similar complaints experienced with back issues and thus not well understood by her treating physicians." In considering causation of the right hip condition, Dr. Davis opines that "femoral acetabular impingement is not caused by trauma. This is a pre-existing condition." Next, he raises his concern that there was no report of a right hip injury or a correlating mechanism of injury resulting from the July 19, 2014 event. Dr. Davis ultimately opines that he finds not causal relationship between the right hip pathology on the February 3, 2015 MRI and the work injury on July 19, 2014 noting that, "based on clinical findings I agree with the diagnosis and the recommended treatment but I do not find a causal relationship to the subject accident…" (Respondents' Exhibit A, p. 4).

31. On April 17, 2015, the Claimant saw Dr. Aschberger again and he noted that the Claimant still had persistent irritation at the low back as well as at the right groin. She also continued to report issues of the hip catching and a sensation of buckling (Respondents' Exhibit B, p. 8).

32. The Claimant saw Dr. Burris again on April 29, 2015. He noted that since his first visit with the Claimant, she had undergone an IME with Dr. Davis who did not feel her chief complaints were work related and so the hip surgery recommended by Dr. White was denied by the carrier. Dr. Burris noted that as the labral tear to the right hip was not considered to be work-related based on the IME, the Claimant was approaching MMI for her right shoulder and low back complaints. He noted that he reviewed the Workers' Compensation concepts of MMI, impairment, permanent work restrictions and maintenance care with the Claimant. He also modified the Claimant's

current temporary work restrictions to allow for lifting up to 20 pounds (Respondents' Exhibit C, pp. 17-18).

33. The Claimant saw Dr. Aschberger on May 15, 2015 and he noted that both he and Dr. Burris had reviewed the issues of MMI and impairment with the Claimant. Dr. Aschberger noted that the issue of the hip labral tear was being contested regarding whether or not that was causally related to the work injury. Dr. Aschberger opined that if the hip issue is clarified and found to be related, then the Claimant is not at MMI. If the hip issue is not found to be related, then Dr. Aschberger anticipated impairment for the back, but little, if any, impairment at the shoulder (Respondents' Exhibit B, p. 6).

34. Dr. I. Stephen Davis testified by evidentiary deposition on July 27, 2015 as an expert in the field of orthopedic surgery (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 3-4). Dr. Davis testified that he is familiar with the Claimant from an independent orthopedic evaluation conducted on March 31, 2015 (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 4). Dr. Davis testified that the Claimant described a work injury to him involving assisting a patient transfer from a toilet to a wheelchair where she was lifting and twisting and she strained her low back and right shoulder. Dr. Davis found the description the Claimant provided to him to be consistent with the medical records of other providers (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 6). Dr. Davis was asked to evaluate the Claimant's complaint of right hip pain which he found to have developed after initial treatment. He testified that the first documentation that he noted regarding a possible right hip complaint was Dr. Aschberger's note of December 5, 2014 which led to an MRI of the hip on February 3, 2015 which revealed a tear of the labrum (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 7). Dr. Davis testified that the Claimant has been diagnosed with a labrum tear which is evidenced by the February 2015 MRI of her right hip. Labrum tears can be degenerative or they can be caused by trauma (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 9-10). However, Dr. Davis testified that there is no way to date the labrum tear from the MRI image and the tear may or may not have predated her July 19, 2014 injury. There were no MRI studies prior to July 19, 2014 and Dr. Glassman had documented pre-existing hip joint complaints but he attributed them to bursitis at that time and did not document the possibility of a labral tear (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 10).

35. Dr. Davis testified that the Claimant advised him she was having right groin pain at the March 31, 2015 IME and that she thought it might have started a couple of months after her work injury (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 10-11). Yet, Dr. Davis opined that the medical records that he reviewed did not support the Claimant's statements to him. Rather, Dr. Davis testified that the first record after the injury that documents pain that could be related to the hip or groin is the December 5, 2014 note of Dr. Aschberger which discusses a stabbing pain in the back and a sensation of the right leg wanting to buckle, which Dr. Davis assumes led Dr. Aschberger to recommend an MRI of the hip (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 11). Dr. Davis testified that if the Claimant had injured her hip causing the labral tear evidenced on the MRI on the date of her work injury, he would expect groin

pain, along with catching, popping and snapping at the groin right after the injury date (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 12). Dr. David opined that the arthroscopic hip surgery proposed by Dr. White is reasonable and necessary (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 14-15). However, Dr. Davis testified that, while it is possible that the Claimant's hip condition is causally related to her July 19, 2014 work injury, he can't state this to a reasonable degree of probability because there is no medical documentation of the Claimant complaining of groin pain and catching and popping until many months after the work injury (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 15).

36. The Claimant testified at the hearing that she gets a "popping, grabbing, burning sensation" in her groin (Hearing Tr., p. 8). The Claimant testified that she mentioned this to her physical therapist and to Dr. Holden and on July 25, 2014, she put an X on her pain diagram in the middle of the body below the waist area which she intended to indicate the whole area of her lower back, groin and down her leg was where she was experiencing pain (Hearing Tr., p. 9; Claimant's Exhibit 7; Respondents' Exhibit C, p. 42). The Claimant testified that she also experienced popping and clicking in her shoulder and her right leg (Hearing Tr., p. 10). The Claimant testified that she has mentioned the clicking and popping and groin pain to her physical therapist and to Drs. Holden, Aschberger and Bazaz (Hearing Tr., p. 11).

37. The Claimant testified at the hearing that she first was able to distinguish her low back pain from the groin pain after a diagnostic hip injection. After this, she was able to separate the pain and realized it was two distinct pains (Hearing Tr., p. 12). The Claimant testified that, at first, she did not specifically complain about hip pain and groin pain and the pain radiating down her leg separately from the low back pain because she didn't realize they were separate and distinct until after the diagnostic shot, which she stated "separated the pain" for her (Hearing Tr., pp. 14-16). The other thing that caused the Claimant to realize that she had hip and groin pain that was separate from her low back pain was the MRI (Hearing Tr., pp. 25-26). She testified that regardless, the whole time she was having pain in her low back and hip and the whole region, along with the popping and catching, although it has worsened over time (Hearing Tr., p. 16). The Claimant testified that both Dr. White and Dr. Aschberger recommend she undergo hip surgery and, if offered hip surgery, she would have it done (Hearing Tr., p. 18).

38. Prior to her injury on July 19, 2014, there was mention of hip pain in the Claimant's medical record of a March 31, 2013 office visit with her PCP Dr. Glassman, who suspected "possible iliotibial band syndrome" (Respondents' Exhibit F, pp. 61-62). On April 23, 2013, Dr. Glassman noted the Claimant had "mild-to-moderate tenderness right at the superior portion of the greater trochanteric part of the hip" with a positive FABER sign. Dr. Glassman suspected trochanteric bursitis and recommended a right hip x-ray (Respondents' Exhibit F, p. 63). The right hip x-ray taken on April 23, 2013 was essentially normal (Respondents' Exhibit H, p. 78). While Dr. I. Stephen Davis testified that a labral tear would not have been revealed on an x-ray (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 14), it is also not very likely that these complaints of hip pain in 2013 are related to the labral tear seen on the Claimant's

February 3, 2015 MRI since Dr. Davis testified that the reason he doesn't believe the Claimant's current hip condition is related to the July 19, 2014 work injury is that he believes she did not complain of groin pain and catching and popping until many months after the work injury (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 15), where he would have suspected symptoms right after the injury date. Also, Dr. Glassman's diagnosis of trochanteric bursitis would have been associated with a different type of hip pain, which is consistent with the Claimant's reports to treating physicians and to Dr. Davis that she had not previously experienced the type of symptoms that she does now with respect to her groin/hip area (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 12-13).

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. 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 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 – Related and Reasonably 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. 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).

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).

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).

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).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In this claim, there was some evidence of the Claimant raising complaints of hip pain that predated the work injury on July 19, 2014. However, it was found that it is more likely than not that these prior complaints of hip pain in 2013 are unrelated to the labral tear seen on the Claimant's February 3, 2015 MRI. The Claimant was working full duty prior to July 19, 2014, and, other than 2 complaints of hip pain in March and April of 2013, there are no other medical records showing the Claimant sought or received medical treatment for any hip condition prior to July 19, 2014. Dr. Davis testified that that the reason he doesn't believe the Claimant's current hip condition is related to the

July 19, 2014 work injury is that he believes she did not complain of groin pain and catching and popping until many months after the work injury, where he would have suspected symptoms right after the injury date. So if the labral tear was going back to 2013, or otherwise predated the work injury, it would not make sense that the Claimant made no additional complaints of hip pain between April 23, 2013 and July 19, 2014. Also, Dr. Glassman's diagnosis of trochanteric bursitis would have been associated with a different type of hip pain, which is consistent with the Claimant's reports to treating physicians and to Dr. Davis that she had not previously experienced the type of symptoms that she does now with respect to her groin/hip area.

In this case, there is no disagreement that the February 3, 2015 MRI of the Claimant's right hip evidences a labral tear. Dr. Davis testified that he does not disagree with Dr. White's diagnosis of the Claimant's hip condition, nor does he disagree that the proposed surgery is reasonable and necessary to treat that condition.

Rather, the medical benefits issue in this case generally comes down to consideration of the contrasting opinions of Dr. White and Dr. Davis as to whether the hip condition is causally related to the July 19, 2014 work injury. In considering the opinions of Dr. White and Dr. Davis, the ALJ finds the opinion of Dr. White, as further supported by the medical records from Dr. Aschberger, Dr. Huldin and Dr. Bazaz and the Claimant's MRI imaging, to be more persuasive than the opinion of Dr. Davis in this case.

The Claimant repeatedly and consistently described her mechanism of injury as occurring when she was assisting a patient with a transfer from a toilet to a wheelchair and she was lifting and twisting as this occurred. While Dr. Davis opined that he does not believe the mechanism of injury is consistent with her current hip condition, Dr. White opined that rotation and twisting motions reproduced in his office were causing pain and that the main source of the pain was coming from the hip. Dr. White further opined that this was a "very complex patient" and he thought "the hip has been part of the problem all along."

Over the course of the medical treatment, there were indications of pain that may have been coming from the hip, but that the Claimant associated with the low back pain, as did some of her treating physicians for quite some time. As early as August 13, 2014, less than one month after the work injury, there were complaints of shooting pains to the right groin. The Claimant testified credibly that at first she was unable to distinguish her low back pain from her groin pain and did not realize that they were two separate and distinct pains. She testified that she was experiencing the low back and hip region pain the whole time after the work injury, including the popping and catching, although it worsened over time. It was only after the diagnostic hip injection that the Claimant was fully able to appreciate that she was experiences separate pain from two locations and it was not all emanating from the same generator. The Claimant's testimony in this regard is consistent with the medical records. It is also important to note that for the first few months of treatment after her work injury on July 19, 2014, the focus of the treatment was on her shoulder, leading up to right shoulder surgery on September 24, 2014. In

fact, on October 3, 2014, Dr. Aschberger even noted that while he recommended injections for therapeutic and diagnostic purposes, they would have to be delayed until after the Claimant recovered from the postoperative pain from her shoulder surgery. Therefore, bilateral SI joint injections were not performed until February 18, 2015 and the right hip injection was not performed until March 9, 2015. The Claimant experienced a positive diagnostic response with both injections, with her hip injection taking her pain level from 6/10 to 1/10. These responses, in addition to the Claimant's clinical presentation and the pathology seen on the MRI prompted Dr. White to submit a request for right hip surgery on March 13, 2015.

Ultimately, based on the opinions and recommendations of Dr. White, the proposed right hip surgery is found to be reasonable, necessary, and causally related to the July 19, 2014 work injury .

ORDER

It is therefore ordered that:

1. The right hip surgery recommended and requested by Dr. White is reasonable and necessary to treat the Claimant's right hip condition, and is causally related to the July 19, 2014 work injury.

2. Respondent's liability shall specifically include medical treatment consisting of the above surgery, and all related medical treatment required for appropriate preparation for the surgery, as well as reasonably necessary post-surgical follow-up treatment per the Division of Workers Compensation Medical Fee Schedule.

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 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 petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 16, 2015

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

ISSUES

The issues for hearing as determined at the outset of the hearing were:

1. Compensability; and,

2. Medical benefits.

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer on June 25, 2014 and had been so employed for approximately 5 years.

2. The claimant's position was photo specialist. Her duties included checking out customers, bagging purchases, processing film, cleaning up, and cashier.

3. On June 25, 2014 the claimant started her shift at 2 or 3 pm. The claimant was injured while working at approximately 3:20 pm.

4. Just before the time of her injury the claimant was scheduled to be on the register and was so engaged. The claimant began to check out a customer. She placed a bag on the counter to facilitate loading the bag.

5. The claimant carries two liter bottles by holding onto the spout and then lifting the bottle.

6. Upon picking up a two liter plastic bottle of soda that was being purchased the claimant felt immediate pain in her right shoulder. She continued bagging using her left hand and arm to assist.

7. The claimant then went to the manager.

8. More specifically, the claimant reached to get the bottle from the countertop, grabbed the bottle around the cap and lifted it up to bag it. The claimant reached out to her side to perform this action.

9. Upon lifting the bottle she felt burning and sharp pain in her right shoulder. She didn't know what it was.

10. She then immediately told the manager, Mr. Young, because she needed a replacement.

11. The claimant filled out an incident report and then Mr. Young called HR.

12. The claimant was sent to an urgent care clinic at first but she was then told to come back and was sent to the Emergency Department because the workers' compensation doctors were not available at the time, which was around 4:45 pm.

13. The claimant had no prior pain in her shoulder and had suffered no significant prior right shoulder injury. The claimant cannot think of anything else that would cause the pain.

14. At the ED the claimant was provided a sling and underwent x-ray examination.

15. The following day the claimant went to the WC doctor. She was then referred to an orthopedic surgeon, Dr. Simpson. The claimant was diagnosed with a partial tear. She was set up with some physical therapy for 6-8 visits. This provided the claimant with some relief but she was still unable to work with her right arm.

16. The claimant was then informed that her worker's compensation claim had been denied.

17. Currently, there days where the claimant's shoulder aches; she cannot put her arm up behind her back; and, she can't reach. She can no longer lift her granddaughter with her right arm. She holds her right arm down by her side. She asserts she has compensated for the loss of use of her right arm and would be willing to try physical therapy again.

18. The only witness to the incident was the unknown customer.

19. The ALJ finds the claimant to be credible.

20. Dr. Peterson, the claimant's authorized treating physician has opined that the claimant aggravated or exacerbated a previously asymptomatic supraspinatus tear.

21. Dr. Simpson, the orthopedic surgeon, has opined that the claimant exacerbated her pre-existing condition.

22. Dr. Hall conducted an IME and has opined that the claimant's mechanism of injury is consistent with a work related injury.

23. All of the medical opinions from these physicians indicate that the claimant is still in need of treatment. Dr. Peterson indicates that he placed the claimant at MMI solely because the claim was denied by the respondent-insurer. Thus, he in essence found her to be at maximum *administrative* improvement rather than maximum *medical* improvement.

24. The ALJ finds the opinions and analyses of Dr. Peterson, Dr. Simpson, and Dr. Hall to be credible and persuasive with respect to causation and need for further medical treatment.

25. The ALJ finds that the claimant has established that it is more likely than not that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

26. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to reasonable, necessary, and related medical care to cure or relieve her from the effects of her injury.

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 her 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 her 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 that the claimant is credible.

12. The ALJ concludes that the opinions and analyses of Dr. Peterson, Dr. Simpson, and Dr. Hall are credible and persuasive with respect to causation and need for further medical treatment.

13. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to reasonable, necessary, and related medical care to cure or relieve her from the effects of her injury.

ORDER

It is therefore ordered that:

1. The claimant's claim is compensable under the Workers' Compensation Act of Colorado.

2. The respondent-insurer is responsible for payment of the claimant's medical care to cure or relieve her from the effects of her industrial injury, including care already provided to date.

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: December 8, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-958-741-02

ISSUES

I. Whether Claimant sustained a compensable injury to his left leg on August 6, 2014.

II. If Claimant did sustain a compensable left leg injury, whether he established by a preponderance of the evidence that he is entitled to an award of medical benefits.

FINDINGS OF FACT

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

1. Claimant is a long time employee of the Pueblo Police Department. He has worked as a patrol officer for the City of Pueblo for approximately 25 years.

2. In order to carry out his routine duties, Claimant is required to get in and out of a patrol car multiple times a day.

3. On August 6, 2014, as Claimant was exiting his patrol car to investigate a burglary, he injured his left leg. Claimant explained that his patrol vehicle sits very low to the ground. Consequently, Claimant must put extra weight on his left leg in an effort to get up from the seat. According to Claimant's testimony, there was sand and gravel on the ground where he had stopped to exit his car on August 6, 2014. Afraid that he would slip while standing up, Claimant testified that he extended his left leg further in front of himself away from the sand and gravel. In the process of standing, Claimant felt a tearing and burning sensation in the back of his leg, above his knee. Claimant testified that he had no prior injuries to the left leg. He further testified that he had no restrictions or requirements for modified duty as a consequence of prior conditions involving the left leg. Based upon the record presented, the ALJ finds no supporting evidence to refute Claimant's testimony regarding the condition of his left leg or his full duty work status prior to the incident in question.

4. Claimant reported his injury and was referred to Centura Centers for Occupational Medicine (CCOM) where he was evaluated by physician Assistant (PA), Steven Byrne on August 7, 2014. Claimant's Health and Injury History form provides the following description of the injury: "stepping out of car, felt a tearing sensation, my left hamstring (leg)". This form also indicates that the physical requirements of Claimant's job include getting "in and out of vehicle, arrest violent offenders". There is

no description of the patrol car riding low or any other obstacle, i.e. sand Claimant testified he encountered while exiting the patrol car documented in the CCOM intake form. Although he did not include the detail that his injury occurred because his patrol vehicle sat low to the ground and he was trying to avoid slipping on sand, Claimant's testimony regarding the mechanism of injury has been consistent throughout the pendency of this case. Based upon the totality of the evidence presented, the ALJ finds that Claimant had little space in which to write down the details of what happened. Moreover, the evidence offered persuades the ALJ that Claimant likely was not questioned by either PA Byrne or Dr. Merchant about the specifics of how the injury occurred. Rather, both PA Byrne and Dr. Merchant felt that Claimant's objective clinical findings were consistent with Claimant's described mechanism of injury (MOI). Consequently, the ALJ finds Claimant would have no reason to think he needed to elaborate and discuss the physical characteristics of his patrol vehicle or the specifics of exactly how he stepped when he was raising himself from the seat of his car. Because this injury was personal to Claimant, the ALJ is also finds it reasonable that he would have reason to recall the events surrounding the injury, i.e. that the car sat low and that he was trying to avoid sand and gravel in the area while rising up from a seated position.

5. Claimant was first seen by Dr. Merchant on August 12, 2014, after his initial visit with PA Byrne. During Dr. Merchant's examination Claimant described the mechanism of injury as exiting his patrol car and that he suffered immediate pain and tenderness in the posterior of his thigh secondary to this event. Dr. Merchant's examination of the patient showed no swelling and only some minimal tenderness on the posterior region of his thigh. Claimant was returned to regular duty without restriction by Dr. Merchant.

6. Subsequent evaluation showed Claimant's condition stabilized and the identified hamstring strain suffered by Claimant was resolving without incident. The only issue was difficulty Claimant had in extending his leg fully. See, deposition of Dr. Merchant, page 21 lines 4-23.

7. Claimant was referred for orthopedic evaluation by a Dr. Alex Romero. Dr. Romero found no objective evidence suggesting significant injury and recommended Claimant continue his usual activities. Claimant was discharged at maximum medical improvement (MMI) effective September 23, 2014 with no impairment. *Id., page 29 lines 15-25.*

8. Claimant's testimony regarding the mechanism of injury is consistent, credible and convincing. The ALJ credits Claimant's testimony that his patrol vehicle rode low to the ground and that he was trying to avoid sand and gravel while exiting his car to complete an investigation when he injured his left leg. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left leg on August 6, 2014 while exiting his vehicle to investigate a burglary in the course of his employment.

9. Based upon the evidence presented, the ALJ finds the care Claimant received at

CCOM and through their referrals, reasonable, necessary to relieve him from the effects of his acute left hamstring strain. Moreover, the need for the care received from CCOM and the referrals made by providers there was directly related to Claimant's August 6, 2014 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.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. 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 testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address 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).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, 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 to establish compensability. *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). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant sustained an injury to his left leg "arising out of" his employment.

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 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. § 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). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. 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).

G. The totality of the evidence presented in this case persuades the ALJ that Claimant has established the requisite causal connection between his work duties and his left leg injury. In concluding as much, the ALJ agrees with Claimant that Respondent's compensability defense rests largely on the suggestion that Claimant is not credible because he was able to recall details surrounding the injury are not evident in the intake forms he completed at CCOM. As found above, the ALJ is not persuaded. Furthermore, the ALJ is not convinced by Respondents suggestion that there is nothing unique about the patrol car in question and as such Claimant's injury is not compensable because it could have happened by stepping out of any car outside of work. Merely because Claimant was engaged in activity, specifically rising from a seated position, which is performed many times a day outside of work does not compel a finding that Claimant's injury is not work-related. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the evidence presented persuades the ALJ that Claimant's employment caused him to suffer an acute left hamstring injury because it obligated him to exit a low riding vehicle on terrain possessing a dangerous defect likely to cause injury if un-avoided under the circumstances presented. In keeping with the decision announced by the Court in C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the ALJ concludes that Claimant's left hamstring strain probably would not have occurred "but for" the obligations and conditions of Claimant's employment. Contrary to Respondent's assertion, it was not the simple fortuity of being at work that Claimant contends makes his injury compensable.

H. Finally, the ALJ finds Respondent's argument that the current claim is akin to the situation presented in *Alexander v. Emergency Courier Services*, W.C. No. 4-917-156 (ICAP October 14, 2014) misplaced. In *Alexander* the claimant was simply stepping while carrying coolers he used to make deliveries as a part of his job. He felt a pop in his knee when his foot struck the ground. The ALJ resolved the issue of whether a causal connection existed between the claimant's work and his injury by determining that the claimant's pre-existing condition was the direct cause of the injury. Conversely, in this case there is a dearth of evidence suggesting that Claimant's hamstring injury was caused by a pre-existing condition. Rather, the balance of the persuasive evidence supports a conclusion that there is a direct connection between Claimant's obligation to exit his low riding vehicle in an area covered by sand to investigate a burglary call and his left leg injury. Simply put, Claimant's obligation to complete his investigation combined with condition of his car and the ground directly caused his injury. As noted above, the mere fact that Claimant had performed this maneuver many times without injury prior does not negate the causal connection between his work activity and his injury on August 6, 2014. Consequently, the ALJ finds that Claimant has established that his injury arose out of his employment. The injury is compensable.

Medical Benefits

I. 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 his 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).

J. As found here, the evidence demonstrates that Claimant's medical care as provided at CCOM and their referrals, including the orthopedic evaluation performed by Dr. Romero was reasonable, necessary and related to his acute left hamstring strain sustained August 6, 2014. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of the sprain. Additionally, the specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's ongoing difficulty in extending his left knee and the persistent popping in the left leg. Consequently, Respondents are liable for that medical treatment reasonably necessary to cure and relieve Claimant from the effects of his compensable left leg injury.

ORDER

It is therefore ordered that:

1. Claimant's August 6, 2014 left leg injury is compensable.

2. Respondent shall pay for all authorized, reasonable, necessary and related medical treatment, resulting from Claimants August 6, 2014 left leg injury, including but not limited to the care provided or directed by providers at CCOM including PA Byrne, Dr. Merchant. This order extends to the care provided by those referrals made by providers at CCOM, including Dr. Romero.

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: December 8, 2015

/s/ Richard M. Lamphere

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that the right total knee arthroplasty recommended by Rocci Trumper, M.D. is reasonable, necessary, and causally related to the April 5, 2014 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer at one of Employer's stores.

2. On April 5, 2014 Claimant was assembling resin tables on Employer's east patio. Claimant caught his right foot on the middle leg of the table, twisted his right knee, and had immediate sharp pain.

3. Claimant had pain and swelling in his right knee afterwards but hoped the pain and swelling would resolve. Claimant did not immediately report the incident or seek treatment. After a couple of weeks his pain and swelling persisted and Claimant sought medical treatment.

4. On April 23, 2014 Claimant was evaluated by Rocci Trumper, M.D. at the Orthopedic & Spine Center of the Rockies. Claimant reported twisting his knee several weeks ago and having difficulty getting through his workday. Claimant reported pain in the medial aspect of his knee with some activity-related swelling and no improvement over the past few weeks. Dr. Trumper noted that x-rays showed early to moderate degenerative changes in the medial compartments bilaterally. Dr. Trumper suspected Claimant might have a right medial meniscal tear in addition to degenerative changes in the medial compartments in both knees. Dr. Trumper injected Claimant's right knee and noted if no improvement he would consider an MRI scan. *See* Exhibit 4.

5. On April 28, 2014 Claimant reported the injury to Employer. Employer filled out an Employer's First Report of Injury and referred Claimant for treatment.

6. On April 29, 2014 Claimant was evaluated by Robert Nystrom, D.O. Claimant reported working at a table with flowers on it when he turned to the right and caught his right toe on the table leg, twisted his knee, and had immediate pain. Claimant reported the pain gradually worsened over the next week or so and that he went to see Dr. Trumper. Claimant reported no previous injuries to his knees. Dr. Nystrom assessed knee strain and ordered an MRI of Claimant's knee. Dr. Nystrom agreed with Dr. Trumper that Claimant probably had a medial meniscus tear and an MCL sprain. Dr. Nystrom noted he would most likely refer Claimant back to Dr. Trumper once he had the MRI results. *See* Exhibit 2.

7. On May 6, 2014 Claimant underwent an MRI of his right knee that was interpreted by Russell Fritz, M.D. Dr. Fritz provided the impression of complex tear of the medial meniscus communicating with a parameniscal cyst along the anteromedial joint line and arthrosis with areas of cartilage loss and chondral fissuring in the medial and lateral compartments. *See* Exhibit 3.

8. On May 7, 2014 Claimant was evaluated by Rosalinda Pineiro, M.D. Dr. Pineiro assessed knee strain, arthritis, and meniscus medial derangement. Dr. Pineiro noted that Claimant's tear was complex and explained the MRI to Claimant. Dr. Pineiro noted that Claimant's right knee had swelling and tenderness as well as limited range of motion and weakness. Dr. Pineiro referred Claimant to Dr. Trumper. *See* Exhibit 2.

9. On June 4, 2014 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that the MRI revealed a medial meniscal tear, along with some early degenerative changes. Dr. Trumper noted that Claimant had a symptomatic medial meniscal tear in the right knee that failed to respond to conservative treatment and opined that a knee arthroscopy was a reasonable option. *See* Exhibit 4.

10. On August 15, 2014 Claimant underwent right knee surgery performed by Dr. Trumper. Dr. Trumper's postoperative diagnoses were degenerative medial meniscal tear right knee, grade 3 chondral changes of medial femoral condyle, and grade 4 chondral defect lateral femoral condyle right knee. *See* Exhibit 4.

11. On October 1, 2014 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that Claimant was making slow progress and Dr. Trumper injected Claimant's right knee to see if it would help jump-start the recovery progress. *See* Exhibit 4.

12. On November 3, 2014 Claimant was evaluated by Dr. Trumper. Dr. Trumper again noted that Claimant was making slow progress. Dr. Trumper opined that clinically Claimant's knee looked reasonably good but noted that at the time of arthroscopy Claimant had some grade 4 chondral changes in the lateral femoral condyle and he suspected the slow progress was related to that. Dr. Trumper noted they would try a series of hyalgan injections as a reasonable next stop and opined that if Claimant did not improve enough the only other option would be to consider a knee replacement. *See* Exhibit 4.

13. Claimant underwent three separate hyalgan injections without improvement.

14. On January 12, 2015 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted Claimant was still symptomatic and having trouble with an increasingly antalgic gait. Dr. Trumper opined that the only other option would be to consider a knee replacement. Dr. Trumper opined that Claimant had essentially failed all other conservative treatment and that the knee replacement was Claimant's only remaining option. *See* Exhibit 4.

15. On March 9, 2015 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that Claimant had not improved with oral anti-inflammatory, knee arthroscopy, or injections. Claimant reported that he did not feel that his symptoms were bad enough where he wanted to consider a knee replacement. *See* Exhibit 4.

16. On May 18, 2015 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that Claimant was continuing to struggle with the right knee. Dr. Trumper noted that Claimant's history and exam suggested that most of Claimant's symptoms were related to his degenerative changes and that Claimant had grade 4 changes on the lateral femoral condyle. Dr. Trumper opined that Claimant's only reasonable option was a knee replacement. Claimant wanted to get the knee replacement set up. *See* Exhibit 4.

17. On July 9, 2015 Claimant underwent an Independent Orthopedic Evaluation performed by I. Stephen Davis, M.D. Claimant reported assembling tables at work for the garden section when he caught his foot and twisted his right knee with immediate pain and swelling. Claimant reported no prior right knee problems before the work incident and that he held a very active and athletic lifestyle including bicycle touring, golfing, playing with grandchildren, fishing, and maintaining his home. Claimant reported being unable to do the activities presently due to his right knee complaints. *See* Exhibit F.

18. Dr. Davis opined that Claimant sustained an injury to his right knee that was causally related to the April 5, 2014 on the job incident. Dr. Davis opined that the injury was an aggravation of right knee joint symptoms due to a degenerative tear of the medial meniscus and pre-existing osteoarthritis. Dr. Davis agreed that a right total knee arthroplasty as recommended by Dr. Trumper was appropriate based on complaints and examination findings. Dr. Davis opined that the meniscus tear was reasonably considered as causally related to the on the job incident but that Claimant's osteoarthritis was not causally related. Dr. Davis opined that Dr. Trumper's recommendation for right total knee arthroplasty was for treatment of the osteoarthritis and that the operation was not causally related to the subject on the job incident. *See* Exhibit F.

19. Dr. Davis testified at hearing consistent with his report. Dr. Davis opined that Claimant likely suffered a medial meniscus tear on April 5, 2014 but that it was likely an acute tear to an already degenerative meniscus. Dr. Davis reiterated that Claimant's moderate to severe degenerative knee joint disease pre-existed April 5, 2014 and that someone with grade III or IV osteoarthritis similar to Claimant's would normally have pain, swelling, popping, and locking. Dr. Davis opined that there was no objective evidence to show that the April 5, 2014 incident caused any acceleration of Claimant's knee condition and that the total knee replacement was not causally related because it was treating the pre-existing osteoarthritis. Dr. Davis opined that Claimant's baseline condition before the work incident was severe longstanding osteoarthritis and

that his baseline condition after the injury continues to be severe longstanding osteoarthritis.

20. Dr. Trumper testified by deposition. Dr. Trumper opined that a meniscal tear can, no question, be the result of a twisting injury. Dr. Trumper noted that while performing surgery they noted the meniscal tear as well as arthritic changes in the inside part of Claimant's knee and the outside/lateral part of Claimant's knee. Dr. Trumper opined that it would be believable if Claimant reported that he was functional prior to the work injury despite the level of arthritis in Claimant's knee. Dr. Trumper opined that he has seen a lot of patients with degenerative osteoarthritis in their joint which is minimally symptomatic or asymptomatic. Dr. Trumper opined that a twisting injury could cause the pathology in a knee to become more symptomatic and less functional and that any injury could make arthritic symptoms become symptomatic. Dr. Trumper opined that based on Claimant's history, he believed the twisting injury in this case caused Claimant's osteoarthritis to become symptomatic. Dr. Trumper opined that Claimant's meniscal tear was essentially gone at this point but that Claimant remained symptomatic and that it the exacerbation of arthritis was the source of Claimant's pain.

21. Dr. Trumper opined that a twisting injury can advance or accelerate arthritis or a degenerative condition, and that exacerbation of Claimant's arthritis occurred in this case. Dr. Trumper opined that all conservative options had been exhausted at this point and that the right total knee replacement was reasonable and necessary. Dr. Trumper opined that the need for the total knee replacement was due to the exacerbation of Claimant's pre-existing osteoarthritis caused by the work injury. Dr. Trumper opined that an injury can lead to needing a knee much sooner than if you hadn't had an injury, and that is what happened in Claimant's case.

22. Dr. Trumper opined that he had lots of patients who have had grade 4 arthritis but have been asymptomatic. Dr. Trumper noted patients with knees similar to Claimant's knee who become asymptomatic after surgery to repair the meniscal tear even though he knows they have exposed bone arthritis. He opined that was actually pretty common.

23. Claimant testified at hearing that prior to the April 5, 2014 work injury, he had no history of right knee pain or limitations due to his right knee. There were no medical records presented identifying any prior pain or limitations in Claimant's right knee. Prior to the injury, Claimant was very active with bicycle riding and golfing (walking). Claimant participated in regular bicycle riding including long tours of 500 to 700 miles and golfed approximately three times per week.

24. Claimant's testimony is credible and persuasive. It is consistent with Dr. Trumper's opinion that it can be common to be asymptomatic despite underlying osteoarthritis and is consistent with a lack of medical documentation on prior right knee pain or limitations. Claimant presented openly, candidly, and is found credible. Claimant did not have pain or symptoms in his right knee prior to the April 5, 2014 work injury.

25. The opinion of Dr. Trumper is found more credible and persuasive than the opinion of Dr. Davis. Although Dr. Davis opined that someone with osteoarthritis similar to Claimant's would normally have pain, swelling, popping, and locking, Dr. Trumper is more persuasive that it is common to be asymptomatic despite osteoarthritis similar to Claimant's. Dr. Trumper is persuasive that the work injury caused an aggravation to Claimant's underlying osteoarthritis, caused it to become symptomatic, and sped up Claimant's need for a right total knee replacement.

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). Where relatedness, and/or 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). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to show, more likely than not, that the right total knee replacement recommended by Dr. Trumper is reasonable, necessary, and causally related to his April 5, 2014 work injury. Although the MRI reflects that Claimant had pre-existing and significant osteoarthritis of his right knee, the work injury on April 5, 2014 aggravated Claimant's underlying osteoarthritis, caused it to become symptomatic, and accelerated Claimant's need for a right total knee replacement. Prior to April 5, 2014 Claimant was able to work full duty without restrictions, Claimant had no pain complaints specific to his right knee, Claimant had no limitations in his right knee, and Claimant lived a very active lifestyle. Claimant's testimony is credible and persuasive that he had no prior right knee pain or limitations before his work injury. The injury, as found above, involved a twisting mechanism which caused not only a degenerative meniscus to suffer an acute tear, but it caused the underlying osteoarthritis to become symptomatic. Claimant has established that his need for a right total knee replacement is due to his work injury which significantly aggravated his asymptomatic underlying osteoarthritis and accelerated his need for treatment. Therefore, the ALJ concludes that Claimant has met his burden to show, more likely than not, that the need for a right total knee replacement was aggravated and accelerated by his work injury and that the treatment is causally related to his work injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that the right total knee arthroplasty recommended by Dr. Trumper is reasonable, necessary, and causally related to his April 5, 2014 work injury.

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

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

DATED: December 23, 2015 /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 to be determined by this decision are the following:

1. Whether the claimant has proven by a preponderance of the evidence that on August 11, 2014 she sustained an injury to her neck arising out of and in the course of her employment with the respondent-employer.

2. If so whether, the medical benefits claimant received on and after August 11, 2014, specifically treatment at the Southern Colorado Clinic, P.C., are reasonable, necessary, and causally related to claimant's August 11, 2014, injury.

Based upon the findings and conclusions below that the claim is not compensable as it did not arise out of nor occur in the course of her employment with the respondent-employer, the ALJ does not address any additional theories of liability raised in the pleadings.

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer on August 11, 2014 employed as a massage therapist. The claimant had worked for the respondent-employer for five years prior to this date. She had never made any previous workers' compensation claims. The claimant is currently a 34 year old female who is no longer employed by the respondent-employer.

2. On August 11, 2014 the claimant reported to work and had a full-day of massages scheduled. On this morning, she was complaining of constant aching, tingling, and numbness. The claimant said she suffered from tightness and her shoulders would "lock-up" on her preventing her from completing her job duties.

3. It was a practice of the respondent-employer, and specifically Dr. Robert Avila, to perform chiropractic adjustments on employees on an as needed basis. Dr. Avila admitted that it was a perk or fringe benefit of employment that employees receive free treatment, whether it is chiropractic care from him or self-administered care to include ultra-sounds. The claimant received treatment in the form of an adjustment from

Dr. Avila on August 11, 2014.

4. On August 11, 2014, Dr. Avila agreed to adjust the claimant. During the adjustment, while the claimant was lying down on her stomach, the claimant stated that Dr. Avila grasped her head from the right side with one hand while yanking her right shoulder away from head. The claimant stated that this manipulation of her cervical spine caused immediate, jarring pain and that she told Dr. Avila to stop and began to cry. She used a pillow case to wrap around her head vertically while holding up her head with the pillow case end with left hand.

5. The claimant thereafter completed a massage and at the end of the massage appointment, the claimant left the respondent-employer and went home where she attempted to rest and treat her cervical spine condition with no success. She placed herself in a C-Collar she had and used it to help brace her neck, along with a towel. The claimant eventually went to Parkview Medical Center in the early morning hours of August 12, 2014. She reported to treating staff that she was suffering from "right-sided neck pain after undergoing spinal manipulation by chiropractor." Her examination revealed neck tenderness. She was told to see her primary care physician for an MRI to rule-out a disc bulge. She was prescribed hydrocodone and diagnosed with a cervical strain.

6. On August 12, 2014, the claimant made her first report of injury to Office Manager Kellie Avila.

7. The claimant did not return to work for over one week.

8. On August 12, 2014, the claimant went to CCOM in Pueblo, CO and began treatment with her ATP Dr. Terrance Lakin.

9. The ALJ finds that the claimant's taking advantage of free chiropractic care create a mutual benefit for the employer and the employee.

10. The ALJ finds that, assuming arguendo that the claimant suffered an injury at the hands of Dr. Avila, such injury did not arise out of nor occur in the course of her employment with the respondent-employer.

11. The ALJ finds that the claimant was obtaining healthcare from Dr. Avila outside of work. She was not on the clock at the time her treatment occurred, and the claimant testified she was not seeing patients or working at the time this treatment occurred. The claimant was not told by the respondent-employer to obtain this treatment on August 11, 2014, and it was not required for her to see Dr. Avila to be able

to work that day or to perform any work for the respondent-employer that day. This is therefore not an injury that arises out of and in the course of the claimant's employment.

12. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury on August 11, 2014 arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the findings as unpersuasive. *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; a witness' bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin 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. In this regard, there is no presumption that injuries which occur in the course

of a worker's employment arise 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). The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms, or that the employment aggravated or accelerated a preexisting condition. Instead, the appearance of symptoms may be the logical and recurrent consequence of a preexisting condition *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985). As noted in *Martinez v. Monfort, Inc.*, W.C. No. 4-284-273 (ICAO August 6, 1997), "The fact that the claimant's job duties may have intensified her pain does not compel a different result because the ALJ was persuaded that it is the underlying condition which prevents the claimant from returning to work." *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO October 27, 2008), holds that because claimant's symptoms arise after the performance of a job function a causal relationship based on temporal proximity is not established. The panel in *Scully* noted, "[C]orrelation is not causation," and a coincidental correlation between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and her work sufficient to prove compensability. To establish a compensable injury the claimant must prove to a, "reasonable probability" that there is a causal connection between the need for treatment and the employment. *Morrison v. Industrial Claim Appeals Office*, 760 P.2d 654 (Colo. App. 1988).

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

6. The question of whether the 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).

7. Under the 'dual purpose' doctrine, an injury suffered by an employee performing acts for the mutual benefit of the employer and the employee is compensable. *E.g., Deterts v. Times Publishing Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976). This doctrine has been applied in cases where claimant sustained an injury as

claimant conducted some personal business or activity that also involved an errand for employer. For example, in *Capalety v. The Humane Society of the Pikes Peak Region*, W.C. No. 4-232-993 (October 24, 1996) the ICAO affirmed an award of benefits where claimant was injured on his lunch hour after conducting some personal business at the courthouse. On the way to the courthouse to tend to his personal affairs, the claimant had stopped at another office to check for subpoenas in connection with his employment. Because the claimant's trip during his lunch hour had the dual purpose of benefitting both his employer and him, the accident that occurred while returning to the office was compensable. *Shirzadian v. University of Colorado/Denver*, W. C. No. 4-619-435 (February 13, 2006) In order for the 'dual purpose' doctrine to apply, there must be in fact a purpose of the activity that benefits the employer and claimant. It is not sufficient that claimant may be happy because of the activity. The employer needs to practically benefit from the action causing the alleged injury *Hanson v. Fairfield & Woods PC*, W.C. No. 4-892-321-01 (July 23, 2013). In *Hanson*, ICAO reversed the ALJ's decision finding the claim's injury compensable, holding that finding the activity that lead to the injury made the employee happier does not trigger or implicate the 'dual purpose' doctrine to make the claim compensable. The ICAO warned in its ruling to avoid extending the 'dual purpose' doctrine to cases where there was no connection to the course and scope of employment, such as cases where claimant was injured shopping for clothes to wear at work. ICAO stated, "In order for fringe benefit to be considered a part of employment, there must be shown a substantial nexus between employment and the use of the benefit," such as direction by the employer to engage in the activity, and if this nexus does not exist, the activity is extraneous to any fringe benefit offered to claimant. *Hanson*, supra. If the action of an employee is for the employee's sole benefit, the injury does not arise out of and in the course of employment. *Hanson*, supra; citing *Brogger v. Kezer*, 626 P.2d 700 (Colo. App. 1980). In *Zamecnik v. Bradsby Group*, W.C. No. 4-684-646 (April 9, 2007), the mere fact that the employer reimbursed claimant the cost of parking or traveling to work did not mean an injury while walking from a parking lot to the employer's building was compensable, because the employer did not require where the employee must park or required the employee to take a certain mode of transportation to work. Citing this case, ICAO stated, "This absence of direction by the employer led to the conclusion there was no nexus between the employment and the process of arriving at work." *Hanson*, supra. In *Hanson,* supra, the employee's provision of a parking pass to claimant that allowed her to park in the employer's building, thus making her happier, was not directed or controlled by the employer, was for the sole benefit of claimant, and the injury that occurred while claimant was obtaining the parking pass from her employer was found not compensable.

8. The ALJ concludes that any possible injury suffered by the claimant arising out of the events of August 11, 2014 did not arise out of nor occur in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

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

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

DATE: December 4, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues presented for hearing were compensability, medical benefits, temporary total disability benefits and average weekly wage. The parties stipulated to an AWW of $501.46.

FINDINGS OF FACT

1. The Claimant was employed as a custodian in maintenance for the Employer on September 25, 2014. Her job required her to mop, sweep, change light bulbs and haul bags of trash to the dumpster.

2. At about 7:25 p.m. Claimant testified that she was mopping inside the warehouse break room shortly before her work shift ended. Her mop hit a white table leaning against a larger, brown rectangular table that was propped against a wall. This caused the white table to fall onto her left foot in turn knocking her over so that she hit her right shoulder against a nearby upright table then fell to the floor.

3. Claimant testified that she initially was shaken up by the fall, but she got up, used her left hand to pick up the white table and prop it up back to where it had been leaning against the brown table.

4. Claimant finished mopping the break room floor then went to report the injury to her supervisor, Amber (Powell) Samora. Ms. Samora, however, was not at her desk. Because Claimant was not paid overtime she punched out, as required, and left the premises. Employer's records show Claimant punched out at 7:43 p.m.

5. Claimant testified she did not know how to use the Employer's phone, and so could not page her supervisor after the injury. Oscar Franco, assistant store manager for Employer, testified he had not taught Claimant how to use the Employer's phone system, but still felt she "could have" contacted Ms. Samora before she left work.

6. After she arrived home, Claimant took off her shoe and then first noticed her foot was sore. She did not know she was injured until she got home. At 8:20 p.m., she left a message for Fred Mecillas, her direct supervisor, who was not then at the store. Claimant then called the store and reached the manager on duty, Amber Samora (formerly Powell). Ms. Samora wanted to know why Claimant left before reporting the incident. Eventually, about two hours later, an Employer representative called and told her to go to the emergency room for treatment.

7. Around 8:32 p.m., directly after speaking to Claimant, Ms. Samora went to the break room. Nothing looked out of place to her.

8. Mr. Franco also took photos of the break room and he testified about the position of the tables located in the break room. He did not believe that Claimant's work accident could have happened as she described based upon his knowledge of the break room setup.

9. After considering the conflicting and confusing testimony of the various witnesses concerning Claimant's accident, the ALJ finds that a table fell onto Claimant's foot as she described and she fell into another table and onto the floor.

10. Claimant went to Longmont United Hospital Emergency Department after speaking with the Employer representative. Dr. Leslie Armstrong documented a history and physical exam consistent with multiple areas of contusion and muscular strain status post fall. Dr. Armstrong noted limited range of motion in Claimant's right shoulder, no tenderness to palpation over bony structures and mild tenderness to palpation over the deltoid muscle. Claimant had normal neck range of motion, and small left dorsal foot contusion with no swelling. Dr. Armstrong diagnosed a right shoulder strain and left foot contusion. Dr. Armstrong recommended that Claimant remain off work two to three days and to follow up with a workers' compensation doctor. Claimant was sent home with her arm in a sling. Claimant did not report neck pain to the emergency room staff.

11. The next morning, September 26, 2014, Claimant filled out an injury report with Mr. Franco, assistant manager, and reported an injury to her left foot and right shoulder. She did not report striking her head nor did she report neck pain.

12. The Employer referred the Claimant to Workwell for medical treatment. William Ford, a nurse practitioner, examined the Claimant and noted limited range of motion of the right shoulder in all planes and significant shoulder pain with strength testing. Claimant reported pain in the left dorsal foot and Mr. Ford noted swelling in the dorsal area, but no bruising. The Claimant reported, for the first time, upper back and neck pain. The PA took Claimant off work and stated, "The cause of this problem is related to work activities."

13. At a follow-up visit September 29, 2014 Claimant's condition was assessed as contusion of the left foot and back; strain of the right shoulder and cervical strain.

14. Claimant saw Dr. William Alexander at Workwell on October 20, 2014. Claimant posterior neck, but no swelling was observed. Claimant reported that her left foot pain had resolved. Dr. Alexander recommended that Claimant continue physical therapy and get an MRI of her cervical spine.

15. Mr. Ford evaluated the Claimant again on November 3, 2014, at which time she did not complain of any left foot or ankle pain. She complained only of pain in her neck and right shoulder.

16. On November 13, 2014, the Claimant, for the first time, complained of pain over the left lateral ankle to Mr. Ford. Mr. Ford also noted that Claimant had a cervical MRI which showed multilevel degenerative changes, and degenerative stenosis.

17. On December 1, 2014 Dr. Alexander requested MRIs of Claimant's left foot and right shoulder.

18. On December 18, 2014, an MRI of Claimant's right shoulder showed degenerative disease of the acromioclavicular joint, a tear of the supraspinatus, and osteophytes

19. The MRI of Claimant's left ankle, which occurred on December 17, 2014, showed edema around the anterior talofibular ligament, suggesting sequela of a high-grade sprain and/or partial tear.

20. Dr. Alexander referred Claimant to Dr. Gregg Koldenhoven at Front Range Orthopedics & Spine for evaluation and treatment for her right shoulder and left ankle injuries. Dr. Koldenhoven examined the Claimant on December 29, 2014 and noted swelling of the right shoulder, painful movements and a positive impingement test. He also noted swelling, decreased range of motion and painful movement of the left ankle, along with evidence of instability.

21. On January 20, 2015, Claimant also was evaluated at Front Range Orthopedics by Dr. Robert Fitzgibbons for her right shoulder injury. Dr. Fitzgibbons recommended arthroscopic repair of Claimant's rotator cuff and prescribed aggressive physical therapy.

22. On March 6, 2015, Dr. Mars, a provider at Workwell, imposed work restrictions of 10 pounds maximum with occasional lifting and/or carrying; no squatting or bending. Dr. Mars noted that Claimant's complaints seem out of proportion with the findings, and she exhibited non-physiologic findings s well.

23. Claimant testified at hearing that as a result of the work incident of September 25, 2014, she had injuries to her left ankle and right shoulder, for which she requested treatment, including surgery. Claimant testified that as a result of the work incident, she also injured her neck, upper back, and had persistent headaches.

24. On February 10, 2015. Dr. Kathleen D'Angelo evaluated the Claimant at the request of Respondents. Dr. D'Angelo supplemented her initial report on March 25, 2015 after additional materials were provided, including medical records and a surveillance report.

25. Dr. D'Angelo opined that Claimant's right shoulder problems are degenerative and not due to an acute injury. Dr. D'Angelo opined that Claimant did not sustain an acute rotator cuff tear nor did Claimant aggravate a pre-existing rotator cuff tear. Dr. D'Angelo stated that she did not "believe it's an aggravation because I'm not seeing anything within the MRI nor did I see anything on her evaluation, particularly in

the early evaluations, that would lead me to believe there was intra-articular acute damage." Dr. D'Angelo did not further explain her opinions concerning lack of intra-articular acute damage and why that would mean Claimant could not have aggravated a pre-existing degenerative shoulder condition when she fell.

26. Dr. D'Angelo also opined, and the ALJ agrees, that Claimant did not sustain an injury to her cervical spine nor are the left ankle MRI findings related to or aggravated by the work incident.

27. Claimant sustained a contusion to her foot, and she reported resolution of her foot pain on October 20, 2014. There is no credible evidence that Claimant's left ankle condition or need for any surgery to her left ankle is related to the work accident.

28. There is no persuasive evidence which supports Claimant's testimony that she suffered injuries to her upper back and neck as well as ongoing headaches as a result of the September 25, 2014 incident. Claimant had normal neck range of motion in the emergency room on September 25, 2014 and did not report any pain in her neck or upper back at that time.

29. The ALJ finds that although some of Claimant's shoulder pathology was preexisting, she aggravated the pre-existing condition to produce the need for medical treatment when she fell at work on September 25, 2014. There was no persuasive or credible evidence to suggest that Claimant had right shoulder symptoms prior to September 25, 2014, or that she had sought treatment for similar symptoms in her right shoulder in the past.

30. Claimant has not returned to work since her work injury, and continued to have work restrictions. Employer has not offered any modified work within Claimant's restrictions. As such, Claimant is entitled to temporary disability benefits beginning September 26, 2014, less any applicable offsets, based on the stipulated AWW of $501.46.

CONCLUSIONS OF LAW

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

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

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

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

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

4. A 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. A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. The evidence presented in this case consisted primarily of conflicting testimony concerning whether the Claimant indeed injured herself in the manner she described. After carefully considering and weighing the evidence presented, the ALJ concludes that Claimant proved a table fell onto her left foot while she mopped the break room in the course and scope of her employment. The ALJ credits Claimant's testimony regarding the table falling onto her foot as credible. However, the Claimant has failed to prove that the ongoing need for treatment of her left *ankle* is related to the industrial accident. The Claimant received reasonable and necessary conservative treatment for her left foot contusion and reported resolution of her foot pain on October 20, 2014. The left ankle pain surfaced much later as referenced in the medical records. The ALJ is not persuaded that the table falling on Claimant's foot somehow caused a high grade left ankle sprain especially in light of Claimant's reports that her left foot pain had resolved. Any request for additional medical treatment to the left foot including surgery to the left ankle is denied.

7. The Claimant has also proven that she fell into a table and onto to the floor causing an aggravation of a pre-existing degenerative condition in her right shoulder. Again, the ALJ credits Claimant's testimony as credible although the ALJ notes that Claimant has reported subjective symptoms that are out of proportion with objective findings. To date, Claimant has undergone reasonable, necessary and related conservative treatment for the right shoulder. The Claimant has proven entitlement to ongoing treatment for the right shoulder, including a rotator cuff tear repair. The ALJ is not persuaded by evidence to the contrary including Dr. D'Angelo's opinions.

8. Claimant has also alleged upper back and neck pain, and headaches, but the ALJ can find no persuasive evidence that links any of her ongoing complaints to the industrial accident. As such, Claimant has failed to prove that she sustained an upper back or neck injury or headaches as a result of the September 25, 2014 industrial accident, and any request for medical treatment to those body parts is denied.

9. Claimant is entitled to TTD benefits if her work injury causes a disability, the disability causes claimant to leave work, and claimant misses more than three regular working days. Section 8-42-105, C.R.S. The Workwell staff restricted Claimant from working beginning on September 26, 2014. Her restrictions were later modified, but never fully lifted. In addition, there was no evidence that Respondents offered modified duty work. Claimant has not worked since September 25, 2014. Claimant's inability to work was precipitated by the injury to her left foot and right shoulder. Given that Claimant is still on work restrictions and requires ongoing treatment to her right shoulder, the Claimant has proven entitlement to TTD commencing on September 26, 2014 at the stipulated AWW. Respondents are entitled to any applicable offsets.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is granted. Claimant sustained a contusion to her left foot, and an injury (aggravation of a pre-existing condition) to her right shoulder on September 25, 2014.

2. Claimant is entitled to TTD commencing on September 26, 2014, and ongoing at the stipulated AWW of $501.46.

3. Claimant is entitled to additional medical treatment for her right shoulder, including but not limited to, the rotator cuff repair surgery recommended by Dr. Fitzgibbons.

4. Any request for additional medical treatment for the left foot, headaches, neck pain or upper back is denied.

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: November 27, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

1. Whether the Claimant prove by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on September 16, 2014 while performing services arising out of and in the course of his employment with his Employer.

2. If the Claimant proved he suffered a compensable injury, whether he proves he is entitled to medical benefits

FINDINGS OF FACT

1. The Claimant is a line cook who has worked for the Employer since the summer of 2014 through recruitment from his culinary school. The Claimant's job duties generally include prep work and cooking or preparing meals from scratch.

2. The Claimant's shift would either start at 6:00 a.m. or 7:00 a.m. If the Claimant was scheduled to work a 6:00 a.m. shift, the Claimant would be working the breakfast line. As part of his job duties working the breakfast line, the Claimant would need to make bacon and eggs and would need to get baked goods into the oven. If the Claimant worked the 7:00 a.m. shift, then the Claimant would be working prep for the lunch meal. As part of his prep for the lunch meal, the Claimant would be required to set up salads, get fruit and finish up on the grill. If the Claimant was working the 7:00 a.m. shift, he would not be responsible for any breakfast prep work, including making bacon.

3. Both the Claimant and the Respondents submitted Claimant's time card for September 16, 2014. The time card reflects that the Claimant started his shift at 7:17 a.m. Consequently, on September 16, 2014, the Claimant was not working the breakfast shift; rather, the Claimant was working the shift involving lunch preparation.

4. Both the Claimant and the Respondents submitted into evidence an Incident Report dated September 16, 2014. The Incident Report is signed by the Claimant and the Claimant's supervisor, Michael Wishon. The Claimant, in his own handwriting, indicated that at approximately 6:00 a.m., he injured his left shoulder while he was taking trays of salad into the walk-in cooler. Specifically, the Claimant stated that while taking the trays of salads into the cooler, the door of the walk-in cooler closed on his left shoulder causing an injury. The incident report reflects that the Claimant reported this incident at approximately 9:00 a.m. on September 16, 2014.

5. At the hearing, the Claimant testified that his alleged injury to his left shoulder on September 16, 2014, occurred while he was taking trays of salad <u>into</u> the walk-in cooler. He testified that he had prepped the salads and placed them on metal

sheet trays and then he had to take the trays of salads and put them on racks located in the freezer. He testified that he had opened the freezer door and was in the process of putting the tray onto the speed rack but as he was doing this the freezer door started to close on him while his hands were still full with the salad trays. He testified that the freezer door caught him and hit him on the shoulder and he felt immediate pain and the pain continued throughout the day. He kept working through that pain because he just had to finish. Later that day, he went to fill out workers' compensation paperwork. Although the Claimant acknowledged that he had previously reported there were no witnesses or other employees working at the time of the incident, at the hearing he testified on cross-examination that another employee would have been working as the line cook at that time. The Claimant's testimony at the hearing is rather significantly inconsistent with other previous reports that the Claimant made about the incident to his supervisor, to an insurance company investigator and to an evaluating physician.

6. The Claimant introduced as evidence the transcription of a recorded statement that was taken of him by a private investigator dated November 26, 2014. During his recorded statement, the Claimant told the private investigator that he had injured his left shoulder at 6:00 a.m. on September 16, 2014, and that the injury occurred while he was taking trays of bacon out of the walk-in cooler, that the door to the walk-in cooler suddenly closed, striking his left shoulder. The Claimant told the private investigator that, because the injury occurred at 6:00 a.m., he was the only person in the kitchen at the time. Based on the review of the transcript of the recorded statement, the Claimant exhibited no uncertainty in describing how he believed the September 16, 2014 incident occurred.

7. At hearing, the Claimant acknowledged that, in his answers to Respondents' interrogatories dated March 27, 2015, he had stated that his left shoulder injury occurred at 6:00 a.m. on the morning of September 16, 2014, while he was taking trays of bacon and sausage out of the cooler. The Claimant also admitted that, in his answers to interrogatories, he indicated that there were no witnesses to this alleged incident.

8. The Claimant attended an independent medical evaluation with Dr. Elizabeth Bisgard on April 13, 2015. At that time, Dr. Bisgard attempted to take as detailed a statement as possible of how this incident occurred. Dr. Bisgard testified that, because her task was to make a causality analysis as to whether an injury at work caused the Claimant's left shoulder problems, it was important to take as detailed a statement as possible as to how the Claimant believes his left shoulder injury occurred. According to Dr. Bisgard's report, as well as her testimony at hearing, the Claimant stated that on September 16, 2014, he worked the early shift from 6:00 a.m. to 2:00 p.m. After he put the water on for oatmeal, he went into the walk-in cooler to retrieve eight trays of bacon and/or sausage. The Claimant described to Dr. Bisgard holding the door with his left foot and grabbing the trays with both hands. The Claimant told Dr. Bisgard that, as he turned to his left to go out the door, the door came back too fast, and that in order to protect his left hand from being slammed by the door, he leaned forward

and allowed the refrigerator door to hit the top anterior part of his left shoulder. The Claimant told Dr. Bisgard that he developed immediate and severe pain in his left shoulder and cried out in pain. The Claimant told Dr. Bisgard that he set the trays down in the refrigerator and stood in the main kitchen area for about 20 minutes because of the pain. The Claimant told Dr. Bisgard that Ray, the person coming in for the 7:00 a.m. shift, had not arrived at that point. The Claimant told Dr. Bisgard that he was eventually able to finish the setup for breakfast by using only his right hand and placing the food on the cart to set up the line. The Claimant recalled cooking bacon that morning in the oven, scrambling eggs with his right hand, and either making pancakes or waffles. The Claimant told Dr. Bisgard that he was able to make oatmeal, but he could not lift the pot off the stove, so he used a pan and scooped the oatmeal into smaller bowls. The Claimant told Dr. Bisgard when his co-worker Ray arrived at 7:00 a.m., the Claimant did not discuss the injury, as Ray had to set up his own station. At approximately 9:00 a.m., when the Claimant's supervisor, Michael Wishon arrived, the Claimant told Dr. Bisgard that he spoke with him about the injury.

9. At the hearing, Dr. Bisgard testified that the Claimant had absolutely no difficulty recalling in detail the details of the alleged incident. At no time did the Claimant tell Dr. Bisgard that he was not sure of how the injury occurred, or that he was in any way confused as to how it occurred.

10. Dr. Bisgard also testified that the Claimant has a partial tear to the left supraspinatus. Usually, the mechanism of injury for this type of injury would be a "throwing" mechanism. Dr. Bisgard testified that this type of injury is not usually caused from a strike to the shoulder, such as from a freezer door closing.

11. At the hearing, the Claimant testified that subsequent to filing the Employer's First Report of Injury, the Employer had not provided him a copy of the September 16, 2014 incident report. This ALJ finds that the first time that the Claimant received a copy of the September 16, 2014 incident report was sometime in early May 2015, after counsel for Respondents had provided counsel for the Claimant a copy of the Incident Report. As found above, Claimant's review of the Incident Report in early May 2015 was subsequent to his recorded statement with the private investigator, subsequent to answering Respondents interrogatories, and subsequent to his statements made to Dr. Bisgard.

12. The Claimant acknowledged that, on several occasions subsequent to the completion of his Incident Report, he in fact had stated that the September 16, 2014 incident occurred while he was taking trays of bacon out of the walk-in cooler at 6:00 a.m. on September 16, 2014, as opposed to what he stated in his Incident Report, which was the injury occurred while taking trays of salad into the walk-in cooler at approximately 6:00 a.m. As an explanation, the Claimant testified that he was "confused" about the details of how this incident actually occurred. However, during his testimony, the Claimant acknowledged that, in his answers to interrogatories, he stated that he experienced immediate pain on a scale of 9 out of 10 following this alleged

incident. Dr. Bisgard testified that, in 20 years of her practice, she has never experienced a patient who, following an incident, experienced immediate and sudden onset of severe pain, and was not able to describe the details of the actual incident.

13. The Claimant acknowledged that, as of September 16, 2014, he did not have any health insurance.

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).

The totality of the evidence does not support a determination that the Claimant suffered a compensable injury on or about September 16, 2014 while performing his work activities. As outlined in below, the Claimant's various inconsistent statements as to how this injury occurred contain too many discrepancies for this Judge to find that the Claimant has proven by a preponderance of the evidence that he has suffered a compensable injury on September 16, 2014:

a. In the incident report completed by the Claimant on the date of the injury, the Claimant reported that the injury occurred at 6:00. However, the Claimant's time card of September 16, 2014 reflects that the Claimant did not begin his shift until 7:17 a.m.

b. Because the Claimant's time card reflects that he did not begin his shift until after 7:00 a.m., the Claimant would have been working the salad shift. If that is the case, then another employee would have been present at the time of the alleged injury. As found above, the Claimant told both the private investigator and Dr. Bisgard that, in no uncertain terms, no employee was present at the time of this alleged injury.

c. As found above, the Claimant, in his incident report completed on September 16, 2014, described that the injury occurred as a result of him taking trays of salad into the cooler at approximately 6:00 a.m. The Claimant was then not required to provide another description of how this incident occurred until Claimant provided a recorded statement to the private investigator on November 26, 2014. At that time, the Claimant told the private investigator that the injury occurred at 6:00 a.m. taking trays of bacon out of the cooler. As found above, the Claimant consistently provided this description of how this incident occurred through late April 2015. At that time, for the first time, Claimant received a copy of the Incident Report he completed which, in his own writing, he described the incident occurring when he was taking trays of salad into the cooler.

As noted above, Claimant attempted to explain the significant discrepancies in how this incident occurred by stating that he was confused about the details. However, as found above, Claimant showed no uncertainty of the details when describing the incident to both the private investigator and Dr. Bisgard. As found above, the Claimant provided Dr. Bisgard minute details of all the events that he believed occurred subsequent to his alleged work injury.

The Claimant acknowledged that, as of September 16, 2014, he did not have health insurance. This fact raises the concern that the Claimant may have suffered an injury to his left shoulder outside of work, and then chose to report this injury as an injury that occurred at work in order to obtain medical treatment through the workers' compensation system.

Because there are concerns regarding the credibility of the Claimant's testimony and his prior inconsistent statements, the Claimant has failed to meet his burden of proving that he suffered a compensable injury while performing services arising out of and in the course of his employment in this case.

ORDER

Based on the foregoing, it is ORDERED:

1. The Claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence. As such, any remaining issues are moot.

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is therefore 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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. 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: November 30, 2015

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-966-802-01

ISSUES

- Whether Claimant proved by a preponderance of the credible evidence that the industrial injury to his left shoulder should convert to a whole person impairment.

- Whether Respondents proved by the preponderance of the credible evidence that Claimant has a 6% scheduled impairment rating.

FINDINGS OF FACT

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

1. Claimant is a 61 year old male who sustained an industrial injury to his left shoulder on August 5, 2014. Claimant testified he was injured when a picnic table he was sitting on at work collapsed. Claimant tried to catch himself with his outstretched left hand. After the fall, he stated he had pain in his left shoulder, neck, and back.

2. An MRI on August 5, 2014 revealed, among other things, a full thickness tear of the supraspinatus.

3. On January 9, 2015, Claimant underwent surgery with Mark Failinger, M.D. Dr. Failinger performed the following procedures, "Left shoulder examination under anesthesia; left shoulder arthroscopic subacromial decompression; left shoulder mini-open rotator cuff repair; left shoulder distal clavicle resection with inferior osteophyte resection; left shoulder debridement of the labrum, rotator cuff with glenoid chondroplasty; and left shoulder biopsy of crystals."

4. On February 8, 2015, Claimant returned to full duty work, and was able to perform the essential functions of his job. Claimant testified the pain in his back resolved. His current pain included pain in his shoulder, neck, and chest. with the onset of pain when he reached overhead.

5. On April 7, 2015, Claimant saw Dr. Kathryn Bird. Claimant rated his pain as two out of ten. Claimant indicated he was able to sleep on his left shoulder. He specifically denied neck pain. Claimant described good range of motion of his arm except above his shoulder. Dr. Bird noted Claimant had no crepitus, full range of motion, and five out of five strength.

6. On June 1, 2015, Claimant returned to Dr. Bird. He rated his pain as one out of ten. Dr. Bird noted Claimant had normal bilateral shoulder strength. Dr. Bird

opined Claimant was at maximum medical improvement ("MMI") with 6% scheduled impairment for loss of range of motion, and 10% scheduled impairment for distal clavicle resection. These impairments combined for 15% upper extremity impairment rating which can convert to 9% whole person impairment if appropriate.

7. On June 30, 2015 Respondents issues an Amended Final Admission of Liability admitting to the 15% schedule rating and reasonably necessary medical care.

8. On July 29, 2015, Claimant filed his Application for Hearing seeking to convert his scheduled impairment rating to a whole person rating.

9. On August 25, 2015, Respondents filed their Response to Application for Hearing contesting Claimant's permanent partial disability benefits.

10. On September 2, 2015, Claimant returned to Dr. Failinger reporting the onset of mild pain in his left shoulder due to "doing more around the house such as mowing" and specifically "trying to take out a bush with a chainsaw." Dr. Failinger noted Claimant had full and painless abduction of his shoulder on all planes. Claimant's strength on forward elevation, external rotation, and abduction were all 5/5. Claimant also had active forward elevation greater than 150 degrees, with no discomfort elicited.

11. On September 30, 2015, Claimant saw Dr. Failinger again. Claimant described shoulder pain and stiffness with lifting arm above head. Claimant specifically denied any night pain or additional symptoms. Dr. Failinger noted Claimant had full range of motion of his cervical spine. Claimant also had full range of motion of his left arm in all planes. Claimant specifically denied night pain or additional symptoms. Dr. Failinger recommended a repeat MRI scan.

12. On October 29, 2015 Claimant returned to Dr. Bird. Dr. Bird noted, "[Claimant] mostly notices pain when reach[ing] overhead. Pt. has occasional numbness and states it's hard to get comfortable at night." Dr. Bird noted Claimant had stopped doing his home exercise program. She noted Claimant saw Dr. Failinger who recommended six more therapy visits which Claimant reported had "helped." Claimant's repeat MRI scan showed tendinosis of the supraspinatus and the infraspinatus. She opined Claimant remained at MMI and recommended he continue with his home exercise program and continue taking naproxen. Dr. Bird's assessment includes "impingement syndrome, shoulder, left."

13. Because Claimant's August 5, 2014 MRI revealed a full thickness tear of the supraspinatus, the ALJ reasonably infers that the tendinosis of the supraspinatus revealed on Claimant's repeat MRI scan more likely than not was related to his August 5, 2014 industrial injury or treatment for that injury.

14. But Claimant failed to present persuasive evidence that the tendinosis of the supraspinatus required any treatment, would not resolve on its own, or further restricted his range of motion beyond his rated impairment.

15. Respondents hired Michael R. Striplin, M.D., to review Claimant's medical records set forth below. These were limited to:

    - 1/7/2015 note from Denver-Vail Orthopedics
    - 1/20/2015 note from Angela Waller, PA-C.
    - 6/1/2015 note from Dr. Bird.
    - 9/2/2015 note from Dr. Failinger.
    - 10/29/2015 note from Dr. Bird.

16. On November 6, 2015, in response to Respondents' interrogatories, Dr. Striplin opined:

    - Claimant's left upper extremity rating would not convert to a whole person equivalent.
        - He reasoned that the definition of "arm" used in the AMA Guides should be used when interpreting the word "arm" in section 8-42-107(2) of the Workers' Compensation Act. Because this is a legal opinion, the ALJ gives it no weight.
        - He also reasoned that the assignment of impairment for resection of the distal clavicle is "controversial" sine Table 19 of the AMA Guides does not contain a does not contain a space identified for the resection rating. The ALJ finds this reasoning to be incredible and not persuasive.
    - Claimant's then-current left shoulder symptoms "may be related" to residual post-operative pain. The ALJ finds this opinion is not stated to a reasonable degree of medical probability and does not find it persuasive.
    - Claimant remained at MMI.
    - No further treatment appeared necessary based on the records reviewed. The ALJ finds that because Dr. Striplin reviewed so few medical records, his opinion regarding the need for further treatment is not persuasive.
    - Dr. Bird's impairment rating was performed correctly.

17. Claimant returned to work with no restrictions and was able to perform all of his job duties.

18. Claimant testified he has ongoing left shoulder pain when attempting to lift his arm above shoulder height. Claimant testified that he experiences dull pain in his neck and pectoral area when attempting to move his arm above shoulder height. However, Claimant can perform that task.

19. On cross-examination, Claimant testified that medical records which reported he was able to sleep on his left shoulder, had no joint pain, no back pain, no neck pain, and no night pain, were wrong. He denied ever reporting his pain level at 1/10 although medical records so reflect. He also testified that Dr. Failinger's report dated October 5, 2015was wrong to the extent that that it reports that he had no night pain; other symptoms; and had full, painless active range of motion in all planes of his cervical spine.

20. Based on the totality of the evidence, the ALJ credits Claimant's medical records over Claimant's testimony where the two conflict.

21. Based on the totality of the evidence, the ALJ finds that Claimant did not establish by a preponderance of the evidence that the part of his body that has been functionally disabled or impaired does not appear on the schedule of disabilities.

22. Based on the totality of the evidence, the ALJ finds Respondent's did not establish by a preponderance of the evidence that Claimant should not have been assigned a 10% rating for his distal clavicle resection.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

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

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). The ALJ has found Claimant's testimony less credible than his medical records. The ALJ has also found relevant portions of Dr. Striplin's report to be incredible and unpersuasive.

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 PPD 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.* The ALJ has found that Claimant did not meet this burden of proof.

Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO November 16, 2007); *O'Connell v. Don's Masonry,* WC 4-609-719 (ICAO December 28, 2006). The ALJ finds and concludes that Claimant's alleged pectoral and neck pain do not represent a functional impairment.

ORDER

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

1. Claimant is not entitled to a conversion of his scheduled impairment rating to a whole person impairment rating.

2. Claimant is entitled to a 15% scheduled impairment rating.

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

4. 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: December 24, 2015

Kimberly Turnbow
Kimberly B. Turnbow
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 she suffered a compensable injury to her low back on August 11, 2014.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable, necessary, and related medical benefits for treatment of her low back including but not limited to epidural steroid injections.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from November 11, 2014 and ongoing.

STIPULATIONS

1. Claimant's average weekly wage is $306.00.

2. Dr. Weber is an authorized provider.

FINDINGS OF FACT

1. Claimant worked for Employer as a donation clerk with duties that included assisting with and collecting donations dropped off by donors at Employer's donation center.

2. On August 11, 2014 Claimant was assisting a donor with a television and was attempting to carry the television with the donor into the donation center. The donor lost grip of the television and Claimant attempted to catch the television to keep it from hitting the ground. Claimant felt immediate pain in her low back and immediately reported the injury to her supervisors.

3. Claimant did not seek immediate medical attention and continued to work for Employer. On August 20, 2014 Claimant attempted to help a donor get clothing out of a car when she felt worse pain in her back and she sought medical attention.

4. On August 20, 2014 Claimant was evaluated by Michelle Waller, PA-C. Claimant reported right mid back pain with some numbness below her scapula as well as lower back pain and right sided hip pain after trying to move a television at work on August 11, 2014. Claimant also reported having right leg numbness since August 11, 2014 and that both of her hands were numb at times. Claimant reported the pain was

excruciating and that she was helping a donor get clothes out of a car that day which caused worse pain. *See* Exhibit G.

5. Claimant reported no prior back issues. PA Waller noted that claimant was tender to palpation on the right SI joint, right lower back, lumbar spine, right sided parathoracic muscles, and medial to and inferior to the scapula. PA Waller noted Claimant was unable to walk on her toes and had pain with thigh extension and weakness and pain with right leg flexion. PA Waller assessed low back pain, radiculopathy, back pain, and sacroilitis. PA Waller recommended a referral for physical therapy and that Claimant undergo an MRI of her lumbosacral spine. PA Waller asked Claimant to hold returning to work until August 25, 2014 and noted at that time Claimant could return with restrictions of no lifting over 10 pounds, no repetitive lifting over 5 pounds, no carrying over 10 pounds, and no kneeling, squatting, or climbing. *See* Exhibit G.

6. On August 22, 2014 Claimant underwent an MRI of her lumbar spine that was interpreted by David Solsberg, M.D. Dr. Solsberg noted mild degenerative retrolisthesis at L5-S1 with mild zygapophyseal joint arthritis and no stenosis, fluid in the interspinous space at L4-5 and L5-S1 consistent with interspinous bursitis, dorsal paraspinal fatty muscle atrophy, mild curvature of the spine convex to the left, and no fracture, epidural hemorrhage, conus lesion, or plexus pathology identified. *See* Exhibit 5.

7. On August 28, 2014 Claimant began physical therapy at Mountain View Physical Therapy. Claimant reported a prior history of right greater than left hip pain with x-rays performed one year ago and some arthritis. See Exhibit 10.

8. On September 2, 2014 Claimant was evaluated by PA Waller. PA Waller assessed lower back pain. PA Waller noted that Claimant was improving significantly and had performed one full day of work where she had significant pain but was working again and was doing a little bit better. PA Waller recommended Claimant maintain her work restrictions and continue with physical therapy. PA Waller requested that Claimant follow up with the clinic in two weeks. *See* Exhibit G.

9. On September 16, 2014 Claimant was evaluated by Andrea Weber, M.D. Claimant reported continued pain at her mid to lower back with the pain occasionally radiating down the right side, with wrap around and radiation down the right buttock and lateral to the anterior thigh but not below the knee. Claimant reported that she needed to get back to her usual function and that she had never had back problems before this. Claimant reported being uncomfortable if in any position for too long. *See* Exhibit G.

10. Dr. Weber noted on examination that Claimant had some significant spasm at the left lower thoracic and entire lumbar paraspinous muscles, that Claimant was tender to palpation on the right greater than left SI joint, in the right lower back, the lumbar spine, and on the right sided parathoracic muscles. Dr. Weber assessed lower back pain and lumbosacral radiculopathy. Dr. Weber opined that Claimant had an

acute injury to the back with abnormal MRI suggesting pathology and inflammation at L4-S1 and that Claimant's symptoms were consistent. Dr. Weber noted that Claimant was better than on the first day seen but had some persisting symptoms. Dr. Weber did not see anything surgical on the MRI report and recommended Claimant continue with physical therapy and return in one month for follow up. *See* Exhibit G.

11. On October 14, 2014 Claimant was evaluated by Dr. Weber. Claimant reported that she was not getting much better and had no major improvement overall. Claimant reported her job did not care about her restrictions and that she still had to do some lifting as there was not enough staff to do the jobs needed. On examination, Dr. Weber again noted some significant spasm in the bilateral lumbar paraspinous muscles and tenderness to palpation right greater than left SI join, right lower back, lumbar spine, and in the right sided parathroacic muscles. Dr. Weber continued to assess lower back pain and lumbosacral radiculopathy. Dr. Weber noted that Claimant would continue physical therapy and would be referred to a specialist. Dr. Weber opined that Claimant had symptoms compatible with nerve root issues at L5 on the right. *See* Exhibit G.

12. On November 11, 2014 Claimant was evaluated by Dr. Weber. Claimant reported increased pain and that on the right side it now radiated to her foot and on the left side that it radiated to her knee. Claimant reported that she had continued to work and had continued to do physical therapy but had missed physical therapy due to concerns for her job and her inability to get to physical therapy on days that she had to work. Claimant reported needing her job and that her job had made some accommodations but she did not feel that they had made enough and that she lifted things outside her restrictions because she was afraid of getting fired if she did not. Claimant reported she had not seen a specialist because she did not hear from them. On examination, Dr. Weber again noted some significant spasm in the bilateral lumbar paraspinous muscles, tenderness to palpation right greater than left SI joint, right lower back along the lower lumbar spine, and right sided parathoracic muscles. Dr. Weber noted tenderness deeply at the gluteous bilaterally. Dr. Weber assessed lower back pain, and lumbosacral radiculopathy. *See* Exhibit G.

13. Dr. Weber noted Claimant was getting worse and not adhering to the restrictions due to the threat of job loss. Dr. Weber noted she was taking Claimant out of work and that Claimant needed to see neurosurgery/spine specialist. Dr. Weber noted her concern with Claimant's symptoms and worsening. Dr. Weber provided Claimant direct information for specialist and told Claimant to make an appointment as soon as possible. *See* Exhibit G.

14. On November 28, 2014 Claimant was evaluated at physical therapy by Hannah Johnson, PT. PT Johnson noted that Claimant had demonstrated minimal to no improvement since initiating physical therapy in August. PT Johnson opined that the objective impairments are often inconsistent with Claimant's subjective reports and that Claimant displayed a minimal amount of distress while reporting 8-9/10 pain unless a formal assessment is being conducted. PT Johnson opined that upon physical

examination, the vocalization of pain is often disproportionate to the test performed. PT Johnson also noted that the previous MRI does not support Claimant's complaints of severe radicular symptoms. PT Johnson noted that Waddell testing of the lumbar spine was positive suggesting non-organic pain or malingering. *See* Exhibit 10.

15. On December 1, 2015 Claimant was evaluated by J. Paul Elliott, M.D. Dr. Elliott noted on examination that Claimant was tender to palpation over the lumbar spine and bilateral SI joints. Dr. Elliott noted that Claimant presented with symptoms of axial low back pain and bilateral lower extremity radiculopathy but that her imaging revealed no significant central or foraminal stenosis or dynamic instability. He noted that Claimant's exam was notable for diffuse proximal lower extremity weakness, which did not entirely correlate with her imaging. Thus, he discussed considering bilateral lower extremity EMG/NCVs to better evaluate Claimant's weakness. He also recommended that Claimant undergo a high volume epidural steroid injection. *See* Exhibit 7.

16. On December 18, 2014 a physician advisor provided a review of Claimant's case. Yusuke Wakeshima, M.D. noted Dr. Elliot's recommendation for EMG/NCV testing and his request for high volume epidural steroid injection midline at L5-S1. Dr. Wakeshima noted that questions arose as to whether this is appropriate at this juncture. Dr. Wakeshima opined that for the injection to be considered Claimant must first undergo electrodiagnostic studies to confirm whether there are any radiculopathy issues and that based on the electrodiagnostic studies if significant radiculopathy is appreciated, then consideration can be made for epidural steroid injections. Dr. Wakeshima opined that if no significant pathology is appreciated, then consideration can be made for possible facet joint injections. *See* Exhibit 6.

17. On December 23, 2014 Claimant underwent EMG and NCV studies performed by Daryl Figa, M.D. Dr. Figa noted that Claimant presented with lower back pain radiating to the legs. Dr. Figa provided the impression that Claimant had moderate acute L5 and S1 radiculopathy on the right and left. *See* Exhibit 7.

18. On December 26, 2014 Claimant was evaluated by Dr. Weber. Claimant reported she had seen the specialist and reported that her EMG was abnormal. Dr. Weber noted on examination that Claimant had some minimal spasm bilaterally in the lumbar paraspinous muscles, tenderness to palpation in the right greater than left SI joint, right lower back just along the lower lumbar spine, at the right sided parathroacic muscles, and in the right buttock deeply. Dr. Weber noted the physical therapist's note about right hip concern and Claimant reported not being aware of any hip problems in the past. Dr. Weber noted on examination some discomfort in the hip with internal and external rotation. Dr. Weber assessed lower back pain, lumbosacral radiculopathy, and right hip pain. Dr. Weber noted that an x-ray of the hip was completed and that Claimant had evidence of arthritis at the right hip that was likely contributing to her symptoms and advised Claimant to see her PCP about the right hip. Dr. Weber opined that the right hip was not workers' compensation related. *See* Exhibit G.

19. On January 12, 2015 a physician advisor provided a review of Claimant's case. Lynne Fernandez, M.D. opined that based on multiple non-organic signs and lack of clear findings on MRI, the epidural steroid injection should be declined and opined that there were not clear physical findings and history to show the injection would be beneficial. *See* Exhibit 6.

20. On January 29, 2015 Claimant was evaluated by Dr. Weber. Claimant reported continued back pain and right posterior hip pain. Claimant reported being frustrated as she needed to get back to work and reported that insurance had not agreed to provide her with any injections. Dr. Weber noted that Claimant was in a holding pattern, had seen neurosurgery, and had an EMG test but that Claimant had not been approved for further therapy including physical therapy and spinal injections. Dr. Weber noted she was at the limit of what she could do. Dr. Weber noted that she would request a Level II evaluation. Dr. Weber opined that Claimant had osteoarthritis of the right hip which was a chronic condition but that Claimant's current symptoms were not all due to the right hip. *See* Exhibit G.

21. On March 2, 2015 Claimant was evaluated by Joseph Fillmore, M.D. Dr. Fillmore noted that Claimant was sent by Dr. Weber for an evaluation and that it appeared they were looking for a second opinion. Claimant reported primarily right leg pain and back pain that began on August 11, 2014. Dr. Fillmore noted in physical findings that Claimant had decreased sensation in an L5 pattern on the right, and positive fabers/patricks on the right. Dr. Fillmore noted that the MRI findings showed a retrolisthesis at L5-S1 and that the EMG showed an L5 and S1 radiculopathy. Dr. Fillmore assessed acute back pain with sciatica, and spondylolisthesis, acquired. Dr. Fillmore opined that Claimant was not at maximum medical improvement (MMI) and recommended deferring an impairment rating. Dr. Fillmore opined that Claimant should have the epidural injections and that he did not see any contraindications or significant non-physiologic findings during his visit. Dr. Fillmore also opined that pending the outcome of the epidural injections, Claimant could hopefully return to work but that she was not yet at maximum medical improvement. *See* Exhibit 8.

22. On May 8, 2015 Claimant was evaluated by Dr. Weber. Claimant continued to report low back pain with pressure at the low back and right side, into the buttocks, and to the sacrum. Dr. Weber noted that Claimant had been recommended to have an epidural steroid injection by two separate physician specialists but that it had not yet been approved by workers' compensation insurance. Dr. Weber advised Claimant that she needed to get going on treatment and recommended that Claimant go through her other insurance because the longer Claimant had pain the harder it would be to treat. Dr. Weber advocated that Claimant get treatment with the next step sooner rather than later since Claimant's symptoms had failed to resolve with conservative measures. *See* Exhibit G.

23. On May 9, 2015 Claimant underwent an independent medical evaluation performed by Michael Rauzzino, M.D. Claimant reported being injured on August 11, 2014 and that she had immediate back pain. Claimant denied having a prior back

injury. Claimant reported prior hip problems that were not currently a concern. Claimant reported lower back pain that started at about the L3 level and that radiated down to the gluteal cleft with some radiation into the right buttock. Dr. Rauzzino reviewed the MRI as well as the EMG/NCV tests. Dr. Rauzzino opined that the MRI showed no significant foraminal stenosis at any level and did not show any significant nerve root compression at any level. Dr. Rauzzino opined that Claimant did not have a herniated disc or fracture but had mild facet joint arthritis in her lower back. Dr. Rauzzino noted that the EMG, however, was positive for L5 and S1 radiculopathy bilaterally despite the absence of a structural lesion compressing those nerves. *See* Exhibit F.

24. Dr. Rauzzino opined that based on imaging there was no evidence of compression of any of the nerve roots which would be consistent with bilateral L5 and S1 radiculopathy and noted that although Claimant had mild degenerative changes at L5-S1 there was no acute structural injury to her lumbar spine that would account for the severity of her symptoms eight months after her injury. Dr. Rauzzino opined that quite possibly Claimant sustained a muscular strain when moving the television set, but that the strain should have resolved with time. Dr. Rauzzino noted that Claimant had some non-organic findings with numbness only at the tips of her feet from the metatarsals to the tips of her toes that is not explained physiologically by examination. He noted that Claimant also had weakness more proximally than disatally which was not consistent with the levels suggested by the EMG. Dr. Rauzzino opined that the only abnormal finding in Claimant's workup was the EMG/NCV. Dr. Rauzzino believed Claimant's diagnosis was acute lumbar strain and mild chronic degenerative changes of her lumbar spine and did not see any evidence of a new structural injury to her back that would be attributable to her work related injury. *See* Exhibit F.

25. Dr. Rauzzino noted that Claimant reported prior right hip pathology. Dr. Rauzzino opined that Claimant's current presentation was not the same as the pre-existing condition. Dr. Rauzzino opined that an epidural steroid injection would only be done if there was some structural problem that it would treat in the L5-S1 area. Dr. Rauzzino opined that in Claimant's case there was no evidence to support and noted that although a positive EMG existed, the EMG is not an exact science and that he weighed the MRI more heavily than the EMG. He also opined that Claimant's physical examination did not correlate with the EMG. Dr. Rauzzino opined that Claimant's ongoing complaints were not related to her reported August 11, 2014 work injury. *See* Exhibit F.

26. On July 14, 2015 Claimant was evaluated by Dr. Weber. Claimant reported continued low back pain. Dr. Weber noted Claimant had chronic issues for almost one year now without resolution. Dr. Weber again recommended that Claimant go forward with treatment for her back through regular insurance rather than waiting for workers' compensation to come through. Dr. Weber noted she would refer Claimant to Dr. Rentz but suspected the referral might need to come from Claimant's primary care provider. Dr. Weber continued to list Claimant's work status as unable to work. *See* Exhibit G.

27. On August 13, 2015 Claimant was evaluated by Jack Rentz, M.D. Dr. Rentz noted that Claimant was being evaluated for chronic pain associated with low back pain. Dr. Rentz performed an examination and noted the treatment plan would be for lumbar transforaminal epidural steroid injection at L5-S1 on the left and right. Dr. Rentz noted that physical therapy would be considered after the epidural steroid injection for facet if Claimant had better symptom control. *See* Exhibit 9

28. On September 14, 2015 Claimant underwent bilateral L5-S1 transforaminal epidural steroid injections performed by Dr. Rentz. *See* Exhibit 9.

29. Dr. Weber testified at hearing consistent with her medical reports. Dr. Weber opined that the claim was work related and that Claimant's MRI after the first visit showed evidence of inflammation and acute L5/S1 pathology. Dr. Weber opined that the EMG referral a few months later also was consistent with acute radiculopathy. Dr. Weber was unaware of Claimant's significant treatment for her right hip previously in Texas. However, Dr. Weber opined that Claimant's back pain radiates in a different pattern. Dr. Weber noted the physical therapist's opinion and that the opinion told her that Claimant might have some exaggeration during physical therapy. Dr. Weber maintained her opinion that the injury was work related and that both the MRI and EMG were two objective sources that showed an acute back injury occurred.

30. Dr. Rauzzino testified at hearing consistent with his IME opinion. Dr. Rauzzino opined that the lumbar spine was not the cause of Claimant's current complaints and that her complaints were not emanating from a low back injury. He opined that the MRI did not show a structural lesion that would be causing her reported pain. He opined that x-rays did not show instability in the spine or impingement. Dr. Rauzzino opined that the only limits are Claimant's subjective reports of pain. He opined that the EMG, although positive, is not an exact test and that the MRI test is more objective. He opined that the EMG is positive in an area where Claimant does not display radiculopathy and that the EMG does not correlate with Claimant's reported symptoms. Dr. Rauzzino opined that with only Claimant's subjective complaints and an invalid EMG, the current symptoms Claimant had were not work related. Dr. Rauzzino opined that although he knows Dr. Elliott and believes him to be competent and qualified, that Dr. Elliott got it wrong and that injections were not the correct thing to do in Claimant's case.

Prior medical treatment

31. On September 2, 2010 Claimant was evaluated by James Spradlin, D.O. Claimant reported pain on the right hip that radiated to her right knee when there is a low pressure storm in the area. Claimant reported that after the weather improved, she noted improvement in her pain. Claimant reported the right hip pain and radiation stemmed from a fall down the stairs at her home two years prior. Dr. Spradlin noted that Claimant would be sent for an x-ray of the right hip and right knee to assess the joint and cause of her pain. *See* Exhibit N.

32. On December 16, 2010 Claimant was evaluated by Christopher Loar, M.D. Claimant reported right hip pain, depression, headaches, lightheadedness, and difficulty sleeping and that her symptoms started in May of 2008. Claimant reported that she had osteoarthritis in the right hip and that her symptoms impaired her ability to perform her daily life activities. Claimant reported pain of 7-10/10. Dr. Loar opined that Claimant's gait was embellished and dramatic and that there was no objective difficulty in Claimant's ability to do work activities such as sit, stand, move about, lift, carry, handle objects, hear, or speak. Dr. Loar opined that based on the history and physical exam there were no objective neurological abnormalities to support Claimant's complaint of 7-10/10 pain. *See* Exhibit M.

33. On January 12, 2011 Claimant was evaluated by Dr. Spradlin for a primary complaint of a cough. Dr. Spradlin noted that Claimant's norco prescription for her severe hip osteoarthritis was refilled. *See* Exhibit N.

34. On February 8, 2011 Claimant was evaluated by Dr. Spradlin. Claimant reported severe right hip pain that was interfering with her activities of daily living. Claimant reported limited mobility due to her right hip and that she required assistance at home. Dr. Spradlin noted her limited range of motion in the right hip. *See* Exhibit N.

35. On March 2, 2011 Claimant was evaluated by Dr. Spradlin and again reported hip pain and that she required assistance at home as the hip pain affected her activities of daily living. Dr. Spradlin noted her decreased range of motion and pain in the right hip and noted that Claimant felt some discomfort in her low back from the hip. *See* Exhibit N.

36. On March 15, 2011 Dr. Spradlin wrote a letter to the Law Office of William Bonilla. Dr. Spradlin indicated that Claimant was being seen by his office for depression and severe hip pain and that Claimant was unable to do very much due to the pain. Dr. Spradlin wrote that Claimant was unable to do all the activities of daily living and that Claimant required assistance. *See* Exhibit N.

37. On March 21, 2011 Claimant was evaluated by Dr. Spradlin. Claimant reported that her disability attorney had withdrawn from her case and that she had a hearing in three weeks. Claimant reported worsened hip pain. *See* Exhibit N.

38. On April 5, 2011 Dr. Spradlin wrote a letter addressed "to whom it may concern." Dr. Spradlin again indicated Claimant was being treated for depression and severe hip pain. In this letter Dr. Spradlin noted that Claimant was not able to do all her activities of daily living and that she required assistance. Dr. Spradlin noted that Claimant had difficulty with bending, stooping, and navigating stairs. Dr. Spradlin noted that Claimant had been off work for the last year due to medical problems and that she needed continued care and could not work the next year per doctors' orders. *See* Exhibit N.

39. On May 18, 2011 Claimant was evaluated by Dr. Spradlin. Claimant reported diarrhea that she felt might be related to the stress of being turned down by the disability office. Claimant also reported hip pain and that she was willing to have surgery. Claimant denied having any back pain. *See* Exhibit N.

40. On October 24, 2012 Claimant was evaluated by Dr. Spradlin. Claimant reported severe right hip pain with associated symptoms of muscle pain and back pain. Claimant reported she recently moved back from Corpus Christi where she was living with her uncle helping to care for him. Claimant reported being unable to keep her home due to financial reasons but that she moved back and had a job pending to help. Dr. Spradlin noted that Claimant was aware she needed surgery on her hip and that she had been seeing a pain management doctor in Corpus Christi. Claimant reported her hip was getting worse and that she had back pain but reported that she had no financial ability to pay for the surgery and after care required. Dr. Spradlin noted pain on the hips with some difficulty getting from the chair to a standing position and pain after walking short distances and standing for a while. Dr. Spradlin noted that Claimant had an MRI which showed dysplasia of the right hip and that Claimant was aware she needed to see an orthopedic surgeon to help with the joint. *See* Exhibit N.

41. On November 27, 2012 Claimant was evaluated by Dr. Spradlin. Claimant reported she suffered a fall over a pit bull the previous Wednesday. Claimant reported continued right hip pain. Claimant denied back pain. *See* Exhibit N.

42. On August 16, 2013 Claimant was evaluated by Dr. Spradlin. Dr. Spradlin noted Claimant's medication for her hip was refilled and that Claimant would need a hip replacement. Claimant again denied back pain. Dr. Spradlin noted that Claimant had pain in her right hip with prior imaging showing severe degenerative changes and that her pain impaired her ability to walk and stand and secondarily gave her back pain. *See* Exhibit N.

43. On June 26, 2013 Claimant was evaluated at Denver Health Medical Center Emergency Department. Claimant reported right lower extremity pain and that she had been tubing and fell out of the tube and hit a rock on her right hip. Claimant reported being unable to walk and that she could not lift her legs due to her right hip pain. Claimant reported her pain as 10/10. *See* Exhibit O.

44. On January 17, 2014 Claimant was evaluated by Dr. Spradlin. Dr. Spradlin noted that Claimant had chronic hip and back pain and that she would need surgery soon but was unable to afford surgery. Dr. Spradlin noted that Claimant had not been able to work and had limited gait and limited standing abilities. Under ROS Dr. Spradlin noted that Claimant denied back pain. On physical examination Dr. Spradlin noted that Claimant had pain on the hips bilaterally and had some low back pain with difficulty getting up and antalgic gait. *See* Exhibit N.

45. On December 9, 2014 a letter from Dr. Spradlin's office indicated that neither Dr. Spradlin nor any other physician in the practice had treated Claimant for any back or neck injury. *See* Exhibit N.

Credibility

46. Claimant's testimony, overall, is not credible or persuasive. Claimant denied filing a social security claim, living in Corpus Christie, or having any prior back pain before the work injury when she reported otherwise to her past medical providers. Either her reports to the medical providers or her testimony is inaccurate. Claimant also reported to Dr. Weber that she had no prior hip problems when she had a clear and disabling hip condition within the several years prior to seeing Dr. Weber. Claimant's testimony claims no memory of certain events or medical treatment visits but clear memory of others. Overall, Claimant's testimony cannot be relied upon to any degree of certainty.

47. Although Claimant's testimony cannot be relied upon to any degree of certainty, the medical records reflect that Claimant does not shy away from seeking medical treatment for any ailment/incident. Claimant has received extensive medical treatment for various reasons over the past several years. Claimant also exaggerates her reports of pain and pain levels despite a lack of objective evidence to correlate with her extremely high pain level reports. Although Claimant has this history, there is no prior report of a back injury or lumbar injury prior to August 11, 2014.

48. Dr. Spradlin is credible that Claimant had significant and limiting right hip pain and symptoms for which she treated with him from 2008 through 2014. These limitations were to the point where he opined that she had been unable or incapable of working for two years during this period of time. Dr. Spradlin, however, also opined that Claimant's pain reports were never related to back pain or lumbar radiculopathy but were related to the hip and that any pain for which he treated Claimant that dealt with the low back was secondary to and caused by the severe hip osteoarthritis. Dr. Spradlin credibly opined that Claimant had no low back injury or specific pain while treating with him and that he never considered low back disc conditions because most all of her complaints were centered around the hip. Dr. Spradlin is found credible and persuasive.

49. Dr. Weber is also found credible and persuasive that the low back injury (but not the right hip pain) is work related. Dr. Weber opined that the initial MRI after the work incident showed evidence of acute L5/S1 pathology and inflammation and that the EMG study performed a few months later was also consistent with an acute radiculopathy. Dr. Weber opined credibly that hip pain can radiate on the lateral side but that back pain radiates in a different pattern. Dr. Weber opined that Claimant had an acute back injury and that two objective sources, the MRI and the EMG, showed an acute injury. Dr. Weber opined that the treatment provided to Claimant was reasonable, necessary, and related to her August 11, 2014 injury. Dr. Weber is found credible and persuasive.

50. Dr. Fillmore's opinions are also found credible and persuasive. Dr. Fillmore opined that Claimant suffered acute back pain with sciatica, that she was not at maximum medical improvement, and that Claimant should have the epidural injections recommended by Dr. Figa and Dr. Elliott. Dr. Fillmore credibly opined that the MRI showed retrolisthesis at L5-S1 and that the EMG showed an L5 and S1 radiculopathy.

51. Dr. Elliott opined that Claimant's exam did not entirely correlate with her imaging and that is why he recommended she undergo bilateral lower extremity EMG/NCV testing and recommended a high volume epidural steroid injection for her pain. Dr. Elliott did not provide any opinion on causation or relatedness of Claimant's symptoms to her August 11, 2014 work injury. There also is no opinion by Dr. Elliot after EMG testing or any injections.

52. Dr. Rauzzino's opinions are not as credible or persuasive as the opinions of Dr. Weber, Dr. Fillmore, and Dr. Spradlin.

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

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. *See § 8-41-301(1)(b), C.R.S.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). 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.

Claimant has established by a preponderance of the evidence that she suffered a low back injury that arose out of the course and scope of her employment on August 11, 2014. Claimant suffered a low back injury when attempting to help a donor with a television donation. Claimant has shown that after the injury she has suffered low back complaints and radiculopathy that was different from her prior and pre-existing hip osteoarthritis. This is supported by objective EMG and MRI testing and by the opinions of Dr. Weber, Dr. Fillmore, and Dr. Spradlin. Although Claimant had significant pain complaints in the past surrounding her right hip with corresponding treatment and medical evaluations for her right hip and pain, the current pain Claimant is suffering is more likely than not different and due to her low back work injury. Although Claimant’s testimony is not found to be credible and cannot be relied upon to any degree of

certainty, the objective medical testing through MRI and EMG and the opinions of Dr. Spradlin, Dr. Weber, and Dr. Fillmore are found credible and persuasive that she suffered an acute injury to her low back and that the low back injury was distinct and separate from her pre-existing severe right hip osteoarthritis. The ALJ concludes that Claimant's August 11, 2014 back injury is an independent injury and source of pain from her pre-existing hip issues based on the persuasive medical opinions and the objective testing. The opinion of Dr. Rauzzino is not found as credible or persuasive. Dr. Rauzzino comes to a different conclusion surrounding the MRI and discounts the positive EMG test.

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. (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).

As found above, Claimant has established that she suffered a compensable injury on August 11, 2014. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve the effects of her injury. The medical treatment provided for her low back injury to date, including the steroid lumbar injections performed by Dr. Rentz, has been reasonable, necessary, and causally related to her work injury. The injections were recommended to cure and relieve the effects of her work related low back pain. Claimant was referred to Dr. Rentz by her authorized treating provider Dr. Weber who also recommended she undergo the injections. Claimant has established that the injections and the treatment received to date for her lower back was recommended by different authorized treating providers and was reasonable and necessary to attempt to cure and relieve her low back pain.

Temporary Total Disability

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 § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Claimant has established that her August 11, 2014 work injury caused her a disability that resulted in actual wage loss. Claimant has established that she has been unable to work or earn wages due to her work injury from November 11, 2014 through the present time. Claimant was taken off work by her treating provider Dr. Weber on November 11, 2014 and remains under a no work restriction. This restriction impairs her ability to perform her regular employment. Claimant has not reached maximum medical improvement, has not returned to regular or modified employment, and has not been released to return to regular or modified employment. Thus, Claimant has shown that she is entitled to TTD benefits from November 11, 2014 and ongoing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her low back on August 11, 2014.

2. Claimant has established by a preponderance of the evidence that the medical treatment she has received to date for her low back is reasonable, necessary, and causally related to her August 11, 2014 injury. Claimant is entitled to continued reasonable and necessary medical treatment for her low back.

3. Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 11, 2014 and ongoing until terminated by law.

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: December 9, 2015

/s/ Michelle E. Jones

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

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ISSUES

- Are Respondents entitled to withdraw a Final Admission of Liability because they proved by a preponderance of the evidence that on September 17, 2014 Claimant did not sustain an injury arising out of and in the course of his employment?

- If Claimant is found to have experienced an incident at work on September 17, 2014 are the respondents entitled to withdraw a Final Admission of Liability because the event did not result in an injury that caused disability or the need for medical treatment?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 7 and 9, 10, 11, 12, 14 and 15 were admitted into evidence without objection. The ALJ reserved ruling on Claimant's Exhibit 8. Exhibit 8 is now excluded from evidence because it is not relevant to the issues presented for hearing. Respondents Exhibits A through I were admitted into evidence. Respondents' Exhibit J (interrogatories and Claimant's answers to interrogatories) was partially admitted. Exhibit J was admitted insofar as it contains interrogatory questions 1, 4, 11, 12, 13 and Claimant's answers to these questions.

2. Respondents contend that they should be permitted to withdraw a Final Admission of Liability (FAL) that was filed on January 27, 2015. The FAL admitted Claimant sustained a compensable injury on September 17, 2014 and that Insurer is liable to pay certain medical benefits. The FAL further admitted that Claimant reached maximum medical improvement (MMI) on January 21, 2015 with no permanent impairment. Respondents' now seek to withdraw the FAL by establishing that Claimant did not experience any injurious event while at work on September 17, 2014. Alternatively, Respondents contend that if any potentially injurious event occurred on September 17, 2014 that event did not rise to the level of a "compensable injury."

3. On August 15, 2014 Claimant reported to Mile High Internal Med & Urgent Care (Urgent Care) where he was examined by PA-C Teresa Slager. PA-C Slager noted that Claimant wished to "establish care and be evaluated for shoulder pain." PA-C Slager recorded that Claimant was experiencing "chronic left shoulder pain with acute exacerbation." Claimant advised that his pain had been increasing over the last one and one-half years, that he could no longer lift his arm and that he experienced "catching in the joint" with range of motion (ROM). Claimant stated he could not lift

significant weight or do push-ups. Claimant gave a history that he "separated" his shoulder in high school" and that over the course of his lifetime he "continued to re-exacerbate the injury whether lifting weight, driving for his job, or performing other routine activities." Claimant denied "any new trauma/falls" that could have exacerbated his pain. PA-C Slager assessed chronic left shoulder pain with acute exacerbation and "concern for a rotator cuff tear." PA-C Slager referred Claimant for a left shoulder MRI with contrast.

4. On August 28, 2014 Claimant underwent an MR arthrogram of the left shoulder. The radiologist, Charles Wennogle, M.D., listed his impressions as: (1) Circumferential tear of the labrum with cartilage loss along the glenoid fossa and humeral head with "mild to moderate osteoarthritic changes of the glenohumeral joint;" (2) Through-and-through full-thickness tear but partial-width tear of the distal infraspinatus tendon allowing contrast into the subacromial-subdeltoid bursa with no retraction; (3) Os acromiale with no evidence of significant motion about the fibrocartilaginous articulation.

5. On September 5, 2014 Claimant returned to PA-C Slager to discuss the results of the MRI. On this occasion Claimant reported that his pain had not changed since the previous visit and that significantly limited his ability to work. PA-C Slager advised Claimant of the MRI results and referred Claimant to an orthopedic surgeon. PA-C Slager also advised Claimant to avoid heavy lifting, pushing and pulling.

6. Gregory Labs (Labs) credibly testified as follows. He worked with Claimant in August and September 2014. He recalls that Claimant reported to him that he sustained a shoulder injury. Labs cannot recall the date the Claimant reported the shoulder injury. Claimant only reported one injury to Labs and Labs then sent Claimant to talk to the "boss," Adam Reece. On one occasion Labs observed Claimant performing push-ups, but Labs does not recall when he observed this activity.

7. Adam Reece (Reece) credibly testified as follows. In August and September 2014 he was acting in the role of branch manager at the Employer's Aurora facility. Claimant reported to Reece that he sustained an injury and Reece called the Employer's human resource department to find out what to do. The human resource department advised Reece to "fill out a couple of forms and send" Claimant to a "Workman's Comp facility to be examined." One of the forms Reece was required to fill out was the Supervisor's Accident Investigation Report (SAIR). The SAIR was to be completed within 24 hours of the time Claimant reported the injury. Reece completed the SAIR. (Respondents' Exhibit I, p. 77) Some of the information found in the SAIR was provided by Claimant. The SAIR describes the one and only "incident" that was reported to Reece by Claimant.

8. The SAIR reflects that Claimant's date of injury (DOI) was September 17, 2014 and that the report was completed on September 18, 2014. The SAIR states that Claimant reported a "strain/sprain" of his left shoulder. The description of the "accident" was: "Pulling vinyl insulation, guy was standing on it strained left shoulder."

9. On September 18, 2014 Claimant completed and signed an Employee's Report of Injury. (Respondents' Exhibit I, p.78) In this report Claimant listed the DOI as September 17, 2014 and the date he reported the injury as September 18, 2014. Claimant described the "accident" as follows: "Off loading rolled insulation. Dragging behind me, 1 in each hand. While pulling these rolls my helper by chance stepped on the bag that I was forcing up and over on to the waiting pallet creating a major strain on my left arm and shoulder." Claimant wrote that he wanted to undergo treatment at "Concentra Medical."

10. On September 18, 2014 PA-C Stephanie Missey examined Claimant at Concentra Medical Centers (Concentra). Claimant gave a history that on September 17, 2014 he experienced the "sudden onset" of pain in the anterior left shoulder while "dragging something behind him." PA-C Missey's notes do not contain any indication that Claimant gave a history of shoulder problems prior to September 17, 2014 and do not mention the August treatment for shoulder problems that was provided by PA-C Slager on August 15, 2014 and September 5, 2014. On physical examination Claimant exhibited tenderness to palpation of the anterior AC joint. He demonstrated restricted and painful active ROM. PA-C Missey assessed a shoulder strain and prescribed medication and physical therapy (PT). PA-C Missey imposed restrictions of no lifting, no pushing and no pulling in excess of 20 pounds, no driving and no overhead reaching with the left upper extremity and no use of power tools.

11. On October 2, 2014 PA-C Missey referred Claimant for an MR arthrogram of the left shoulder. She also referred Claimant to an orthopedic surgeon.

12. On October 20, 2014 Claimant underwent a second MR arthrogram of the left shoulder. The radiologist, Dr. Eduardo Seda, M.D., noted that the arthrogram was compared to the "prior MR arthrogram of August 28, 2014." Regarding the supraspinatus tendon Dr. Seda noted a "stable partial tear at the common tendon extending from the articular surface" with contrast "extending into approximately 50% of the tendon." Dr. Seda's impressions were: (1) Stable partial-thickness tear of the common tendon and os acromiale with no changes of abnormal motion and no impingement; (2) Stable large labral tear of the inferior and posterior superior quadrants with suspected old healed posterior inferior glenoid fracture; (3) Stable degenerative cartilage thinning in the posterior glenoid with small inferior humeral osteophytes.

13. On October 23, 2014 orthopedic surgeon John Papilion, M.D., examined Claimant on referral from Concentra. Dr. Papilion noted a history that on September 17, 2014 Claimant was "moving some heavy pallets" when a pallet "got stuck and he pulled it and had immediate pain on the anterior and lateral aspects" of the left shoulder. Claimant also gave a history that about twelve years previously he suffered an injury to the left shoulder. Claimant advised he was treated for this old injury with a subacromial steroid injection and PT resulting in complete resolution of his symptoms. Claimant advised that he "never" had x-rays or an MRI for his shoulder problem. Dr. Papilion's October 23 note does not contain any indication that Claimant mentioned the August 28, 2014 MRI or that PA-C Slager provided treatment for left shoulder symptoms on August 15, 2014 and September 5, 2014.

14. On October 23, 2014 Dr. Papilion reviewed an "MRI arthrogram." According to Dr. Papillion this study revealed a "50% thickness tear of the supraspinatus tendon at the insertion on the greater tuberosity" and "large complex tearing in the posterior-superior labrum. Dr. Papillion assessed a "moderate-grade 50% tear" of the supraspinatus tendon, rotator cuff tear of the left shoulder and a posterior-superior labral tear. From the totality of the October 23 note the ALJ infers that Dr. Papilion reviewed the MRI arthrogram performed on October 20, 2014 and was not aware of the August 28, 2014 MRI.

15. On November 13, 2014 Dr. Papilion opined that Claimant was not doing well and had failed conservative treatment. Dr. Papilion recommended Claimant undergo "exam under anesthesia, arthroscopy, subacromial decompression, and rotator cuff repair."

16. On January 15, 2015 the insurance adjuster wrote a letter to Dr. Papilion providing a copy of the August 2014 MRI and PA-C Slager's Urgent Care notes. Dr. Papilion stated that based on this new information the Claimant's need for surgery was not "work related" and that Claimant had returned to baseline for the injury of September 17, 2014. Dr. Papilion wrote that the newly provided information was "completely different" than the information related to him by Claimant.

17. On January 21, 2015 Concentra physician Matthew Miller, M.D., dictated a note concerning Claimant's condition. Dr. Miller wrote that he examined Claimant on January 20, 2015 and Claimant denied any "prior injuries or problems with his shoulder." However, Dr. Miller stated that Concentra had "received notes from [Claimant's] prior care" and that these records indicated Claimant had undergone a left shoulder MRI 3 weeks prior to the alleged injury of September 17, 2014. Dr. Miller wrote that he asked Claimant why he had an MRI prior to the alleged DOI and Claimant stated "this was related to the same injury despite the date discrepancy." Dr. Miller explained that the "story was a bit unclear, but [Claimant] suggested that he had a prior work injury that led to the first MRI." Dr. Miller stated that upon review of the new medical reports Claimant "has had chronic shoulder problems and the MRI we requested didn't show any changes from the MRI 3 weeks prior to the date of injury." Dr. Miller also noted that Claimant did not "mention" any work-related injury "in the notes from his PCP." Dr. Miller opined Claimant had reached MMI and that "his need for further care is related to non-work related issues."

18. On February 24, 2015 orthopedic surgeon Stewart Weinerman, M.D., examined Claimant. Claimant reported that he had left shoulder pain and the "DOI was in 8/2014 [when] he was pulling a pallet off his work truck it got stuck and he felt sharp pain in the shoulder." Dr. Weinerman noted that he "personally viewed" the shoulder MRI of August 28, 2014 and his findings included an acute rotator cuff tear. Dr. Weinerman diagnosed an acute "Slap tear," shoulder pain and "Rtc Tear Supraspinatus." Dr. Weinerman recommended surgery to treat these diagnoses.

19. On June 2, 2015 Claimant underwent a Division-sponsored Independent Medical Examination (DIME) by Scott Hompland, D.O. Claimant gave a history to Dr.

Hompland that on September 17, 2014 he was "delivering a heavy load" and "his pallet jack became stuck underneath the dock plate." As Claimant was pulling the pallet jack with is "strength" he reportedly felt "instant pain in his left shoulder." Claimant also told Dr. Hompland that he injured his left shoulder when he was 16 years old and again in 2003. However, Claimant state that after both of these injuries his symptoms resolved.

20. Dr. Hompland reviewed the August and October 2014 MRI's. He also reviewed extensive medical records including PA-C Slager's Urgent Care records, the Concentra records, Dr. Papilion's report of November 13, 2014 and Dr. Weinerman's report of February 24, 2015. Dr. Hompland opined that if the August 2014 MRI (requested by PA-C Slager) and Claimant's left shoulder pain pre-existed the DOI (September 17, 2014) then he would agree with Dr. Miller concerning the Date of MMI and conclude Claimant has no impairment related to the injury of September 17. Conversely, if there are "typographical errors" in the medical records and the MRI ordered by PA-C Slager was caused by the injury of September 17, 2014 he would conclude Claimant was not at MMI and needs to undergo surgery.

21. Dr. Papilion testified by deposition on June 9, 2015. Dr. Papilion stated that he reviewed the radiologist's report and the actual MRI images from October 20, 2014. At the deposition Dr. Papilion reviewed the radiologist's report from the August 28, 2014 MRI. Dr. Papilion opined that the two MRI's are different from each other. Specifically, Dr. Papilion opined the October 20 MRI shows a 50 percent tear of the *supraspinatus* tendon while the radiologist's report of the August 28 MRI describes a tear of the *infraspinatus* tendon. Dr. Papilion testified that tears of the infraspinatus and supraspinatus tendons occur at different physiological locations.

22. Dr. Papilion testified that in his opinion Claimant sustained an "acute injury" on September 17, 2014 because there was a "documented work injury" and because there are "definitely different findings on the two MRIs." Dr. Papilion opined that even if there was some "underlying preexisting problems, they were worse" after the September 17 injury.

23. On June 17, 2015 John McBride, M.D., issued a report at Respondents' request. Dr. McBride is board certified in orthopedic surgery and is level II accredited. Dr. McBride's practice involves the treatment of shoulder and knee pathology.

24. In the June 17, 2015 report Dr. McBride stated that he reviewed the MR arthrograms of August 28, 2014 and October 20, 2014. Dr. McBride reviewed the actual images which were available to him on compact disc. Dr. McBride opined that the August 28, 2014 MR arthrogram shows a 13 millimeter "articular-sided tear of the rotator cuff supraspinatus tendon." Dr. McBride further opined that the October 24, 2014 MR arthrogram shows a 14 millimeter "large articular-sided tear" of the supraspinatus tendon. Dr. McBride wrote that the two MR arthrograms "are very similar, if not identical." He further opined that Claimant's pain diagrams are also identical with respect to his left shoulder. In these circumstances Dr. McBride opined that Claimant's "rotator cuff pathology and the labral pathology, as well as the osteoarthritis existed prior to any alleged injuries of September 17, 2014."

25. Dr. McBride testified by deposition on July 13, 2015. Dr. McBride stated that as an orthopedic surgeon he personally reviews MRI films and does not rely solely on a radiologist's report. Dr. McBride reiterated that he personally reviewed Claimant's MRI images from August 28, 2014 and October 20, 2014. He opined that the August 28 MRI image (9 of 20) depicts a 13 millimeter tear of the supraspinatus tendon and that the August 28 MRI does not show a tear of the infraspinatus tendon. Dr. McBride explained the August 28 MRI depicts a tear of the supraspinatus tendon because the torn tendon is attached to a muscle that is "above the spine of the scapula." Dr. McBride reiterated that the October 20 MRI depicts a 14 millimeter tear of the supraspinatus tendon and does not show any tear of the infraspinatus tendon. Dr. McBride explained that the fact the two MRI studies depict a 1 millimeter difference in the length of the tear is not statistically significant. He stated that the 1 millimeter difference is within the "margin of error" and can be explained by how the shoulder was "set up in the MRI gantry."

26. Claimant testified as follows. In early August 2014 he was working on a dock unloading heavy pallets with a hand jack. A pallet caught on something while he was pulling the hand jack "using every last bit of [his] energy." He felt severe left shoulder pain and dropped to his knees. Claimant reported this incident Greg Labs and Wayne Cohen, who he believes were the warehouse manager and the store manager. Claimant did not request medical treatment on this occasion but instead told Labs and Cohen he would "work through the pain."

27. Claimant testified as follows concerning the events of September 17, 2014. He was dragging rolls of insulation that weighed between 75 and 100 pounds. Claimant had a helper who stepped on a roll of insulation that Claimant was dragging. This event caused Claimant to experience shoulder pain that was "like a fire." Claimant felt that he was no longer able to work after the September 17, 2014 event.

28. Claimant testified that on September 18, 2014 he reported the September 17 incident to Greg Labs and Wayne Cohen. According to Claimant, Labs and Cohen "directed" him to "Adam."

29. Claimant admitted that when he was examined by PA-C Slager on August 15, 2015 he did not report any recent traumas or falls. Claimant admitted that when he was examined by PA-C Missey on September 18, 2014 he did not mention the shoulder treatment provided by PA-C Slager in August 2014 and early September 2014. Claimant admitted that despite PA-C Slager's referral he did not seek treatment from an orthopedic surgeon prior to the alleged injury of September 17, 2014. Claimant admitted that he failed to mention the treatment provided by PA-C Slager when the insurance adjuster asked him whether he received treatment prior to September 17, 2014. Claimant agreed that did not mention the August 28, 2014 MRI when Dr. Papilion asked whether Claimant had undergone an MRI prior to October 20, 2014. Claimant admitted that when he was first examined by Dr. Miller he did not mention that he saw his "personal doctor" shortly before the alleged injury of September 17, 2014.

30. Claimant was asked why after the alleged injury of September 17, 2014 he did not disclose to his medical providers that he received prior treatment for his shoulder in August 2014 and early September 2014. Claimant testified that his "thoughts" were that such a disclosure "would jeopardize more if I were to let them know that I had seen my doctors before going to talk to them." Claimant conceded that he did not make a "good decision" when he failed to disclose the pre-injury treatment.

31. The OAC file reflects that on or about March 13, 2015 Claimant filed an Application for Hearing and Notice to Set listing the issues as medical benefits, temporary total disability benefits, petition to reopen and FAL "wrong date and address."

32. On April 10, 2015 Respondents filed a response to the application for hearing and listed, among other things, the issue as "withdraw of admissions."

33. At the hearing the parties agreed that the sole issue for determination by the ALJ is the Respondents' request to withdraw the FAL. (Transcript pp. 3-4).

34. Respondents proved it is more probably true than not that on September 17, 2014 Claimant did not sustain any injury arising out of an in the course of his employment.

35. A preponderance of the credible and persuasive evidence establishes that it is more probably true than not that Claimant falsely reported a September 17, 2014 work-related injury to obtain compensation for a left shoulder condition that is not causally-related to any activity arising out of and in the course of his employment.

36. Claimant's testimony that he sustained a left shoulder injury on September 17, 2014 when a co-employee stepped on a roll of insulation is not credible. The medical records generated after the alleged DOI consistently demonstrate that Claimant failed to tell his authorized providers that in the weeks prior to September 17 he received treatment for a left shoulder condition. Claimant did not disclose to his providers that in the weeks just prior to September 17 PA-C Slager treated him for left shoulder problems, prescribed an MRI and referred him to an orthopedic specialist. Claimant himself admitted that he failed to disclose this information to his various providers. (Finding of Fact 29). Claimant admitted that he did not disclose this information because he realized it might "jeopardize" his claim. Claimant also obfuscated his medical history when he spoke to the insurance adjuster. The ALJ infers from this evidence that Claimant was motivated to conceal his true medical history from his authorized providers and the Respondents in order to obtain workers' compensation benefits for his pre-existing left shoulder condition.

37. Moreover, at hearing Claimant testified that he suffered separate work-related left shoulder injuries in August 2014 *and* September 2014. This testimony is so inconsistent with the history Claimant gave various medical providers that the ALJ finds the testimony is incredible. On September 18, 2014 Claimant reported to his employer that he injured his left shoulder on September 17, 2014 while pulling insulation. On September 18, 2014 Claimant told PA-C Missey at Concentra that he injured his

shoulder on September 17, 2014. On October 23, 2014 Claimant told Dr. Papilion that he injured his shoulder on September 17, 2014 when a "pallet got stuck." Claimant told Dr. Weinerman that he injured his shoulder in August 2014 when he was pulling a pallet off of his truck and a pallet got stuck. On June 2, 2015 Claimant told Dr. Hompland that he injured himself on September 17, 2014 while pulling a pallet jack that got stuck under a "dock plate." The history Claimant gave to these providers is inconsistent with the history recorded by PA-C Slager in August 2014. PA-C Slager documented that Claimant reported chronic left shoulder pain and that he had not suffered any recent trauma that would explain the escalation in his chronic shoulder pain.

38. Claimant's testimony that he suffered injuries in August and September 2014, and that he reported both injuries to the Employer, is contradicted by the credible testimony of Labs and Reece. Labs credibly testified that Claimant reported only *one* injury and that when Claimant reported the injury Labs promptly referred Claimant to Reece. Reece credibly testified that after Claimant reported the injury he promptly completed the SAIR showing that Claimant's DOI was September 17, 2014 and the mechanism of injury was a co-employee standing on insulation dragged by Claimant. The ALJ infers Claimant reported only one injury to the Employer and that was the alleged injury of September 17, 2014.

39. The ALJ is also persuaded that Claimant's condition after September 17, 2014 was no different than it was prior to September 17, 2014. On August 15, 2015 Claimant reported to PA-C Slager that he was experiencing left shoulder symptoms not substantially different than those he reported to PA-C Missey on September 18, 2014.

40. Dr. McBride credibly opined that the shoulder pathology depicted in the October 2014 MR arthrogram (tear of the supraspinatus tendon) predated the alleged injury of September 17, 2014. Dr. McBride persuasively explained that he personally reviewed the August 2014 and October 2014 MRI arthrogram images and that both of them depict nearly identical tears of the supraspinatus tendon and no tear of the infraspinatus tendon. Dr. McBride's opinion is corroborated by Dr. Weinerman who reported that he personally reviewed the MR arthrogram images of August 28, 2014 and these images reveal a tear of the supraspinatus tendon. Dr. Papilion's opinion that the August 28 arthrogram showed a tear of the infraspinatus tendon is not persuasive. Dr. Papilion did not review the actual images but instead relied on the report of the radiologist. The ALJ is persuaded by the testimony of Dr. McBride, as corroborated by Dr. Weinerman, that the radiologist erroneously read the August 28 MR arthrogram as depicting a tear of the infraspinatus tendon rather than the supraspinatus tendon.

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 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.

WITHDRAW OF FINAL ADMISSION OF LIABILITY

Respondents contend a preponderance of the evidence establishes that on September 17, 2014 Claimant did not sustain any injury arising out of and in the course of his employment with the Employer. Consequently, Respondents contend that they should be permitted to withdraw the FAL filed on January 27, 2015. The ALJ agrees with this argument.

Ordinarily, the claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. 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).

However, in this case Respondents filed an FAL admitting, among other things, that on September 17, 2014 Claimant sustained an injury arising out of and in the course of his employment and that this injury rendered them liable for medical benefits. The Claimant contested the FAL by seeking medical and TTD benefits. The Respondents then sought to withdraw the FAL by taking the position that Claimant, contrary to his reports, did not experience any injurious event while at work on September 17, 2014.

It is permissible for respondents to seek to withdraw of their own FAL's in cases where the claimant has contested the FAL in accordance with law. *HLJ Management Group v. Kim,* 804 P.2d 250 (Colo. App. 1990); *Parker v. Home Depot USA, Inc.,* WC 4-665-039-01 (ICAO January 14, 2013); *Fausnacht v. Inflated Dough, Inc.,* WC 4-160-133 (ICAO July 20, 1999), *aff'd., Fausnacht v. Industrial Claim Appeals Office,* Colo. App.

No. 99CA1499 (May 4, 2000) (not selected for publication). In this case Claimant has not disputed the right of Respondents to seek withdrawal of the FAL.

Because the FAL admitted that on September 17, 2014 Claimant sustained a compensable injury on arising out of and in the course of his employment, the Respondents now bear the burden of proof to establish that Claimant did not sustain a compensable injury on September 17, 2014. Section 8-43-101(1), C.R.S. (party seeking to modify issue determined by general of final admission shall bear burden of proof for modification); *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

The ALJ concludes Respondents are entitled to withdraw the FAL filed on January 27, 2015. As found, Respondents proved it is more probably true than not that Claimant falsely reported that on September 17, 2014 he sustained an injury to his left shoulder when a co-employee stepped on insulation that Claimant was dragging behind him. Rather, the ALJ finds it is more probably true than not that Claimant reported the alleged injury as a means of obtaining workers' compensation benefits to compensate for a condition that is probably not related to any injury that he suffered while working for the Employer. Specifically, the ALJ has found as a matter of fact that Claimant did not sustain any work-related injury on September 17, 2014. Similarly the ALJ has discredited Claimant's testimony that he suffered a work-related injury in August 2014. Claimant's testimony that he suffered an injurious event on September 17, 2014 is incredible for the reasons stated in Findings of Fact 36 though 38. Moreover, for the reasons stated in Findings of Fact 39 through 40 the ALJ is persuaded Claimant's medical condition after September 17, 2014 was no different than it was prior to September 17, 2014. As found, the ALJ credits the opinion of Dr. McBride that the MRI arthrograms taken on August 28, 2014 and October 20, 2014 are substantially identical. Therefore, the credible and persuasive evidence establishes that after the August 2014 MRI Claimant did not exhibit any new pathology that could have resulted from the alleged injury of September 17, 2014.

In light of these findings Respondents are entitled to withdraw the FAL. The ALJ need not consider Respondents' alternative argument that if Claimant experienced a potentially injurious event on September 17, 2014 the event did not result in a "compensable injury."

ORDER

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

1. Respondents' request to withdraw the Final Admission of Liability filed on January 27, 2015 is granted.

2. 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: December 15, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

- 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?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant was employed with employer as a groundskeeper. Claimant testified that on October 26, 2014, he was working cleaning parking lots at a local high school and was sucking leaves around a sidewalk when he sucked up some glass and reached into bag to empty the bag when he felt a pull from his arm down into his neck. Claimant testified he reported the incident to his supervisor, Mr. Demi.

2. Claimant testified he did not seek medical treatment immediately following his injury because he felt he may have only incurred a strain. Claimant testified he had previously received medical treatment for arthritis with Dr. Eicher and Dr. Lippmann, Jr. The medical records entered into evidence establish claimant was seeking medical treatment for issues involving joint pain and swelling in his wrists and elbow, that was diagnosed as possible rheumatoid arthritis and a potential tick bite during June through September 2014.

3. Claimant testified he was not referred for medical treatment by employer and eventually came under that care of Dr. Liotta. Dr. Liotta first evaluated claimant on December 18, 2014 and noted claimant was complaining of symptoms that had been going on for about six months and came on insidiously. Claimant denied a recollection of the event that brought on claimant's symptoms. Dr. Liotta diagnosed claimant with degenerative disc disease and C5-C6 radiculopathy. Dr. Liotta recommended a magnetic resonance image ("MRI") of the cervical spine.

4. Claimant underwent the MRI on December 30, 2014. The MRI revealed degenerative changes most pronounced at C6-C7 with a large fragment extruding on the right.

5. Claimant was evaluated by Dr. Ceola on January 2, 2015. Dr. Ceola noted that claimant began having quite a bit of pain in his hand and arm back in May. Dr. Ceoloa reviewed the MRI and noted claimant's treatment options would include

possible C6-7 anterior cervical diskectomy with interbody cage and plating. The ALJ notes that this medical record is almost identical to a record from Dr. Miller also dated January 2, 2015, but this record appears to be from an evaluation from Dr. Ceola.

6. Employer filed a first report of injury on January 5, 2015. The first report of injury notes that employer was first informed of the injury on October 26, 2014.

7. Claimant was again seen by Dr. Lippman, Jr. on January 8, 2015. Claimant reported to Dr. Lippman, Jr. on this occasion that he injured his neck on October 26, 2014 while emptying leaves from a leaf blower at work. Dr. Lippman, Jr. noted that he would obtain the records from Dr. Miller. The ALJ notes that this is the first medical history provided by claimant of his symptoms being related to a work injury in October 2014.

8. Claimant returned to Dr. Lippman, Jr. on January 12, 2015. Dr. Lippman, Jr. diagnosed claimant with cervical radiculopathy and provided claimant with work restrictions. Claimant testified he continued to work with the restrictions set forth by Dr. Lippman, Jr.

9. Claimant continued to treat with Dr. Lippman, Jr. On March 10, 2015, Dr. Lippman, Jr. noted claimant's work related diagnosis included cervical radiculopathy and his plan of care included surgery. This diagnosis continued consistently for Dr. Lippman, Jr. after January 2015. Dr. Lippman, Jr. does not explain the relationship of the symptoms in light of the discrepancies that are contained within the medical records. The ALJ further notes that claimant first reported his symptoms being related to an incident at work on October 26, 2014 after claimant obtained the MRI of his cervical spine, over two months after his alleged work injury.

10. The ALJ notes that there are discrepancies in the medical records regarding claimant's report of symptoms to his physicians and when he developed the onset of those symptoms as related to the work injury. The ALJ finds that these discrepancies indicate that claimant's symptoms predated his alleged work injury on October 26, 2014. The ALJ credits the medical history provided in claimant's medical records over claimant's testimony at hearing that his symptoms developed after his October 26, 2014 work injury.

11. The ALJ finds that claimant has failed to demonstrate that it is more probable than not that the medical treatment with Dr. Lippman, Jr. after he reported the work injury to employer in writing on January 5, 2015 related to his alleged October 26, 2014 work injury. The ALJ notes that claimant did not request medical treatment from employer following the work injury and when he did eventually seek medical treatment following his alleged October 26, 2014 work injury, he did not relate his symptoms to the incident when he was reaching into the bag at work.

12. The ALJ therefore determines that claimant has failed to meet his burden of proving that the incident at work on October 26, 2014 resulted in the need for medical treatment to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the ALJ credits the medical records entered into evidence at hearing over the testimony of claimant at hearing and finds that claimant has failed to prove that he sustained a compensable injury arising out of and in the course of his employment with employer.

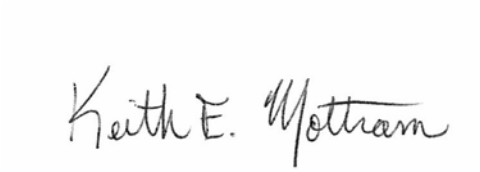
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits related to an October 26, 2014 work injury 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: December 31, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues presented for determination are whether Claimant's ongoing headaches are causally related to his August 12, 2014 work injury; and whether treatment (Depakote and Cambia) for headaches recommended by neurologist Dr. Bennett Machanic is reasonable, necessary and related to the work injury.

FINDINGS OF FACT

1. The Claimant worked for the Employer as a technician and maintenance supervisor. His job duties primarily entailed maintaining rental units.

2. On August 12, 2014, Claimant injured his low back and left elbow when he slipped on stairs while carrying a window air conditioning unit.

3. The Respondents admitted liability for the injury and Claimant has continued to receive medical treatment.

4. Claimant initially received treatment at Union Medical with Dr. Mark Paz. Dr. Paz eventually referred the Claimant to Dr. Franklin Shih.

5. On August 25, 2014, Dr. Shih evaluated the Claimant for his left elbow and low back symptoms.

6. Dr. Shih referred the Claimant to Dr. Nicholas Olsen for an interventional pain management consultation. On November 18, 2014, Dr. Olsen performed a lumbar epidural steroid injection (ESI) at the L5-S1 level of Claimant's spine.

7. On November 20, 2014, Claimant saw Dr. Paz, and reported that since the ESI he feels discomfort his right leg, right buttock and anterior thigh. Claimant reported that the pain in his leg increases with weight bearing. Claimant did not report any headache symptoms to Dr. Paz.

8. On December 1, 2014, Claimant returned to see Dr. Paz. Claimant did not report headache symptoms at that time.

9. Claimant testified that two to three days after the ESI he began to experience headaches, and that he contacted Dr. Olsen's office by telephone two times. Claimant testified that he had never experienced headaches like that prior to the ESI.

10. On December 2, 2014, Dr. Olsen diagnosed dural headaches, a side effect of ESIs. In Dr. Olsen's December 2, 2014 report, he stated that he had talked to

Claimant the day prior and that Claimant reported improvement in his headaches when lying in a supine position and exacerbation when sitting up right.

11. On December 2, 2014, Dr. Olsen and performed a blood patch procedure at the L5-S1 level of Claimant's spine. Claimant reported immediate relief of his headache symptoms.

12. Dr. Olsen re-evaluated the Claimant on December 4, 2014, for Claimant's low back symptoms and headaches. Dr. Olsen's report notes that Claimant experienced significant relief of his headache symptoms following the blood patch on December 2, 2014, but that his headache returned the following day. Dr. Olsen noted that Claimant may need a repeat blood patch, and recommended that Claimant try to rest the remainder of that day and over the ensuing weekend to see if lying down, increasing his fluids and using moderate caffeine will affect the headaches. Dr. Olsen restricted Claimant from working at all to allow him the opportunity to rest over the weekend.

13. Claimant returned to see Dr. Olsen on December 8, 2014. Claimant reported that the Employer required him to work over the weekend despite the "off-duty" order given by Dr. Olsen. Dr. Olsen recommended a repeat blood patch and explained the importance of resting for five days following the repeat blood patch. Claimant agreed to coordinate a rest period following the second blood patch.

14. On December 9, 2014, Dr. Olsen performed the repeat blood patch procedure for the diagnosed dural headaches. Claimant reported a reduction in his headache pain from 9 out of 10 to 5 out of 10 on the pain scale.

15. On December 15, 2014, Claimant returned to see Dr. Olsen. Claimant reported that after the blood patch, he felt better the first day, okay on the second day and by the third day, he his headache and back pain increased. Claimant went to the emergency room, and was prescribed steroids and instructed to follow up with Dr. Olsen. Dr. Olsen diagnosed persistent dural headaches. Dr. Olsen recommended that Claimant continue to observe supine positioning, and increasing his fluid intake including caffeine intake.

16. The emergency room record dated December 10, 2014 discusses only back pain. There is no mention of headaches.

17. On December 22, 2014, Dr. Paz's physician's assistant, Erin Lay, evaluated the Claimant. Claimant reported that his headaches improved but have persisted, occurring twice per day for up to two to three hours in duration.

18. On January 6, 2015, Dr. Shih noted that Claimant's headaches had resolved.

19. Dr. Paz discharged Claimant for "non-compliance" on January 16, 2015. Dr. Paz did not examine or even see the Claimant on that date.

20. On February 13, 2015, Dr. David Yamamoto evaluated the Claimant. Claimant reported headache pain up to 10 out of 10. Dr. Yamamoto indicated he would refer the Claimant to a neurologist.

21. Claimant was eventually evaluated by neurologist, Dr. Bennett Machanic, on May 21, 2015. Dr. Machanic stated that, "[Claimant] has headaches secondary to apparently complications of the epidural steroid injection." Dr. Machanic took a history from Claimant and documented that Claimant had an ESI which resulted in immediate headaches although the Claimant stated to Dr. Machanic that he does not experience a worsening or improvement in his headaches regardless of positional change. Claimant described the headaches as daily and "predominantly occupying the occipital region and apical region with a steady character, interspersed with severe headaches twice daily." Claimant reported the severe headaches typically last two to three hours, but sometimes four to six hours with throbbing, nausea and oftentimes photophobia. Dr. Machanic reiterated that the headaches are not dependent upon Claimant's posture.

22. Dr. Machanic's assessment included post epidural steroid injection headache due to apparent penetration of the dura. Dr. Machanic noted, "This is a mixed headache type of phenomena, mainly involving interspersed migrainous events, but also associated with tension-cephalgic mechanisms." Dr. Machanic recommended Depakote and Cambia to treat Claimant's headaches.

23. Claimant returned to see Dr. Machanic on June 25, 2015. Claimant reported significant improvement in his headaches with the Depakote. He told Dr. Machanic that he missed his Depakote dosage two times which resulted in a headache within 24 hours of the missed dose. Claimant took the Cambia packs on those occasions which reversed the headaches. Dr. Machanic continued the prescriptions for Depakote and Cambia.

24. On August 5, 2015, Claimant saw Dr. Machanic. He reported that he had been experiencing headaches once per day despite the Depakote. Claimant described the headache as an aching hemicranial pain. Claimant had tried Cambia for these headaches but he had run out because a large supply for Cambia had not been authorized. Dr. Machanic increased Claimant's Depakote dosage to twice per day.

25. The Respondents referred Claimant to Dr. Eric Ridings for an independent medical examination which occurred on August 25, 2015. Dr. Ridings met with the Claimant and reviewed Claimant's medical records. Claimant reported to Dr. Ridings that his headaches did not change whether he was lying down or sitting up. He told Dr. Ridings that at first, he experienced random headaches three times per day, and that he would have no headaches for much of the day even when he was up and about. Claimant reported that a headache could arise when he was lying in bed. Claimant reported that the Depakote prevents onset of a headache and that since August 5, he had experienced only one headache because he had forgotten to take the Depakote.

26. Claimant described his headaches to Dr. Ridings as running from the top of neck, up over the back of his head, the top of his head to the bifrontal region, and that

they generalize throughout his head. Claimant stated his headaches were not positional. Dr. Ridings opined that the Claimant's headaches include migrainous features based on the description Claimant provided, and that no specific pathology for the headaches has been identified.

27. In his report, Dr. Ridings ultimately opined that Claimant's ongoing headaches and treatment recommended to alleviate the headache symptoms is not related to the work injury or the ESI performed by Dr. Olsen. Dr. Ridings indicated that the blood patch procedures were reasonable, but any treatment beyond those procedures is unrelated. Dr. Ridings' opinion relied, in part, on lack of documentation in the record that Claimant's headaches were positional and Claimant's reports to Dr. Ridings that his headaches were not positional. Dr. Ridings explained in his report that the hallmark of dural headaches is resolution of symptoms when the patient is lying down and onset or severe worsening of symptoms when the patient sits up.

28. On September 11, 2015 Dr. Machanic opined that Claimant's ongoing headaches and need for ongoing headache treatments is "absolutely" related to the ESI. Dr. Machanic provided no explanation concerning the reported resolution of symptoms as of January 6, 2015 or Claimant's self-report that he does not experience a change in symptoms with a change in position.

29. Claimant testified that about two to three days after the ESI he experienced massive pain from the back of his head over the top to his head. He rated his pain at a level 10 out of 10 on the pain scale. He called Dr. Olsen and eventually returned to see him on December 2, 2014 when he had the first blood patch procedure. Claimant felt relief for a few hours after each blood patch procedure but his headaches continued.

30. Claimant testified that his headaches have continued and if he does not take his pills, he will have headaches all day. Claimant testified that his headaches are better when he lies down and worse when he is sitting up.

31. Claimant admitted that he told Dr. Machanic that his headaches are the same all of the time with no changes in symptoms regardless of his position (sitting/standing versus lying down). Claimant also testified that he told Dr. Ridings that his headache symptoms improve when he is lying down although Dr. Ridings documented no changes in his symptoms with postural changes.

32. Dr. Ridings testified as an expert in physical medicine and rehabilitation. He explained that when an ESI is performed, a small tear can occur in the dura which causes cerebrospinal fluid to leak which leads to headache symptoms. The characteristics of dural headaches include increased severity when standing or sitting within 15 minutes of assuming an upright position; and disappearance or dramatic improvement in symptoms when lying down. Dr. Ridings explained that a blood patch procedure is the most common treatment for a suspected dural puncture.

33. Dr. Ridings testified that based upon specific studies done of post lumbar puncture headaches (or dural headaches), the headaches usually last no more than 14 days.

34. Prior to issuing his report or testifying at the hearing, Dr. Ridings had not reviewed Dr. Olsen's December 2, 2014 report in which Dr. Olsen noted that Claimant had improvement in his headaches when lying in a supine position and exacerbation when sitting up right. Dr. Ridings admitted that if he had the same history Dr. Olsen had at that time he also would have diagnosed dural headaches. Dr. Ridings opined that the blood patch procedures were reasonable to treat the Claimant's suspected dural puncture and resulting headaches.

35. Dr. Ridings admitted that Claimant likely had dural headaches initially, but he opined that Claimant's ongoing headaches are no longer dural. Dr. Ridings relied on Dr. Machanic's report which indicated that Claimant's ongoing headaches were migrainous and "tension-cephalgic" in nature. Dr. Ridings also opined that Depakote and Cambia should not improve a dural headache because the dural headache is caused by a cerebrospinal fluid leak and to improve symptoms related to such leak, the leak needs to be repaired. Depakote and Cambia are not used to treat dural headaches. Finally, Dr. Ridings pointed out that Claimant's headaches resolved as of January 6, 2015 per Dr. Shih which is consistent with a positive response to the blood patch used to treat a dural headache within the appropriate timeframe.

36. Dr. Ridings testified that Claimant should be better now if his headaches were indeed dural in nature, but Dr. Ridings admitted that the medical literature documents one case in which an individual suffered a dural headache for 19 months.

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.

6. Claimant testified that he continues to experience headache symptoms and that lying down improves his symptoms and sitting up or standing worsens them. The medical records, however, contradict Claimant's description of his symptoms. Claimant admittedly told Dr. Machanic that his symptoms remain the same throughout the day, and Dr. Ridings documented no changes in symptoms with postural changes. Both of these providers closely questioned Claimant on the specific issue of postural change because as Dr. Ridings explained, the hallmark of dural headaches is resolution of symptoms when the patient is lying down and onset or severe worsening of symptoms when the patient sits up. Claimant explicitly denied to Drs. Machanic and Ridings that postural changes affected his headaches. Claimant's testimony concerning postural changes impacting his headaches lacks credibility given his inconsistent statements to the medical providers.

7. The ALJ credits the opinions and testimony of Dr. Ridings that Claimant may have suffered a dural headache as a result of the lumbar ESI, but that his dural headache symptoms resolved as of January 6, 2015. Claimant has failed to prove by a preponderance of the evidence that his ongoing headaches are causally related to his work injury or the ESI. Thus, Claimant has failed to prove that the current need for treatment of his headaches, including the Depakote and Cambia prescriptions as well as ongoing treatment with Dr. Machanic specifically for his headaches, is causally related to the ESI of November 18, 2014.

ORDER

It is therefore ordered that:

1. Claimant's request for an award of medical benefits for treatment related to his headaches, including the Depakote and Cambia prescriptions and treatment by Dr. Machanic specifically for his headaches, 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: December 16, 2015

DIGITAL SIGNATURE:

L. Broniak

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-972-684-02

STIPULATIONS

1. The parties stipulate that Respondents have never designated an authorized treating physician and all medical providers are in the chain of referral from authorized treating providers.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether the Claimant proved she suffered compensable injuries while performing services arising out of and in the course of her employment with Respondent Employer when she was injured in a motor vehicle accident on November 11, 2014.

2. If the Claimant sustained a compensable work injury, determination of the Claimant's average weekly wage ("AWW").

3. If the Claimant sustained a compensable work injury, whether the Claimant proved she is entitled to temporary total disability benefits from November 12, 2014 ongoing.

4. If the Claimant sustained a compensable work injury, whether the Claimant proved she is entitled to medical benefits for medical care she received as a result of the November 11, 2014 motor vehicle accident.

FINDINGS OF FACT

1. Dr. Amy Jorgensen-Blackburn is the owner of the Employer dental clinic, Amazing Smiles. She is a general dentist, but she chooses to only see kids, so she considers herself a pediatric dentist. Dr. Jorgensen-Blackburn employed the Claimant in her clinic as the "lead assistant" who managed the other 3-4 assistants in the back. Dr. Jorgensen-Blackburn was the Claimant's direct supervisor. Joan Jorgensen is the office manager for the clinic and also Dr. Jorgensen-Blackburn's mother. The Claimant was employed by Employer at about the time the new dental clinic first opened, since May 10, 2010 and she helped the business start up. Dr. Jorgensen-Blackburn testified that she considered the Claimant to be an integral part of her dental clinic. The Claimant was employed there on November 11, 2014, the day on which she sustained physical injuries in a motor vehicle accident ("MVA") while driving home from the clinic where she worked.

2. The Employer's dental clinic was open for business Tuesday – Friday each week, scheduling all client appointments on those days and it was closed Saturday, Sunday and Monday. The Claimant testified that she averaged about 36 hours a week. She saw typically patients from 8am – 5pm. The Claimant agrees that she did not always arrive at work on time, depending on weather, traffic. The Claimant testified that she typically left the office at about 6:00 pm each day the clinic was open after cleaning up and sterilizing the instruments.

3. The Claimant was paid $22.00 per hour. The Claimant did receive a bonus in 2013. She was not promised a 2014 bonus nor did she receive one. The Claimant testified that she had a health insurance benefit until receiving notice that it was terminated. The Employer paid 100% of the health insurance premium. The Claimant testified that she also received a credit card from her Employer for her to put gas in her car. Although, Dr. Jorgensen-Blackburn testified more persuasively that the Claimant did not receive any gas or mileage reimbursement as part of her employment compensation. Rather, the Claimant would often state to Dr. Jorgensen-Blackburn that she was short on money and Dr. Jorgensen-Blackburn felt bad about this and allowed the Claimant to use a gas card every once in a while, but this was a gift, not compensation, and the Claimant would have no expectation that she would have the right to use the gas card or be reimbursed for mileage for travel between her home and the dental clinic.

4. The Claimant's work duties were different at the beginning of her employment in 2010 than they were on the date of her MVA. Her start up work duties included marketing and promotion. Claimant was also a dental assistant and she managed the girls in the back. At beginning, the marketing duties were prevalent and included travel to schools to do orientations. However, as of November 11, 2014, the Claimant's duties were managing the other dental assistants, working as a dental assistant which included chair-side prep and completion of work with clients, obtaining consents from parents for issues related to children receiving dental care (eg papoose boards, nitrous oxide), taking daily notes for regular meetings, and ordering all supplies for the office.

5. The Claimant's duties also included scheduling patients. She would try to fit in patients who were scheduled out further in order to get them in to earlier dates. On Tuesdays – Fridays, the Claimant would confirm patients in the office for scheduled appointments. On Friday, the Claimant would bring home the schedule so that on Monday, when the clinic was closed to clients, she could contact the Spanish-speaking patients with Tuesday appointments to confirm. This activity would occur on and off all day because she would leave messages for patients from Employer's emergency phone line and they would often call back later in the day.

6. In addition to her patient contact for scheduling reminders on Mondays, the Claimant also used the clinic's emergency phone to follow up with parents of

kids/patients after hours at times in cases of a tooth extraction or in cases like that. The Claimant also used the emergency phone at her home in order to answer calls or take messages off the phone when patient's (or the parents) called that line outside of the clinic's normal hours. If there was an emergency call, the Claimant testified that she would text her supervisor, Dr. Amy, to let her know about it. The Claimant testified that she does not recall how many emergency calls came in through this line in 2014. Dr. Amy Jorgensen-Blackburn testified that, on average, about 1 emergency call per month would come in to the emergency phone that the Claimant maintained. The ALJ finds Dr. Jorgensen-Blackburn's testimony to be credible and persuasive on this issue.

7. The Claimant does not have a land line at her home. She does have a personal cell phone in addition to the emergency phone for the clinic. The Claimant agreed that she permitted her daughter to make calls and receive calls on the Employer's emergency phone. The Claimant states that her daughter did not take the phone with her to school, it would remain at home, but she is not sure how the phone was used while it was at home and she was at work. The Claimant stated that the agreement with her daughter about the emergency phone usage was due to the fact that the Claimant wasn't home when her daughter left for school and came home from school, so her daughter was to text the Claimant to let her know when she left for school and when she came home. In any event, the intention was that the emergency phone remain at the Claimant's home and that the Claimant would make calls on Mondays and would receive emergency calls and/or retrieve messages outside of the hours the clinic was open while the Claimant was at her home. The Claimant did not keep the emergency phone with her, so she would only have access to it when she was at home.

8. On Monday, Nov. 10, 2014, the Claimant did call patients to confirm Tuesday scheduled appointments, but she does not recall how many calls that she made on that date.

9. On November 11, 2014, the Claimant worked at the clinic. On that day, it was snowy. This was the last day that the Claimant showed up to work for Employer. Dr. Jorgensen-Blackburn reviewed the Claimant's timesheet for that day which showed the Claimant had clocked out at 5:45 pm. Dr. Jorgensen-Blackburn testified credibly that she did not give the Claimant any additional assignment or work that night (a Tuesday). The Claimant testified that her normal route home from the clinic in Westminster to her home near Johnstown is: Federal to I-25, exits on Hwy 66 and gets on County road 13. The Claimant testified credibly that she was driving her normal route and hit a patch of ice and rolled her vehicle.

10. Medical records from the emergency room where the Claimant was transported from the accident indicate the Claimant was not wearing a seatbelt and she was ejected from the vehicle. The Claimant testified that a passerby saw the Claimant's truck had rolled and called it in. The Claimant was taken to Emergency Department for the University of Colorado Health. The Claimant was admitted and stayed overnight and she was released the next day. Medical records from the University of Colorado Health

confirm this and note that the Claimant suffered pulmonary contusions, a rib fracture, and some neck and back pain, but no evidence of head trauma or loss of consciousness (Claimant's Exhibit 1).

11. The night of the motor vehicle accident, the Claimant had her sister call Dr. Jorgensen-Blackburn to let her know what happened. Dr. Jorgensen-Blackburn agreed that the Claimant's sister called her to let her know what had happened to the Claimant on November 11, 2014. The Claimant testified that the next contact with her Employer was when the Claimant called and talked to Dr. Jorgensen-Blackburn and the Claimant let her know she was in a lot of pain. The Claimant testified that Dr. Jorgensen-Blackburn told her that she hoped the Claimant got better soon. The Claimant doesn't recall if she advised Dr. Jorgensen-Blackburn that she could not return to work that day. The Claimant testified that she believes that on either November 15th or 16th that she wasn't able to get to work because she was currently at the doctor. The day after the Claimant saw the doctor, she had just been referred to Colorado Clinic and she didn't have any new information about her condition yet. The Claimant testified that she told Dr. Jorgensen-Blackburn that she was waiting for the doctor to call her back. The Claimant testified that on about November 22, 2014, she spoke with Dr. Jorgensen-Blackburn about missing work and Dr. Jorgensen-Blackburn asked if the Claimant could get a note from her doctor. The Claimant testified that she called the doctor and obtained a note dismissing her from work and the Claimant photocopied it and faxed it to the Amazing Smiles clinic. Per the Claimant's testimony, this note kept the Claimant off work until Dec. 8, 2014. The Claimant testified that on about December 8, 2014 she received another note excusing her from work and she mailed this to the Amazing Smiles clinic. The Claimant testified that there was one more note excusing the Claimant from work until January and the Claimant testified that she also provided this to the Amazing Smiles clinic. On cross-examination, the Claimant testified that she sent the work status notices to the Amazing Smiles clinic, but did not address them to anyone in particular. There is a note from Dr. Kenigsberg dated November 26, 2014 excusing the Claimant from work until December 11, 2014 due to her MVA (Claimant's Exhibit 2, p. 32). A second note from the Colorado Clinic dated December 11, 2014 requests an excuse from work through December 18, 2014 (Claimant's Exhibit 2, p. 33) and a third note from the Colorado Clinic dated December 17, 2014 requests an excuse for Claimant from work until January 1, 2015 (Claimant's Exhibit 2, p. 34).

12. Dr. Jorgensen-Blackburn testified that the Claimant communicated with her twice by phone call after her motor vehicle accident. Dr. Jorgensen-Blackburn testified that she communicated to the Claimant that I hoped she was feeling better and asked when she would come back to work and indicated that the Claimant could just answer phones at the clinic instead of her regular duties. Other than this, Dr. Jorgensen-Blackburn testified that she only had communications with the Claimant by text after the November 11, 2014 MVA. The text messages between Dr. Jorgensen-Blackburn and the Claimant were exchanged between November 13, 2014 and December 2, 2014. Dr. Jorgensen-Blackburn testified that during all of the communications that she had with the Claimant following the November 11, 2014 MVA, she never receive a note from the Claimant from a doctor taking her off work. Dr.

Jorgensen-Blackburn further testified that if one had been sent to the clinic, she would have received it because she reads all of her mail after the office manager Joan opens it.

13. The Claimant testified that at some point, she received a note that her insurance coverage terminated as of 11/5/14 (See Ex 10, p. 62). When the Claimant received the letter regarding termination of insurance, she believed that she was no longer an employee of Employer. The Claimant testified that she also received notification from Facebook that she was removed as the "administrator" for the clinic's Facebook page and she could no longer access the Facebook account to post pictures, etc. The Claimant testified that she was also aware that the other employees at the Employer's clinic received Christmas bonuses in 2014 and she did not receive a bonus or any notification about a bonus. The Claimant testified that she also became aware that the emergency phone line was turned off. The Claimant still has possession of the phone that she previously used for the clinic's emergency phone line. She stated that she would be willing to return it. The Claimant still has not returned the key to the front door of the clinic and she never received any official notice that her employment with Employer was terminated.

14. Dr. Jorgensen testified that neither she nor the office manager fired the Claimant. She further testified that she did not take the Claimant off as the clinic's Facebook administrator because Dr. Jorgensen-Blackburn does not even know how to do this. Dr. Jorgensen-Blackburn also disconnected the emergency phone at some point because the Claimant wasn't responding to her or answering the phone and she wanted to make sure that someone would answer the clinic's emergency line over the Thanksgiving weekend. As for the health insurance, Dr. Jorgensen-Blackburn testified that she is not sure when the Claimant's health insurance was terminated, but stated that this was done after she received a phone call from Weld County human services offices with the Claimant present as well. The caller advised Dr. Jorgensen-Blackburn that the Claimant was with her at the Weld County offices and advised them that she was fired and they were asking about the Claimant's wages. Dr. Jorgensen-Blackburn testified that she called the Claimant after this phone call and she didn't answer the phone. Dr. Jorgensen-Blackburn further testified that since it was clear to her after this that the Claimant wasn't coming back to work, the health insurance and emergency phone service were cancelled.

15. The Employer typically gives staff bonuses, depending on performance, at the clinic's holiday party. The Claimant was invited to the party but did not come and so she did not receive any bonus for 2014.

16. Dr. Jorgensen-Blackburn testified that she didn't think to reach out to the Claimant to tell her she wasn't fired because she thought the Claimant knew she was not fired. Dr. Jorgensen-Blackburn testified that the Claimant had previously been involved in a motorcycle accident and the Employer held her job for her for over a month until she could return to work. Dr. Jorgensen-Blackburn testified that just as with the 2013 motorcycle accident, the Employer would have made accommodations at work

for the Claimant so she could come in and leave when she needed and she could just answer phones or assist the front office person instead of her regular duties. On rebuttal, the Claimant agreed that she had been in a motorcycle accident and had missed work. However, the Claimant testified that for the prior motorcycle accident, the Employer did not require a note from doctor that she was off work or couldn't work.

17. On January 19, 2015, a Worker's Claim for Compensation was completed for the Claimant by a paralegal for the Claimant's attorney. The claim states that the Claimant injured her mid to low back, radiating upwards, and ribs. The claim arises out of the Claimant's motor vehicle accident on November 11, 2014 when her car slid on black ice and rolled over, ejecting her from the vehicle (Respondents' Exhibit C). Employer completed an Employer's First Report of Injury on January 27, 2015 noting the same injuries and mechanism of injury (Respondents' Exhibit D). A Notice of Contest was file on February 4, 2015 (Respondents' Exhibit E).

18. The Claimant treated with Dr. Doug Lerner who indicated the Claimant was under temporary work and activity restrictions pending cervical surgery. Dr. Lerner provided medication management treatment for the Claimant's neck pain that also caused migraines. Dr. Lerner noted the Claimant was scheduled for 2 level cervical fusion. The Claimant had cervical spine fusion surgery in May of 2015. Her post-operative care consists of physical therapy and follow up with her neurologist, Dr. Beth Gibbons (Claimant's Exhibit 6; Respondents' Exhibit G).

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.

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
(Going to and Coming from Work Rule and Exceptions)

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 involve an "injury" which requires medical treatment or causes 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). 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 general rule is that injuries sustained by employees going to and from work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 212 (Colo. 1967). An exception to this general rule exists when "special circumstances" create a causal relationship between the employment and the travel, beyond the sole fact of the employee's arrival at work. *Madden v. Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). *Madden, supra,* listed four factors which are relevant in determining whether "special circumstances" have been established which create an exception to the "going to and coming from" rule. These factors are: (1) whether the travel occurred during work hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the

obligations or conditions of employment created a "zone of special danger." *Madden* at 864.

Although the Claimant appeared to argue that the motor vehicle accident occurred during work hours under the first *Madden* factor, the facts do not support this. The Claimant testified that her MVA occurred on a Tuesday and an hour of time would be added to her Tuesday payroll for work performed by the Claimant on Mondays. However, this was a legal fiction to compensate the Claimant for work she performed on the phone on Mondays when the Employer's dental office was closed. It did not actually extend the Tuesday work day by an hour. Even if this was the case, the clinic had closed at about 5:00 pm and Claimant had clocked out from work at 5:45 pm on the date of her MVA after cleaning instruments and closing up and then she left the clinic in Westminster. She drove directly home that night with no errands and she testified on cross-examination that the traffic that day was slower than usual due to the weather, but it takes from 1 hour to 1 ½ hours to drive home from work depending on the weather. The Claimant's claim for compensation indicated the injury occurred at 6:45 pm. The MVA occurred near the Claimant's home near Johnstown, so the Claimant would have been outside of the work hours for the clinic even if the extra hour from Monday was included as a work hour on Tuesday. Therefore, under any circumstance, the Claimant's travel was not during work hours.

The third factor was also implicated in this case by the Claimant and, as the *Madden* court recognized, a claimant may be found to be in "travel status," because the travel is a substantial part of the service to the employer. *Id at 865.* This variable covers many different fact situations. For example, claims have been compensable when a particular journey was assigned or directed by the employer. *See Walsh v. Industrial Commission*, 34 Colo. App. 371, 374-75, 527 P.2d 1180, 1181-82 (1974) (holding that the claimant could recover for injuries sustained in a fall on ice because she had previously turned back from an attempt to drive to work in a snowstorm and was injured after she was subsequently ordered to come to work). Claims have been compensable when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 495, 391 P.2d 677, 679 (1964) (holding that when an employee uses his own car to perform services for or at the direction of his employer, the employee remains in the course of his employment until he returns home).

Claims have also been compensable when the employer provides transportation or pays the cost of the employee's travel to and from work. *See Industrial Commission v. Lavach*, 439 P.2d 359 (Colo. App. 1968). However, "the 'traveling employee' doctrine does not distinguish between salaried and non-salaried workers; nor does the doctrine depend upon the employee being compensated by the employer for transportation, lodging, and meals. While these factors may be indicative of business travel when that is an issue in dispute, the absence of one or more of these factors does not, in and of

itself, disqualify a claimant from receiving benefits. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995).

Another situation which may also fall within the *Madden* factors creating a special circumstance under the third factor, is when an employee is "on call" for work duty. However, simply being "on call" is not enough to transform the act of traveling home into the performance of employment duties. There needs to be some evidence that, at the time of an injury, the employee was actively engaged in performing a duty or responsibility related to work activities under the express or implied direction of the employer. With specific reference to an accident that occurs while traveling home, for example, there should be some evidence that a claimant intended to perform office work at home on the evening of an accident that occurs on the way home from an office, or that a claimant performed work for employer at home with sufficient regularity such that the employee's home genuinely became a part of the employment premises. *Rogers v. Industrial Commission,* 574 P.2d 116 (Colo. App. 1978); *Varsity Contractors v. Baca,* 709 P.2d 55 (Colo. App. 1985).

In this case, the facts, when viewed in their entirety, do not support a finding that, at the time of her MVA, the Claimant was performing services arising out of and in the course of the employee's employment under any theory advanced by the Claimant.

There is a conflict in the record as to whether the Claimant was "on call" after clinic hours in order to immediately respond to emergency calls. The Claimant maintains that she was required to answer the emergency phone when it rang, but Dr. Jorgensen-Blackburn testified that Claimant was directed to let the emergency phone ring so that the caller would leave a message, then listen to the message and respond appropriately. Yet, in any event, the record is clear that the emergency phone was to remain at the Claimant's home. Therefore, the Claimant was not required to deal with emergency calls during clinic hours nor did she handle emergency calls during her commute from the clinic to her home. She did not have possession of the emergency phone until she returned home. While she was driving, the Claimant was not actively engaged in work duties. Further, the number of emergency calls per month was minimal, and no additional payments were made to the Claimant for emergency phone call work. Therefore, the Claimant's emergency phone duties were not sufficiently regular such that the Claimant's home genuinely became a part of the employment premises. Thus, the Claimant's "on call" status after clinic hours in this case is not enough to transform the act of traveling home into the performance of employment duties.

The other duties that the Claimant performed using the emergency phone were to make calls to Spanish-speaking patients/parents on Mondays to confirm appointments scheduled for Tuesdays. These duties were estimated to take an hour total and an additional hour of compensation was added to the Claimant's payroll on Tuesdays. However, the work itself was performed on Mondays. Therefore, there was no expectation that the Claimant had to perform any work duties, at home or otherwise, after she left the clinic on Tuesday, November 11, 2014. On that date, the Claimant was merely commuting

home from work when she was in a motor vehicle accident near her home approximately one hour after leaving work.

Based on the foregoing, the Claimant has failed to meet her burden of proof to establish that she was performing service arising out of and in the course of her employment when she suffered injuries while driving home from the clinic where she worked.

Remaining Issues

The Claimant failed to prove that her November 11, 2014 motor vehicle accident resulted in a compensable work injury. As such, the remaining issues regarding temporary disability benefits, average weekly wage and medical benefits are moot.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant failed to meet her burden of proving that the injuries she suffered during a motor vehicle accident while she was travelling home from the Employer's clinic on November 11, 2014 constituted a compensable work injury.

2. The Claimant's claim for worker's compensation benefits under WC 4-972-684-02 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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. (Please note the new address for the Denver Office, effective November 12, 2013, is: 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. 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: December 24, 2015

#J9PXTAR40D13PAv 1

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

#J9PXTAR40D13PAv 1

ISSUES

The issues presented for determination are whether the medical treatment recommended to treat Claimant's urinary and fecal incontinence is reasonable, necessary, and causally related to the Claimant's work injury. Specifically, authorized treating physician (ATP) Dr. Caroline Gellrick made a referral to a colorectal specialist and physical therapy for urinary incontinence.

FINDINGS OF FACT

1. On December 1, 2014, Claimant sustained an admitted work injury when he was involved in a motor vehicle accident (MVA) while driving a box truck for the employer.

2. Following the MVA, paramedics took Claimant to Good Samaritan Medical Center. It was reported that Claimant was driving a large 20 foot panel van when he was rear ended by a Jeep. The truck's bumper sustained minimal damage and the air bags did not deploy.

3. At the emergency room, Claimant complained of numbness and tingling to his face which had resolved, and also numbness and tingling to his hands and feet. Claimant's medical history included incontinence of bowel, urinary incontinence, and thoracic and lumbar back pain. Claimant told the emergency room medical providers that he had not used significant pain medications for a long time, but had recently used muscle relaxants.

4. According to the emergency room report Claimant's current medications included: Flexeril, Valium, Norco, and Vicodin.

5. A physical exam of Claimant's musculoskeletal system indicated, "good range of motion in all major joints with complaints of pain with movement but no specific complaint of pain in one area being greater than any other area. No major deformities noted." Claimant was discharged from the emergency room with prescriptions for Flexeril, Valium, and Norco and he was instructed to follow up with his doctor.

6. Claimant was referred to Dr. Gellrick who initially evaluated him on December 4, 2014. Dr. Gellrick noted that Claimant has a history of bowel problems which Claimant felt had worsened since the MVA. Claimant wondered if the worsened bowel incontinence was related to the muscle relaxers or Valium he received in the emergency room. In Dr. Gellrick's "post-MVA on the job resulting" diagnoses, Dr.

Gellrick refers to Claimant having a history of bowel incontinence and a *new* history of bladder incontinence.

7. Claimant admitted that when he first saw Dr. Gellrick he did not provide her with a complete medical history regarding his incontinence issues.

8. Claimant reported to Dr. Gellrick that he had a back injury in 2006 that had totally resolved yet he had sought treatment for pain in the lumbar and thoracic spine on October 23, 2014 with Dr. Andy Fine.

9. Dr. Gellrick recommended MRIs of Claimant's spine due to problems with incontinence.

10. On December 4, 2014, the Claimant was also evaluated by Dr. Tomm Vanderhorst who is a physician with Exempla. Dr. Vanderhorst documented a history of urinary and bowel incontinence, and noted that Claimant reported "some post void urinary leakage since the injury," but no urgency leakage or incontinence. Dr. Vanderhorst noted that Claimant had no problems with bowel control. Dr. Vanderhorst's report does not document worsening bowel incontinence although Claimant described such worsening to Dr. Gellrick on the same day.

11. On December 31, 2014, Dr. Gellrick referred Claimant for a urological consultation, EMG studies, and consultation with an orthopedic spine specialist.

12. On December 13, 2014, Claimant had an MRI of his lumbar spine. The radiologist compared the results with an MRI Claimant had on April 20, 2011. She noted that the L4-5 disc protrusion found in April 2011 had actually significantly decreased in size as of December 13, 2014, and that the other levels in the lumbar region were essentially unchanged.

13. Dr. Gellrick's diagnosis was thoracic, lumbar and cervical strains.

14. On January 27, 2015, Dr. Richard Augspurger with the Urology Center of Colorado evaluated the Claimant based on Dr. Gellrick's referral. Dr. Augspurger reported that Claimant has a long history of rectal incontinence. Claimant told Dr. Augspurger that since the motor vehicle accident he has had "increased rectal incontinence and has now developed urinary incontinence." Dr. Augspurger noted that Claimant reported dribbling at the end of urination and squirts of urine with urinary urgency but no true urge incontinence. Dr. Augspurger noted that some of Claimant's incontinence sounds like post-void dribbling, but does not explain the sudden squirt of urine. Dr. Augspurger also stated that when Claimant was taking Valium and Flexeril his urinary and bowel incontinence worsened. Claimant was referred for urodynamics testing.

15. The Claimant was also evaluated by orthopedic surgeon, Dr. Bryan Castro, on February 2, 2015. Claimant reported that his rectal incontinence had

worsened following the MVA. He reported diminished control and loss of control that lasts several hours following a bowel movement. Dr. Castro's report also documents that Claimant experienced loss of control for several hours after a bowel movement before the MVA. Claimant also reported new urinary symptoms described as pain and urgency, but he is able to typically hold it until he can get to a bathroom. Dr. Castro concluded that Claimant suffered a thoracic and lumbar sprain/strain. Dr. Castro recommended against any surgical intervention.

16. On February 27, 2015, Claimant underwent urodynamics testing with Physician Assistant (PA) Lisa Zwiers. Claimant told PA Zwiers that he had no urinary problems prior to his December 1, 2014, work injury, but did acknowledge a history of bowel incontinence.

17. The urodynamics testing revealed a normal capacity bladder with no evidence of detrusor over-activity. The testing also showed no sensory urgency at capacity with no leak. PA Zwiers noted a voiding dysfunction, and prescribed Flomax and noted that Claimant would benefit from pelvic floor physical therapy (PT).

18. On March 9, 2015, Dr. Augspurger recommended the following treatment options for Claimant: (1) alpha blocker, (2) pelvic floor physical therapy, (3) bladder retraining biofeedback, and (4) InterStim. Claimant was referred to either Dr. Montoya or Dr. Hsu—physicians who performed InterStim procedures.

19. On March 26, 2015, Dr. Hsu counseled Claimant on InterStim. Dr. Hsu noted that Claimant had a history of rectal incontinence that post-MVA worsened to 24-hour rectal leakage that appears positional. Claimant reported new urinary urge incontinence following the December 2014 MVA. Dr. Hsu indicated that he was unsure of the exact etiology for Claimant's incontinence, but that his pre-existing rectal issues may have been exacerbated by spinal trauma from the MVA. With respect to InterStim, Dr. Hsu stated that "it is possible [Claimant] will experience improvement in both his urinary and fecal incontinence with an InterStim."

20. Claimant has a history of both bowel and urinary incontinence that preexists the work-related MVA. Regarding the urinary incontinence, the medical records reflect the following:

> On February 10, 2011, Claimant reported to Dr. William Elzi that he had begun experiencing dribbling after urinating and that he voided in his pants when he was unable to get to a restroom fast enough while at work.
>
> On April 28, 2011, Claimant reported to Dr. E. Lee Nelson that he started experiencing urinary incontinence since January or February 2011.
>
> On May 17, 2011, Dr. Nelson documented bladder urgency/frequency with bouts of incontinence since March 2011. Dr. Nelson referred Claimant to a neurologist.

On May 17, 2011, neurologist Dr. Douglas Redosh documented a history of urinary incontinence for 16 months.

Dr. Redosh's June 7, 2011 report states that Claimant was refused a urology appointment until he had a neurological work-up.

21. The Claimant also had a significant history of bowel incontinence. On January 19, 2010, the Claimant reported to Dr. Brenda Westhoff that he was experiencing rectal incontinence for the past three years, and that it has increased in severity. She documented that Claimant experiences fecal incontinence for "several hours" after having a bowel movement. Dr. Westhoff recommended a colonoscopy and manometry.

22. On February 10, 2011, Claimant reported to Dr. William Elzi that had a two-year history of rectal incontinence with seepage for "several hours" after a bowel movement.

23. On April 28, 2011, Claimant reported to Dr. Nelson that he experienced leaking stool for approximately one hour after a bowel movement.

24. On October 30, 2014, Claimant was evaluated by Dr. Glenn Sakamoto regarding bowel incontinence. Dr. Sakamoto's report reflects that Claimant has had continual stool leakage following bowel movements throughout the day, and that the symptoms had been ongoing for eight years. Dr. Sakamoto recommended an anal manometry and pudendal nerve latency studies. Dr. Sakomoto also stated that Claimant may need and InterStim.

25. On November 6, 2014, Dr. Susan Sgambati performed the manometry procedure and pudendal nerve latency testing. She concluded that Claimant had left pudendal neuropathy, and impaired rectal tone. She recommended biofeedback therapy or sacral nerve stimulation.

26. Dr. Sakamoto reviewed the manometry and nerve latency test results with the Claimant on November 13, 2014. Dr. Sakamoto assessed weak external sphincter and high normal pudendal nerve latency. He recommended a trial of biofeedback and then InterStim.

27. Claimant testified that his bowel and urinary incontinence pre-existed the work-related MVA, but that both conditions had worsened after the MVA.

28. Claimant described the differences in both the fecal and urinary incontinence pre- and post-MVA. Claimant explained after the MVA, his rectal leakage lasted longer than usual and that he had to keep cleaning supplies with him to clean himself throughout the day. He also testified that he has more urinary leakage after he

urinates so he has to wear pads or shields in his underwear to prevent wetness from showing through.

29. The subjective reports of worsening rectal or urinary incontinence symptoms Claimant provided during his testimony are not significantly different than the symptoms he reported to medical providers prior to the work-related MVA.

30. On August 17, 2015, Dr. Jeffrey Snyder examined the Claimant. The Claimant reported to Dr. Snyder that his rectal incontinence had worsened since the MVA. Claimant also told Dr. Snyder that he is experiencing urinary incontinence in the form of leaking requiring him to use pads.

31. Dr. Snyder also performed a physical examination of Claimant. He noted that claimant has a three-quarters external anal sphincter weakness and that there was no evidence of rectal incontinence or soiling noted on a pad or anus during the examination. According to Dr. Snyder, Claimant had a "dry anus on exam" and there was no rectal irritation or proctitis noted.

32. Dr. Snyder provided written responses to questions posed by Respondents. He noted that he reviewed Claimant's medical records and that Claimant had a pre-existing history of urinary and rectal incontinence. Dr. Snyder also opined that based on the history and mechanism of injury, Claimant's "current complaints' were consistent with an "exacerbation of his pre-existing condition and not a de novo event. The radiologic findings have been deemed as predominantly chronic degenerative disease." Dr. Snyder clarified that "current complaints" referred to Claimant's subjective complaints of worsening urinary incontinence.

33. Dr. Snyder indicated that a referral to a colorectal specialist and physical therapy were reasonable first line therapies for the treatment of both urinary and fecal incontinence. He also opined that Claimant should repeat the urodynamic evaluation to confirm an accurate diagnosis. Dr. Synder suspected that Claimant's post-void dribbling is related to bladder outlet obstruction, and that once the diagnosis is confirmed, treatment could be maximized such that Claimant could reach maximum medical improvement within a few months.

34. Dr. Snyder testified at hearing as an expert in urinary and rectal incontinence issues. He has been certified by the American Board of Urology since 1982.

35. Dr. Snyder testified that according to Claimant's subjective complaints of incontinence, Claimant experienced a worsening of his incontinence due to the work injury. However, Dr. Snyder testified there is no objective evidence to support that the December 1, 2014, MVA worsened Claimant's pre-existing rectal or urinary incontinence. He also testified that there was no connection between the MVA and worsening rectal or urinary incontinence.

36. Dr. Snyder testified that back pain from the MVA could contribute to and exacerbate Claimant's bowel and urinary incontinence. He also testified that Flexeril and other muscle relaxers may contribute to incontinence problems.

37. Claimant also had pre-existing back pain as reflected in the medical records.

38. Dr. Snyder testified there was no known cause of Claimant's pre-existing urinary and rectal incontinence.

39. Dr. Snyder testified that incontinence is a multi-factorial condition that is affected by diet, activities; and that incontinence issues symptoms will wax and wane over time. Dr. Snyder further testified that in individuals with an organic disease, the condition will generally stay the same or will get worse. For instance, Dr. Snyder explained that a person with an organic cause of incontinence—such as "MS"—may have progressively worsening incontinence over time depending on the severity of "MS." Dr. Snyder testified that no organic cause of Claimant's incontinence has been discovered.

40. Dr. Snyder discussed the InterStim treatment recommended by both Dr. Sakamoto and Dr. Augspurger. Dr. Snyder testified that InterStim is a pacemaker type of device that can be used to control nerve impulses. The device can stimulate or shutdown overactive nerves, and can be used urologically in patients who are not urinating enough or too much. Dr. Snyder explained that for rectal incontinence the InterStim is used for the same purpose.

41. Dr. Snyder explained that the InterStim recommended by Dr. Augspurger and Dr. Sakamoto are based on the same principle and are virtually identical procedures.

42. Claimant has failed to prove that the work-related MVA worsened his ongoing and chronic urinary and rectal incontinence.

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. The Claimant has failed to prove entitlement to ongoing treatment for urinary or bowel incontinence under his workers' compensation claim. Claimant has failed to prove that the work-related MVA worsened his ongoing and chronic urinary and rectal incontinence. Claimant provided subjective reports of worsening but the medical

records do not support a worsening. First, the idea that muscle relaxers may have worsened the incontinence is actually contradicted by Claimant's self-report to the Good Samaritan emergency room that he had recently been taking muscle relaxers. It defies logic that some new muscle relaxers would have a dramatic effect on Claimant's pre-existing incontinence. In addition, Claimant had pre-existing spine problems as evidenced by his visit with Dr. Fine just six weeks before the MVA. The MRIs taken before and after the MVA are not significantly different. There are no new persuasive objective findings that support Claimant's subjective reports of worsening incontinence. There is no persuasive or credible evidence that any increased back pain worsened his incontinence. The ALJ concludes that the work-related MVA did not, in fact, exacerbate Claimant's urinary or rectal incontinence.

ORDER

It is therefore ordered that:

1. Claimant's request for medical treatment for bowel and urinary incontinence, including a referral to a colorectal specialist and physical therapy directed at urinary incontinence, 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: December 11, 2015

DIGITAL SIGNATURE:

L. Broniak

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

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ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable injury to her left knee in the course and scope of her employment for Employer on January 26, 2015?
- Whether Claimant established the right to select a physician based on the Respondents' refusal to tender care after February 5, 2015?
- Whether medical care rendered by Denver Health East Grand Community Clinic and Olive View Medical Center was reasonable, necessary, and related to Claimant's January 26, 2015 injury?

STIPLUATIONS

The parties stipulated that if the claim is found compensable;

1. Claimant's average weekly wage ("AWW") at the time of injury from her two separate places of employment is $693;

2. Claimant is entitled to temporary total disability benefits, subject to applicable offsets, from January 26, 2015 until June 3, 2015.

3. Claimant is entitled to temporary partial disability benefits from June 4, 2015 ongoing until terminated pursuant to statute.

FINDINGS OF FACT

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

1. Claimant is 41 years old, and has worked as a snowboard instructor for Employer for six seasons.

2. Prior to the injury at issue, Claimant experienced laxity in the ligaments of her knees and sought preventative care in December 2013. At that time, an MRI of her left knee was taken and her doctor prescribed braces for both knees. The MRI was read as, "lax MCL, no tears, ACL ok." Claimant testified that she had worked for seventeen years as a stunt woman and that several of her joints were hyper-flexible. Claimant testified that she always wore the braces while boarding to protect her knees.

3. Between the hours of 8 and 9 a.m. on January 26, 2015, Claimant was teaching a clinic to 5 other board instructors which was titled, “Open Topic – Rotation Once You Leave the Air.” This activity was in the course and scope of her employment for Employer.

4. Claimant credibly testified that at the end of her clinic she fell on the last run while demonstrating spins and felt “an explosion in my left knee” while she was doing a rotation. She then debriefed her students, walked a short distance to the locker room building, took the elevator down to the ski and board instructor room to change and complete online surveys for the instructors who had taken part in the clinic.

5. Stephan Littlejohn-Adkins, Tim Neary, and Erin Daley were instructors who participated in Claimant’s clinic. Mr. Littlejohn-Adkins testified that he saw Claimant fall during the clinic. Mr. Neary testified he did not recall anything specific about Claimant falling, and that he did not know if Claimant fell during the clinic. Mr. Neary acknowledged that prior to testifying, he spoke both with Respondents’ counsel and with Toni Terrari, his supervisor in 2016 and Employer’s manager, who “told him about the situation.” Ms. Daley testified that she did not see Claimant fall during the clinic, but saw her limping during the following weeks.

6. Claimant credibly testified that at approximately 10:44 a.m. she walked to and rode up the Zephyr lift to practice her turns in the super pipe staging area below the rails and rollers at the top of the run. Claimant is a level 3 certified instructor and indicated she was training to maintain her certification level and that she does not have time to free board.

7. After exiting the top of the Zephyr lift and snowboarding down approximately two to three hundred yards, Claimant came to the first roller on the run and her left knee gave out causing her to fall. Claimant credibly testified that she was not doing any rotational moves, and was not attempting to do any rotational moves at the time she fell.

8. Mixed evidence was offered at the hearing concerning whether Claimant was thinking about an Ollie or attempting to Ollie at the time of her fall. The ALJ finds, based on the totality of evidence presented at hearing, that an Ollie is not a rotational move.

9. Claimant was unable to move her left leg and Mr. Littlejohn-Adkins, who arrived at the scene moments later, called ski patrol for assistance. Mr. Littlejohn-Adkins was Claimant’s supervisor that season, and Claimant effectively communicated her injury to him. Patroller Derek Lowery picked Claimant up off the ski slope at approximately 11:25 a.m. Mr. Lowery subsequently writing a report five days later at Employer’s request. His report stated that Claimant had “tried to do an Ollie [on] a roller, heard a click, knee locked up. Patient could not straighten knee.” Mr. Lowery’s report reflects that Claimant was in the middle of the rail yard at the top of the run.

10. After being taken to the bottom of the ski lift by the Ski Patrol, Claimant was evaluated at Denver Health East Grand Community Clinic ("Denver Health") where a history was taken as follows:

> 40 yo [female] presents [with] c/o severe knee pain and decreased ROM was snowboarding and was standing & knees flexed when she felt her knee "go out." She then fell.

Claimant's testimony clarified that she was not standing still, but rather in a standing position on her moving board when she felt her knee go out.

11. The treating physicians at Denver Health placed Claimant on modified-duty work restrictions which included only the ability to perform inside office duties, to not perform physical work of any kind, and an inability to ski or ride. Employer was unable to accommodate Claimant's temporary work restrictions.

12. On January 30, 2015 Claimant filled out a Supervisor's Notification of Workplace Incident alleging that her injury had occurred at 9:00 a.m. on January 26, 2015 at the end of practice and setting forth:

> Teaching a clinic and fell on corridor then my knee got worse and went out and had to be taken down by sled at entrance of Railyard. Teaching rotation as a snowboard, demonstrating the movement on Corridor, hit ice block and fell.

13. On January 29, 2015 and again on January 30, 2015, Claimant returned to Denver Health for follow up care. On January 30, 2015, Claimant reported to Dr. Meaghan Hughes and Dr. Alorkeza Khodaee that she fell with a twisting mechanism during a snowboard lesson. She was not permitted to return to Denver Health after that time.

14. On January 31, 2015, five days after the fact and at Employer's request, Mr. Lowery wrote a statement in which he reaffirmed that Claimant was starting at the beginning of the railyard when she began her downward descent and attempted an Ollie. Mr. Lowery did not witness the event and could not state whether Claimant actually performed the activity or only thought about it. Claimant testified that she did not attempt an Ollie. Mr. Lowery indicated that he has completed over several hundred reports. However, this was one of about ten instances where Employer requested he complete a follow up statement. Claimant disputed Mr. Lowery's statements regarding her alleged history of similar previous events.

15. Mr. Lowery testified for Respondents on direct. Mr. Lowery testified that he received the information that Claimant was attempting an Ollie from Claimant and that based on where Claimant fell she would have either been attempting an Ollie to get to the top of the rail, or she would be going over rollers. To the extent that Claimant's and Mr. Lowery's testimonies and statements are inconsistent, the ALJ finds Claimant to be a more credible historian of the events recounted.

16. On February 5, 2015, Dr. Gen Maruyama at Middle Park Medical Center performed an MRI on Claimant's left knee. The doctor found Claimant had a "buckle-handle tear of the medial meniscus," as well as a "complete ACL tear."

17. Claimant credibly testified that Employer's Human Resources ("HR") Director, Paula Labin, informed her that her workers' compensation claim was denied and she was not permitted to receive any further medical care paid for by Employer and "that she would need to go home."

18. Claimant credibly testified she was also contacted by Insurer's Adjuster and told that her claim was denied and no further medical care would be forthcoming as a result of the denial.

19. On February 6, 2015 Respondents' filed their Notice of Contest.

20. After Respondents denied Claimant medical treatment, she returned to California where she was treated under the California Medi-Cal program. On February 19, 2015, Claimant sought treatment at Olive View Medical Center, where she reported sustaining a left ACL medial meniscus tear while snowboarding on 01/26/2015 in Colorado. She described it as a twisting injury and that she heard a pop. Despite working on motion and continuing the use of crutches and a knee immobilizer, she was unable to reach full extension. The doctor assessed an acute anterior cruciate ligament injury with a bucket handle tear of the medial meniscus. Dr. Petrigliano also evaluated Claimant and scheduled ACL reconstruction within the next 1-2 weeks. Dr. Petrigliano discussed using allograft from Claimant's Achilles.

21. On April 3, 2015 Claimant underwent knee surgery at Olive View Medical Center to address the anterior cruciate ligament tear and bucket handle medial meniscus tear.

22. On April 14, 2015, at Claimant's initial post-surgical physical therapy assessment, Claimant reported that her injury occurred while she was turning on her snowboard and felt her left knee give out.

23. Claimant has not been returned to full-duty worknor has she been placed at MMI.

24. On June 4, 2015, Claimant began working as a server in a restaurant in California and has been working different jobs since that time.

25. Claimant credibly testified that she had no left knee symptoms prior to her injury, however, in the past had suffered laxity and, therefore, had an MRI and braces made to protect her knees as a "preventative measure." The MRI performed on December 9, 2015 reflected lax MCL, no tears, ACL ok. *See* Respondents' Submission Tab E, BS 23.

26. In anticipation of hearing, Respondents' retained Eric O. Ridings, M.D., to perform a Respondent-requested independent medical evaluation. Dr. Ridings understood he was to address the following issues for Respondents:

> The issue for my evaluation today per your telephone conference of 07-09-15 is primarily to obtain a detailed history from Ms. Littlejohn regarding her mechanism of injury, with a question regarding the work-relatedness of her left knee injury, as well as determination of her current medical status. Provided medical records in five sections per your index as well as subsequently provided records from the patient's employer including the incident report and statement from ski patrol were carefully reviewed. No treatment was provided to the patient, and no doctor-patient relationship was established. Per Rule 8, this visit was audio-recorded. Ms. Littlejohn expressed understanding of the nature of today's evaluation.

27. After reviewing the medical records, interviewing and examining Claimant, Respondent's expert Dr. Ridings opined that Claimant had suffered a work-related injury stating:

> In my opinion within a reasonable degree of medical probability, Ms. Littlejohn injured her left knee in her fall while instructing the class of [board] instructors on the morning of January 26, 2015. Falling while performing rotational movements on a snowboard could cause a meniscal tear and/or ACL tear, both of which she was found to have on subsequent evaluation. I suspect she was having some swelling of the knee (whether she noticed it or not) subsequent to that event. The difference in time between that fall and calling the ski patrol by her history is related to completing the paperwork after the instructor class. After that she got on a lift and when she next attempted to snowboard nearly immediately fell, with her knee locked in a bent position. This is consistent with her bucket handle medial meniscus tear, with the bucket handle likely flipping up out of position and getting caught, preventing her knee from extending.

28. Dr. Ridings also opined that medical care rendered by Denver Health and thereafter at the Olive View Medical Center and its referrals was reasonable, necessary and related to Claimant's January 26, 2015 injury stating:

> Her work-related diagnoses are a left medial meniscus tear and ACL tear, both operatively repaired April 3, 2015. She has a good prognosis, having made excellent strides toward

> recovery with postoperative physical therapy and her home exercise program. She has already regained good knee range of motion, and her examination is benign today. I would anticipate that she would be found to be at maximum medical improvement on follow-up with her orthopedic surgeon at the completion of physical therapy, which will be in three weeks. She does not have a follow-up visit scheduled, however, and she should make such an appointment. I would recommend a 6-month gym membership as maintenance care.

29. Dr. Ridings was present throughout Claimant's testimony, but Respondents did not call him during their case in Chief. Dr. Ridings' written report indicated:

> In the absence of evidence to the contrary, it is my opinion within a reasonable degree of medical probability that the initial fall was the fall that caused the injury, and that the injury is work-related.

30. No medical professional opined that an attempt to perform an Ollie maneuver caused the meniscus and ACL tears. The persuasive evidence regarding an Ollie maneuver is that it requires no twisting to perform. Dr. Ridings' written report indicates that a rotational movement on a snowboard could cause an ACL tear.

31. In their case in chief, Respondents contend that Claimant's attempt to perform an Ollie maneuver approximately two hours after her original fall caused her left knee injuries. No persuasive medical evidence supports this position.

32. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she was injured in the course and scope of her employment at the end of her clinic when she tore her ACL and medial meniscus.

33. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established the right to select a physician based on Respondents' refusal to tender care after February 5, 2015, and that her medical treatment providers on and after February 5, 2015 are authorized.

34. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established the medical treatment she received was reasonable, necessary and related to her work injury.

33. All issues not decided herein are reserved.

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), Title 8, Articles 40 to 47, C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. C.R.S. § 8-40-102(1). A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Therefore a claimant must prove by a preponderance of the evidence that his injury arose out of and in the course and scope of his employment. C.R.S. § 8-43-201*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). Proof that something happened at work, without more, is insufficient to carry burden of proof. *Finn v. Industrial Commission*, 165 Colo. 106 (1968). 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). Moreover, if an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-181 (March 7, 2002). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12P.3d at 846. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address 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).

Compensability

Claimant, as an employee, carries the burden of proving by a preponderance of the evidence that her accidental 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 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).

Claimant has sustained her burden of proving by a preponderance of the evidence that she sustained a left knee injury on January 26, 2015, and, therefore, Claimant is entitled to benefits under the Workers' Compensation Act.

Medical Benefits

Once compensability is established, Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record.

Respondents were on notice of Claimant's injury through Claimant's reporting to Employer. However, Insurer denied the claim, and Employer told Claimant to "go home" for treatment. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Respondents' actions constitute a failure to treat and triggered Claimant's right to select a doctor. She exercised the right by continuing treatment with doctors at the Olive View Medical Center.

The ALJ concludes that Claimant established the right to select a physician based on the Respondents' refusal to tender care after February 5, 2015, and that her medical treatment providers on and after February 5, 2015 are authorized.

Respondents' own expert concurs that the medical treatment Claimant received was reasonable, necessary and related to Claimant's admitted industrial injury. The ALJ concludes the medical care rendered by Denver Health and Olive View Medical Center was reasonable, necessary, and related to Claimant's January 26, 2015 injury.

ORDER

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

1. Claimant has established by a preponderance of the evidence a compensable left knee injury which occurred in the course and scope of her employment on January 26, 2015.

2. All medical benefits provided by Denver Health Medical Center and the Olive View Medical Center are reasonable, necessary and related to Claimant's January 26, 2015 work injury.

3. After January 30, 2015 the Respondents failed to tender medical care, and the right to pursue care passed to Claimant who selected Olive View Medical Center.

4. Pursuant to the parties' stipulation, Claimant is entitled to temporary total disability benefits at two-thirds of her average weekly wage, subject to applicable offsets, from January 26, 2015 until June 3, 2015.

5. Pursuant to the parties' stipulation, Claimant is entitled to temporary partial disability benefits from June 4, 2015 until terminated pursuant to statute.

6. Pursuant to the parties' stipulation, Claimant's average weekly wage is $693.

7. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

8. 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 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: December 1, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
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 compensable injury to her low back on February 8, 2015 while scooping ice cream.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to reasonable, necessary, and related medical treatment as a result of the February 8, 2015 injury.

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits from February 9, 2015 through April 19, 2015; TPD benefits from April 20, 2015 through May 14, 2015; and TPD benefits from August 20, 2015 and ongoing.

STIPULATIONS

The parties stipulated to holding the issue of AWW in abeyance pending the resolution of the issue of compensability.

The parties agreed that there is no wage loss resulting from the work injury, if compensable, from May 20, 2015 – August 19, 2015 when Claimant was not working during the summer. The ALJ approves the parties' stipulations

FINDINGS OF FACT

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

1. Claimant works as an assistant supervisor at the Preserve Restaurant located on the campus of the Colorado College in Colorado Springs. Claimant's job includes serving customers, using the cash register, and preparing the restaurant for service. She has worked for Employer since February 1, 2013. Claimant works the academic year extending from the middle of August until the middle of May of the following year. She does not work from in June or July. Claimant generally works seven and a half (7.5) hours a day, Wednesday through Friday.

2. Claimant testified that she sustained an injury to her low back at approximately 2:00 PM on February 8, 2015 while working for Employer. Claimant explained that she was bending over while reaching out and down from her body into a display freezer to scoop ice cream when she felt something snap in her back.

3. Claimant estimates that she was flexed forward at the waist at approximately 90 degrees and that she was reaching toward the back of the cooler at the time she felt the pain in her back. She described the pain as a burning sensation followed by a stabbing pain in the lower left quadrant of her back.

4. Claimant testified that she has never had any previous low back injuries nor has she received treatment to her lower back prior to February 8, 2015. The ALJ finds this testimony corroborated by the medical record evidence submitted at hearing.

5. After the injury, Claimant applied ice to her back and took some medication, probably a Midol, in an attempt to relieve her pain while she contacted her supervisors to notify them of her injury.

6. Claimant attempted to call her direct supervisor, Beatrice Russell, but she did not answer so she sent her a text message. She also tried calling Chef John, the supervisor above Beatrice.

7. Claimant was instructed to fill out an incident report while witness statements were obtained from Claimant's coworkers, Jessica Clancey and Ashlee Ramirez. Ms. Clancy documented that she "did not notice anything amiss after the incident" and that Claimant told her approximately 5-10 minutes after the incident that she had hurt her back. According to Ms. Clancy, Claimant was not showing any signs of distress immediately after the incident, but that she began to "limp and worsen" as time went on. Ms. Clancy's statement corroborates Claimant's report that her pain was not immediately debilitating and worsened with the passage of time as she moved around. Ms. Ramirez's statement confirms that Claimant was limping as the afternoon progressed and that Claimant explained to Ms. Ramirez that she injured her back while bending to scoop ice cream.

8. Claimant continued to work the rest of her shift on February 8, 2015 until approximately 6:00 PM; however, she did not perform her normal job duties after the incident. She remained seated at the register for most of the remaining portion of her shift because she was in too much pain to stand as time progressed.

9. Claimant did not seek medical treatment the evening of the incident because she wanted to go home and rest in hopes that she would be okay the next day. The following morning, Claimant continued to have low back pain along with pins and needles sensations with shooting pain down her left leg. Consequently, Claimant contacted Chef John on the morning of February 9, 2015 to report her condition. Chef John instructed Claimant to return to work in order to finish filling out the paperwork. Claimant went straight to Concentra upon completion of this paperwork.

10. Dr. Walter Larimore examined Claimant on February 9, 2015. Dr. Larimore noted that Claimant reported to him that she was scooping ice cream on February 8, 2015 and felt a snap on the left side of her back and later in the evening developed pain

radiating down to the “left buttocks, to the posterior, lateral and anterior thigh and calf; however, there was no radiation to the foot. X-rays of the low back were obtained which were later interpreted as “unremarkable”.

11. Dr. Larimore’s physical examination revealed reported tenderness of the left paraspinals at the L3-5 levels along with palpable left-sided muscle spasms with associated reduced range of motion in all planes.

12. Dr. Larimore diagnosed Claimant with a lumbar strain and concluded, based on the history and the exam of Claimant, that there was a greater than 50% chance that her injury was work related. Dr. Larimore prescribed naproxen, cyclobenzaprine, along with instruction to use an ice pack and to begin physical therapy three times per week for up to three weeks. Dr. Larimore also spoke to Claimant’s supervisors at this time.

13. Dr. Larimore imposed restrictions of no climbing stairs, ladders, and working no more than six hour shifts at a time. He also specifically noted that lifting, pushing and pulling activities must be performed “close to body”. Claimant was later instructed against engaging in activities which involved extended reaching by her physical therapist.

14. Claimant began physical therapy on February 9, 2015. Mr. Aaron Pieffer, PT documented a positive supine straight leg test and a positive crossed straight leg test. He also documented moderate muscle spasms on palpation to the lumbroscaral joint and lumbar spine at the L4-5 levels. Similar findings were documented at Claimant’s February 10th and 12th, 2015 PT appointments.

15. On February 17, 2015, Claimant was seen in PT by Janine Rodriguez who documented reports of improving low back pain down to a 5/10 level. Nonetheless, Claimant continued to report lower extremity numbness. Physical examination revealed continued moderate muscle spasms in the lumbroscaral joint and lumbar spine. In addition, Ms. Rodriguez documented hypomobile painful joint segments at L4-5 and L5-S1with anterior glide testing.

16. Dr. Larimore examined Claimant again on February 18, 2015. Claimant reported feeling approximately 25% better at this time with reduced levels of pain, but she was still experiencing the left leg symptoms. Dr. Larimore again documented left sided tenderness and muscle spasms. He instructed Claimant to continue with physical therapy and renewed Claimant’s work restrictions.

17. Dr. Larimore’s final examination before the Claim was denied was on March 4, 2015. Dr. Larimore referred Claimant for chiropractic treatment because her condition had failed to improve.

18. Claimant was out of work, without wages from February 9, 2015 through April 19, 2015, as a consequence of her low back injury. Claimant returned to work pursuant to a modified job duty offer on April 20, 2015, working no more than 6 hours per day.

Claimant had been working 7.5 hours per day prior to her injury. Claimant was out of work from May 15, 2015, for her regularly scheduled summer break until returning to work on August 20, 2015. Claimant continued to work reduced hours until October 26, 2015, which was the first day she returned to full hours.

19. Dr. Timothy Hall performed an independent medical examination (IME) on July 15, 2015, at Claimant's request. Claimant was symptomatic at this examination, although not as symptomatic as she had been in March of 2015. Dr. Hall's physical examination revealed tenderness over the left sacrotuberous ligaments, the SI area, and into the piriformis and gluteal muscle on the left side.

20. Dr. Hall diagnosed Claimant with SI joint dysfunction versus possible facet injury, piriformis syndrome more likely than radiculopathy, and myofascial pain in the lumbosacral area. Dr. Hall explained that, at the time of the injury, Claimant was bending over at approximately 90 degrees and forcibly scooping ice cream. According to Dr. Hall, Claimant's described mechanism of injury (MOI) was reasonable for causing injury to the low back because Claimant was involved in a "torquing maneuver with the back in a vulnerable position with the body leaning forward". Dr. Hall noted that this posture involves poor body mechanics and is the likely cause of Claimant's low back injury.

21. Dr. Hall concluded, "It is therefore my opinion within a reasonable degree of probability that her present symptoms in the low back and leg are the direct consequence of the February 8, 2015 work injury." He recommended that Claimant undergo chiropractic treatment and consider trigger point injections along with soft tissue mobilization of the piriformis.

22. Claimant was questioned at hearing about her answers to interrogatories regarding employment with another company: Pikes Peak Chocolate Factory. Her interrogatories indicated that she worked for Pikes Peak Chocolate from August of 2014 through May of 2015. Claimant explained that these dates were erroneously reversed, in that she worked for them from May of 2014 through August of 2014.

23. Claimant was questioned about her work as an author under the name "Pamela Nihiser." Claimant explained that she writes books under her maiden name. Claimant does not sell her books, the publishing company does. She explained that she did not disclose this information on her employment history in the interrogatories because she does not get paid for her work. The ALJ finds Claimant's testimony regarding the omission of her writing activities in her discovery responses reasonable.

24. Claimant testified that she spoke at "Galaxy Fest" at the Hilton in Colorado Springs on February 28, 2015 and March 1, 2015. Claimant does not recall if she was scheduled to speak at this convention prior to her February 8, 2015 injury. She does not get paid for speaking at these conventions. Facebook Photos of Claimant taken during this time show her wearing boots and posing for pictures. It is unclear whether Claimant's boots have heels, as suggested by Respondents; however, the ALJ finds

from the pictures that Claimant looks to be in no apparent distress. Though she told the physical therapist that she had pain with sitting for any amount of time, additional photos show Claimant sitting in a soft backed chair at a table. While the photos appear to be taken from a substantial distance, the ALJ is able to discern that Claimant does not appear to be in any distress in the photos presented. Regardless, Claimant explained that her pain "came and went," and she was still able to do activities such as go to the gym in attempt to "exercise a little bit of it out." Claimant's Facebook postings bear this out. Moreover, Claimant was provided with muscle relaxers and instructed in an exercise program which she reportedly took and preformed which helped relieve her pain as reported during a PT session on February 10, 2015. Consequently, the ALJ finds little evidentiary value in photos of Claimant smiling and posing several weeks after her injury as related to the issues presented for determination.

25. Claimant went for a hike on March 31, 2015 outside of the Garden of the Gods on "the little trails and stuff" nearby. Claimant testified that "it was not climbing a mountain" as suggested by Respondents. Respondents submitted Facebook photos of this activity. A photo from Claimant's hike depicts a pair of feet and lower extremities with landscape in the background. The ALJ is unable to accurately discern the elevation or other identifying information regarding the terrain from the picture presented. Consequently, the ALJ is not persuaded that the hike was strenuous and; therefore, inconsistent with Claimant's physical capabilities or her stated pain complaints. The ALJ finds the photo of limited evidentiary value when weighed against the totality of the evidence presented, including Dr. Ridings testimony as outlined at paragraph 34 below.

26. Claimant also went to her boyfriend's concerts during the summer where she testified that she would stand for approximately 45 minutes during the show. Review of Claimant's Facebook page photos reveals a picture of Claimant probably taken during one of these concerts. It shows Claimant leaning back on a male companion, presumably her boyfriend, in what appears to be a bar or a pool hall. Outside of this picture, the ALJ is unable to find any depiction of Claimant engaging in any activity that would be inconsistent with her stated capabilities at a concert. Consequently, the ALJ finds Claimant's Facebook page photos of her boyfriend playing in a band of no evidentiary value to the issue of whether Claimant sustained an injury to her low back while scooping ice cream on February 8, 2015.

27. Mr. Randy Kruse testified at hearing on behalf of Respondents as the general manager for Employer. He testified that he was present in the courtroom during Claimant's testimony and that her demonstration of how she would scoop the ice cream was "for the most part" an accurate depiction of what she would need to do in order to scoop. Mr. Kruse's testimony differed from Claimant's in that Mr. Kruse estimated that Claimant needed to bend only to 45 degrees to scoop ice cream. The ALJ finds this a difference without distinction as Claimant would have been, even according to Mr. Kruse, bent at the waist with her arms extended away from her body to forcibly scoop ice cream.

28. Mr. Kruse testified that, at the time of Claimant's injury, she had .52 hours of vacation time remaining. He testified that if Claimant had requested time off to attend the aforementioned convention on February 28, 2015, she could have taken the day off, without pay, if there was somebody who could cover her shift. Based upon the evidence presented, the ALJ finds Respondents' suggestion that Claimant fabricated the February 8, 2015 injury to attend a science fiction convention unpersuasive.

29. Dr. Eric Ridings performed a respondent requested IME of Claimant on October 7, 2015. Dr. Ridings testified consistent with his review of the available medical records his examination of Claimant and his report. He opined to a reasonable degree of medical probability that Claimant did not suffer an injury to her left low back on February 8, 2015.

30. In support of his conclusion, Dr. Ridings noted that, Claimant had no abnormal findings on his physical examination and based upon the Claimant's description of the injury (i.e. feeling a pop in her back) and the subsequent symptoms into the lower left leg, he opined that the most medically probable explanation would be a left sided disc herniation in the low back. However, Dr. Ridings explained that the distribution of nerve pain into the left leg was not anatomically consistent, or possible, given the pain complaints into the front of the leg, but not into the ankle. Dr. Ridings further explained, that when conducting facet loading on the right side of the low back, the Claimant complained of pain whereas she did not complain of pain when the left sided was loaded. Dr. Ridings explained that Claimant's pain complaints were not anatomically consistent since she should have had pain on the left when the left sided was loaded.

31. Furthermore, Dr. Ridings ruled out piriformis syndrome as a possible cause of Claimants pain as suggested by Dr. Hall. Dr. Ridings conducted a piriformis stretch, which did not reproduce any radicular or pain symptoms. Dr. Ridings explained that, if the Claimant had piriformis syndrome, she more likely than not would have had a reaction to this test.

32. Dr. Ridings expressed additional concerns regarding the Claimant's pain presentations. He explained that he measured her flexion range of motion at 80 degrees of free movement initiated by Claimant while she was distracted. However, during formal range of motion of testing Claimant could not move beyond 59 degrees. Dr. Ridings explained that scooping ice cream while bending is not a reasonable mechanism of injury. (Dr. Ridings doubted that the Claimant was bending over at 90 degrees while scooping ice cream).

33. Dr. Ridings concluded that Claimant's mechanism of injury "would not be expected" to cause an injury; however, Dr. Ridings agreed that there are no medical records documenting that Claimant had any sort of pre-existing lower back injuries or that she was suffering from lower back pain prior to February 8, 2015. He also testified that "It's possible to have a lumbar strain just from bending over".

34. Dr. Ridings testified that, for a lumbar strain, he would recommend that the

injured person try to remain active and to stay active with their usual daily activities as much as possible. He testified that activities such as taking a hike and standing around at a concert would be activities that he would have no problem encouraging his own patient to perform with a lumbar strain.

35. Based upon the totality of the evidence presented, the ALJ finds Dr. Hall's opinions credible and more persuasive than the contrary opinions of Dr. Ridings. Similarly, the ALJ finds Claimant's testimony credible and more persuasive that the contrary opinions of Mr. Kruse, who did not witness the injury or how the Claimant was scooping ice cream at the time of the incident in question.

36. The ALJ finds the examinations of Dr. Larimore, PT Pieffer and PT Rodriguez to contain objective findings consistent with a low back injury. The ALJ further finds it more probable than not that Claimant's described MOI is the cause of her low back spasms, pain and limited mobility.

37. Claimant has proven by a preponderance of the evidence that she sustained an injury to her low back in the form of a lumbar strain on February 8, 2015 while scooping ice cream. The ALJ finds further that the care required for this injury, as provided by Dr. Larimore and PT's Pieffer and Rodriquez, was reasonably necessary to cure or relieve her from its effects. Claimant has proven by a preponderance of the evidence that she is entitled to an award of medical benefits to cure and relieve her from the effects of her February 8, 2015 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.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. 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 testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo.

App. 2002). 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).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address 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).

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 scooping ice cream which is connected to her duties and position 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 pain and her subsequent need for treatment was caused by her work related functions of scooping ice cream. Here the evidence presented establishes that Claimant was bent at the waist in an effort to scoop ice cream for a customer. The un-refuted evidence also establishes that her arms were extended in an effort to reach the back of the cooler and she was torquing her body to scoop the ice cream, placing additional stress on her low back. As persuasively explained by Dr. Hall, such torqueing maneuvers with the back in a vulnerable, bent position, involved poor body mechanics which caused Claimant's low back strain in this case.

H. Dr. Ridings' opinions to the contrary are unpursuasive. Dr. Ridings calls into question the degree to which Claimant was bent over at the time of the injury and not that the incident did not occur. Claimant stated that she was bent at 90 degrees at the time she was scooping. Dr. Ridings stated that his measurement of Claimant's bend was actually 80 degrees, but he still doubted that she was bent over to that degree based on his "experience frequenting ice cream shops." More importantly, Dr. Ridings provided no explanation as to why bending at 45 degrees, as testified to by Mr. Kruse, versus bending at 80 or 90 degrees makes a difference in the likelihood of Claimant sustaining a lower back injury in light of her need to reach away from the body and torque to scoop the ice cream. Based upon the evidence presented, the ALJ credits the opinion testimony of Dr. Hall to conclude that a combination of hip flexion, while reaching away from the body and torquing to scoop the ice cream, more probably than not, resulted in Claimant sustaining a lumbar strain. There was no question in Dr. Larimore's mind that the mechanism of injury was reasonable when he concluded the day after the incident that it was more than 50% likely that her symptoms and need for treatment were causally related to the bending and scooping activities that she described to him. Moreover, Dr. Larimore specifically noted that Claimant was to keep all lifting, pushing and pulling activities close to the body. These body mechanics were reiterated by PT Pieffer when he instructed Claimant to keep all objects close to the body and not engage in extended reaching. Based upon the totality of the evidence presented, including instructions to use proper body mechanics to avoid injury, Dr. Ridings' opinion, that the described MOI would be unlikely to cause an injury, is not credible as this is the exact posture and activity that Claimant was in at the time of her

injury, specifically a loaded torquing activity with the arms extended away from the body while in a bent position at the waist.

I. Dr. Ridings opinion that Claimant did not sustain an injury to her low back is further undermined when on February 9, 2015, less than 24 hours after the initial incident, Dr. Larimore documented objective physical findings consistent with Claimant's mechanism or injury and subjective complaints. Claimant reported to her supervisors, commented to her co-workers, and told her physicians, that she felt a snap on the left lower side of her back at the time of the injury at that she began feeling left lower extremity symptoms later than evening. Dr. Larimore documented that Claimant was tender on the left side of her lumbar spine and was experiencing muscle spasms only on the left side of her back. Co-worker Jessica Clancy wrote a statement documenting that she personally witnessed Claimant begin to limp at work shortly after the event occurred, and in her own words, noticed that Claimant's condition "seemed to worsen as time went [on]." Co-worker Ashlee Ramirez wrote a statement documenting that she arrived to work at 4:30pm, roughly 2.5 hours after the incident, and saw Claimant limping around. The witness statements support Claimant's exact timeline of events. Moreover, subsequent examinations by PT Pieffer and Rodriquez document similar objective findings, including spasm and hypomobility. Consequently, the ALJ concludes that Claimant has established the requisite causal connection between her work duties and her low back injury. The injury is compensable. Respondents' suggestions, including the theory that Claimant fabricated her injury to speak at a convention on February 28- March 1, 2015, are unconvincing.

Medical Benefits

J. 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).

K. As found here, the evidence demonstrates that Claimant's initial care from Dr. Larimore and his referral to physical therapy was reasonable, necessary and related to her acute low back injury. Dr. Larimore's care and treatment was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her low back sprain. Additionally, the PT referral was reasonable and necessary to determine an exact rehabilitation plan and further ameliorate Claimant's ongoing symptoms.

Temporary Disability Benefits

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

M. If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. Section 8-42-103(1)(b), C.R.S. 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*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

N. In this case, the evidence presented establishes that Claimant was injured on February 8, 2015 and left work February 9, 2015, suffering an actual wage loss as a consequence of her compensable injury. Moreover, as of February 9, she was under restrictions provided by Dr. Larimore. Claimant was not offered modified employment until April 20, 2015. Consequently, the ALJ concludes that Claimant was "disabled"

within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits for the time period of February 9, 2015 through April 19, 2015. *See generally*, *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); § 8-42-103(1)(b), C.R.S. Claimant returned to work on April 20, 2015 and worked through May 14, 2015; however, as found, she worked modified duty. Claimant was limited to 6 hours per day per Dr. Larimore's orders rather than the 7 hours she worked prior to her compensable injury. Consequently, Claimant is entitled to temporary partial disability (TPD) for the time periods extending from April 20, 2015 through May 14, 2015. Because Claimant admittedly did not work over the summer and is not asserting any lost wages beginning May 15, 2015 through August 19, 2015, no temporary benefits are ordered paid to Claimant during this time frame. However, Claimant returned to work on August 20, 2015, in a modified duty capacity working only 6 hours per day until October 26, 2015 when she returned to full duty work at full wages on October 26, 2015. Therefore, the ALJ concludes that Claimant is entitled to TPD from August 20, 2015 through and including October 25, 2015.

ORDER

It is therefore ordered that:

1. Claimant's February 8, 2015 lumbar strain injury is compensable.

2. Respondent shall pay for all reasonable and necessary and related medical treatment, resulting from the Claimants compensable low back injury, including but not limited to the care provided by all providers at Concentra, specifically Dr. Larimore, and the physical therapy department.

3. Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), beginning February 9, 2015 through April 19, 2015 at a rate of sixty-six and two-thirds percent of her average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week so long as Claimant's disability is total. C.R.S. § 8-42-105(1).

4. Respondents shall pay temporary partial disability benefits (TPD) in accordance with C.R.S. § 8-42-106 at a rate of sixty-six and two-thirds percent of the difference between Claimant's AWW at the time of the injury and Claimant's AWW during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for the time periods April 20, 2015 through May 15, 2015 and August 20, 2015 through October 25, 2015.

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: December 9, 2015

/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

1. The following issues were presented for determination at hearing:

    a. Whether Claimant proved by a preponderance of the evidence that he suffered work related injuries in the course and scope of his employment for Respondent-Employer;

    b. Under Section 8-43-404(5)(a)(I)(A), whether Claimant exercised his right to select a physician; and

    c. Whether Claimant proved by a preponderance of the evidence that he was disabled from his usual employment from December 26, 2014, and ongoing and is therefore entitled to temporary total disability benefits.

STIPULATION OF FACT

The parties stipulate that, if the case is found to be compensable, Claimant's average weekly wage as of the date of injury was $884.80 per week.

FINDINGS OF FACT

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

1. Claimant is a 61 years old man employed by Employer for 15 years. English is Claimant's second language and he does not write English. Employer operates a very large facility, approximately the size of two football fields, which produces cement.

2. In October 2013, Claimant switched jobs from being a day laborer to being a dust collector maintenance employee. Ten of the dust collectors were located on top of 140 foot high silos. Another 95 dust collectors of lesser heights were also Claimant's responsibility to clean. Normally, the dust collectors are accessed via elevator. In September 2013, Employer's plant lost electricity as a result of a flood. As a consequence, the elevators used to access the dust collectors no longer operated. In order to perform Claimant's maintenance tasks, he was required to climb vertical steel ladders, on steps that were approximately as big around as his index finger and 14 inches apart, to the top of each silo. Claimant

performed these duties every workday for fourteen months beginning in October 2013 and December 2014.

3. Claimant's job included changing the belts and the motors in the dust collectors, and placing new bags inside the dust collectors when the old bags were full. In order to change the bags, once he had reached the top of the silo where the dust collectors were located, Claimant had to enter into the inside of the dust collector, stand on a ladder, and work with his hands in the air to remove the bags, and then replace them. The large dust collectors were as large as the court room in which this case was heard. There were ten of the very tall dust collectors, but approximately 95 dust collectors in all that Claimant was responsible for maintaining. Claimant carried his tools on his back in a backpack when he climbed the ladders. The tools weighed between 25 to 30 pounds.

4. Claimant's job as a dust collector maintenance worker was the hardest job he had ever had. Claimant was exhausted when he finished work and laid down at home. Claimant credibly testified that he had no outside activities that could contribute to or cause his condition. Claimant credibly testified that his extracurricular activities only included an occasional walk and attending church.

5. Claimant's low back began to hurt in December 2013, 2 months after beginning climbing the ladders, and around the time Claimant treated for prostate cancer. Claimant told his safety director in June 2014 that he had low back pain and he asked for a back-belt. The safety director did not provide him with a back-belt so Claimant bought his own. The safety director did not send Claimant to a doctor in June 2014 regarding his back pain complaints. Claimant went to a chiropractor of his own choice in July 2014.

6. Claimant began to experience problems with his right shoulder in October 2014. Claimant advised his supervisor about his shoulder problems in October 2014 and again in November 2014. Claimant's supervisor did not fill out any paperwork or send him to a doctor at that time. Claimant again complained to his supervisor on December 10, 2014, and the supervisor advised Claimant he would speak to upper management and they would decide what to do.

7. There was no persuasive medical evidence introduced that Claimant had right shoulder and low back pain as a result of pre-existing degenerative conditions. Even if Claimant had latent degenerative conditions in his low back and right shoulder, those conditions did not become acutely symptomatic until 2014 after Claimant climbed high ladders at work on a daily basis.

8. On December 26, 2014, Claimant reported to his supervisor that he could not take the pain any longer. Employer sent Claimant to a doctor. Since Claimant does not write in English, his supervisor wrote up an injury report. Claimant reported to his supervisor that he was having pain in his neck, his shoulder and

his low back. Claimant did not read the report prepared by his supervisor, he did sign it. Claimant was sent to Workwell. He was not given a choice of doctors.

9. Claimant had a prior shoulder work injury in 2009 for which he was treated at Workwell for about a month with physical therapy and medication. Claimant did not miss any time from work, did not get an impairment rating, and was discharged to full duties for the 2009 injury. Claimant credibly testified that he had not had any problems that required medical care for his neck or right shoulder after the 2009 work injury until he began to experience pain in 2014 from his current injury.

10. Claimant treated at Workwell for approximately five weeks, primarily receiving physical therapy. Claimant reported to Workwell physicians, physician's assistant and physical therapist that he had pain in his neck, shoulder, and low back.

11. Workwell sent Claimant for a surgical consultation with Dr. Fitzgibbons in March 2015. Dr. Fitzgibbons requested authorization for shoulder surgery and Respondent Insurer denied authorization and Claimant was discharged by Workwell.

12. After being discharged by Workwell, Claimant treated with Dr. Yamamoto for his shoulder and neck problems. Dr. Yamamoto referred Claimant to Dr. Eric McCarty for his shoulder care. Dr. McCarty performed surgery on the Claimant's right shoulder on May 12, 2015.

13. On March 11, 2015, Respondents denied compensability of Claimant's low back condition. Workwell referred Claimant to his primary care doctor, Dr. Jaramillo, at the SALUD family health center, for treatment of his low back injury. Jaramillo sent Claimant to Dr. Kara Beasley at Boulder Neurosurgical & Spine associates for his low back care.

14. In fact, Claimant had been seeing Dr. Jaramillo for the work injury since December 30, 2014. Claimant saw Dr. Jaramillo and received treatment January 5, 2015, January 26, 2015, February 10, 2015, February 24, 2015, March 23, 2015, April 23, 2015 and May 6, 2015.

15. It is found that Dr. Jaramillo is the physician that Claimant selected in December 2014, when he reported the work injury to Employer and Employer failed to comply with Section 8-43-404(5)(a)(I)(A). It is further found that Claimant demonstrated by his words and conduct that he chose Dr. Jaramillo to treat the industrial injury.

16. Claimant was disabled from his usual employment after December 26, 2014, because of his work injuries.

17. Dr. John Hughes conducted an Independent Medical Examination (IME) on June 9, 2015. Dr. Hughes credibly opined that Claimant sustained a work related right shoulder rotator cuff tear and aggravated a previously occult degenerative lumbar spine pathology, both injuries occurring as a result of repetitive ladder climbing.

18. Dr. Hughes credibly testified that Claimant's occupational history, includes climbing ladders that were up to 150 feet in height while carrying a backpack and a tool belt over the course of fourteen months which required climbing, reaching, and bending. Dr. Hughes credibly opined that Claimant suffered a right shoulder sprain and strain secondary to repetitive climbing of ladders. Dr. Hughes credibly testified that in the process of climbing the 150 foot tall ladders while carrying a backpack, Claimant's shoulder "would sustain all of the traction forces of holding on to the vertical part of the ladder during both ascent and descent of the ladder. A hundred and fifty feet is fifteen stories. That is quite a rigorous ascent. And forces are increased if the individual is obese, as Mr. Rivas is…or was as of June 9. And increased still further by wearing tools and a backpack." Hearing Transcript p. 15.

19. Dr. Hughes credibly testified that Claimant also had "relatively occult lumbar spondylosis, consistent with being a 61 year old man, until the year 2014, and then I believe his work related activities accelerated his lumbar degenerative disease to where he became relatively more symptomatic... So I believe that his work of the year 2014 substantially and permanently aggravated his lumbar spine condition, leading to the need for medical evaluation and treatment of his lumbar spine". Hearing Transcript p. 18. Dr. Hughes further credibly testified that the "twisting activity that would occur from climbing a 15 story high ladder and descending a 15 story high ladder on a regular basis" would cause an aggravation of the Claimant's lumbar pathology. Hearing Transcript p. 18 and 19.

20. Dr. Hughes further credibly testified that the Claimant's low back pain in June 2010 was caused by Claimant's bout with shingles and was not related to his current back pain. Likewise, Dr. Hughes credibly testified that Claimant's diffuse back pain in August 2010 was caused by post-herpetic neuralgia and was not related in any way to his current back pain complaints. Last, Dr. Hughes credibly testified that the Claimant's low back pain documented in the medical records in December 2013 was, at least, in part, caused by the treatment for prostate cancer that occurred that month, as well as by the high ladder climbing for the prior 2 ½ months.

21. Dr. Lesnak saw Claimant for an IME on June 16, 2015, and Dr. Lesnak testified in a post-hearing deposition on September 9, 2015. Dr. Lesnak concluded in his IME report that Claimant suffered no work injury as a result of his occupational activities at Employer.

22. Dr. Lesnak testified that Claimant made no mention of low back pain in any of the initial medical records. Dr. Lesnak reviewed Claimant's first physical therapy visit note dated December 30, 2014, but did not note Claimant's complaint of low back pain and subsequently opined that the records did not contain reports of low back pain.

23. Dr. Lesnak's IME report and testimony is found not to be as credible and persuasive as the testimony and IME report of Dr. Hughes. Dr. Lesnak's opinion lacked medical probability. No credible or persuasive evidence was offered to mitigate the finding regarding the intensity of these duties. No one credibly contradicted Claimant's account of his duties and his consistency in the performance of those duties.

24. It is found that Claimant suffered an occupational injury/disease to his right shoulder and to his low back as a result of his repetitive ladder climbing in 2014.

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 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*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. 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).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

3.Claimant sustained his burden of proof to establish that he suffered an occupational injury/disease to his low back and shoulders as a result of his work related job duties with this Employer. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" is defined by Section 8-40-201(14), C.R.S., as:

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

4. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* Indeed, a compensable occupational disease may be found where the ALJ determines that the hazards of a claimant's employment have aggravated or accelerated a medical condition caused in part by a prior industrial injury. *Cf. University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001). However, a claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

5. The claimant was required to prove by a preponderance of the evidence that the alleged occupational disease was directly and proximately caused by the employment or working conditions. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999).

6. The ALJ concludes that Claimant proved by a preponderance of the evidence that his assigned duties for Employer were the direct and proximate cause of his low back and shoulder injuries and/or the hazards of Claimant's employment have aggravated or accelerated a medical condition caused in part by a prior industrial injury. Claimant's credible testimony and the testimony and medical report of Dr. Hughes

established that Claimant suffered a compensable occupational disease in the course and scope of his employment for Employer.

Right of Selection of Medical Provider

7. Claimant contends that the right of selection of medical provider passed to him when he advised Employer of his work injury and Employer did not comply with the provisions of Section 8-43-404(5)(a)(I)(A). Claimant argues that Respondents did not comply with Section 8-43-404(5)(a)(I)(A) when Respondents directed Claimant to obtain medical treatment at Workwell. It is Claimant's contention that he had another opportunity to select a physician when Workwell determined Claimant's low back condition was not work related and released him from care for non-medical reasons. Claimant argues that he selected Dr. Yamamoto as his physician for his right shoulder injury and he selected Dr. Jaramillo for his low back condition.

8. Respondents contend that Workwell is the authorized provider of medical treatment and was designated as such when Claimant was directed by Respondents to seek treatment there and Respondents agreed to pay for Claimant's medical expenses. Respondents argue that Workwell is a medical facility that has numerous physicians from whom Claimant could obtain treatment. Respondents argue that Claimant was not directed to one specific doctor at Workwell.

9. Authorization refers to the physician's legal authority to treat the injury at respondents' expense, and not necessarily the reasonableness of the particular treatment. *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Section 8-43-404(5), *supra*, allows the employer the right in the first instance to designate the authorized treating physician; the right to select however passes to claimant where the employer fails to designate in the first instance. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The employer's right to select the treating physician is triggered when the employer receives oral or written notice from the employee or has:

> [S]ome knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.
>
> *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo.App. 1984).

Where the right to select passes to the claimant, treatment from the physician the claimant selects after that date is authorized. *See Grove v. Denver Oxford Club*, et al., W.C. No. 4-293-338 (ICAO November 14, 1997).

10. Claimant contends that the right of selection of medical provider passed to him when Respondents failed to comply with Section 8-43-404(5)(a)(I)(A), C.R.S. to designate providers.

11. Section 8-43-404(5)(a)(I)(A), C.R.S. applicable to this 2014 injury and claim for benefits, provides that:

> In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee.

The statute further provides 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 or chiropractor."

12. In *Squitieri v. Tayco Screen Printing, Inc.,* W.C. No. 4-421-960 (ICAO September 18, 2000), the ICAO held that the term "select," as it appears in the predecessor to Section 8-43-404(5)(a)(I)(A) is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives. Thus, the ICAO held that a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." The ICAO also indicated that the question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ, and the ALJ's resolution of this issue must be upheld if supported by the record.

13. Based on the medical records, it is concluded that Claimant selected Dr. Jaramillo at the Salud Clinic as the physician from whom he would receive care for the work injuries. Claimant appeared for treatment with Dr. Jaramillo on December 30, 2014, and continued treatment with this physician at least through May 2015. Claimant's words and conduct while in treatment with Dr. Jaramillo evidenced his intent to select the physician for treatment. The ALJ rejects Claimant's contention that he is entitled to select a second physician as his treating physician based on Respondents action dismissing Claimant from care for non-medical reasons.

TTD

14. Finally, Claimant contends entitlement to TTD benefits from December 26, 2014, and ongoing. Respondents argue that Claimant's injury is not work related and therefore he is not entitled to TTD benefits because he is not disabled by the work injury. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his/her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to

work, or by restrictions which impair the claimant's ability effectively and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

15. Based on the totality of the evidence, it is concluded that Claimant established by a preponderance of the evidence that he is disabled from his usual employment by the work injury and therefore his is entitled to TTD from December 26, 2014, and ongoing until terminated by law.

ORDER

It is therefore ordered that:

1. Respondents shall be liable for workers' compensation benefits for the occupational disease injury with the onset of disability date of December 26, 2014, affecting Claimant's right shoulder and low back.

2. Under Section 8-43-404(5)(a)(I)(A), Claimant selected Dr. Jaramillo as his treating physician for the occupational disease injury.

3. Respondents shall be liable for TTD from December 26, 2014, 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: December 9, 2015___

DIGITAL SIGNATURE:

Margot W. Jones

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

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STIPULATIONS

Prior to the commencement of hearing, the parties reached the following stipulations:

- Claimant withdrew his request for TTD and TPD benefits without prejudice.

- The parties stipulated that should the injury be found compensable, Claimant's authorized medical provider is the Southern Colorado Clinic.

- Respondents stipulated that, should the injury be found compensable, the medical treatment for Claimant's right knee provided by Southern Colorado Clinic and its written referrals are reasonable, necessary, authorized, and causally related to this claim's injury.

- The parties stipulated that, should be the injury be found compensable, Claimant's average weekly wage (AWW) is $237.58.

These stipulations were accepted and approved by the ALJ.

REMAINING ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury to his right knee on February 17, 2015.

II. If Claimant did suffer a compensable injury to his right knee, whether he proved by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment.

FINDINGS OF FACT

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

1. Claimant was working as a laborer for Employer on February 17, 2015, when he injured his right knee while attempting to enter a narrow trench to attach a tracer line to a newly installed sewer pipe. The trench was approximately 4 feet deep and 18 inches wide. Interspersed with the dirt forming the side walls of the trench were discarded buried bricks which, along with surrounding attached dirt, would extend out from the

sidewall to form small ledges along the trench. Consequently, the sidewalls of the trench were not completely smooth.

2. Although he is relatively short in stature, being 5 feet 8 inches tall, Claimant is a large man, weighing approximately 275 pounds. He felt the trench was too deep for him to jump into. Consequently, he chose to enter the trench by placing his left foot on one of the small sidewall ledges located about half way down and on the far side of the trench. Claimant was effectively straddling the trench in this position with his left foot lower than the right which remained on the ground at the top of the trench. According to Claimant, as he transferred his weight to his left foot, the ledge gave way and his left foot slid abruptly to the bottom of the trench. Claimant testified that his right foot remained on the ground at the top of the trench.

3. Claimant testified that his left knee buckled as he slid to the bottom of the trench, but his right ankle got hung up on the top, and that his right knee was at a really "weird angle." Claimant felt immediate burning pain and felt a tearing sensation in his right knee. Claimant gathered himself and crawled out of the trench. He took some Tylenol that he carried in his lunch bag, and tried to continue to work for the rest of the day. Claimant testified that he was unable to perform all of his work duties.

4. Don Chapman is the owner of the property which Claimant was working on. Mr. Chapman testified that he witnessed Claimant slip getting into the trench, but that Claimant slipped slowly and only half way down the side of the trench, not to the bottom. He did not see Claimant twist his knee, act as if he were injured, or observe Claimant's leg was in an awkward angle as Claimant testified to. Mr. Chapman also testified that Claimant came up to him later to confirm that he (Mr. Chapman) witnessed the slipping. According to Mr. Chapman, Claimant did not say he hurt his knee or mention any knee injury at that time.

5. Claimant was able to complete his shift and drive another employee home after their shift had ended. After dropping his co-employee off, Claimant called Employer to report his injury. According to an undated and unsigned Employee incident report, Claimant reportedly informed Employer that he was "calling . . . to let [Employer] know that earlier in the day when [he] jumped into the ditch, [he] sprained [his] knee." Claimant did not provide a specific time for the injury. Rather, he estimated that it occurred around "mid-morning". A witness statement was obtained from the co-worker Claimant drove home the day of his injury. That witness, Khalid Morales provided a witness statement on February 19, 2015. He indicated in his witness statement that Claimant reported that as he was "getting in our trench his left foot got caught and fell in the trench". According to Mr. Morales' statement, this incident occurred around 10:00 AM on February 17, 2015. Claimant mentioned to Mr. Morales during the lunch break that he thought, "[H]e might have twisted his knee while jumping into the ditch." Although Claimant did not discuss the alleged injury while driving Mr. Morales home that day, Mr. Morales, in describing the incident in his witness statement, noted that that Claimant had a "limp" and did not appear to want to be at the job site to work. The ALJ finds Mr. Morales' statement to Employer about Claimant standing around a lot and not

appearing interested in working suggestive of and consistent with Claimant's testimony that he could not perform all of his work duties after he was injured.

6. While record inconsistencies between the testimony of Claimant and Employer exist regarding how Claimant entered the trench, the ALJ resolves those differences in favor of Claimant to find that if Claimant used the word "jumped" when describing getting into the trench, it was used, more probably than not, as a term of art in expressing his willingness to get in the trench and get the job done rather than the contrary suggestion that he, being 5 feet 8 inches tall and weighing 275 pounds literally "jumped" into a four foot deep, 18 inch wide trench. Furthermore, the testimony of Mr. Chapman convinces the ALJ that Claimant did not actually "jump" into the trench.

7. Claimant has a history of a prior February 5, 2014 injury to the right knee for which he was treated by Dr. Lakin and which resulted in a right knee arthroscopy with partial lateral meniscectomy and lateral retinacular release performed by Dr. Ritter on April 4, 2014. Claimant was placed at MMI for his February 5, 2014 right knee injury by Dr. Lakin on August 13, 2014. At the time of his discharge from care for this injury, Claimant reported aching pain in his right knee, difficulty kneeling, and difficulty putting on socks and activities involving complex bending and rotation. He had an independent exercise program as maintenance medical care for that prior injury. Nevertheless, Claimant was released to full duty work. Consequently, he secured employment with a stucco supply company in the Denver area. As part of his duties, Claimant would fill customer orders by transferring 90 pound bags of stucco and other materials onto his truck for delivery. Claimant would also unload these materials at the designated drop site. Claimant injured his neck on January 6, 2015 while working as a stucco supply man. He then returned to Pueblo and the necessary care for his neck injury was transferred to Dr. Lakin at the Southern Colorado Clinic.

8. On the morning of February 18, 2015, Employer called Claimant and requested that he see a doctor for the "knee he injured yesterday". Claimant had a previously scheduled appointment with Dr. Lakin on this date to obtain a final release for his compensable neck injury as described above. While this previously scheduled appointment had nothing to do with Claimant's knees, Dr. Lakin saw Claimant for his claimed new right knee injury and wrote a report. In his initial examination report, Dr. Lakin indicated yes to the question "are your objective findings consistent with history and/or work related mechanism of injury/illness?" Dr. Lakin also imposed work restrictions.

9. Claimant testified that he had no problems or symptoms from his February 5, 2014 injury at the time he reinjured the knee forming the basis of this claim. The ALJ finds Claimant's testimony in this regard credible given the physical demands associated with his job as a stucco supply man and the paucity of medical records documenting any symptoms and/or need for treatment concerning the right knee in the months, weeks and days leading up to his right knee injury in this case. Consequently, the ALJ finds, as unpersuasive, Respondents' suggestion that Claimant's current knee condition and need for medical treatment is related to his February 5, 2014 injury.

10. Claimant had multiple follow up visits with Dr. Lakin concerning his right knee. On March 10, 2015, Claimant underwent an MRI of the right knee which revealed a horizontal tear in the lateral meniscal body that extends to the superior articular surface, partial meniscectomy changes involving the lateral meniscus and a small area of full-thickness cartilage defect in the posterolateral femoral condyle. The MRI also showed a Grade 2 medial collateral ligament (MCL) sprain.

11. On April 9, 2015, Claimant had an appointment at Parkview Orthopedics. He was seen by Physician Assistant Mark Rice, PA-C. PA Rice described a mechanism of injury consistent with what Claimant testified to at hearing. In his note from this date, PA Rice wrote, "I think the patient sustained a significant injury to his right knee when he fell." He further wrote "my clinical examination also suggests a medial meniscus tear, which the MRI films support."

12. Claimant returned to Parkview Orthopedics on April 30, 2015, and was seen/evaluated by Dr. Ritter. Dr. Ritter reviewed Claimant's MRI scan, and stated, "I think that the symptoms have shifted from a medial collateral strain to symptoms of a meniscal tear. I think that these are related to his more recent injury." To support this conclusion, Dr. Ritter noted that Claimant "had done very well after his last scope and had gone back to work doing heavy labor."

13. In his report from Claimant's May 27, 2015 appointment, Dr. Lakin stated, "I believe it is clear [from] Dr Ritter's over-read of MRIs in his note that this is a new meniscal tear from a new injury."

14. Dr. Anjmun Sharma examined Claimant at the request of Respondents on August 6, 2015. He also testified at hearing. Dr. Sharma opined that Claimant's right knee condition, diagnoses, and anatomic changes seen on the MRI pre-existed Claimant's alleged February 17, 2015, right knee injury. According to Dr. Sharma, the MRI findings would have been seen without any incident on February 17, 2015. Dr. Sharma explained that no force sufficient to cause a meniscus tear or injury was placed on Claimant's knee given the mechanism of injury described by Claimant at hearing or during the IME appointment he conducted on August 6, 2015. The ALJ has carefully considered Dr. Sharma's opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. Sharma's opinions less persuasive than those of Dr. Ritter.

15. Based upon the evidence presented, including the testimony of Claimant and Mr. Chapman, the witness statement of Mr. Morales and the medical record as a whole, the ALJ is persuaded that Claimant attempted to enter the trench by straddling it and placing his left foot on a sidewall ledge which subsequently gave way causing his left foot to slide toward the bottom of the trench while leaving his right foot at ground level above. The depth of the trench, in combination with Claimant's height and weight persuades the ALJ that Claimant's right knee was placed in an awkward position causing an MCL strain and a traumatic tear to the lateral meniscus of the right knee.

Consequently, the ALJ finds that Claimant's right MCL strain and lateral meniscal tear occurred in the course and scope of and arose out of his work related functions as a laborer for Employer. Claimant has proven by a preponderance of the evidence that his right knee injury is compensable.

CONCLUSIONS OF LAW

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

A. As found above, Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right knee on February 17, 2015 as he attempted to descend to the bottom of a trench to tape a tracer line on to a newly installed sewer pipe. 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 taping a tracer line onto a sewer pipe which was connected to his position as a laborer for Employer. Nonetheless, the question of whether the injury "arose out of" Claimant's 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 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).

D. In this case, the question is whether Claimant's right knee pain and pathology, specifically his medial collateral ligament strain and the horizontal lateral meniscal tear was caused by his work related functions of attempting to enter the trench to tag the sewer line or whether the aforementioned pathology is a consequence of the natural progression of a pre-existing degenerative condition of the right knee. Opposing opinions were presented in this regard. On one hand, Dr. Ritter opines that Claimant's lateral meniscal tear is acute and related to his February 17, 2015 injury. On the other hand, Dr. Sharma testified that the findings noted on Claimant's MRI are not suggestive of acute injuries. Dr. Sharma testified further that Claimant's reported mechanism of injury (MOI) lacks a sufficient torquing component likely to cause meniscal tearing. According to Dr. Sharma, in the absence of twisting a planted and bent knee, meniscal tearing does not occur. Based upon the evidence presented, the ALJ is not persuaded by Dr. Sharma's opinions for the following reasons: First, Claimant's MOI as explained establishes that his right leg was in an awkward bent position and that it twisted as the left leg descended into the trench as the dirt wall upon which he was standing gave way. Second, the MRI references a Grade 2 MCL strain along with the aforementioned horizontal left lateral meniscal tear. While the report does describe probable degenerative chondral changes in the patella and posterolateral femoral condyle, the record presented fails to support a conclusion that the meniscal tear in question is degenerative in nature. Indeed, Dr. Ritter described the tear as traumatic. Here, Dr. Ritter's opinions are more persuasive than the contrary opinions of Dr. Sharma. In fact, Dr. Sharma indicates that Claimant may have sustained a knee strain, albeit a "small" one in his opinion. Based upon the totality of the evidence presented, the ALJ concludes that Claimant likely sustained a Grade 2 MCL strain along with a traumatic lateral meniscus tear of the right knee when the dirt ledge he was standing on gave way and his left leg slid toward the bottom of the trench while his right leg was left atop of the trench in a twisted, bent position. This conclusion is consistent with Claimant's report of immediate pain and a tearing sensation in the right knee. Consequently, the ALJ concludes that Claimant has established the requisite causal connection between his work duties and his right knee injury. The injury is compensable.

E. 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). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary 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, a 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). In this case, Claimant has established that his need for a right knee arthroscopy is directly related to his compensable right knee injury. Nonetheless, the question of whether the arthroscopy was reasonable and necessary must be addressed.

F. 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. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Based upon the evidence presented, the ALJ concludes that Claimant has proven by a preponderance of the evidence that the right knee arthroscopy recommended by Dr. Ritter is reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Ritter to recommend an arthroscopy. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the recommended right knee arthroscopic procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of his compensable injury.

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 knee of February 17, 2015.

2. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment, including but not limited to the right knee arthroscopic procedure, recommended by Dr. Ritter to cure and relieve him of the effects of his February 17, 2015 compensable right knee injury.

3. 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 right knee condition, including, but not limited to the right knee arthroscopic procedure recommended by Dr. Ritter.

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: December 30, 2015

/s/ Richard M. Lamphere

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

ISSUE

The issue to be determined by this decision is as follows:

Is the requested injection from Dr. Blau reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer, an auto body shop, as a service writer in Fort Collins, Colorado. On November 26, 2014 the claimant was a walking across the shop floor when he slipped and fell. The claimant injured his back in the fall. The claimant was referred by the respondent-employer to Concentra Medical Center. The claimant had been employed by the respondent-employer for two weeks prior to this injury.

2. The claimant was seen by Dr. Jeffrey Winkler on December 3, 2014. The claimant reported that he had previously injured his low back and had a disc problem, but did not give a detailed history as to the multiple incidents over the years. Dr. Winkler noted that the claimant had only been working for the respondent-employer for ten days at the time of injury. Physical therapy were prescribed medications were to be handled by his PCP. The claimant was diagnosed with back contusions after x-rays had been performed.

3. The claimant relocated to the Colorado Springs area and transferred his care to Concentra in Colorado Springs. The claimant was seen by Dr. Randall Jones on January 6, 2015. Dr. Jones noted the claimant's current use of medications for his chronic back condition. Physical therapy was prescribed. The claimant had an acute pain increase which required a visit to the emergency room on January 19, 2015. The claimant returned to Dr. Jones on January 30, 2015. It was noted there was minimal swelling at the impact site. Dr. Jones noted that the claimant was a high risk for delayed recovery. Acupuncture was considered.

4. The claimant was referred to Dr. Shimon Blau on February 16, 2015. Dr. Blau noted the history that had been contained in the records. He did record right sided

pain. Dr. Blau obtained a history of PTSD, Bi-Polar Disorder, and Hypertension. The claimant reported that he incurred a back injury in the motor cycle accident, but failed to mention the multiple other traumas and ongoing chronic issues over the years. Dr. Blau diagnosed the claimant with a radiculopathy, but also noted a normal gait. Physical therapy was recommended to continue. Weaning of medications was discussed.

5. Dr. Blau saw the claimant again on April 27, 2015. The claimant noted an increase in pain in the morning, but that medications and use of a TENS unit there was improvement. Straight leg raises were negative and range of motion was noted to be good. There was pain with facet loading, however, neural tension was normal and there was normal tone in the bilateral extremities as well as no atrophy. Gait was also normal. Dr. Blau recommended L4 and L5 nerve root blocks.

6. The respondent-insurer had Dr. Shirley Conibear review the request from Dr. Blau. Dr. Conibear reviewed the complete medical chart for this claim. Dr. Conibear noted the long standing use of narcotics and that on physical exam lower extremity strength was normal as well as reflexes. She noted that there was no objective finding of a Radiculopathy that must correlate with imaging studies. Also, there is no failure of conservative care outlined, but notes that indicated the claimant was progressing with physical therapy. It was her opinion that medical necessity of the request was not established and recommended denial of the procedure. Insure issued a letter pursuant to W.C.R.P. Rule 16-10(b) on May 13, 2015 pursuant to this request.

7. The claimant returned to work at a book store owned by his parents sometime in the summer of 2015.

8. The claimant was seen by Dr. Floyd Ring for an IME on August 11, 2015. The claimant reported the injury consistent with records. The claimant did inform Dr. Ring of his dissatisfaction with Dr. Winkler. The claimant did not recall that he had an increase in pain which led to his February emergency room visit. His past history was recovered for narcotic use, however, the claimant was not very detailed as to his multiple recurrent injuries. He did mention to Dr. Ring that while treating for his motorcycle accident, he had an issue with the injection and did experience needle phobia. The claimant informed Dr. Ring of his long time narcotic usage.

9. On the claimant pain diagram, pain was noted in the small area of the back. There was no indication of radicular pain. Exercise and stretching were noted to be of benefit. Medications were recorded. On physical exam, tenderness was noted but the exact etiology could not be ascertained. There was no atrophy in the muscles

and lower extremity strength was exhibited as 5/5. Sensation was intact throughout the bilateral extremities. No evidence of any neurological abnormality, radicular findings, or evidence of facet mediated pain was noted.

10. Dr. Ring's impressions were prior history of motor vehicle accident, chronic narcotic and Benzodiazepine use, and myofacial back pain. The claimant reported to Dr. Ring that he was not experiencing radicular symptoms and that he did not plan on returning to Dr. Blau in the form of injections. Dr. Ring noted that due to the claimant's normal physical examination and minimal pain complaints that the requested epidural injection was not reasonable or necessary. Dr. Ring viewed the surveillance video taken in the spring of 2015. Dr. Ring noted that the claimant was able to bend and lift multiple items without difficulty. He also noted that there was no evidence of pain behaviors and that the claimant walked with a non-antalgic gait. It was Dr. Ring's impression after viewing the videos that the claimant did not demonstrate restrictions in range of motion, pain behavior or necessity for any restrictions.

11. The claimant continued to treat at Concentra and was released at MMI in October of 2015, prior to the hearing.

12. The ALJ finds Dr. Ring's analyses and opinions to be credible and persuasive.

13. The ALJ finds that the claimant has failed to establish that is more likely than not that he requires the injections as recommended by Dr. Blau.

CONCLUSIONS OF LAW

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

2. 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). The injured worker bears the burden of proof to entitlement to medical benefits.

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

4. A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. ICAO*, 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 record.

5. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251, 252 (Colo. App. 1999). Further, the respondents are liable if employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. ICAO,*. Pain is a typical symptom from the aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-mart Stores*, W.C. No. 4-669-654 (January 28, 2008).

6. Where the 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. ICAO, supra*. 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).

7. The ALJ concludes that Dr. Ring is credible and persuasive in his opinion that the requested procedure is not reasonable and necessary. Dr. Ring came to the same conclusion that Dr. Conibear had reached that there was no objective finding of a radiculopathy. Dr. Ring was consistent in his testimony that claimant did not display the required radicular symptoms to warrant the requested procedure.

8. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the procedure requested by D. Blau is reasonable or necessary.

ORDER

It is therefore ordered that:

1. The claimant's request for medical care in the form of injections, as recommended by Dr. Blau, is 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: December 17, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing June 23, 2015, even though he previously was released to return to regular employment and lost that employment for economic reasons?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 and 3 were received in evidence. Respondents' Exhibits A, B and D through H were received in evidence.

2. Employer is in the business of installing and maintaining vapor recovery units on large oil storage tanks. Claimant was employed as a "field technician." This job required Claimant to perform work on the vapor recovery units.

3. Claimant sustained admitted work-related injuries on March 9, 2015, when he was involved in a motor vehicle accident (MVA). On March 9, 2015 Claimant was seen at the emergency room where he was assessed as suffering from multiple accident related injuries including injuries to the cervical spine and the low back.

4. John Borkert, M.D., of Banner Health, became Claimant's primary authorized treating physician (ATP) for the admitted industrial injury. On March 11, 2013 Dr. Borkert placed Claimant on "sedentary" work restrictions. Under these restrictions Claimant was limited to standing "only occasionally, lifting 10 pounds maximum and frequent lifting or carrying of objects such as small tools." The employer accommodated Claimant's restrictions and he returned to work performing light duty.

5. Dr. Borkert examined Claimant on April 29, 2015. Dr. Borkert noted claimant was status post-MVA and "feeling much better overall." Nevertheless Claimant reported some neck soreness and middle back soreness. Dr. Borkert noted Claimant was then under "light-medium restrictions" and had undergone a "negative neck MRI."

6. On April 29, 2015 Dr. Borkert assessed "muscle spasms of neck" and "some bilateral trapezium muscle spasm." Dr. Borkert released Claimant to "return to regular work without restrictions." Dr. Borkert also referred Claimant to physical therapy (PT) three times per week for four weeks. Dr. Borkert wrote that his "goals" for the PT included pain relief and increased function. Dr. Borkert also continued prescriptions of oxycodone-acetaminophen (Percocet), Robaxin and Valium.

7. Following Dr. Borkert's release to regular employment Claimant returned to his pre-injury employment as a service technician.

8. Mr. Keith Segura (Segura) was Claimant's supervisor. Segura testified that after Dr. Borkert issued the April 29, 2015 release to regular employment Claimant returned to work at "full duty." Segura testified that after April 29 he observed Claimant performing his duties and Claimant appeared to be doing fine. Segura further testified that he regularly asked Claimant how he was feeling and Claimant said he was doing fine and there was nothing Segura could do.

9. Claimant testified that after he returned to work at full duty he told Segura that he still was experiencing pain. Claimant stated that some days were better than others.

10. Claimant commenced PT on May 18, 2015. On May 18 Claimant complained of mid and low back pain with "prolonged sitting, standing, and walking."

11. On May 22, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported he was sore after the last treatment then "felt much better."

12. On May 26, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "feeling OK" but was "still pretty sore."

13. On May 29, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "feeling pretty good."

14. On June 4, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "still pretty sore in the mid back."

15. On June 10, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "stiff in the mid back."

16. On June 15, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "feeling a little better."

17. On June 16, 2015 Dr. Borkert again examined Claimant. Dr. Borkert noted Claimant was "doing well overall" and his thoracic back pain was improving. However, Claimant stated that he felt he needed additional PT. Dr. Borkert noted his physical examination (PE) of Claimant was "consistent with paraspinous muscle spasm." Dr. Borkert prescribed 4 more weeks of PT and continued Percocet, Robaxin and Valium.

18. On June 19, 2015 Employer terminated Claimant's employment. Segura credibly testified that Claimant was terminated by direction of upper management because there was a significant drop in oil prices and the Employer no longer needed as many service technicians. Segura explained Claimant was selected for termination because he was the most recently hired service technician.

19. Following the termination from employment Claimant made an appointment to see Dr. Borkert on June 23, 2015.

20. On June 23, 2015 Dr. Borkert noted that Claimant gave a history that he was "fired from his job last Friday" and was "wondering about work restrictions." Claimant reported his back was "feeling worse." Dr. Borkert noted the PE was consistent with muscle spasms of the neck and myofascial back pain. Dr. Borkert recommended that Claimant continue with PT and medications.

21. On June 23, 2015 Dr. Borkert also authored a "Work Status Note." The Work Status Note states that Claimant "has an existing medical condition which limits him from doing additional activity beyond light duty restrictions." Dr. Borkert wrote Claimant was permitted to engage in "a light level of activity, which means lifting 20 pounds maximum, frequent lifting or carrying objects that weigh up to 10 pounds, walking or standing to a significant degree, or sitting most of the time with pushing/pulling arm/leg controls."

22. Claimant testified he did not ask Dr. Borkert to author a letter imposing restrictions. Rather, Claimant explained that he asked what type of work he should avoid in order to let his back heal.

23. Segura credibly testified that Claimant could not have returned to his regular employment as a service technician given the "light duty" restrictions imposed by Dr. Borkert on June 23, 2015.

24. Claimant continued with PT after he was terminated from employment. On June 24, 2015 Claimant reported to the physical therapist that he was "still pretty sore."

25. On July 1, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that his cervical spine was "feeling pretty good" but the thoracic spine was still painful.

26. On July 9, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was feeling "pretty good overall."

27. On July 15, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant

reported that since he had stopped working he felt as though his "neck and back have been able to calm down."

28. Claimant proved it is more probably true than not that he is entitled to an award of temporary total disability benefits commencing June 23, 2015. The ALJ is persuaded that the restrictions imposed by Dr. Borkert on June 23, 2015 were causally related to the admitted industrial injury, that these restrictions physically precluded Claimant from returning to his regular employment as a service technician and that Claimant sustained an actual wage loss as a result of these restrictions.

29. On June 23, 2015 Dr. Borkert was still treating the Claimant's injury-related back symptoms with medications and PT. On June 23, 2015 Dr. Borkert performed a PE and noted findings consistent with muscle spasms and mysofascial back pain. On June 23, 2015 Dr. Borkert had not found Claimant to have reached maximum medical improvement (MMI).

30. The Claimant credibly testified that on June 23, 2015 he asked Dr. Borkert about work restrictions that would permit Claimant to obtain new employment while also allowing his back to heal.

31. The ALJ infers from the totality of the circumstances that when Dr. Borkert imposed the new restrictions on June 23, 2012 he was exercising his independent medical judgment concerning the course of Claimant's medical treatment. The ALJ is not persuaded that Dr. Borkert imposed the restrictions merely because Claimant asked for them. In this regard the ALJ finds that at the time Dr. Borkert imposed the June 23, 2015 restrictions he knew Claimant had returned to regular duties after the April 29, 2015 release. Dr. Borkert also knew that since the April 29 release Claimant's injury-related neck and back symptoms had persisted despite the ongoing PT and the use of narcotic medication and muscle relaxants. The ALJ infers that Dr. Borkert determined that imposition of the June 23 activity restrictions was necessary for Claimant to obtain the maximum sustained benefit from the ongoing medical treatment. The ALJ finds that Dr. Borkert reached this conclusion regardless of whether Claimant's overall condition could be described as "improving" or "worsening."

32. Claimant proved it is more probably true than not that the restrictions imposed by Dr. Borkert caused him to be temporarily disabled from performing his regular duties as a service technician. As determined in Finding of Fact 23, Segura credibly testified that the June 23, 2015 restrictions placed Claimant in the "light duty" category which precluded him from performing the regular duties of a service technician. Dr. Borkert's decision to impose these restrictions is credible and persuasive evidence that Claimant was disabled commencing June 23, 2015. Therefore, the Claimant has been disabled from performing his regular duties for longer than three days. Indeed the PT records establish Claimant was still not working when he saw the therapist on July 15, 2015.

33. At the hearing the parties stipulated Claimant's average weekly wage (AWW) is $1515.76.

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.

CLAIM FOR TEMPORARY TOTAL DISABLITY BENEFITS

Claimant seeks an award of TTD benefits commencing June 23, 2015 and continuing. Claimant argues, based on his testimony and the restrictions imposed by Dr. Borkert on June 23, 2015, that he became temporarily totally disabled on that date.

Conversely, Respondents argue the June 23, 2015 restrictions are not credible and persuasive evidence of Claimant's alleged disability because Claimant requested imposition of the restrictions "immediately after" his termination from employment on June 19, 2015. Respondents also argue the medical and PT records establish that on June 23, 2015 Claimant's condition was "improving" after he had already successfully returned to regular employment pursuant to Dr. Borkert's April 29, 2015 release. Respondents reason that this evidence credibly and persuasively demonstrates there was no "worsening" of Claimant's condition after April 29 that could justify a finding of temporary disability beginning on June 23, 2015. The ALJ concludes Claimant proved that he is entitled to an award of TTD benefits.

To prove an initial entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he or she 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 prove a causal connection between the 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 that 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 the occurrence of one of the events 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. To prove disability there is no requirement that a 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). When a claimant does present medical evidence of restrictions it is for the ALJ to assess the weight and credibility to be assigned such evidence. *King v. The Inn at Silver Creek,* WC 4-844-514 (ICAO February 6, 2012).

Section 8-42-105(3)(c) provides that TTD benefits are terminated when the "the attending physician gives the employee a written release to return to regular employment." When applying this statute our courts hold that an unequivocal release to regular employment by an attending physician is conclusive and may not be altered by an ALJ. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000). In this case Claimant does not dispute that his initial entitlement to TTD benefits, if any, ended when Dr. Borkert released him to return to regular employment on April 29, 2015. Section 8-42-105(3)(c), C.R.S. However, Claimant contends that the release to regular employment did not bar him from establishing a right to TTD benefits when Dr. Borkert imposed the new disabling restrictions on June 23, 2015.

The ICAO has held in a number of cases that termination of TTD benefits pursuant to § 8-42-105(3)(c) does not establish a *permanent* bar to receipt of TTD benefits. Rather the ICAO has held that where an attending physician has released the claimant to return to regular employment, but the claimant proves a post-release "worsening of condition" causing "additional disability restrictions" the Claimant is again entitled to TTD benefits. *Aragon v. Western LCM, Inc.,* WC 4-874-169 (ICAO December 13, 2012); *Vigil v. Pioneer Healthcare,* WC 4-779-599 (ICAO March 24, 2010); *Rivera v. Ames Construction,* WC 4-421-438 (ICAO August 25, 2000), *aff'd., St. Paul Fire & Marine Insurance v. Industrial Claim Appeals Office,* (Colo. App. No. 00CA1664, January 18, 2001) (not selected for publication). The ICAO has reasoned

that after a release to regular employment a request for TTD benefits based on a subsequent worsened condition does not constitute an impermissible "attack on the attending physician's opinion that the claimant was previously able to perform regular employment." *Vigil v. Pioneer Healthcare, supra.*

Although most of the ICAO cases regarding reinstatement of TTD benefits after a release to return to regular employment involve an alleged "worsened condition," the ALJ does not understand the cases as holding that a "worsened condition" is the only fact pattern that would justify reinstatement of TTD benefits. To the contrary, the ICAO has emphasized a request to reinstate TTD benefits is to be determined under the same legal standards applicable to the initial claim for TTD benefits. *Aragon v. Western LCM, Inc., supra*; *Vigil v. Pioneer Healthcare, supra; Vigil v. Pioneer Healthcare, supra.* As set forth above, the standards applicable to an initial claim for TTD require only that the claimant prove the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, that the disability resulted in an actual wage loss, and that there is a causal connection between the injury and the wage loss.

Applying the standards governing an "initial" claim for TTD benefits the ALJ concludes Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing June 23, 2015. As determined in Findings of Fact 29 through 31 the ALJ is persuaded that the admitted industrial injury caused Dr. Borkert to impose the June 23 restrictions. Specifically, the ALJ is persuaded that Dr. Borkert imposed the limitations on Claimant's physical activities in order to facilitate maximum benefit from the ongoing medical treatment program and to produce maximum relief of Claimant's symptoms.

Claimant proved that the restrictions were "disabling" in the sense that they precluded him from performing all of the duties of his regular employment as a service technician. The restrictions have not, so far as the evidence indicates, ever been rescinded. Thus, Claimant's disability has lasted longer than three days.

The ALJ concludes that Claimant proved the industrial injury has caused Claimant's wage loss since June 23, 2013. At the time the June 23 restrictions were imposed Claimant was unemployed through no fault of his own. As determined in Finding of Fact 18 the Employer terminated Claimant's post-injury employment on June 19, 2015 for economic reasons. A termination from employment for economic reasons does not sever the causal relationship between an injury-related disability and subsequent wage loss. This is true because injury-related disability impairs a claimant's ability to obtain comparable employment on the open labor market. *See Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993); *Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989).

The ALJ concludes that in this case it is does not matter whether or not Claimant's overall medical condition "improved" or "worsened" after the April 29, 2015 release to regular employment. As determined in Finding of Fact 31, the ALJ infers from the circumstances that Dr. Borkert imposed the June 23 restrictions as a means of insuring maximum sustained benefit from the medical treatment program, including the

PT. Put another way, Dr. Borkert determined that whether or not Claimant was generally improving or worsening, it was detrimental to the effectiveness of the treatment plan for Claimant to perform physical activities in excess of the restrictions.

Moreover, the ALJ notes Respondents did not present any credible or persuasive medical expert who opined that the restrictions imposed by Dr. Borkert on June 23, 2015 restrictions were not reasonable and necessary to treat Claimant's injury-related symptoms. Although Respondents do not have the burden of proof and were not required to present medical evidence to defeat the claim for TTD benefits, the ALJ considers Respondents' failure to present expert testimony contravening Dr. Borkert's decision to impose the restrictions to be a significant factor in considering the weight to be assigned Dr. Borkert's decision to assign the restrictions. As noted above, the ALJ may consider whether or not evidence has been contradicted as a factor in evaluating the credibility of the evidence.

The Insurer is liable to pay TTD benefits to Claimant commencing June 23, 2015. Such benefits shall be based on the stipulated AWW and the statutory formula for calculating TTD benefits. Section 8-42-105(1), C.R.S. In light of this determination the ALJ need not consider Claimant's argument that his need to attend PT during work hours constitutes a form of "disability" that entitles him to an award of TTD benefits.

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 Claimant temporary total disability benefits at the statutory rate commencing June 23, 2015 and continuing until terminated by law or order.

3. Issues not resolved by this order are reserved for future consideration.

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: December 18, 2015

DIGITAL SIGNATURE:

David P. Cain

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

Claimant's opening brief was filed, electronically, on December 8, 2015. After the granting of an extension of time, Respondents' double-spaced 20-page answer brief was filed, electronically, on December 16, 2015. On the same date, the Claimant indicated that no reply brief would be filed, at which time the matter was deemed submitted for decision.

ISSUES

The issue to be determined by this decision is whether the right rotator cuff surgery recommended by one of the Claimant's authorized treating physicians (ATPs), Steven E. Horan, M.D., an orthopedic surgeon, is causally related to the admitted injury of February 17, 2015 and reasonably necessary to cure and relieve the effects of that injury.

FINDINGS OF FACT

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

Preliminary Findings

1. The Respondents filed a General Admission of Liability (GAL), dated March 20, 2015, admitting for reasonably necessary and causally related medical care; an average weekly wage (AWW) 0f $1,089.13; and, temporary total disability (TTD) benefits of $726.09 per week from March 6, 2015 to "undet." The GAL continues to be in full force and effect.

2. The Claimant is a 46 year old female who was employed with the Employer as a counselor since October 28, 2014 (Respondents' Exhibit A). The Employer is a juvenile facility for troubled girls with backgrounds of abuse. Some of the girls visited the Employer for school only while others were patient-residents. Some of the patient residents have a propensity for violent behaviors. The Claimant's duties included checking on, monitoring, and assisting patients.

The Admitted Work-Related Incident

3. On February 17, 2015, the Claimant sustained work related injuries when a patient-resident, who was 17 years old, 5' 7" to 5' 9" tall, 280 pounds, attacked the Claimant. The patient-resident punched, kicked, grabbed, stomped the Claimant's foot, picked the Claimant up and threw the Claimant. The First Report of Injury documented that the Claimant sustained a contusion with injury to the "R Upper Leg" when the Claimant was "attempting to physically manage a client and de-escalate the client, staff was kicked, thrown, hit" (Respondents' Exhibit. A). The patient-resident jumped on the Claimant's back and tried to choke her. Then the patient-resident kicked, hit the

Claimant and reached for a butcher knife, whereupon the Claimant had to slam their hands in a filing cabinet to have the patient release the knife. The patient threw the Claimant onto a table as the Claimant was reaching for the telephone to call for help and hurt the Claimant's right shoulder. . The Claimant, however, gave a history of right-sided trauma. The patient grabbed the telephone and ripped it from the wall. As the claimant was trying to reach for her cell phone underneath the desk the patient jerked claimant's right arm back and kicked her in her legs. The attack continued for 8 minutes until help arrived. The Respondents dispute that the violent patient-resident specifically hurt the Claimant's right should because the Claimant did not give a specific medical history of a right shoulder injury until approximately May 2015 and the Claimant did not mark an "X" on pain diagrams of the right shoulder. Also, the Respondents rely on physician medical records reviewers who base their opinions on lack of causal relatedness on the later manifestations of right shoulder pain and the fact that the Claimant had had pre-injury right shoulder problems years before the date of injury.

Medical History of the Admitted Injury

4. On February 18, 2015, the Claimant filled out a form for HealthONE, indicating that she had pain in her right side, quad, knee, left side, hand-pinky, quad, foot, and back (Claimant Exhibit 3, p. 3).

5. On the same date, Robert White, M.D. her then treating physician at HealthONE, noted, "Again, multiple pain complaints. Pain is achy pain. All in her back from below her neck, midback mostly. Left fifth finger. Sore over her right hip, above her left knee and left hip, over her left knee, left top of her foot. Right knee anterior and right anterior lower thigh. Everything is sort of achy" (Claimant's Exhibit. 3, p.5).

6. On the same date, Dr. White performed a physical examination of the Claimant's musculoskeletal system that showed tenderness over the infrascapular and parascapular areas, in addition to minimal discomfort in the thoracic area. Dr. White prescribed Motrin and Flexeril (Claimant's Exhibit. 3, p. 6). The ALJ infers and finds that these areas are close to the right shoulder, although specific right shoulder pain was not articulated.

7. On February 24, 2015, Dr. White noted that the Claimant is a "little sore in the midback and infrascapular area." He gave the Claimant restrictions of no grasping or pinching with her left hand (Claimant's Exhibit. 3, p. 9).

8. On March 6, 2015, the Claimant filled out a pain diagram for HealthONE, indicating aching from the neck across her back (Claimant's Exhibit. 3, p.12). Again, the ALJ infers and finds that this general area is close to the right shoulder although specific reference to the right shoulder was not made.

9. On the same date, Dr. White noted more trapezial tenderness and infrascapular bilateral and gives restrictions of lifting no more than 20 pounds. (Claimant's Exhibit 3, pp. 13-14).

10. On April 16, 2015, the Claimant was referred for psychological treatment to Lupe Ledezma, Ph.D., licensed clinical psychologist, and Dr. Ledezma noted soreness over most of the Claimant's body (Claimant's Exhibit 5, p.61).

Specific Complaints Involving the Right Shoulder

11. On the May 21, 2015, the Claimant saw Chiropractor Dr. Keith J. Graves, D.C. , and the pain diagram specifically shows aching over the upper back and **right shoulder** (Claimant's Exhibit 6, p. 77) on referral from HealthONE, Deana Halat, FNP (nurse practitioner).

12. On the same date, Dr. Graves, D.C., started treating the **Claimant's rotator cuff.** Dr. Graves, D.C., treated the Claimant's Infraspinatus, Teres Minor, and Subscapularis (Claimant's Exhibit 6, p. 78).

13. Also, on the same date, Nurse Deana Halat noted "posterior shoulder girdle complaints" (Claimant's Exhibit 6, p. 81) and the Claimant indicated that she currently has shoulder pain (Claimant's Exhibit 6, p. 88).

14. On June 4, 2015, Dr. Graves, D.C. circled pain in the right shoulder when providing treatment (Claimant's Exhibit 6, p. 95).

15. On June 8, 2015, Dr. Megan Hahler, D.C., of Denver Spine & Extremity noted that "the Claimant's right shoulder pain began a week or two ago and she is now having difficulty maneuvering her right arm. Claimant complains of stiffness and limited range of motion and denies new trauma" (Claimant's Exhibit 6, p. 97).

16. On the same date, Dr. Hahler, D.C., noted that the shoulder decompression test is positive for reproducing local anterior shoulder pain. Right shoulder ranges of motion were limited to 90 degrees in flexion and abduction due to local anterior shoulder pain. Dr. Hahler, D.C., noted that shoulder pain is 5-7 (Claimant's Exhibit 6, pp. 99-102).

17. On June 17, 2015, Nurse Deana Halat of HealthONE noted that the Claimant's right shoulder is extremely painful Halat recommended a MRI (magnetic resonance imaging) of the Claimant's right shoulder and left knee and referred the Claimant for an orthopedic evaluation of the right shoulder (Claimant's Exhibit 3, pp. 34-36).

18. On the same date, Nurse Halat noted that the Claimant's right shoulder has pain with Neer testing and has limited abduction and adduction both actively and passively (Claimant's Exhibit 3, p. 35).

19. On June 24, 2015, Nurse Halat noted that the Claimant has increased right shoulder pain (Claimant's Exhibit 3 p. 41).

The MRI of June 29, 2015

20. On June 29, 2015, the Claimant received an MRI of her right shoulder. The MRI showed multifocal concealed laminar tears of the supraspinatus tendon, 7 to 10 mm in length, estimated intermediate to high-grade (Claimant's Exhibit 10, p. 156). The Respondents' medical records reviewers offer no plausible alternative explanation, other than the Claimant's underlying pre-existing right shoulder condition, for these "concealed" laminal tears.

Orthopedic Surgeon Steven E. Horan, M.D. and Caroline Gellrick, M.D.

21. On July 7, 2015, Dr. Horan noted that the Claimant had decreased strength in abduction against the right. He also noted that the Claimant had a positive Hawkins' and Neer's test. Dr. Horan stated, "At this point, I really do not think anything short of a surgery and a rotator cuff repair for the right shoulder makes sense. We are going to go ahead and set her up for that" (Claimant's Exhibit 7, p. 115).

22. On July 8, 2015, Dr. Horan recommended right shoulder arthroscopy and a rotator cuff repair (Claimant's Exhibit 7, p. 117).

23. On July 23, 2015, Nurse Halat noted that the Claimant was likely to get shoulder surgery done before foot surgery (Claimant's Exhibit 3, p. 50).

24. On August 28, 2015, Dr. Gellrick noted that the Claimant had multiple injuries including a right shoulder tear of the supraspinatus (Claimant's Exhibit 9, p. 141).

25. On August 31, 2015, Dr. Horan noted: **"Radiological and clinical exam were consistent with a high-grade tear of the supraspinatus. I feel that the description of the injury and the results seen on examination and MRI are consistent, and there is a causal relationship. I feel that the patient does need to have her shoulder repaired due to the injuries sustained in February 2015"** (Claimant's Exhibit 7, p. 123). The ALJ finds Dr. Horan's opinion on the causal relatedness of the need for right shoulder surgery to be rendered to a reasonable degree of medical probability, and it is contrary to the opinions of medical records reviewers, Christopher Isaacs, D.O., and James Lindberg, M.D., both of whom never

physically examined the Claimant and both of whom were engaged by the Respondents to render opinions on causality. In a manner of speaking, Dr. Horan does not "have a dog in this fight."

26. On September 2, 2015, Dr. Gellrick noted that the Claimant sustained injuries to her right shoulder with MRI showing supraspinatus tear (Claimant 's Exhibit 9, p. 143). Dr. Gellrick's exam showed that the Claimant's right shoulder was very painful. And the Claimant was positive for supraspinatus and impingement testing, and had a decreased range of motion by 30% noted on the right shoulder (Claimant's Exhibit 9, p. 145). Dr. Gellrick noted:, "**In the mind of this examiner, the patient had eight minutes of assault and was thrown and stomped on and the shoulder injury can certainly be compensable to the current work comp claim"** (Claimant's Exhibit 9, p. 147). The ALJ draws a plausible inference and finds that Dr. Gellrick has rendered an opinion, to a reasonable degree of medical probability, that the need for the right shoulder surgery is causally related to the admitted injury of February 17, 2015.

27. On October 1, 2015, Dr. Gellrick noted that the Claimant's right shoulder can only actively flex to 90 degrees. Dr. Gellrick noted that Claimant's Spurling remained positive with a tight right trapezius (Claimant's Exhibit 9, p. 153). Dr. Gellrick noted that the Claimant **has a right shoulder strain with a positive rotator cuff and needs to have surgery** (Claimant's Exhibit 9, p. 154).

28. On October 6, 2015, **Dr. Horan again requested authorization of the surgery** (Claimant's Exhibit 7, p. 121).

Independent Medical Records Reviewers Dr. Isaacs and Dr. Lindberg

29. Dr. Lindberg was of the following opinion: "I do not believe that the shoulder (right) complaints had any relationship whatsoever to her assault...Therefore, any kind of surgical intervention under workers' compensation **is** (emphasis supplied) is denied." When the ALJ asked Dr. Lindberg, at hearing, what his "denial" meant, his response was not that satisfactory. When asked if he had an alternative plausible explanation for the Claimant's right shoulder condition, Dr. Lindberg stated that was not within his purview. His mission was to render an opinion on medical causality, or a lack thereof. This statement substantially weakens his opinion. Indeed, his ultimate opinion departs, substantially, from the opinion of an objective medical evaluator, and it crosses over into the realm of advocacy for the Respondents on his part. For this reason, the ALJ finds the opinion of Dr. Horan on causality considerably more credible and persuasive than Dr. Lindberg's opinion.

30. Dr. Isaacs stated: "I am in agreement with Dr. Lindberg that the shoulder complaints come many months after the original injury and therefore (are) not related to the injury." The ALJ infers and finds that the underlying parapet for Dr. Isaacs opinion. involves the time between the admitted injury and the Claimant's first complaints of right

shoulder pain. Dr. Isaacs further opines that he MRI findings are "very soft" (whatever that means) and would not indicate the need for rotator cuff repair. Dr. Isaacs recommends that any treatment of the shoulder should be denied. The ALJ finds Dr. Isaacs' opinions far less credible than the opinions of Dr. Horan.

The Claimant

31. It was the Claimant's undisputed testimony at hearing, that after the attack she was focusing on the body parts that were "screaming" in pain and that is why she did not mention her right shoulder pain initially. The ALJ finds this testimony plausible and credible. The Claimant stated that after the other body parts started to recover, she noticed that the pain in her right shoulder was continuing and that she was also experiencing weakness in her right shoulder and problems undoing her bra and brushing her hair. The ALJ finds this testimony plausible, credible and persuasive.

32. The Claimant also testified that prior to the admitted work injury she did martial arts and also taught kick boxing and was not having any problems with her right shoulder while doing those activities, which compromises the medical opinions that her right shoulder condition must be related to her pre-existing right shoulder condition.

Lupe Ledezma, Ph.D, Clindal Psychologist

33. The Claimant is currently undergoing psychological treatment with Dr. Ledezma for the work-related psychological conditions, including major depression, acute stress disorder and history of post-traumatic stress disorder (PTSD). Against this backdrop, the Claimant's explanation of why she did not mention the right shoulder pain as herein above described makes even more sense

Ultimate Findings

34. The Claimant presented in a straight-forward and credible manner. She offered a plausible explanation why she did not specifically mention, or focus on, her right shoulder condition until a few months after the admitted injury. The ALJ makes a finding of evidentiary (basic) fact that the Claimant's testimony is credible, consistent with the weight of credible evidence, and un-rebutted other than by the Respondents' arguments, based on the opinions of their experts.

35. As found, the ALJ finds the opinions of Dr. Horan and Dr. Gellrick more credible and persuasive than the opinions of Dr. Lindberg, Dr. Isaacs, and all other opinions to the contrary.

36. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Horan and Dr. Gellrick, concerning the causal relatedness

and reasonably necessity of the surgery recommended by Dr. Horan, and to reject all opinions to the contrary.

37. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that the rotator cuff repair, recommended by Dr. Horan, is causally related to the admitted injury of February 17, 2015 and is reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented in a straight-forward and credible manner. She offered a plausible explanation why she did not specifically mention, or focus on, her right shoulder condition, until a few months after the admitted injury. As further found, the

ALJ made a finding of evidentiary (basic) fact that the Claimant's testimony was credible and consistent with the weight of credible evidence. Indeed, as found, it was un-rebutted other than by the Respondents' arguments, based primarily on the opinions of their medical experts. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. Also, as found, the opinions of Dr. Horan and Dr. Gellrick on the causal relatedness and reasonable necessity of the recommended right rotator cuff repair were more credible and persuasive the opinions of Dr. Lindberg and Dr. Isaacs, based on medical records review only. Indeed, the opinions of Dr. Horan and Dr. Gellrick are more credible and persuasive than any other opinions to the contrary.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Horan and Dr. Gellrick, concerning the causal relatedness and reasonably necessity of the surgery recommended by Dr. Horan, and to reject all opinions to the contrary.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979).

People v. M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven, by a preponderance of the evidence that the rotator cuff repair, recommended by Dr. Horan, is causally related to the admitted injury of February 17, 2015 and is reasonably necessary to cure and relieve the effects thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of the right rotator cuff repair, recommended by Steve E. Horan, M.D., and all other treatment for the right shoulder injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The General Admission of Liability, dated March 20, 2015, remains in full force and effect.

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

DATED this 18 day of December 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

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

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his work-related injuries.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 8, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 30 year old male. He worked for Employer as a Package Car Driver. His job duties involved delivering packages out of his delivery truck. Claimant averaged approximately 250 deliveries in an eight hour day. He noted that the delivery truck is approximately one foot off of the ground and he maintained three points of contact when removing a package from the truck for delivery.

2. On February 23, 2015 Claimant was walking over snow on the ground while making a package delivery. He experienced the immediate onset of pain in his left knee area. Claimant completed his work shift for the day.

3. On February 24, 2015 Claimant continued to experience sharp pain in his left knee area. He thus reported his symptoms to his supervisor and was directed to Authorized Treating Physician (ATP) Tanya Michelle Kern, M.D. for treatment.

4. On February 25, 2015 Claimant visited Dr. Kern for an examination. Claimant reported the gradual onset of left knee pain that began on February 23, 2015. He specifically noted that his "left knee started aching in the cold weather and his knee almost "gave out" but he did not fall. Dr. Kern commented that she was uncertain whether Claimant's left knee condition was at least 50% likely to have been caused by his exposure at work. She noted that there was no specific mechanism of injury and Claimant's "sensitivity seems a bit out of proportion to the injury as there is no effusion or soft tissue swelling on exam."

5. On March 4, 2015 Claimant returned to Dr. Kern for an evaluation. Dr. Kern was still uncertain about the cause of Claimant's left knee symptoms but noted that it was possible Claimant was suffering from patellofemoral syndrome that was

aggravated by his delivery work. She remarked that Claimant could not complete his job duties for Employer because he had developed a severe limp.

6. On March 17, 2015 Claimant visited private orthopedic surgeon Steven Weinerman, M.D. Dr. Weinerman commented that Claimant had undergone an "unremarkable" MRI of his left knee on March 7, 2015. He diagnosed Claimant with patellar tendonitis and prescribed physical therapy, occupational therapy and a knee brace.

7. On April 1, 2015 Claimant returned to Dr. Kern for an examination. Dr. Kern noted that Claimant suffered from patellofemoral instability of his left knee. Claimant reported that his knee injury was likely caused by getting in and out of his truck to make package deliveries for Employer. Dr. Kern stated "while I do agree that patellar tendonitis could be due to his work that requires frequent getting in and out of a truck, I cannot explain the level of dysfunction he has and I believe there is a psychological overlay."

8. In a note dated April 7, 2015 Dr. Weinerman drafted a letter stating that Claimant's patellar tendonitis was caused "from this type of work." He did not perform any causation analysis connecting Claimant's left knee symptoms to his work activities.

9. On April 17, 2015 Claimant returned to Dr. Kern for an evaluation. Dr. Kern remarked that Claimant "has secondary reasons for not working and he is likely to do poorly with treatment." She noted that Claimant was not working because his Temporary Alternative Work (TAW) for Employer had ceased earlier in the month.

10. On May 15, 2015 Claimant again visited Dr. Kern for an examination. Dr. Kern could not explain Claimant's range of motion loss, severe persistent limp and pain that was out of proportion to his left knee condition. Dr. Kern commented that she was "not sure that his persistent pain and lost ability to walk and work [could] be considered work related." Nevertheless, she stated that Claimant could not perform his job for Employer.

11. On July 6, 2015 Claimant returned to Dr. Kern for n evaluation. Dr. Kern noted that Claimant continued to suffer from patellofemoral instability and pain in the left knee. She continued Claimant's work restrictions and noted that he was scheduled to undergo left knee surgery with Dr. Weinerman on July 24, 2015. Dr. Kern explained that a second orthopedic opinion would be valuable because Claimant did not have an "impressive knee injury."

12. On July 24, 2015 Dr. Weinerman performed arthroscopic surgery on Claimant to repair the left knee patellar tendon. He specifically removed a portion of the fat pad and patellar tendon with granulation tissue. On August 7, 2015 he assigned work restrictions of no kneeling, squatting or climbing.

13. On August 19, 2015 Claimant underwent an independent medical examination with John R. Schwappach, M.D. Dr. Schwappach agreed that Claimant

had suffered from “recalcitrant patellar tendonitis” and the surgery performed by Dr. Weinerman was reasonable and necessary. He explained that Claimant’s left knee injury was not caused by his work activities for Employer but constituted the aggravation of a pre-existing condition.

14. Claimant testified at the hearing in this matter. He explained that his job duties for Employer were physically demanding and required significant walking and stepping. He noted that on February 23, 2015 the weather was very cold and he was delivering a normal-sized package. Claimant was simply walking on uneven ground and experienced left knee pain. He was not kneeling, bending, squatting or twisting when his left knee pain began. Claimant commented that he engages in predominantly sedentary activities outside of work. He asserts that he suffered an occupational disease in the form of left knee patellar tendonitis as a result of repetitive walking and stepping in and out of his work truck to deliver packages.

15. On October 27, 2015 the parties conducted the evidentiary deposition of Dr. Schwappach. Dr. Schwappach maintained that Claimant’s left knee patellar tendonitis was not caused by his work activities as a Package Car Driver for Employer. He noted that Claimant may have had asymptomatic, pre-existing patellar tendonitis prior to February 23, 2015. Claimant’s left knee symptoms became clinically relevant on February 23, 2015 but his symptoms could have manifested themselves at any place or time. Claimant was merely walking when he experienced left knee pain. He was not doing anything medically relevant while working that would have constituted an aggravation of a pre-existing condition. Dr. Schwappach explained that the causal mechanism of Claimant’s left knee injury was unclear but the cold weather and change in barometric pressure could have explained the onset of symptoms. He acknowledged that Claimant could have aggravated his left patellar tendonitis by entering and exiting his delivery truck, but there was no medical evidence to support the aggravation of a pre-existing condition at work on February 23, 2015.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of left knee patellar tendonitis during the course and scope of his employment with Employer. Claimant explained that he was walking and carrying a normal-sized package when he suddenly experienced left knee pain on February 23, 2015. The medical records consistently reflect that Claimant suffered from pre-existing patellar tendonitis and thus brought a personal risk of injury to the workplace. The circumstances surrounding Claimant’s experience of left knee pain do not constitute a special hazard. He was simply engaged in the ubiquitous activity of walking when he noticed left knee symptoms.

17. Dr. Schwappach persuasively maintained that Claimant’s left knee patellar tendonitis was not caused by his work activities as a Package Car Driver for Employer. He noted that Claimant may have had asymptomatic, pre-existing patellar tendonitis prior to February 23, 2015. Claimant’s left knee condition became clinically relevant on February 23, 2015 but his symptoms could have manifested themselves at any place or time. Claimant was merely walking when he experienced left knee pain. He was not doing anything medically relevant while working that would have constituted an

aggravation of a pre-existing condition. Dr. Schwappach acknowledged that Claimant could have aggravated his left patellar tendonitis by entering and exiting his delivery truck, but there was no medical evidence to support the aggravation of a pre-existing condition at work on February 23, 2015.

18. ATP Dr. Kern expressed ambiguous opinions about whether Claimant's patellar tendonitis was caused by his work activities for Employer. She explained that getting in and out of a truck could cause patellar tendonitis but could not identify a specific mechanism of injury to Claimant's left knee. She was unsure whether Claimant's condition was work-related because of persistent concerns about Claimant's level of pain behavior and desire for secondary gain. Even by May 15, 2015 Dr. Kern specifically stated that she was "not sure that [Claimant's] persistent pain and lost ability to walk and work [could] be considered work related." In contrast, Dr. Weinerman attributed Claimant's left knee condition to his work activities for Employer. He drafted a letter stating that Claimant's patellar tendonitis of the left knee was caused "from this type of work." However, Dr. Weinerman did not perform any causation analysis connecting Claimant's left knee symptoms to his work activities. Accordingly, Claimant has failed to establish a direct causal relationship between the conditions of his employment and his left knee injury. Claimant's work activities on February 23, 2015 did not trigger the onset of left knee symptoms. Instead, the symptoms constituted the manifestation of Claimant's pre-existing patellar tendonitis or an idiopathic condition that did not arise out of his employment with Employer on February 23, 2015. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his pre-existing patellar tendonitis.

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

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

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

6. When the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's pre-existing condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard" if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

7. 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.

8. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of Colorado's Workers' Compensation Act and is thus compensable as a work-related injury. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. For example, if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. *Id.* at 504-05.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of left knee patellar tendonitis during the course and scope of his employment with Employer. Claimant explained that he was walking and carrying a normal-sized package when he suddenly experienced left knee pain on February 23, 2015. The medical records consistently reflect that Claimant suffered from pre-existing patellar tendonitis and thus brought a personal risk of injury to the workplace. The circumstances surrounding Claimant's experience of left knee pain do not constitute a special hazard. He was simply engaged in the ubiquitous activity of walking when he noticed left knee symptoms.

10. As found, Dr. Schwappach persuasively maintained that Claimant's left knee patellar tendonitis was not caused by his work activities as a Package Car Driver for Employer. He noted that Claimant may have had asymptomatic, pre-existing patellar tendonitis prior to February 23, 2015. Claimant's left knee condition became clinically relevant on February 23, 2015 but his symptoms could have manifested themselves at any place or time. Claimant was merely walking when he experienced left knee pain. He was not doing anything medically relevant while working that would have constituted an aggravation of a pre-existing condition. Dr. Schwappach acknowledged that Claimant could have aggravated his left patellar tendonitis by

entering and exiting his delivery truck, but there was no medical evidence to support the aggravation of a pre-existing condition at work on February 23, 2015.

11. As found, ATP Dr. Kern expressed ambiguous opinions about whether Claimant's patellar tendonitis was caused by his work activities for Employer. She explained that getting in and out of a truck could cause patellar tendonitis but could not identify a specific mechanism of injury to Claimant's left knee. She was unsure whether Claimant's condition was work-related because of persistent concerns about Claimant's level of pain behavior and desire for secondary gain. Even by May 15, 2015 Dr. Kern specifically stated that she was "not sure that [Claimant's] persistent pain and lost ability to walk and work [could] be considered work related." In contrast, Dr. Weinerman attributed Claimant's left knee condition to his work activities for Employer. He drafted a letter stating that Claimant's patellar tendonitis of the left knee was caused "from this type of work." However, Dr. Weinerman did not perform any causation analysis connecting Claimant's left knee symptoms to his work activities. Accordingly, Claimant has failed to establish a direct causal relationship between the conditions of his employment and his left knee injury. Claimant's work activities on February 23, 2015 did not trigger the onset of left knee symptoms. Instead, the symptoms constituted the manifestation of Claimant's pre-existing patellar tendonitis or an idiopathic condition that did not arise out of his employment with Employer on February 23, 2015. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his pre-existing patellar tendonitis. *See In re Gray,* W.C. No. 4-721-655 (ICAP, Sept. 25, 2008) (where claimant passed out and could not explain what caused him to fall, his fall was unexplained and therefore not compensable); *In re Licalzi,* W.C. No. 4-661-550 (ICAP, Sept. 7, 2006) (where claimant was walking down a linoleum hallway but fell for reasons she could not describe, fall was unexplained and therefore not compensable).

ORDER

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

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

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

DATED: December 31, 2015.

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 issues determined by this decision involve Claimant's entitlement to death benefits under the Workers Compensation Act following a fatal injury to her son on July 8, 2013. The specific questions to be answered are:

I. Whether the decedent was an employee of Carrera's Tires at the time of his death.

II. If the decedent was an employee of Carrera's Tires at the time of his death, whether his death was proximately caused by an injury arising out of and in the course and scope of his employment for Carrera's Tires.

III. Whether Claimant established by a preponderance of the evidence that she is a wholly dependent family member of the decedent, Oscar Muro-Cardoza.

FINDINGS OF FACT

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

1. At the time of his death, Claimant's son, Oscar Muro-Cardoza ("Mr. Cardoza"), was routinely working at a liquor store on afternoons and evenings. This employment did not afford Mr. Cardoza sufficient living expenses. Consequently, he sought additional employment at a tire shop owned and operated by Respondent-Employer.

2. Based upon the evidence presented, the ALJ finds that Mr. Cardoza probably had been working for Respondent-Employer in excess of one year before his death on July 8, 2013. According to the testimony of Respondent-Employer, Mr. Cardoza would come to the shop "every day" to help out. Per Respondent-Employer, Mr. Cardoza was free to come and go as he chose; he had no set hours.

3. Respondent-Employer testified that Mr. Cardoza would clean up around the shop and hand him tools as he was installing tires onto customer's vehicles. Occasionally, Respondent-Employer would leave Mr. Cardoza in charge of the front office while he would leave to run errands. According to Respondent-Employer, Mr. Cardoza was not hired to nor did he perform mechanical work when at the shop. Furthermore, Respondent-Employer testified that Mr. Cardoza was not hired to and did not work with or on tires when he was at the shop.

4. Claimant disputes Respondent-Employer's description of Mr. Cardoza's duties as

that of a janitor, claiming instead that he was working as a mechanic and tire installer for Respondent-Employer. Outside of her claim, Claimant presented no independent evidence to establish that Mr. Cardoza's duties included working as a mechanic or a tire installer.

5. On July 8, 2013, Mr. Cardoza brought his personal vehicle to Respondent-Employer's tire shop and parked it outside, to the left of the shop entrance bay and away from the building. Respondent-Employer testified that he left Mr. Cardoza at the tire shop to go and pick up some tires that morning. When Respondent-Employer returned to the shop he could not locate Mr. Cardoza inside where he expected him to be. He then searched outside and found Mr. Cardoza pinned and lifeless under his car.

6. Emergency medical services were requested and responded to the scene. Mr. Cardoza's body was removed from under the car and transported to the coroner's office where an autopsy was performed. The immediate cause of death is listed on Claimant's death certificate as "mechanical asphyxia". The death certificate lists Mr. Cardoza's usual occupation as "Mechanic".

7. Mr. Cardoza was 22 years old and was not married on July 8, 2013. He had no children at the time of his death.

8. Respondent-Employer testified as follows:

- That he has no employees claiming that Mr. Cardoza was an independent contractor.
- That Mr. Cardoza had not sought permission to work on his personal vehicle at the shop on July 8, 2013 or at any other time prior.
- That Respondent-Employer never gave Mr. Cardoza permission to work on his personal vehicle at the shop on July 8, 2013 or any other day prior.
- That Respondent-Employer had no idea that Mr. Cardoza intended to work on his car outside of the shop on July 8, 2013.
- That Mr. Cardoza was not using tools owned by Respondent-Employer at the time of the accident. Rather, according to Respondent-Employer, Mr. Cardoza was using his personal tools to work on his personal vehicle at the time of the accident.

9. An Officer from the Colorado Springs Police Department investigated the accident. Office John DeClerck took witness statements from several people, including Respondent-Employer. Based upon the evidence presented, including the witness statements, the ALJ finds that Claimant's was probably killed sometime during the late morning hours of July 8, 2013, after he elected to take his lunch break and begin

working on his car alone. The car likely slipped off the jacks it was resting on and fell onto Mr. Cardoza, crushing him to death.

10. As noted, Respondent-Employer gave a witness statement. In that statement, he refers to Mr. Cardoza as his "employee". Per the witness statement Respondent-Employer had employed Mr. Cardoza for "about a year". The witness statement also indicates that Mr. Cardoza had been an "excellent employee".

11. According to this witness statement, Respondent-Employer noted that Mr. Cardoza had taken an old Honda Civic to the shop and asked if he could "use the shop equipment to work on the Honda during his lunch breaks". Respondent-Employer "gladly" allowed Mr. Cardoza to do so. The statement also indicates that on July 8, 2013, around noon Respondent-Employer went to make a tire delivery while Mr. Cardoza began working on his car in the parking lot.

12. Respondent-Employer's prior witness statement and his testimony at hearing are materially inconsistent in the following respects:

- While he testified that he did not employ Mr. Cardoza, his witness statement refers to Mr. Cardoza as his employee on a number of occasions.

- While he testified that Mr. Cardoza had not sought permission and he did not give Mr. Cardoza permission to work on his personal vehicle at the shop, his witness statement provides otherwise. Specifically, his witness statement indicates that Mr. Cardoza brought an old Honda to the shop and asked to use shop equipment to work on it during his lunch breaks to which Respondent-Employer "gladly" consented.

- While he testified that he had no idea that Mr. Cardoza intended to work on his car outside of the shop on July 8, 2013, his witness statement indicates otherwise. Specifically, Respondent-Employer informed Office DeClerck that he went to make a tire delivery around noon and Mr. Cardoza began working on his car in the parking lot.

13. Based upon the evidence presented, the ALJ finds much of Respondent-Employer's hearing testimony incredible and unconvincing. Contrary to Respondent-Employer's suggestion, the balance of the persuasive evidence establishes that Mr. Cardoza was an employee and not an independent contractor of Carrera's Tires at the time of the July 8, 2013 accident. More probably than not, Mr. Cardoza was hired to clean and maintain the shop and act as an assistant to Respondent-Employer during tire installation or repair jobs.

14. Moreover, Claimant's prior statements to a police officer investigating the accident within hours after its occurrence persuades the ALJ that Mr. Cardoza had asked Respondent-Employer if he could work on his car, using shop equipment during his lunch hours and that Respondent-Employer acquiesced to the request.

Nonetheless, Claimant failed to establish that Mr. Cardoza was using shop equipment to work on his car over the lunch hour.

15. Finally, Respondent-Employer's claim that he had no knowledge that Mr. Cardoza intended on working on his car on July 8, 2013 is refuted by his prior statement to Officer DeClerck that Mr. Cardoza began working on his car as he left to "make a tire delivery". Consequently, Respondent-Employer's hearing testimony that he could not find Mr. Cardoza inside where he expected him to be upon his return to the shop after making a tire delivery is unpersuasive.

16. Mr. Cardoza resided with his mother and step-father at the time of the accident.

17. Claimant testified that Mr. Cardoza helped with some expenses in the household. She also testified that her name, her husband's name and the Mr. Cordoza's name were on the lease to their apartment, but no lease was entered into evidence. Claimant did not establish the extent of support or the length of time Mr. Cardoza provided such financial support before his death.

18. Manual Gonzalez testified that he regularly came to Respondent-Employers tire shop and never saw Mr. Cardoza working with/on tires or as a mechanic in the shop.

19. All witnesses testified that the car involved in the accident was outside the shop and to the left of the building when they came to the shop after the accident occurred. The police report supports this testimony.

20. Claimant has failed to establish by a preponderance of the evidence that Mr. Cardoza's death arose out of and in the course and scope of his employment.

21. Claimant has failed to establish by a preponderance of the evidence that she is entitled to death benefits as a wholly dependent family member of Mr. Cardoza.

CONCLUSIONS OF LAW

Based upon the forgoing 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.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or

respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. 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 testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address 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).

Employee Status

D. As a general rule, any individual who performs services for another is an employee. *Section 8-40-202(2)(a), C.R.S.* This provision applies unless the individual is free from the control or direction of the person for whom services are preformed and who otherwise meets the definition of a person engaged in an independent trade occupation, profession of business. *Section 8-40-202(2)(b), C.R.S*. As found here, the totality of the evidence presented establishes that decedent was an employee of Carrera's Tires and that he was hired to clean up and maintain the shop in addition to acting as an assistant during repair or tire installation jobs. The ALJ concludes the testimony that Mr. Cardoza was free to come and go from the shop as he chose insufficient, by itself, to establish that he was acting as an independent contractor. Outside of the scant evidence that decedent had no set hours, Respondent-Employer presented no evidence to establish decedent's freedom from control and direction. Indeed Respondent-Employer acknowledges that his claim of independent contractor status is not a "strong" position in light of the fact that no written independent contractor agreement was introduced at hearing. While Claimant has proven that decedent was an employee of Carrera's Tires, she must still establish the compensable nature of his death.

Compensability

E. To sustain her burden of proof concerning the compensable nature of her son's death, Claimant must establish, by a preponderance of the evidence, all the elements necessary to find a work related injury compensable, specifically that the death arose out of and in the course of employment. *See generally, Matter of Death of McLaughlin, 728 P.2d 337 (Colo. App. 1986); Gates Rubber Co. v. Industrial Commission, 705 P.2d 6 (Colo. App. 1986); see also, Deane Buick Co. v. Kendall, 160 Colo. 265, 417 P.2d 11 (1966)..*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for an 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).

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 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).

H. In this case, the persuasive evidence establishes that at the time of Mr. Cardoza's accident and injury, he was working on his personal vehicle, probably with his own tools in the parking lot outside Respondent-Employer's shop; not in close proximity to the entrance bay doors where cars were brought in for tires or repair. Moreover, the evidence presented persuades the ALJ that Mr. Cardoza elected to do mechanical work on his vehicle, outside the course of his work with Respondent-Employer. Consequently, the ALJ concludes that Mr. Cardoza's injury did not "arise out of" his employment because it did not have its origin in his work-related functions of cleaning and maintaining the shop or assisting Respondent-Employer with tire installation and auto repair. The ALJ concludes that Mr. Cardoza's work on his personal car over his lunch hour, with his own tools is not sufficiently related to his work functions to be considered part of his employment contract. Nor is the ALJ convinced, based upon the evidence presented that Mr. Cardoza's death occurred "in the course of" his employment since it did not take place within the time and place limits of the employment relationship and was not an activity connected to his job-related functions.

Dependency

I. Pursuant to § 8-41-502, family members who are not presumed to be dependents can nevertheless prove entitlement to death benefits as whole dependents. As in this case, a mother can claim entitlement to benefits related to the death of a child even though she is living with her husband and supported in part by him. *See Industrial Commission of Colorado v. Di Nardi, 87 Colo. 591, 87 P.2d 494 (1939).* However, entitlement to death benefits in the case of a family member who not presumed dependent requires the proponent to prove the following:

- That the deceased employee (Mr. Cardoza) provided financial support to the family member at the time of death and for a reasonable period before death, *See Largo v. Industrial Commission*, 82 Colo. 341, 259 P.516 (1927);

- That the family member was wholly dependent on the decedent, and;

- That the dependent family member is incapable of or disabled from employment. *Picardi v. Industrial Commission*, 70 Colo. 266, 199 P. 420 (1921)

J. As found here, Claimant testified that Mr. Cardoza helped with some expenses in the household. She also testified that her name, her husband's name and the Mr. Cordoza's name were on the lease to their apartment, but no lease was entered into evidence. Nonetheless, Claimant did not establish the extent of support or the length of time Mr. Cardoza provided such financial support before his death. While it has been settled that 30 days[1] to two months[2] of support provided to an alleged dependent family member is sufficient to constitute a reasonable time period before death to prove dependency, Claimant failed to present any evidence establishing the time period she received financial support from Mr. Cardoza before his death. Claimant also failed to present evidence that she was incapable of or disabled from earning a living, as is required to prove dependence. Rather, Claimant simply noted on her "Dependents Notice and Claim for Compensation" admitted as part of Claimant's Hearing Exhibit 1 that she was a homemaker and "stays home to care for child". Without additional evidence to consider, the ALJ concludes that being a mother and homemaker is not a disability that would render Claimant incapable from earning a living. Under the circumstances and on the evidence presented in this case, the ALJ concludes that Claimant has failed to prove entitlement to benefits as a wholly dependent family member of Mr. Cardoza. Consequently, her claim must be denied and dismissed.

[1] Empire Zinc Co. v. Industrial Commission, 102 Colo. 26, 77 P.2d 130 (1937).
[2] Mile High Masonry v. Industrial Commission, 718 P.2d 257 (Colo. App, 1986).

ORDER

It is therefore ordered that:

1. Claimant's claim for death benefits 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: December 10, 2015

/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

The issue to be determined is as follows:

Have the respondents established by a preponderance of the evidence that the claimant is not entitled to temporary total disability benefits for the closed period beginning June 19, 2015 and ending through October 21, 2015 due to the claimant's volitional acts causing his termination of employment.

STIPULATION

Pursuant to a stipulation of the parties, the claimant's average weekly wage is $798.85.

FINDINGS OF FACT

1. On March, 18, 2015 the claimant sustained an injury to his right shoulder arising out of and in the course of his employment with the respondent-employer.

2. The claimant was hired by the respondent-employer on July 9, 2014. Prior to being hired, the claimant had to undergo a pre-employment physical examination and a lift test, both of which he passed.

3. At the July 9, 2014 orientation meeting for new employees, the claimant was required to complete a Conditional Job Offer and Medical Review form. In this form, the claimant was asked to list any on-the-job injuries. The claimant wrote that he had a back injury in 1990 while working for Mid Coast Welding and a left shoulder injury in 2011 while working for Pagosa Springs Resort. This form reads that false or misleading statements are grounds for rescinding this job offer. This form also reads that the job offer is valid only if the back of the form is signed by a company representative. This form also has a section that is for a medical professional to sign. The form was not signed by a company representative or a medical professional.

4. Cindy Morris, the DOT/OSHA coordinator at the respondent-employer observed that the Medical Review Form is used to determine a baseline for employees if something were to happen to an employee in the future. Regarding the form not being signed by a company representative, Ms. Morris testified she never signs the Medical Review forms.

5. After the claimant was injured, he was referred by the respondent-employer to Colorado Springs Health Partners, where he saw Dr. Cindy Lockett on March 25, 2015. Dr. Lockett diagnosed a trapezius strain and an upper arm strain. Dr. Lockett gave the claimant work restrictions of: no lifting over 10 pounds and no repetitive lifting over 5 pounds. The claimant returned back to Dr. Lockett on April 8, 2015. At that time, Dr. Lockett diagnosed the claimant with a right arm stain, trapezius strain, and a shoulder strain. Dr. Lockett changed the claimant's work restrictions to: no lifting over 10 pounds, and no overhead lifting. The claimant had these work restrictions up until October 22, 2015.

6. The claimant had no problems in performing his job duties up until the date he was injured. Mr. Gordon, the respondent-employer's HR manager declared that the respondent-employer wants honest and trustworthy employees working for them and that is why it is important to the respondent-employer that its potential employees honestly fill out the Medical Review Form. However, Mr. Gordon acknowledged that as far as he knew, the claimant accurately completed his paperwork and was truthful in performing his job. The claimant was never disciplined or reprimanded and in fact received raises while employed with the respondent-employer.

7. On June 19, 2015, the claimant was terminated from his employment with the respondent-employer. According to Mr. Gordon the reason for termination was the claimant's willful failure to truthfully report his past medical history as part of the post-offer medical evaluation.

8. The claimant had other prior on–the-job injuries other than those listed on the Medical Review Form. The first was an injury to his right forearm while employed with American Courier in November 2011. The second was an injury to his right shoulder on January 12, 2012, also while employed with American Courier. According to the claimant, these were consolidated into one claim and treated as such. For these injuries, the claimant was off work for approximately three months and made a full recovery without restrictions or impairment. The third on-the-job injury was an injury was to the claimant's right shoulder which occurred with Pagosa Springs Resort on February 12, 2013. The claimant was off work for approximately three months and was

released with no restrictions or impairment. The claimant did receive a nominal settlement of $1,500.00 in this particular claim.

9. The claimant credibly testified that he was confused about the date and employer for the 2012 injury. He said that he considered the November 2011 right forearm injury part of the 2012 injury since Dr. Jernigan treated them as one injury. Regarding the 2013 injury, the claimant said he just forgot it. The claimant denied deliberately and willfully withholding any of his on-the-job injuries. The claimant testified that he assumed the 2011 injury was the same as the 2012 injury since they were combined into one claim. In addition, the claimant testified that between 2011 and 2013 he had worked for a number of different employers.

10. The claimant testified that he fully recovered from both of his shoulder injuries with no restrictions or impairment. After both of his shoulder injuries, the claimant was able to do heavy work including lifting over 75 pounds, extensive overhead lifting, and carrying heavy objects without any problems. The claimant testified that he was able to perform all of his job duties at the respondent-employer without any problems.

11. The ALJ finds the claimant to be credible.

12. The ALJ finds that the respondents have failed to establish that it is more likely than not that the claimant was responsible for his termination.

CONCLUSIONS OF LAW

1. Section 8-42-105(4) C.R.S. and 8-42-103(1)(g), C.R.S. state that in cases where it is determined that a temporarily disabled worker is responsible for termination of employment, the resulting wage loss shall not be attributable to an on-the-job injury. The concept of "responsibility" appears to have been reintroduced with the Worker's Compensation Act as the concept of "fault." *Colorado Springs Disposal v. Industrial Claim Appeals Office.* 58 P. 3d 1061, 1064 (Colo. App. 2002). "Fault requires that the Claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination." *See Padilla v. Digital Equipment Corp.,* 902, P. 2d 414 (Colo. App. 1995). The employer bears the burden of establishing evidence that a Claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office,* 187 P. 3d 1129 (Colo. App. 2008). The question whether the Claimant acted volitionally or

exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ.

2. The ALJ concludes as found above that the claimant inadvertently failed to provide information about a specific injury. The claimant did in fact provide information about a prior shoulder injury and he was hired nonetheless.

3. The ALJ concludes that the claimant is credible.

4. There is insufficient evidence to establish that the claimant would not have been hired but for this inadvertent omission.

5. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant was responsible for his termination under the Workers' Compensation Act of Colorado.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant temporary total disability benefits from and including June 19, 2015 through and including October 21, 2015.

2. The claimant's average weekly wage is $798.85.

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.

f 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.

December 28, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- 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?

- If claimant has proven that he sustained a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant was hired by employer on April 12, 2011 as a rig hand. Claimant began working as a crane operator for employer in December 2011.

2. Prior to claimant beginning his work for employer, claimant sustained a workers' compensation injury while employed with a different employer. Claimant's workers' compensation claim resulted from an injury to his low back that occurred on January 31, 2011. Claimant treated for his low back injury with Dr. Loftis.

3. Claimant testified that on October 30, 2014 he was working operating a crane on the construction of the new Walmart store in Pagosa Springs, Colorado. Claimant testified he came up to the cockpit of the crane at about 2:00 p.m. and started to jump to grab the hand rail when he hit his head on a window that was hinged open.

4. Claimant testified that after striking his head on the window, he fell into the seated position and sat for several seconds in order to get his wits. Claimant testified he felt immediate pain in his neck following the incident and was frustrated, but continued to work that day and the following day. Claimant testified that over the next few days his symptoms got worse to the point that he could not do the essential functions of his job.

5. Claimant presented testimony at the hearing from Mr. Melendy, a co-worker. Mr. Melendy testified he was present with claimant on the job site on October 30, 2014. Mr. Melendy testified he was not looking at claimant but heard claimant hit his head, turned around and saw claimant on his knees grabbing and holding his head. Mr. Melendy testified claimant appeared to be in pain and sat for a while. Mr. Melendy testified he asked claimant if he was OK, and claimant replied "I think so".

6. Claimant presented the testimony of Mr. John at hearing. Mr. John testified he is a rigger/signaler for employer. Mr. John testified that on October 30, 2014, he saw claimant approximately 10 seconds prior to the incident, then turned to

walk away, heard a sound he described as a "turtle shell" of the hard hat hitting the window, turned around and saw claimant in a crouched position with a gimmace on his face. Mr. John testified he walked over to the crane and picked up claimant's sunglasses off the ground and handed them to claimant. Mr. John testified that after this incident, heavy lifting was difficult for claimant. Mr. John testified he now helps claimant with lifting on the job site.

7. Claimant testified that after the incident, he did not go to the doctor right away, and hoped his neck would get better. Claimant testified he eventually sought treatment with Dr. Lake a couple of weeks after the incident, but did not report to Dr. Lake that he was injured on the job. Instead, claimant told Dr. Lake that he did not know why his neck and shoulders hurt. Claimant was referred for physical therapy and again did not tell the physical therapist about his work injury.

8. Claimant testified he eventually reported the injury to Mr. Carlson, his supervisor at work. Claimant testified he did not recall the date he told Mr. Carlson of the injury. Claimant's testimony in this regard was corroborated by the testimony of Mr. Melendy and Mr. John, who testified they recalled claimant discussing the incident in question in the presence of Mr. Carlson after the injury.

9. Claimant testified he eventually spoke to Mr. Carlson on the phone in a plea to have his neck injury treated through workers' compensation. Mr. Carlson testified he had made an appointment with Dr. Loftis at this point. Claimant testified Mr. and Mrs. Carlson called claimant back 30 minutes later and asked claimant to cancel the appointment and come in to the office the next day to discuss the injury.

10. Claimant testified he arrived at the office and Mr. and Mrs. Carlson had claimant fill out an incident report and gave claimant a list of physicians to choose from.

11. Mrs. Carlson testified at hearing in this matter. Mrs. Carlson is the bookkeeper and safety coordinator for employer. Mrs. Carlson testified that on January 12, 2015 she became aware for the first time that claimant was alleging a work injury when she received a phone call from La Plata Family Medicine requesting information for a workers' compensation claim. Mrs. Carlson testified she then called claimant and had him on a speaker phone to ask him what had happened and inform claimant that there were proper procedures to follow regarding work injuries. Mrs. Carlson testified claimant said he wasn't sure why he hadn't reported the work injury and was trying to take care of it on his own but had taken it as far as he could on his own.

12. Mrs. Carlson testified she met with claimant on January 13, 2015 in order to have claimant fill out an accident report and refer claimant for medical treatment. Mrs. Carlson testified she did not refer claimant to Dr. Lake, Dr. Loftis of physical therapy.

13. The employer records document claimant reporting the injury in writing on January 13, 2015. Claimant indicated in his claim for compensation that he had

reported the injury to employer on January 2, 2015. Claimant was referred by employer to Dr. Jernigan for medical treatment.

14. Claimant testified he had prior issues with his low back for which he would see a chiropractor up to four times per year. The medical records entered into evidence show claimant treated with Dr. Lake, a chiropractor, on April 16, 2014 with complaints of lumbar and sacral discomfort that started 3 ½ to 4 years earlier. During the course of this treatment, claimant received subluxation to his thoracic and cervical spine in addition to treatment involving his low back.

15. Claimant returned to Dr. Lake on August 25, 2014 and reported pain he described as dull, aching, tightness and tingling discomfort in the back of his neck. Claimant was treated with subluxation of his lumbar, thoracic and cervical spine and was instructed to return as needed for treatment.

16. Following claimant's injury on October 30, 2014, claimant again sought treatment with Dr. Lake on November 10, 2014. Claimant did not report to Dr. Lake that the pain he was experiencing in his neck was related to any specific incident. Claimant was treated with subluxation of his cervical, thoracic and lumbar spine and instructed to return as need.

17. Claimant returned to Dr. Lake on November 12, 2014, and again did not report an accident history related to his symptoms. Dr. Lake noted claimant reported responding well to the treatment and again performed regional manipulation and adjustments involving the cervical, thoracic and lumbar spine. Claimant returned to Dr. Lake on November 19, 2014 for additional chiropractic treatment.

18. Claimant was evaluated by Dr. Loftis on November 22, 2014. Dr. Loftis noted claimant started having lower back pain, then started getting tight in his right lateral neck and now was having a loss of sensation with a hard time moving his neck and shoulder. Dr. Loftis did not note a history of a work injury. Dr. Loftis prescribed claimant medications and recommended physical therapy.

19. Claimant was seen at Rakita Tomsic Physical Therapy on referral from Dr. Loftis. Claimant reported to the physical therapist initially on December 8, 2014 and noted an accident history of waking up approximately one month earlier with a very stiff neck. Claimant reported he had two visits with his chiropractor before he began having pain in his shoulder with pain shooting across his lat, back and chest.

20. Claimant returned to Dr. Loftis on December 12, 2014 and noted claimant continued to complain of pain in his right lateral and upper neck with radiating symptoms into the right axilla that was worse with neck movement. Dr. Loftis prescribed medications for claimant along with physical therapy.

21. As noted, after claimant reported the injury in writing to Mr. and Mrs. Carlson on January 13, 2015, claimant was provided with a choice of physician's and chose Dr. Jernigan from the list of physicians to treat claimant for his work injury. Claimant was initially evaluated by Dr. Jernigan on January 22, 2015. The intake form

from Dr. Jernigan's office filled out by claimant notes a date of injury of October 30, 2014. Dr. Jernigan noted an accident history of claimant striking his head into a very solid window on a crane with the development of neck tightening over the next 24 hours and very severe neck pain within 3 days. Dr. Jernigan noted claimant initially sought treatment with Dr. Loftis and after his condition got worse, Dr. Loftis suggested claimant file a workers' compensation claim. Dr. Jernigan diagnosed claimant with a likely C6 radiculopathy and provided claimant with medications and recommended a magnetic resonance image ("MRI") of the cervical spine.

22. Dr. Jernigan's January 22, 2014 report indicates that the problem began on December 8, 2014. However, the ALJ finds that this information is not consistent with the patient health history filled out by claimant. The ALJ therefore disregards this portion of Dr. Jernigan's report that indicates that problem started on December 8, 2014 and instead credits the patient health history form filled out by claimant regarding the onset of his symptoms.

23. The cervical MRI took place on January 30, 2015 and was read to show degenerative disk disease at the C5-6 and C6-7 levels with resultant significant right-sided neural froaminal narrowing at C5-6 and C6-7 and to a lesser degree, neural foraminal narrowing on the left at C6-7.

24. Claimant returned to Dr. Jernigan on February 2, 2015 with continued complaints of pain. Dr. Jernigan noted that the MRI showed severe changes in the cervical spine at the C5-C7 levels. Dr. Jernigan referred claimant to Spine Colorado for further medical treatment.

25. Claimant was examined by Mr. Baumchen, a physicians' assistant with Spine Colorado, on February 18, 2015. Mr. Baumchen noted an accident history of claimant striking his head on a window-type entry to a crane cockpit on October 30, 2014. Mr. Baumchen noted the MRI findings and reviewed x-rays that were obtained in the Spine Colorado offices. Mr. Baumchen noted that claimant had not improved with two rounds of oral steroids and recommended claimant be assessed for surgical consultation. Mr. Baumchen noted claimant would need to cease smoking prior to any surgical procedure being performed.

26. Claimant returned to Dr. Jernigan on March 2, 2015. Dr. Jernigan noted claimant was trying to quit smoking and had become irritable as a result. Dr. Jernigan reported claimant felt he was getting worse. Dr. Jernigan recommended claimant continue with his medications and agreed with the recommendations of the orthopedic consultation.

27. Claimant was examined by Dr. Youssef with Spine Colorado on April 3, 2015. Dr. Youssef diagnosed claimant with a spondylosis at C5-6 and C6-7 with right sided radiculopathy with is failing non-operative efforts. Dr. Youssef noted claimant reported he struck his head while entering a crane cockpit, following which he developed worsening symptoms radiating into his right hand and arm. Dr. Youssef recommended claimant undergo an electromyelogram ("EMG") of his right upper

extremity based on his complaints of symptoms into the right hand. Dr. Youssef opined that claimant's condition was directly related to his workers' compensation injury.

28. Dr. Youssef wrote a letter to Dr. Loftis following his April 3, 2015 evalutation that outlined his evaluation and enclosed his surgical consultation. Dr. Youssef testified in his deposition he sent the exact same letter to Dr. Jernigan following the evaluation.

29. Claimant was also seen by Dr. Jernigan on April 3, 2015. Dr. Jernigan noted Dr. Youssef was recommending an EMG and claimant was unchanged clinically with the exception of the onset of headaches. Dr. Jernigan diagnosed claimant with disc disorder with myelopathy of his cervical spine and opined that the cause of this problem was related to his work activities.

30. The EMG was performed on April 16, 2015. The EMG was noted to be normal.

31. Claimant was examined again by Dr. Youssef on April 22, 2015. Dr. Youssef noted claimant's EMG results and recommended claimant undergo surgery consisting of anterior decompression of the spinal cord with arthrodesis at C5-6 and C6-7 with allograft bone and titanium planting. Claimant was instructed that he would need to quit all tobacco products prior to his surgery.

32. Respondents obtained an independent medical examination ("IME") of claimant with Dr. Hattem on April 27, 2015. Dr. Hattem reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME.

33. Dr. Hattem noted in his IME report that claimant reported an injury when he struck his head on an overhead window while getting into a crane at work on October 30, 2014. Dr. Hattem noted claimant received medical treatment two weeks later with Dr. Lake, before seeing Dr. Loftis, his personal physician, on November 22, 2014. Dr. Hattem noted the findings of the MRI showed performed in January 2015 showed significant degenerative changes, but no acute findings.

34. Dr. Hattem ultimately opined that claimant's current condition was not related to his work injury as his condition was primarily an age related hereditary condition. Dr. Hattem noted that claimant didn't seek medical treatment for two weeks and had reported some mild cervical pain in the past.

35. Claimant returned to Dr. Jernigan on May 5, 2015. Dr. Jernigan noted that the recommended surgery had been denied. Dr. Jernigan outlined claimant's options regarding his medical treatment and indicated that claimant would discuss his options with his attorney.

36. Claimant returned to Dr. Jernigan on June 5, 2015. Dr. Jernigan noted claimant would be going to court regarding his proposed surgery and recommended

claimant continue with his medications. Claimant again returned to Dr. Jernigan on July 13, 2015 and continued his recommendations for ongoing medications.

37. In response to an inquiry from claimant's attorney, Dr. Yousseff issued a report dated June 8, 2015 that addressed a series of questions raised by claimant's attorney. Specifically, Dr. Youssef opined in the report that after reviewing Dr. Hattem's IME, Dr. Youssef felt claimant sustained an exacerbation of a pre-existing condition as a result of his October 30, 2014 work injury. Dr. Youssef noted claimant was essentially asymptomatic with regard to neck pain and arm pain before his injury. Dr. Youssef further indicated that claimant's injury on October 30, 2014 combined with his pre-existing condition to cause the need for medical treatment. Dr. Youssef opined claimant's reported headaches were not related to his neck injury, but deferred to any neurology input with regards to whether they would be related to claimant's work injury.

38. Dr. Jernigan provided a letter to claimant's attorney on July 30, 2015 addressing the incorrect date of injury noted on some of his medical reports and clarified that claimant's date of injury for his medical treatment should be October 30, 2014.

39. Claimant returned to Dr. Jernigan on August 24, 2015. Claimant reported to Dr. Jernigan that he was getting more depressed and occasionally smoking again. Dr. Jernigan continued claimant's medications and recommended adding Wellbutrin. Dr. Jernigan noted in his report that it was his opinion that claimant's cervical condition was clearly work related.

40. Dr. Youssef testified by deposition in this matter. Dr. Youssef testified consistent with his medical reports and opined in his deposition that claimant's work injury on October 30, 2014 exacerbated his pre-existing degenerative spine condition and caused his need for medical treatment.

41. Dr. Youssef noted in his deposition that he was unaware of any treatment to claimant's cervical spine from prior to his work injury. Dr. Youssef noted that prior treatment to his cervical spine could change his opinion, but he would need to see the medical records to ascertain the nature and extent of the treatment prior to changing his opinion.

42. Dr. Hattem likewise testified in this case. Dr. Hattem's testimony was consistent with his medical report. Dr. Hattem testified that the findings depicted on the MRI from January 2015 showed degenerative changes that were not associated with claimant hitting his head on October 30, 2014.

43. The ALJ credits the testimony of claimant at hearing, along with the supporting testimony of Mr. John and Mr. Melendy and finds that claimant has established that it is more likely than not that he sustained a compensable injury arising out of and in the course of his employment with employer on October 30, 2014 when he struck his head on the window of the crane that was hinged open. The ALJ further

credits the medical opinions expressed by Dr. Youssef and Dr. Jernigan as being credible an persuasive regarding this issue.

44. The ALJ notes that claimant did report some symptoms in his cervical spine prior to his work injury, but finds the records establish that claimant's incident on October 30, 2014 aggravated, accelerated or combined with a pre-existing condition and resulted in the need for medical treatment. Significantly, the ALJ credits that testimony of Mr. John and Mr. Melendy that the incident that claimant testified to did in fact occur and resulted in claimant appearing in pain on the date of the injury as testified to by claimant.

45. The ALJ notes that there is conflicting evidence in this case as to claimant's condition prior to the October 30, 2014 incident and conflicting evidence as to whether the incident of October 30, 2014 caused, aggravated or accelerated claimant's need for medical treatment. However, after reviewing the evidence, the ALJ has credited the opinions of Dr. Jernigan and Dr. Youssef over the conflicting opinions and finds that claimant has demonstrated that it is more probable than not that the incident at work on October 30, 2014 where claimant struck his head on the overhead window while getting into the crane aggravated, accelerated or combined with claimant's pre-existing condition resulting in the need for medical treatment.

46. The ALJ finds that the treatment provided by Dr. Lake, Dr. Loftis and the physical therapy provided claimant through December 22, 2014 was not authorized medical treatment. The ALJ credits the testimony of the claimant that he was trying to treat this injury on his own and finds that claimant had not reported to employer that he had sustained a work injury that required medical treatment until January 12, 2015 when he spoke to Mr. and Mrs. Carlson regarding the work injury. The ALJ therefore finds that respondents are not liable for claimant's medical treatment with these providers.

47. The ALJ finds that claimant was referred for medical treatment on January 13, 2015 by employer and elected to treat with Dr. Jernigan for his work injury pursuant to a referral from employer. The ALJ credits the records from Dr. Jernigan, the medical records from Dr. Youssef, along with the supporting testimony of claimant and Dr. Youssef at hearing and finds that Dr. Jernigan's medical treatment was reasonable and necessary to treat claimant for the compensable work injury.

48. The ALJ notes that Dr. Youssef testified in his deposition that he would need to re-evaluate the claimant to determine of the proposed surgery was still being recommended and the ALJ makes no finding regarding this specific issue in light of Dr. Youssef's testimony.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he stood up and struck his head on the window of his crane that was hinged open. The ALJ credits the testimony of claimant, Mr. John and Mr. Melendy to determine the incident did indeed occur and that it was significant enough that it drew the attention of Mr. John and Mr. Melendy who inquired as to claimant's well being following the incident. The ALJ further credits the medical opinions of Dr. Jernigan and Dr. Youssef regarding the need for medical treatment following the incident and it's relatedness to claimant's current medical condition and finds those opinions credible and persuasive.

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

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

7. "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. The ALJ notes that claimant testified at hearing that he initially sought to treat his injury on his own without reporting to his employer that the injury was work related. The ALJ finds that the employer became aware that claimant was alleging a work injury for which he was seeking medical treatment on or about January 13, 2015. The ALJ finds that the medical treatment claimant received prior to January 13, 2015, including the treatment from Dr. Lake, Dr. Loftis and Rakita Tomsic Physical Therapy is not "authorized medical treatment" as contemplated by the Colorado Workers' Compensation Act. The ALJ determines that respondents are therefore not liable for the medical treatment provided by Dr. Lake, Dr. Loftis and Rakita Tomsic Physical Therapy that was presented at the hearing.

9. The ALJ credits the testimony of claimant and Mrs. Carlson and finds that claimant was referred for medical treatment with Dr. Jernigan. The ALJ further finds that Dr. Jernigan referred claimant for evaluation with Dr. Youssef. The ALJ finds and concludes that Dr. Jernigan and Dr. Youssef are authorized providers within the chain of referrals in this case.

10. As found, the ALJ credits the medical reports and testimony of claimant and Dr. Youssef presented at hearing and finds that claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Jernigan and Dr. Youssef is reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his compensable work injury provided by physicians authorized to treat claimant for his work injury.

2. The ALJ finds that Dr. Jernigan and Dr. Youssef are authorized to provide claimant treatment related to his work injury.

3. The ALJ finds that the treatment provided by Dr. Lake after claimant's injury through November 19, 2014 is not authorized medical treatment.

4. The ALJ finds that the treatment provided by Dr. Loftis after claimant's injury through December 12, 2014 is not authorized medical treatment.

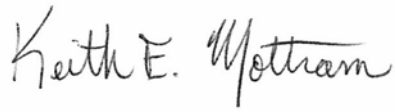
5. The ALJ finds that the physical therapy treatment provided after claimant's injury through December 22, 2014 from Rakita Tomsic Physical Therapy is not authorized medical treatment.

6. Any medical benefits shall be paid pursuant to the Colorado Medical Fee Schedule.

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

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

DATED: December 18, 2015



Keith E. Mottram
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-980-660-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 28 and December 7, 2015, in Denver, Colorado. The hearing was digitally recorded (reference:10/28/15, Courtroom 1, beginning at 8:30 AM, and ending at 11:30 AM; and, 12/7/15, Courtroom 4, beginning at 8:30 AM, and ending at 11:30 AM). Hayate Roobaa was the official Somali/English Interpreter.

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. The Respondents objected to Claimant's Exhibit 6, the objection was overruled and the Exhibit was admitted into evidence. Respondents' Exhibits G through S were admitted into evidence, without objection. The ALJ sustained the Claimant's objection to Exhibits E and F, and the Exhibits were refused, with the exception of Exhibit E-5 (Claimant's answer to Interrogatory No. 16 –a foundation for the admission of extrinsic evidence to impeach having been laid) The ALJ overruled the Claimant's objections to Exhibits A through D, and the Exhibits were admitted into evidence.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, pursuant to the ALJ's instructions, on December 15, 2015.

Respondents' Objection to Claimant's Proposed Order

Contrary to the ALJ's instructions, a hard copy, entitled "Respondents' Objection to Claimant's Proposed Order" was filed on December 18, 2015. Other than minor objections as to form, the thrust of the Respondents' Objection calls for a re-weighing of the evidence, according to the Respondents' spin on the evidence.

Paragraph 2 of the Respondents' Objection argues for a re-weighing of the evidence and dismissal of the claim for compensation or, at least, re-weighing of the evidence and a new finding that the Claimant was "responsible for his termination from employment" through a volitional act on his part that he knew or reasonably should have known would result in his firing. The ALJ, in findings of evidentiary (basic) facts has ruled in a manner consistent with the weight of the evidence and contrary to the Respondents' arguments. *See* § 24-4-105 (15) (b), C.R.S. [which provides that a finding of evidentiary fact **shall** not be set aside unless "contrary to the weight of the evidence].

Paragraph 3 of the Objection concerns the spelling of witnesses' names. This objection is well taken.

Paragraphs 4 through 9 of the Respondents' Objection amount to a request for augmentation of Findings of Fact Nos. 9 and15, in a manner consistent with the Respondents' spin on the evidence. Also, additional findings to buttress the Respondents' argument that the decision reflected in the proposed findings is erroneous are requested. Some of the objections are well taken and other objections seem to amount to a premature launch of an appeal.

After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; temporary total disability (TTD) and/or temporary partial disability (TPD) benefits from March 31, 2015 and continuing; and, the Respondents raised the affirmative defense of "responsibility for termination."

The Claimant bears the burden of proof on all issues other than "responsibility for termination," in which case the Respondents bear the burden of proof by preponderant evidence

FINDINGS OF FACT

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

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated that the Claimant's average weekly wage (AWW) is $455.33, and the ALJ so finds.

2. The Employer, a staffing agency, hired the Claimant on or about November 28, 2014. The Employer placed the Claimant with Udi's – a company that makes pizzas, where he was working at the time of injury.

Findings

3. On March 31, 2015, at about 10:30 AM, the Claimant was pulling trays from the rack to the "pizza cars." He was moving five trays at a time. When he pulled one set he felt they were stuck then he pulled again and felt a pop in his right shoulder up to his neck.

4. The Claimant timely reported the work-related nature of his injury and we went to HealthONE the Employer's designated medical provider, where he was first seen by George Kohake, M.D., who became the Claimant's authorized treating physician (ATP). After July 8, 2015, HealthONE cancelled the Claimant's medical appointment because the Respondents were denying the claim (*See* Claimant's Exhibit 6).

5. Dr. Kohake, initially evaluated the Claimant on April 1, 2015..Dr. Kohake obtained a history that the Claimant is "a 27-year old who works doing pizza line production. … Patient states that he had to lift heavy trays, about five of them, into a delivery vehicle. He said the trays were improperly arranged. They got stuck, and he was trying to push and pull them into position. When he pulled hard, he felt a movement in his shoulder and pain." This history has remained consistent throughout, including in the Claimant's hearing testimony.

6. Dr. Kohake placed the Claimant in a sling and advised him to ice it down over the next five days. Dr. Kohake also restricted the Claimant only to return to work with no use of the right arm.

7. The Claimant's regular employment required the use of both arms in lifting the trays, and the ALJ finds that the Claimant could not perform his regular duties with the restrictions that Dr. Kohake placed on him. As of the last session of the hearing on December 7, 2015, the Claimant still remained under restricted use of the right upper

extremity (RUE). The Claimant earned **no** wages until May 18, 2015, when he began modified employment in the Employer staffing agency's office.

8. The Employer made the Claimant a modified job offer on May 6, 2105, for the Claimant to begin clerical work at the Employer's office, beginning on May 18, 2015 at 8:30 AM -- for 40 hours a week at $9.25 an hour. This equates to $370 per week. This rate yields a temporary wage loss of $85.73 per week.

Responsibility for Termination

9. The Claimant presented for work on May 18, but allegedly arrived five minutes late. Jo Noulin, his supervisor, under the impression that the Claimant should have arrived at 8:00 AM (when the modified offer specified 8:30 AM) testified that the Claimant arrived at 8:05 AM, and was late. The ALJ infers and finds that in their zeal to part ways with the Claimant, the Employer, specifically, Noulin, was not very careful in the time clock department. At about 12:30 PM, the Claimant advised his supervisor, Jo Noulin, that he had to leave the jobsite because of a medical appointment. Noulin testified that she believed the medical appointment to be for Claimant's work injury, although the Claimant was not specific about the medical appointment. The ALJ infers and finds that the communication between Noulin and the Claimant, regarding the medical appointment, was minimal and complicated by a partial language barrier. There was no clarification that the appointment was for the Claimant's mother. Respondents unsuccessfully attempted to parlay this communication into a "lie" that formed part of the basis for the Claimant's termination. The ALJ infers and finds that the Claimant did **not** volitionally intend to mislead the Employer, nor did he intend to **lie** about the nature of the medical appointment. The ALJ finds that the Claimant's mother needed her son to take her to her medical appointment. The Federal Family Medical Leave Act (FMLA) requires employers to allow medical leave for their employees to attend to the medical needs of immediate family members. Consequently, it makes no difference whether the Claimant was going to a medical appointment for his "denied" workers' compensation claim, or for his mother's medical appointment, other than the Employer attempting to parlay the matter into a **lie** worthy of termination from employment. Although it was never specified how far away the medical appointment was, or how long the Claimant would be gone, the Employer vaguely implied, without explicitly specifying, that the Claimant was expected back later that afternoon. Indeed, the ALJ infers and finds that this implied expectation was unfounded.

10. When the Claimant had not yet returned from the medical appointment on the day in question, the Employer and Pinnacol made inquiries to the Claimant's workers' compensation ATPs and determined that the Claimant did not have a workers' compensation medical appointment with any of his ATPs. The ALJ infers and finds that these inquiries were triggered by the Employer's misunderstanding concerning the specific nature of the medical appointment –an appointment for the Claimant's mother. Indeed, the Employer's "rush to judgment" on the issue of the alleged "lie" about the medical appointment leads the ALJ to infer that the Employer was not pleased with

having to provide the Claimant with modified work at their office, instead of being deployed to one of the Employer's customers such as Udi's, where the Employer could earn a fee from Udi's. The Employer chose not to give the Claimant any slack whatsoever. The ALJ infers that such a Draconian approach exceeds the bounds of how a reasonable employer would handle such a situation in a good faith effort at providing modified employment to an injured worker. English is not the Claimant's first language. Dr. Kohake noted that there "is limited communication, as he speaks limited English."

11. The following day, May 19, 2015, the Claimant returned to work about 20 minutes late due to increased traffic from a car accident. When he arrived at work on the 19th, the Claimant explained that the medical appointment was for his mother, Fatuma Hassan, with Jessica Bull, M.D., at the Lowry Health Center, across town from the Employer's location. Subsequently, Dr. Bull wrote a letter after-the-fact, dated September 9, 2015, corroborating the Claimant and asking that he be excused for the day "as he was needed to bring his mother to her appointment." Questioning by the Respondents at hearing implies that the Claimant should have contacted the Employer that he would be late when he was ensnarled in traffic. There was no persuasive evidence that the Claimant was in possession of a cell phone to do so, nor would it have been reasonable for him to abandon his vehicle and walk to a pay phone, if one existed nearby. Again, in their Draconian approach to slavish adherence to the Employer's policies, the Employer insinuated unrealistic expectations for the Claimant to contact the Employer concerning the fact that he was ensnarled in traffic and would be late to work. Again, the ALJ infers that such a Draconian approach exceeds the bounds of how a reasonable employer would handle such a situation in a good faith effort at providing modified employment to an injured worker.

12. The Respondents cite the Employer's policies (Respondents' Exhibit P), which provides, in relevant part:

> When on assignment if you are absent, late, or need to leave e for any reason you are required to contact our office at 303-867-5150. You must also inform your immediate supervisor. If you are late or absent within the first two weeks this can result in ending your assignment or future assignments….
>
> You are expected to complete your assignment as communicated. If you walk off your assignment, No call, No Show or fail to give 48 hours when resigning, any wages owed will be paid at **Minimum Wage** (emphasis supplied) on the next payroll date.

The ALJ infers and finds that reference to these provisions, in support of the Claimant's termination, is a stretch of analogizing and, essentially, irrelevant to the specific circumstances herein.

13. The Employer terminated the Claimant's modified employment at the start of May 19, 2015, on the allegations that the Claimant for was tardy to work two times, and "misrepresented the medical appointment absence." The alleged misrepresentation, as found, resulted from miscommunication between the Claimant and his supervisor, Jo Noulin, whereupon a whole constellation of alleged facts became implanted in the mind of his supervisor. Again, the ALJ infers that such a Draconian approach exceeds the bounds of how a reasonable employer would handle such a situation in a good faith effort at providing modified employment to an injured worker. Indeed, the ALJ finds the "misrepresentation" ground to be without merit.

14. Corrine Vanosdoll, the Owner and Executive Director of the Employer, testified that being late more than 7 minutes or later constitutes a tardy. This is not consistent with Noulin's testimony concerning the Claimant being 5-minutes late. Indeed, Noulin's testimony that the Claimant was 5-minutes late, as found herein above, is not consistent with the Claimant's modified start time of 8:30 AM. Such a lack of care by Noulin, concerning the facts of May 18, lead the ALJ to infer and find desperation on the part of the Employer to come up with **two or three** grounds for the Claimant's termination. Indeed, the ALJ finds that the May 18 tardiness ground is not supported by preponderant evidence.

15. The Employer was not legally obliged to even offer the Claimant modified employment. Also, the Employer could choose to fire the Claimant and not be accountable as long as the Employer did not fire the Claimant for discriminatory reasons against a legally protected class. A "responsibility for termination" defense in the contemplation of workers' compensation is very narrow. The termination must result from a volitional act on the part of the employee whereby the employee knows, or reasonably should know, that such an act, or acts, would get him fired. The ALJ finds that the Respondents failed to prove that the conduct of the Claimant as herein above described amounted to volitional acts that the Claimant knew, or reasonably should have known, would get him fired.

Referral to Colorado Orthopedic Consultants, Nathan D. Faulkner, M.D.

16. HealthONE referred the Claimant to Colorado Orthopedic Consultants, and Dr. Faulkner saw the Claimant on June 22, 2015 and reviewed the MRI (magnetic resonance imaging). Dr. Faulkner's opinion, to a reasonable degree of medical probability, is that the Claimant has "multidirectional instability that was exacerbated by his work-related injury on 3/31/15." Dr. Faulkner recommended physical therapy, home exercise, a steroid injection, and a continuation of the Claimant's work restrictions concerning the RUE.

Independent Medical Examination by (IME) James P. Lindberg, M.D.

17. Dr. Lindberg performed an IME on the Claimant, at the Respondents' request, on August 4, 2015. Dr. Lindberg disagreed with Dr. Faulkner's diagnosis of "multidirectional instability exacerbated by the work-injury. Indeed, Dr. Lindberg is of the opinion that the Claimant's problems are non-physiological (a catchall analysis); that the Claimant did **not** suffer a work-related injury and no further medical treatment is warranted, if any medical treatment was warranted in the first place. The underlying bases of Dr. Lindberg's opinions, in this regard are inadequate if any exist in the first place. For these reasons, the ALJ finds the opinions of the ATP, Dr. Kohake, HealthONE, and Dr. Faulkner, more persuasive and credible than the opinions of IME Dr. Lindberg.

Temporary Disability

18. The Claimant was unable to work from the date of injury, March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days. During this period of time, he earned no wages and he was temporarily and totally disabled. He worked at the modified job on May 18 and was presumably paid the modified wage of $370 per week, thus, sustaining a temporary wage loss of $85.73 per week, which yields a temporary partial disability (TPD) benefit rate of $57.15 per week, or $8.16 per day. There is no persuasive evidence that the Claimant was paid for work on May 19, 2015, the date he was fired. Consequently, he was restricted, could not perform his pre-injury work on that date and was, therefore, temporarily and totally disabled on that date.

19. As of the last session of the hearing on December 7, 2015, the Claimant's ATPs at HealthONE had not lifted that Claimant's restrictions concerning his RUE, nor had they released him to return to his pre-injury job. Indeed, they had cut him off from further medical treatment in July 2015because the Respondents were denying his claim. The Claimant still cannot perform his pre-injury job with these restrictions. Therefore, he was temporarily and total disabled from May 19, 2015, through June 20, 2015, both dates inclusive, a total of 35 days.

20. The Claimant began working with a rental car service on June 21, 2015 driving cars. Claimant is able to work within his restrictions in this lesser paying job. From June 21, 2015 to August 30, 2015 (a period of 71 days) the Claimant earned $4,454.33, which equates to $439.16 per week, thus, yielding a temporary wage loss of $16.17 per week. Based on this temporary wage loss, a TPD rate of $10.78 per week, or $1.54 per day is yielded. After August 30, 2015, wage records from Budget are required to establish whether there is a temporary wage loss.

Ultimate Findings

21. The ALJ finds that the Claimant presented in a straight-forward and credible manner. His testimony concerning his injury was consistent with the medical

histories he gave to providers throughout his treatment. His testimony concerning the circumstances of his termination is more credible and persuasive than the testimony of Jo Noulin and Corrine Vanosdoll and the implications made by them. Additionally, the ALJ finds the opinions of Dr. Kohake, HealthOne nurses, and Dr. Faulkner more persuasive and credible than the opinions of IME Dr. Lindberg.

22. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Kohake, the HealthONE nurse practitioners, Dr. Faulkner, and to reject the opinions of Dr. Lindberg.

23. The ALJ finds that the Claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on March 31, 2015, arising out of the course and scope of his employment for the Employer herein.

24. The ALJ finds that the medical care and treatment that the Claimant has received for his compensable right shoulder injury at HealthONE, by Dr. Kohake and by Dr. Faulkner (an authorized referral) was authorized, reasonably necessary to cure and relieve the effects of his compensable injury and causally related to the compensable right shoulder injury of March 31, 2015.

25. The Claimant has proven, by preponderant evidence that he was temporarily and totally disabled from March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days, based on the admitted AWW of $455.33, the Claimant is entitled to a TTD benefit rate of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of $2,081.28. He worked at the modified job on May 18 and was presumably paid the modified wage of $370 per week, thus, sustaining a temporary wage loss of $85.73 per week, which yields a temporary partial disability (TPD) benefit rate of $57.15 per week, or $8.16 per day, for one day. Additionally, as found herein above, the Claimant was temporarily and totally disabled from May 19, 2015 through June 20, 2015, both dates inclusive, a total of 35 days and is entitled to TTD benefits of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of$1,517.60.

26. As found herein above, the Claimant is able to work within his restrictions in this lesser paying job. From June 21, 2015 to August 30, 2015 (a period of 71 days) he earned $4,454.33, which equates to $439.16 per week, thus, yielding a temporary wage loss of $16.17 per week. Based on this temporary wage loss, a TPD rate of $10.78 per week, or $1.54 per day is yielded. Aggregate subtotal TPD benefits for this period equal $109.34. After August 30, 2015, wage records from Budget are required to establish whether there is a temporary wage loss.

27. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant was responsible for his termination, by virtue of a volitional act on his part, that he knew, or reasonably should have known, would get him fired, or that he exercised a degree of control over the circumstances leading to his termination from employment.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See §* 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented in a straight-forward and credible manner. His testimony concerning his injury was consistent with the medical histories he gave to providers throughout his treatment. His testimony concerning the circumstances of his termination was more credible and persuasive than the testimony of Jo Noulin and Corrine Vanosdoll and the implications made by them. Additionally, as found, the opinions of Dr. Kohake, HealthOne nurses, and Dr. Faulkner were more persuasive and credible than the opinions of IME Dr. Lindberg.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Kohake, the HealthONE nurse practitioners, Dr. Faulkner, and to reject the opinions of Dr. Lindberg.

Medical

c. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, the Claimant was treated at an Employer-Designated facility, HealthONE until July 2015 when HealthONE refused to further treat the Claimant because the respondents were denying the claim. Consequently, all of the Claimant's care and treatment at HealthONE was authorized.

d. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, Colorado Orthopedic Consultants and Dr. Faulkner were upon referral from HealthONE and, therefore, within the chain of authorized referrals.

e. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). As found, the compensable injury of March 31, 2015 caused the need for treatment of the Claimant's right shoulder thereafter.

f. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for the right shoulder was and is reasonably necessary to cure and relieve the effects of the compensable injury of March 31, 2015.

Temporary Disability

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not his fault. As found, the Claimant was **not** responsible for his termination, by virtue of a volitional act on his part, that he knew, or reasonably should have known, would get him fired. The Claimant's testimony alone is sufficient to establish a temporary "disability." See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997), although his temporary disability, as found, is amply supported by medical evidence.

h. Once the causal prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Commission,* 725 P. 2d

107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, that he was temporarily and totally disabled from March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days, based on the admitted AWW of $455.33, the Claimant is entitled to a TTD benefit rate of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of $2,081.28. He worked at the modified job on May 18 and was presumably paid the modified wage of $370 per week, thus, sustaining a temporary wage loss of $85.73 per week, which yields a temporary partial disability (TPD) benefit rate of $57.15 per week, or $8.16 per day, for one day. Additionally, as found herein above, the Claimant was temporarily and totally disabled from May 19, 2015 through June 20, 2015, both dates inclusive, a total of 35 days and is entitled to TTD benefits of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of$1,517.60.

i. Also, as further found herein above, the Claimant was able to work within his restrictions in this lesser paying job. From June 21, 2015 to August 30, 2015 (a period of 71 days) he earned $4,454.33, which equates to $439.16 per week, thus, yielding a temporary wage loss of $16.17 per week. Based on this temporary wage loss, a TPD rate of $10.78 per week, or $1.54 per day is yielded. Aggregate subtotal TPD benefits for this period equal $109.34. After August 30, 2015, wage records from Budget are required to establish whether there is a temporary wage loss.

Responsibility for Termination

j. A discharge in accordance to policy does not compel finding of fault. The mere fact that an employer discharges a claimant in accordance with the employer's policy does not establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *See Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987); *Pace v. Commercial Design Engineering,* W.C. No. 4-451-277 [Indus. Claim Appeals Office (ICAO), May 15, 2001]. § 8-42-105 (4), C.R.S., provides that an employee responsible for his own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible for his termination, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788, (ICAO, June 25, 2003). As found, the Respondents failed to satisfy their burden of proof on the affirmative defense that the Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised ad degree of control over the circumstances leading to termination.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant satisfied his burden on compensability, specific medical benefits as distinguished from a general award of medical benefits [*See Padilla v. Markley Motors, Inc.,* W.C. No. 4-923-087-02 (ICAO, April 14, 2015) [determining that a general award of medical benefits is interlocutory]; AWW; and, TTD and TPD benefits through August 30, 2015.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of medical care and treatment with HealthONE, its referrals, Colorado Orthopedic Consultants and Nathan D. Faulkner, in the specific amounts billed, subject to the Division of Workers' Compensation Medical Fee Schedule. Respondents are entitled to a credit for amounts already paid.

B. The Respondents shall pay the Claimant temporary total disability benefits in the following amounts: from March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days, $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of $2,081.28; $57.15 per week, or $8.16 per day, for one day in the subtotal amount of $8.16; from May 19, 2015 through June 20, 2015, both dates inclusive, a total of 35 days, temporary total disability benefits of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of$1,517.60.

C. From June 21, 2015 to August 30, 2015 (a period of 71 days), $10.78 per week, or $1.54 per day, in the aggregate subtotal amount of $109.34.

D. Grand total temporary disability benefits, payable through August 30, 2015 inclusive, equal $3,607.04, which is payable retroactively and forthwith.

E. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein, including entitlement to temporary disability benefits after August 30, 2015, are reserved for future decision.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-980-909-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for January 28, 2016, in Denver, Colorado. On November 12, 2015, the Claimant filed a Motion for Summary Judgment with attached supporting documents, asserting the there was no genuine issue of disputed material fact concerning the fact that the Respondents failed to timely respond to a Request for Prior Authorization, pursuant to Workers' Compensation Rules of Procedure (WCRP), Rule 16-10, 7 CCR 1101-3. On December 2, 2015, the Respondents filed a Response to the Claimant's Motion for Summary Judgment, with **no** attachments, asserting that there was a genuine issue of disputed material fact, *i.e.,* whether the request for prior authorization by Rocci Trumper, M.D. was "complete" in compliance with WCRP, Rule 16-9.

The summary judgment matter was referred to Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 2, 2015, for a ruling thereon.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact as to whether the Respondents failed to timely respond to a Request for Prior Authorization, pursuant to Workers' Compensation Rules of Procedure (WCRP), Rule 16-10, 7 CCR 1101-3; if so, whether the Respondents waived the right to contest the Request for Prior Authorization (hereinafter "request for PA). The Respondents concede an untimely response to the Request for PA, asserting that there was a genuine issue of disputed material fact, *i.e.,* whether the request for prior authorization by Rocci Trumper, M.D. was "complete" in compliance with WCRP, Rule 16-9. A corollary of this issue is whether an alleged "incomplete" request for PA excuses an untimely contest of the request. Subsidiary issues also concern whether there is a disputed issue of material fact concerning how "complete" is "complete," and whether there is a disputed issue of material fact concerning compliance with WCRP, Rule 16-9. Indeed, may the Respondents allege that the request for prior authorization is not complete until they determine that it is complete—in the nature of a "personal satisfaction" contract. Or, may the ALJ make a legal determination of whether the ATP complied with the requirements of WCRP, Rule 16-9 by use of the principles of statutory construction.

The Claimant bears the burden of establishing that there is no genuine issue of disputed material fact concerning: (1) an untimely contest of the Request for Prior Authorization; and (2) whether Dr. Trumper's request was "complete" as defined by WCRP, Rule 16-9.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted left knee injury on April 14, 2014.

2. On October 5, 2014, the Claimant filed an Application for Hearing seeking, in-part, medical benefits under the Workers' Compensation Act for an admitted injury occurring on April 14, 2015. Specifically, authorized treating physician (ATP) Rocci Trumper M.D. requested prior authorization for an arthroscopic left knee surgery.

3. The Respondents do not dispute that Dr. Trumper is the Claimant's ATP. Dr. Trumper recommended the procedure on September 21, 2015 and faxed a Request for Prior Authorization to Respondents on the same date (Exhibit 2, attached to the

Motion for Summary Judgment). The Respondents do not dispute that the Request was successfully received by them as indicated on the top of the Request.

4. Dr. Trumper's Request for Prior Authorization accurately defined the requested procedure and he attached his September 14, 2015 report as supporting medical documentation (Exhibit 2, attached to Motion). Dr. Trumper's September 14, 2015 report included documentation of the relevant diagnostic and/or surgical indications including the mechanism of injury discussion and physical examination findings (Exhibit 2). Dr. Trumper's recommendation was preceded by and based on the April 22, 2015 MRI (magnetic resonance imaging), performed by Russell Fritz, M.D., which shows a medial meniscal tear (*See* Exhibit 3, attached to the Motion).

5. The Respondents do not dispute that their letter contesting Dr. Trumper's Request for prior Authorization was sent on October 1, 2015, more than seven (7) business days after receiving the September 21, 2015 Request for Prior Authorization. (Exhibit 4, attached to the Motion). Attached to the Respondents' late, October 1 denial of prior authorization was a report, dated September 26, 2015, from Robert P. Mack, M.D., who did a medical record review and expressed the opinion that the Claimant's meniscus tear as documented by the MRI of April 28, 2015, was preexisting and related to previous meniscal surgery (of 2001) and marked obesity. Indeed, this opinion would set up a factual controversy to be litigated but it was a "day late and a dollar short." Indeed, the four-corners of Dr. Mack's report indicate that the Claimant did not, in fact, sustain a left knee injury of April 14, 2014 and it implies that the Respondents were wrong in admitting liability therefore. The Respondents Response to Application for Hearing does not designate "withdrawal of admission" as an issue.

Ultimate Findings

6. There is no genuine issue of disputed material fact concerning the untimely response of the Respondents to Dr. Trumper's Request for Prior Authorization.

7. There is no genuine issue of disputed material fact regarding the "completeness" of Dr. Trumper's request as required by Rule 16-9. Analyzing Dr. Trumper's request and the attachments thereto simply requires a statutory construction assessment of whether the request complies with the requirements of Rule 16-9. The wording on Rule 16-9, as applied to Dr. Trumper's request, along with the attachments thereto, is plain and unambiguous Just because the Respondents say that Dr. Trumper's request is not "complete" does not allow them to create a disputed factual issue on the bald argument concerning an interpretation of WCRP, Rule 16-9, that Dr. Trumper's request is not "complete," along the lines of "it's not complete until we say it's complete to our satisfaction."

CONCLUSIONS OF LAW

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

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents. The Respondents' Response contains no supporting documents. Indeed, it argues their interpretation of the meaning of WCRP, Rule 16-9, and how Dr. Trumper's request is not "complete" as defined by Rule 16-9.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, there is no genuine issue of disputed material fact that the Respondents' response to Dr. Trumper's request for prior authorization was not timely. Also,as found, there is no genuine issue of disputed material fact that Dr. Trumper's request was "complete" as defined by WCRP, Rule 16-9.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in its pleadings, but its response by affidavits or other means must set forth specific facts showing that there is a genuine issue of disputed material fact. C.R.C.P., Rule 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment; contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center, Inc.*, 701 P.2d 114 (Colo. App. 1985). As found, there is no genuine issue of disputed material fact regarding the "completeness" of Dr. Trumper's request as required by Rule 16-9. Analyzing Dr. Trumper's request and the attachments thereto simply requires a statutory construction assessment of whether the

request complies with the requirements of Rule 16-9. Just because the Respondents say that his request is not "complete" does not allow them to create a disputed factual issue on the bald argument concerning an interpretation of WCRP, Rule 16-9, that Dr. Trumper's request is not "complete," along the lines of "it's not complete until we say it's complete to our satisfaction,." with a late report (by Dr. Mack) indicating that the Claimant's claim is not compensable.

Respondents' Argument

d. Citing *Aguirre v. Noatak and Wausau Insurance*, W.C. No. 4-742-953 [Indus. Claim Appeals Office (ICAO), March 19, 2012] (upholding the ALJ's interpretation that the correspondence attached to support the prior authorization request was incomplete as it only offered claimant's subjective observation and not any other explanation as to why the procedure is needed or how the proposed procedure would cure or relieve the effects of the injury –also, the ALJ determined that Dr. Barolo never explained the medical necessity of the requested service), The Respondents argue that a determination of whether a provider submitted a "completed request" under WCRP, Rule 16-9 is a question a fact. The ALJ concludes that sometimes it is and sometimes it is not as in the present case.Indeed, the facts in *Aguirre* are significantly distinguishable from the facts in the present case. In *Aguirre,* the ALJ was affirmed because he made a factual determination that Dr. Barolat's request was not a "completed request." The present case is substantially different because the ALJ herein deems it unnecessary to hear evidence because there is no factual dispute to resolve. A plain reading of Rule 16-9 reveals that Dr. Trumper's request, along with the attachments thereto, is "complete" as defined by Rule 16-9. *See Lassner v. Civil Service Comm'n,* 177 Colo. 257, 493 P.2d 1087 (1972) [where the natural significance of a clause is **plain** and **unambiguous** and involves no absurdity, statutory construction is unnecessary). The wording on Rule 16-9, as applied to Dr. Trunmper's request, along with the attachments thereto, is plain and unambiguous. It is undisputed in the present case that the Request for Prior Authorization is supported by an objective MRI that reveals a medial meniscus tear in the left knee. Further, Dr. Trumper attached the MRI report of Dr. Fritz to his request, which reveals a history of previous surgery (2001). The Respondents admitted liability for the April 14, 2014 left knee injury on the inferred proposition that the Claimant sustained an aggravation and acceleration of his 2001 left knee condition. Ultimately, the holding in *Aguirre* is inapposite to its applicability to the present case.

e. The Respondents cite *McDaniel v. Vail Associates Inc., et a*l., W.C. No. 3-111-363 (ICAP – 2011 WL 3148609) (remanding the matter for the ALJ to make a sufficient findings as to whether a complete prior authorization request existed in conjunction with a request for penalties). Reference to the ICAO decision in *McDaniel* is not helpful to the statutory construction of the plain meaning of Rule 16-9 as applied to Dr. Trumper's Request for Prior Authorization and the attachments thereto.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, there is no genuine issue of disputed material fact concerning the fact that the Respondents' Response to the Request for Prior Authorization of the left knee arthroscopy was untimely.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's Motion for Summary Judgment is hereby granted and Respondents shall forthwith contact Dr. Trumper's office and authorize the arthroscopic left knee procedure requested by Dr. Trumper on September 21, 2015. Respondents shall pay the costs thereof, subject to the Division of Workers' Compensation Medical fee Schedule.

B. Any and all other issues endorsed on Claimant's October 5, 2015 Application for Hearing or added thereafter are reserved for determination at the hearing currently set for January 28, 2016.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.sjord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine.

2. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received for his lumbar spine was reasonable, necessary, and causally related to a work injury.

FINDINGS OF FACT

1. Claimant works for Employer as a firefighter/engineer/emergency medical technician and has been so employed for approximately twenty eight years. As part of his employment, Claimant typically works 48 hour shifts and sleeps at the fire station.

2. Claimant also occasionally performs handyman type work and in 2014 he earned approximately five thousand dollars from such work.

3. On April 7, 2015 Claimant was working for Employer when he responded to a call to assist an individual with medical care. The individual was a woman who weighed approximately 110 pounds, was calm, and was cooperative. The woman walked outside of her residence and sat on a gurney.

4. The electric gurney was raised to working height and then Claimant and his co-workers pushed the gurney to the end of a waiting ambulance. At the ambulance, one end of the gurney was hooked onto the ambulance. Claimant held the other end of the gurney as the electric legs folded underneath the gurney. After the legs folded, Claimant slid the gurney into the ambulance.

5. While assisting the gurney into the ambulance, Claimant stood straight and primarily used his biceps, leg strength, and core strength to both hold the gurney and to slide it into the ambulance.

6. While holding the gurney, Claimant felt a slight twinge in his back that went away very quickly. Claimant did not report the twinge to any co-workers or supervisors.

7. After the call, Claimant and his co-workers returned to the fire station. Claimant participated in normal activities that included cooking dinner, mopping and cleaning the kitchen, and watching television. Claimant went to sleep at the fire station and slept well. Claimant did not experience any back pain during this period of time.

8. On April 8, 2015 Claimant woke up and tried to stand to go to the bathroom. While attempting to get out of bed, Claimant felt severe pain in his lower back and left leg.

9. Claimant immediately notified his supervisor Taylor Stephens, Lt. and sat back down on his bed. Lt. Stevens called a medical unit.

10. Claimant was transported by ambulance to Parker Adventist Hospital. Claimant reported to Paramedic Brian McCoy that he woke up that morning to go from his bedroom to the bathroom when he had a sudden onset of lower back pain location in the region of T10 through about L2 that radiated down his left leg. Claimant reported pain in his entire left leg but more focused toward his left thigh. Claimant reported a similar episode of back pain approximately one week prior which caused him to miss work. Paramedic McCoy noted tenderness at approximately T10 through L3. Claimant did not report to paramedic McCoy that he had a back twinge the day prior while loading a gurney into an ambulance. *See* Exhibit I.

11. At Parker Adventist Hospital, Claimant was evaluated by Gia Viscardi, M.D. Claimant reported that he got out of bed and shortly after standing he developed pain in his left low back in the T10/L1 area. Claimant reported the pain radiated down the lateral and anterior aspect of his left thigh. Dr. Viscardi noted Claimant had a very physical job with frequent heavy lifting but that Claimant had no recent trauma. Claimant reported a similar episode of low back pain a week ago that improved with physical therapy, massage, and chiropractic intervention. Claimant did not report to Dr. Viscardi any back twinge the day prior while loading a gurney into an ambulance. Dr. Viscardi noted tenderness to palpation in the lumbar area more pronounced over the left side. *See* Exhibit J.

12. Dr. Viscardi noted that Claimant had suffered intermittently with back pain including a recent flare that was treated with NSAIDs, physical therapy, and massage and that Claimant presented with an acute flare of the same type of back pain this morning when he got out of bed. Dr. Viscardi discharged Claimant. *See* Exhibit J.

13. Later on April 8, 2015 Claimant returned to the emergency department at Parker Adventist Hospital and was evaluated by Michael Fortner, M.D. Claimant reported that he had injured his back nine days ago and over the course of the next seven days it was getting better with physical therapy and massage. Claimant reported he went back to work the day before yesterday and was feeling fine and had a normal first half of his 48 hours shift. Claimant reported when he woke in the morning he had to go to the bathroom and had the return of sudden onset of left-sided back pain that radiated down his lateral left hip to the anterior left thigh that was severe. Claimant reported being released that morning but that his pain was worse and that he was very uncomfortable. *See* Exhibit K.

14. On April 8, 2015, Lt. Stephens filled out an Employer's First Report of Injury. Lt. Stephens noted that Claimant was walking into the bathroom upon waking up in the a.m. and that there was no specific cause to Claimant's injury and that the Claimant's pain just began while standing. Lt. Stephens listed the injury date as April 8, 2015. Lt. Stephens also filled out a Safety Committee Supervisor's Investigation Report in which he indicated there was no apparent direct cause of Claimant's pain/injury and therefore no specific remedy or action existed that required attention. Claimant did not report to Lt. Stephens that he had a twinge in his back the day prior while loading a gurney into an ambulance. *See* Exhibit S.

15. On April 9, 2015 Claimant was evaluated by J. Grope, M.D. Claimant reported lower back pain that radiated into his left thigh and leg with some numbness. Claimant reported that he was on a call on April 7, 2015 when he lifted a patient onto a pram and felt a pull in his left lower back. Claimant reported he was okay until the next morning when he awoke with sharp pain in the mid lower back and left sciatic/buttock area, with numbness into his thigh. Claimant reported still having considerable pain in the area. Dr. Grope assessed low back pain and parasthesias. Dr. Grope opined that Claimant appeared to have lumbar disc pathology and nerve impingement/sciatica that appeared to be directly related to a work injury. Dr. Grope ordered an MRI of Claimant's lumbar spine. *See* Exhibit L.

16. On April 16, 2015 Claimant underwent an MRI of his lumbar spine that was interpreted by Mark McGehee, M.D. Dr. McGehee noted a history of lifting a patient into an ambulance when Claimant felt low back pain. Dr. McGehee noted a previous injury to the back but no prior surgery. Dr. McGehee concluded that Claimant had a large L1-2 disc protrusion with extrusion effacing the left superior lateral recess and the exiting L2 root, a moderate sized L3-4 focal protrusion contacting the superior lateral recesses but not effacing them, and bilateral moderate to severe L4-5 foraminal stenosis. *See* Exhibit M.

17. On April 17, 2015 Claimant was evaluated by Dr. Grope. Claimant reported continued pain. Dr. Grope reviewed the MRI results and noted the L1-2 and L4-5 pathology. Dr. Grope suspected that Claimant's L1-2 disc popped as described and was related to his workers' compensation injury. Dr. Grope referred Claimant to neurosurgery for further evaluation. *See* Exhibit 5.

18. On April 29, 2015 Claimant was evaluated at Rocky Mountain Spine Clinic by Chad Prusmack, M.D. Claimant reported that three weeks ago he was assisting with the transport of a patient in his job as a firefighter and felt a popping sensation in his back and developed some numbness into the left thigh. Dr. Prusmack noted that Claimant was transported from the scene of the event to the hospital for evaluation based on the severity of his acute back pain at the time. Dr. Prusmack opined that Claimant would not improve with conservative treatment and recommended urgent authorization for a left L1-2 microdiscectomy and decompression. Dr. Prusmack also noted that Claimant had some chronic low back pain but that Claimant's current

symptoms were markedly different than those problems and noted they would focus on the L1-2 level at the present time. *See* Exhibit N.

19. On May 12, 2015 Claimant underwent left L1-2 microdiscectomy performed by Dr. Prusmack. Dr. Prusmack indicated that Claimant had a work related injuring causing an acute onset of back pain, spasms, and radiculopathy and that the MRI showed extruded disc fragment with inferior migration. *See* Exhibit O.

20. On May 26, 2015 Claimant was evaluated by Dr. Prusmack who noted that Claimant was making good progress following surgery and had a small amount of persistent parasthesias but overall that Claimant was much improved. Dr. Prusmack reiterated that Claimant's need for surgery was caused by the acute onset of a herniated disc that he felt was work related when Claimant was lifting a patient into an emergency response vehicle in his job as a firefighter. Dr. Prusmack opined that Claimant was asymptomatic prior to the event and was transported from the fire station within the same shift for evaluation at the emergency department because of the onset of symptoms from the herniated disc. Dr. Prusmack opined that Claimant had no symptoms prior to this and no imaging to suggest that he had any prior issues with his back. *See* Exhibit P.

21. Claimant recovered from surgery and went back to full duty work on August 29, 2015.

22. Prior to the work incident, Claimant had treated for and had back pain for many years, dating back to the 1980's.

23. On June 19, 2000 Claimant was evaluated by Alan Plunkett, M.D. Dr. Plunkett noted that three views of Claimant's lumbar spine showed moderate changes of degenerative disc disease at L4-5 with chronic end plate changes. Dr. Plunkett noted a history of a back injury 20 years prior with recurrent back pain. Dr. Plunkett noted no evidence of acute lumbar pathology or trauma. *See* Exhibit B.

24. On April 18, 2003 Claimant was evaluated by Larry Wilner, D.O. Claimant reported sledding and falling down causing an axial compression along his back with instantaneous pain. Dr. Wilner assessed low back pain with probable osteoarthritis or degenerative disc disease of the back. *See* Exhibit C.

25. On April 18, 2003 three views of Claimant's lumbar spine were taken and reviewed by James Wilson, M.D. Dr. Wilson provided the impression of degenerative changes centered at L4-5. *See* Exhibit C.

26. On December 17, 2008 Claimant was evaluated by Phillip Gunther, M.D. Dr. Gunther noted no previous exams were available for comparison but reviewed imaging and gave the impression of degenerative disc disease at L4-5. Dr. Gunther noted that the disc thinning could cause some nerve irritation and could be causing the leg symptoms. *See* Exhibit D.

27. On June 2, 2014 Claimant was evaluated by Amy Trevey, DC for insidious onset of acute, dull, and aching discomfort in the left side of the neck, right side of the neck, upper thoracic and mid thoracic regions of an unknown origin. Claimant was again evaluated for this pain on June 13, 2014 and on July 2, 2014 with improved complaints and pain levels. *See* Exhibit 10.

28. On December 1, 2014 Claimant was evaluated by DC Trevey for complaints of lumbar left and right sacroiliac dull and aching discomfort. Claimant reported his lower back was acting up and causing pain across the belt line with an insidious onset.

29. The weekend of March 28, 2015 Claimant injured his back at home. Claimant was unsure what specifically caused the injury at home, but took time off work due to the injury and sought treatment due to the injury.

30. On March 31, 2015 Claimant was evaluated by Employer's wellness manager and athletic trainer, Vince Garcia. Claimant reported hurting his back over the weekend and complained of pain midline into both sides of his lower back, more on the left side. Claimant reported a history of minor lower back injuries somewhat similar in nature. Mr. Garcia assessed lumbar strain and noted limited range of motion, tightness, and pt on the left paraspinal lumbar musculature beginning L3 region. *See* Exhibit F.

31. On April 1, 2015 Claimant was evaluated by DC Trevey. Claimant was treated for low back pain.

32. On April 1, 2015 Claimant was evaluated by Mr. Garcia. Claimant reported feeling a little bit better but still complained of pain with sitting and or standing from sitting or lying position. *See* Exhibit F.

33. On April 3, 2015 Claimant was evaluated by Mr. Garcia who noted continued improvement. Claimant reported he was still not 100% and that his symptoms were still present. Mr. Garcia noted improved range of motion in the lumbar region but still limited in flexion. *See* Exhibit F.

34. On April 6, 2015 Claimant stopped by to speak with Mr. Garcia but was not treated or evaluated. Claimant reported feeling great and that he believed he could return to work the next day for his shift. Mr. Garcia noted it was Claimant's choice whether or not to go back to work. *See* Exhibit F.

35. On September 21, 2015 Claimant underwent an Independent Medical Examination performed by Nicholas Olsen, M.D. Claimant reported having a lower compressed disc between the L4-5 levels and that he had been treating with chiropractic care for years. Claimant reported on March 31, 2015 he was doing normal stuff around the house when he noted the onset of lower back pain at 5-7/10 in pain.

Claimant reported consulting Mr. Garcia for a few days and that his symptoms resolved and he then returned to work on April 7, 2015. Claimant reported on April 7, 2015 while on a call he felt a little twinge in his back while loading the gurney onto the ambulance. Claimant reported that the twinge went away just as quickly as it came. *See* Exhibit A.

36. Claimant reported going back to the station, cooking dinner, performing assigned cleaning duties of mopping and cleaning the kitchen, then watched television, and went to bed. Claimant reported he had no pain during this time period. Claimant reported sleeping fine with no pain. Claimant reported when he woke up his left leg felt weird that he sat at the edge of his bed and went to stand up when it felt a little worse and then he noted intense pain in his left leg and lower back that he rated at a 10/10. *See* Exhibit A.

37. After reviewing Claimant's medical history and performing an examination, Dr. Olsen opined that Claimant's disc protrusion at L1-2 was not the result of a work related injury but was related and directly connected to the symptoms Claimant developed at home the weekend of March 28, 2015. Dr. Olsen noted Claimant's left lower back pain greater than right centered around the L3 level after the weekend incident with pain as high as 7/10 compared to a twinge of pain while loading the gurney at work. Dr. Olsen opined that the medical records and history support that the injury that led to the disc protrusion and need for surgery occurred at home on March 28, 2015 and that the alleged work injury described by Claimant was a very minor event that caused no injury at all. Dr. Olsen noted that Claimant may have simply noted a twinge from the same source of pain that Claimant had experienced in March. Dr. Olsen opined that there was no specific or separate injury on April 7, 2015 that would be considered a work related injury. *See* Exhibit A.

38. Dr. Olsen testified at hearing consistent with his IME opinion. Dr. Olsen opined that Claimant did not suffer a work related injury. Dr. Olsen opined that the physical activity in lifting the gurney was not great enough to cause the injury later diagnosed, and noted Claimant's pre-existing symptoms that were similar to those reported post injury. Dr. Olsen opined that Claimant had a significant aggravation of back pain during the weekend of March 28, 2015 while at home. Dr. Olsen noted that Claimant's pain was noted by Mr. Garcia to be at the L3 area which is very close to the L1/L2 diagnosis. Dr. Olsen noted that Claimant reported to Mr. Garcia pain with movement from sitting to standing, similar to the pain he experienced on April 8, 2015 when getting out of bed. Dr. Olsen opined that Claimant was in a standing position when moving the gurney into the ambulance and was not sitting, bending forward, or twisting and it was not likely to cause a disc injury in that position. Dr. Olsen opined that if loading the gurney did cause the disc injury, you would expect an immediate onset of pain and not just a twinge, you would expect some type of pressure on the disc during the movement which did not exist, and you would expect that Claimant would not have been able to continue working. Dr. Olsen opined that if the large disc exclusion had occurred at the time of the incident loading the gurney, Claimant would have experienced significant pain.

39. Dr. Olsen further noted that several providers failed to document the gurney incident and that several noted the pain started after getting out of bed and that Claimant reported pain similar to the March 31, 2015 pain. Dr. Olsen opined that Claimant's testimony that all the providers were wrong and didn't include information he told them did not make sense. Dr. Olsen noted that Dr. Prusmack and Dr. Grope did not have an accurate history of the pain that Claimant had the week prior and that they did not have the whole records to review before concluding that the injury was work related. Dr. Olsen opined that the events of March 31, 2015 set the stage for the significant pain Claimant experienced while climbing out of bed on April 8, 2015 and that the injury/pain and need for surgery was not causally related to the incident lifting the gurney into the ambulance.

40. Dr. Olsen's report and testimony is found credible and persuasive. It is detailed, consistent with the overall medical history, and consistent with the description of the April 7, 2015 incident.

41. The opinions of Dr. Grope and Dr. Prusmack are not found as credible or persuasive. Neither doctor noted a complete history of Claimant's prior issues, including significant pain and issues noted less than one week prior to the alleged work injury involving pain at the L3 level. Dr. Prusmack bases his opinion, in part, on his incorrect belief that Claimant had an acute onset of a herniated disc, that Claimant was asymptomatic prior to the event, and that Claimant had no symptoms prior to this event and no imaging to suggest any prior issues with his back. Here, Claimant did not have an acute onset of symptoms of a herniated disc on April 7, 2015. Claimant had a slight twinge that went away quickly until the next morning when he then felt symptoms that he reported were similar to an episode at home one week prior. Claimant had a long history and prior imaging suggesting many prior back issues, including issues less than one week prior to the alleged work injury centered at the L3 level. Dr. Grope similarly failed to note Claimant's prior history of back pain including the pain less than one week prior to the alleged work injury. With neither doctor having a full history, their opinions are less persuasive than the opinion of Dr. Olsen.

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

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.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). 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.

Claimant has failed to meet his burden to show that he suffered from a work related injury on April 7, 2015. Rather, the testimony of Dr. Olsen is persuasive that the task described by Claimant in loading a gurney into an ambulance would not have put enough stress on the affected discs to cause the damage seen on MRI and that the gurney incident did not mechanically support a disc injury. Dr. Olsen's opinion that Claimant experienced similar symptoms the week prior at home is persuasive and consistent with the treatment notes of Mr. Garcia noting pain centered around the L3 level and is also consistent with Claimant's own report to the emergency room doctor and the paramedic that he had a similar episode of back pain one week prior. Further, Claimant's testimony surrounding his reports of the injury and incident involving the gurney are not persuasive. Claimant testified that he reported the specific gurney incident/twinge to the ambulance drive, his supervisor, and the emergency room doctor. However, all three of those people noted no specific incident/trauma causing Claimant's injury and that his pain just occurred while standing after getting out of bed. Claimant's testimony that all three of those people got it wrong and that he told them all about the incident with the gurney is not persuasive. Further, treating providers Dr. Grope and Dr. Prusmack fail to adequately note Claimant's prior and significant history of back pain including the pain Claimant had less than one week prior to the incident centered at L3. The incident at home the week prior was significant enough for Claimant to rate it a 7/10 pain level, to seek treatment with both Mr. Garcia and his chiropractic doctor, and to take time off of work. The opinions of Dr. Grope and Dr. Prusmack that the incident lifting the gurney caused the injury at L1/L2 are based on incomplete information and are not as persuasive as the opinion of Dr. Olsen. Claimant has failed to establish, more likely than not, that the slight twinge he felt while lifting and pushing the gurney into the ambulance caused his lower back symptoms or L1/L2 disc injury. Rather, it is more likely that Claimant's L1/L2 disc herniation was a result of the natural progression of his injury from the week prior and was not related to work duties or the incident loading the gurney into the ambulance.

Further, Claimant also argues that the act of getting out of bed on April 8, 2015 caused the injury and that he was in the course and scope of employment while getting out of bed at the fire station, and asks for the injury to be compensable based on an April 8, 2015 date of injury. Claimant also has failed to meet his burden to show that a compensable injury occurred on April 8, 2015. Although Claimant was within the time and place limits of his employment while sleeping and arising from sleep at the fire station, Claimant has failed to establish a causal connection between any work related functions and his injury. The simple act of standing up from bed is not sufficiently a work related duty or work related function to be considered part of Claimant's employment requirements and Claimant has not established any meaningful connection to work when he stood up to attempt to go to the bathroom. Claimant has failed to show a nexus between his employment and his back injury.

Medical Benefits

The respondent is 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. 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).

As found above, Claimant has failed to establish a causal connection between his L1/L2 disc herniation and his employment. Therefore, Claimant has failed to establish an entitlement to medical benefits. Although the treatment Claimant has received to date has been reasonable and necessary, it is not causally related to either an April 7, 2015 or April 8, 2015 work related injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffered a compensable injury to his lower back on April 7, 2015 or April 8, 2015.

2. Claimant has failed to meet his burden of proof to establish an entitlement to medical benefits.

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: December 17, 2015 /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 he is entitled to temporary total disability (TTD) benefits.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits.

3. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment on June 1, 2015.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage is $665.54.

FINDINGS OF FACT

1. Claimant was employed by Employer as a truck driver. Employer's business involves dry bulk truck hauling across several states.

2. In February of 2015 Claimant was living in New Mexico and was assigned to Employer's Albuquerque, New Mexico terminal. Claimant regularly drove hauls regionally around the New Mexico area, and also performed longer hauls which took him into Colorado and Wyoming.

3. In February of 2015 Claimant was asked to work out of Employer's Denver terminal on a temporary assignment for a few weeks, as the Denver terminal had more work available than the New Mexico terminal.

4. On February 9, 2015 Claimant drove a haul from Albuquerque to Denver.

5. On February 10, 2015 Claimant began working the temporary assignment out of the Denver terminal. On that day, Claimant hauled a load from Florence, Colorado to Broomfield, Colorado.

6. On February 10, 2015 and while in Broomfield unloading product through a product hose, the hose popped off the truck's storage tanks and struck Claimant on the right side of his head. Claimant was wearing his hard hat at the time of the incident.

7. Claimant notified Employer of the incident the day it occurred and he was referred for medical care and drug testing.

8. On February 11, 2015 Claimant was evaluated at Concentra in Denver by Janine Boyt, PA. Claimant was assessed with cervical strain and headache. PA Boyt provided work restrictions of 30 pounds lifting and no driving. Claimant was prescribed physical therapy three times per week for two weeks. Claimant was taken off work for the rest of the day. *See* Exhibit B.

9. On February 11, 2015 and February 12, 2015 Claimant worked in the Denver terminal shop, performing light duty work. Claimant worked 6 hours on the 11th and 8 hours on the 12th earning $11.60 per hour.

10. On February 13, 2015 Claimant was evaluated at Concentra in Denver by Scott Richardson, M.D. Dr. Richardson released Claimant to regular duty work. See Exhibit B.

11. On February 14, 2015 Claimant returned to his regular duties and again began driving hauls as needed for Employer. Claimant continued driving hauls locally, regionally, and performing long hauls between New Mexico and Colorado or Wyoming as needed by Employer. Claimant continued with his normal duties until April 17, 2015.

12. On February 19, 2015 and February 27, 2015 Claimant was evaluated at Concentra in Albuquerque, New Mexico by Susan Roberts, D.O. Dr. Roberts continued Claimant's full duty work release and continued the recommendation for physical therapy. *See* Exhibit C.

13. On February 27, 2015 Claimant was evaluated at Concentra in Albuquerque by Steven Drilling, D.O. Dr. Drilling assessed neck sprain and headache. Dr. Drilling continued Claimant's full duty work release and continued the recommendation for physical therapy. Dr. Drilling also provided a referral to El Camino Imaging. *See* Exhibit C.

14. On March 3, 2015 Claimant underwent a CT scan of his head at El Camino Imaging that was interpreted by Brian Jellison, M.D. Dr. Jellison opined that the CT scan reflected no acute intracranial abnormality. *See* Exhibit D.

15. On March 6, 2015 Claimant was evaluated by Dr. Drilling. Dr. Drilling continued Claimant's full duty work release. *See* Exhibit C.

16. On April 14, 2015 Claimant was evaluated by pain specialist Timothy Hansen, D.O. Dr. Hansen gave the impression that Claimant's symptoms were consistent with cervical facet syndrome, right greater than left and ligamentous strain of the cervical thoracic junction. Dr. Hansen opined that the right upper cervical facet syndrome was most likely the etiology of Claimant's headache pain. Dr. Hansen injected Claimant's right C2-3, C3-4, and C4-5 facet joints. *See* Exhibit E.

17. On April 17, 2015 Claimant was evaluated by Dr. Drilling. Claimant reported his injury had worsened, that he was having more frequent headaches, and that he was having depression. Claimant reported receiving neck injections on April 14, 2015 that did not make his headaches go away. Claimant reported having a hard time focusing in his daily activities, that he had poor concentration, poor memory, dizziness, insomnia, and reported that he was worried about safety issues of driving a truck due to his poor concentration. *See* Exhibit C.

18. Dr. Drilling provided additional prescription medications and referred Claimant for acupuncture treatment and psychological treatment. Dr. Drilling imposed a work restriction that Claimant could not drive a company vehicle due to Claimant's medication. *See* Exhibit C.

19. At this time, Claimant had filed a workers' compensation claim in New Mexico. Mediation was scheduled for the New Mexico claim on April 29, 2015.

20. On April 28, 2015 the Human Resources (HR) director for Employer, Patty Knapp, traveled to New Mexico in order to meet with Claimant and to participate in the mediation. Ms. Knapp met with Claimant to address his new restriction of not being able to drive a company vehicle and provided Claimant a written offer to perform full-time light duty work in the New Mexico shop as a shop assistant with duties to include pre-tripping company tractors and trailers and other duties as assigned. The offer was for 40 hours per week at $11.60 per hour. *See* Exhibit M.

21. Soon after beginning to work in the New Mexico shop, Claimant contacted Ms. Knapp and advised her that he was homeless and that he was living in one of Employer's truck trailers. Clamant asked if he could work out of the Denver terminal to be closer to family in Cheyenne, Wyoming.

22. Employer accommodated Claimant's request to work out of the Denver terminal. Employer also advanced Claimant $100 to get to Denver. On or about May 5, 2015 Claimant began working light duty in the Denver terminal.

23. On May 8, 2015 Claimant was evaluated by Valerie Mays, PA at Concentra in Denver. Claimant reported neck pain and that injections and physical therapy had not helped. Claimant requested a referral to a psychologist and a spine surgeon. PA Mays ordered an MRI and placed Claimant on work restrictions of no pushing/pulling, no driving company vehicles, no work in safety sensitive positions, no work at heights, and to change positions as needed to relieve discomfort. Claimant was scheduled for a follow up appointment on May 15, 2015. *See* Exhibit F.

24. Claimant went home from work early on May 8, 2015. Claimant failed to report for scheduled work shifts on May 9, May 10, and May 11, 2015.

25. On May 11, 2015 Ms. Knapp spoke with Claimant and advised him that because he had missed the last three days of work that she had moved up his May 15, 2015 doctor's appointment to May 12, 2015.

26. On May 12, 2015 Claimant was evaluated by PA Mays. PA Mays noted that Claimant would continue with the same work restrictions she provided on May 8, 2015 but added that he should not drive to and from work when under the influence of Soma and that he should not work if he had increased neck pain or headache symptoms. See Exhibit F.

27. On May 12, 2015 Claimant underwent a cervical MRI that was interpreted by David Weiland, M.D. Dr. Weiland provided an impression of mild degenerative arthritis and degenerative disc disease with mild central canal stenosis at C5-6 and mild foraminal narrowing at C2-3, C3-4, and C5-6. *See* Exhibit G.

28. On May 12, 2015 PA Boyt reviewed the duties listed in a modified job duty offer that Employer intended to offer Claimant. PA Boyt signed off that she had reviewed the job offer and that it was her opinion that Claimant had the physical capacity and ability to perform the job duties offered. PA Boyt approved the job offer. *See* Exhibit M.

29. Ms. Knapp hand delivered the PA approved modified duty job offer to Claimant on May 12, 2015.

30. On May 15, 2015 Claimant called Ms. Knapp and reported that he could not drive due to his medications. Ms. Knapp advised Claimant that he needed to find a way to get to work.

31. Claimant did not report to work on May 15, 2015. Claimant also did not report to work for scheduled shifts on May 16, 2015 and May 17, 2015.

32. On May 19, 2015 Claimant was evaluated by Kirk Nelson, D.O. Claimant reported pins and needles in his cervical spine area with pain of 6/10. Claimant reported he was enticed to return to Denver by his HR representative but that he had no home in Denver and was traveling from Cheyenne, Wyoming where he lived with his son to Denver to work and for appointments. Claimant reported he had not been working due to his inability to drive while on medications. Dr. Nelson assessed cervicogenic headache and cervical spondylosis. Dr. Nelson noted a plan of starting Soma and provided a referral for an orthopedic spine evaluation. Dr. Nelson opined that Claimant did not appear to have anything surgical and anticipated the recommendations would be to return to conservative care and pain management. Dr. Nelson opined that Claimant was not safe to drive while on the Soma medication and that he could not work in any safety sensitive areas. *See* Exhibit F.

33. Claimant was scheduled to work on May 22, 2015. Claimant did not report to work for his scheduled shift. Ms. Knapp spoke with Claimant and advised him

he either needed to get to work or to see Dr. Nelson. Claimant did not report to work and did not go see Dr. Nelson.

34. On May 22, 2015 Dr. Nelson reviewed the duties listed in a modified job duty offer that Employer intended to offer Claimant. Dr. Nelson signed off that he had reviewed the job offer and opined that Claimant had the physical capacity and ability to perform the job duties offered. Dr. Nelson approved the job offer. The job offer was mailed to Claimant that day. The job offer noted that Claimant would be provided hotel accommodations in Denver and that the hotel offered shuttle service to and from Employer's Denver office. *See* Exhibit M.

35. On or about May 22, 2015 Claimant spoke with Dr. Nelson and discussed the light duty job offer including Employer's offer to put Claimant up in a hotel with shuttle service between the hotel and Employer's Denver office. Claimant was aware the job offer was coming and that Dr. Nelson had approved the offer.

36. Claimant did not report to work for scheduled shifts on May 23, 2015 and May 24, 2015.

37. On or about May 26, 2015 Claimant and Ms. Knapp discussed the May 22, 2015 modified duty offer. Ms. Knapp told Claimant that Employer could have someone drive to Cheyenne to pick him up to bring him to Denver for his next scheduled shift and that hotel accommodations in Denver would be provided. Claimant reported that he did not need transportation to Denver and that he would be at work on May 28, 2015.

38. On May 28, 2015 Claimant failed to report to work for his scheduled shift.

39. On May 28, 2015 Ms. Knapp called Claimant. Claimant reported he could not drive on his medication.

40. On May 28, 2015 Claimant failed to appear for a doctor's appointment with Dr. Nelson.

41. On May 29, 2015, May 30, 2015, May 31, 2015, and June 1, 2015 Claimant failed to report to work. After May 28, 2015 Claimant did not report to work for any scheduled shifts and Claimant did not contact Employer at all after this date.

42. On June 1, 2015 Claimant was terminated from employment. Ms. Knapp mailed a letter to Claimant providing that he was no longer employed due to attendance and job abandonment. Ms. Knapp noted that Claimant failed to report to work on May 28, 2015 after stating he did not need a ride. This letter was sent to an old address and was not received by Claimant. *See* Exhibit M.

43. Claimant did not become aware of the fact that he had been terminated until approximately 3-4 weeks later when he received notification from child support that

his job had been terminated. During this period of time, Claimant did not make any attempt to call or contact Employer.

44. Claimant's testimony, overall, is not found credible or persuasive. Claimant was not enticed to come to Denver by Employer, rather Employer accommodated Claimant's request to work out of the Denver terminal.

45. The testimony of Ms. Knapp is found credible and persuasive. Employer made several attempts to work with Claimant and to provide him modified employment within his restrictions.

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. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. 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.

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).

Temporary Disability Benefits

Temporary Partial Disability

In cases of temporary partial disability (TPD), the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. *See* § 8-42-106, C.R.S. TPD payments shall continue until the first occurrence of either one of the following: the employee reaches maximum medical improvement; OR the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

Here, Respondents agree that Claimant is owed TPD benefits from February 11, 2015 through February 13, 2015 and again from April 17, 2015 through May 29, 2015. Claimant has failed to establish by a preponderance of the evidence an entitlement to any other TPD benefits. In addition to the TPD benefits that Respondents agree are due, Claimant requests TPD benefits from February 14, 2015 through April 17, 2015. Claimant, however, has failed to show any loss of wages during this time period that can be attributed to his work injury. Rather, the evidence and testimony shows that during this period of time, Claimant worked his normal duties, drove normal loads, and performed work as needed. Claimant was not under any work restrictions. Claimant has not established that any difference in wages during this time period was, more likely than not, due to his injury and not simply due to the amount of work and loads available to drive.

The plain language of § 8-42-106(2)(b), C.R.S. indicates that any TPD benefits shall continue until an attending physician gives the employee a written release to modified employment, such modified employment is offered to the employee in writing, and the employee fails to begin such employment. In the present case, the facts establish that Dr. Nelson provided Employer with approval and a written release that Claimant could perform the modified duties offered. This modified employment was offered to Claimant in writing on May 22, 2015 and Claimant not only received the letter offering modified employment but Claimant also spoke with Employer indicating he would be present for the modified employment on May 28, 2015. Despite this, Claimant failed to begin the modified employment. Claimant failed to report for the modified employment on May 28, 2015, May 29, 2015, May 30, 2015, May 31, 2015, and June 1, 2015.

Claimant was able to perform the modified employment that was offered to him, and Dr. Nelson agreed that Claimant could perform the modified employment. The modified employment was in Claimant's normal work location at the Denver terminal. Although Claimant chose to live far from his employment, the modified employment was in the same location that Claimant was assigned to prior to his injury and the location that Claimant requested to work from after his injury. Employer did not assign him to a new or far away terminal for the modified employment offer. The modified employment offer was made at a location that Claimant requested he be allowed to work from. Further, Claimant's testimony that he was enticed to move from New Mexico to the Denver location by human resources is not persuasive. Rather, Claimant sought to work out of the Denver location due to family being nearby in Cheyenne, Wyoming and

Employer accommodated Claimant's request. The ALJ is not persuaded that the opinion of Dr. Nelson should be rejected. Rather, it appears Dr. Nelson carefully reviewed the modified employment, noted it should include hotel accommodations, and Employer included this in their offer to Claimant. Claimant is not credible in explaining that he was waiting for a further phone call or information from Employer. Rather, the testimony of Ms. Knapp is found persuasive that Claimant was aware the hotel accommodations were in place, that Employer could pick him up and drive him from Cheyenne, Wyoming to Denver for work if needed, and that Claimant rejected the offer of transportation and indicated he would be at work. Despite this, Claimant made the decision not to begin the modified employment offered to him by failing to show up for work on May 28, 2015 and thereafter. The modified employment offered to Claimant was not impractical as argued by Claimant and the modified employment offer complied with Dr. Nelson's restrictions and was signed off on by Dr. Nelson. Despite this, Claimant subjectively decided he could not work despite a medical opinion to the contrary. Claimant's argument that he could not, as a practical matter, accept the modified employment offer is rejected and is not persuasive. Employer attempted multiple times to get Claimant back to work within the restrictions provided by his authorized treating providers. The modified employment offer made on May 22, 2015 for Claimant to begin employment on May 28, 2015 or May 29, 2015 complied with his work restrictions, was not impractical, and provided hotel accommodations in Denver if needed. In addition, Employer offered Claimant a ride to Denver to start his first shift but Claimant indicated he did not need transportation to Denver. Despite this, Claimant failed to begin work after the offer of modified employment and therefore the statutory provision of § 8-42-106(2)(b), C.R.S. enables Employer to terminate Claimant's TPD benefits as of May 30, 2015.

Temporary Total Disability

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). 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 the first occurrence of any one of the following: the employee reaches maximum medical improvement; the employee returns to regular or modified employment; the attending physician gives the employee a written release to return to regular employment; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. § 8-42-105(3), C.R.S.

Claimant has failed to show, by a preponderance of the evidence, an entitlement to TTD benefits from May 19, 2015 and ongoing. Claimant has not shown that as of May 19, 2015 he was temporarily totally disabled. Rather, on that date, Claimant remained under work restrictions that were being accommodated by Employer with light duty work in the Denver terminal/shop. Per his treating providers, Claimant was able to work within his work restrictions. Claimant, however, failed to report to work on multiple dates during this time period including: May 9, 10, 11, 15, 16, 17, 22, 23, 24, 28, and at any time after May 28. Claimant has failed to establish, more likely than not, that he was unable to work on these dates due to his work injury. The evidence shows that Claimant reported he was unable to work on several of these dates due to medications he was taking as a result of his injury. However, the authorized treating providers noted that Claimant could still work despite medications and only that he could not drive to and from work while on the medications. Claimant was not totally disabled from working and if he had gotten a ride or requested a ride from Employer to get to work, he was fully capable of working at the shop in modified employment that was within his work restrictions from May 19, 2015 and ongoing. Additionally, despite Claimant's contention that he was totally disabled from May 19, 2015 and ongoing, wage records show that between May 19, 2015 and May 27, 2015 Claimant earned wages. Claimant similarly earned wages between April 17, 2015 and May 19, 2015.

Further, the plain language of § 8-42-105(3)(d) (I), C.R.S. indicates that any TTD benefits shall continue until an attending physician gives the employee a written release to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. In the present case, the facts establish that Dr. Nelson provided Employer with approval and a written release that Claimant could perform the modified duties offered. This modified employment was offered to Claimant in writing on May 22, 2015 and Claimant not only received the letter offering modified employment but Claimant also spoke with Employer indicating he would be present for the modified employment on May 28, 2015. Despite this, Claimant failed to begin the modified employment. Claimant failed to report for the modified employment on May 28, 2015, May 29, 2015, May 30, 2015, May 31, 2015, and June 1, 2015. Therefore, pursuant to the plain statutory language, Claimant is unable to show an entitlement to TTD benefits from May 30, 2015 and ongoing. Claimant failed to begin modified employment offered to him on May 29, 2015 and any entitlement to TTD would end pursuant to statute on that date. As found above, Claimant's arguments that the modified employment offer was impractical and that he was unable to accept the offer are rejected and not persuasive.

Responsible for Termination

Although Claimant has failed to establish an entitlement to TTD or TPD benefits on or after May 30, 2015 due to his failure to begin an offer of modified employment, in the alternative, the ALJ also concludes that Respondents have established that Claimant was responsible for his termination from employment effective June 1, 2015. 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). 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*.

Here, Claimant was not terminated due to his injury. In fact, the evidence shows that Employer continued to employ Claimant and accommodated Claimant’s request to work out of the Denver terminal, provided Claimant with modified employment positions that fit his work restrictions, and continued to attempt to get Claimant back to work after Claimant repeatedly failed to report for scheduled shifts. Claimant was able to work in modified employment as noted by the work restrictions imposed by his authorized providers. However, Claimant failed to report to work on May 9, 10, 11, 15, 16, 17, 22, 23, 24, 28, 29, 30, and June 1 before Employer terminated his employment. The failure to work or report for scheduled shifts was not a consequence of Claimant’s work related injury or work restrictions. The failure to work or report for scheduled shifts was due to Claimant’s failure to get to and from Employer’s location. Claimant’s authorized treating providers were aware of his medications and opined that he could work while on the medications. Claimant’s decision not to get a ride to and from work and not to report to work were volitional decisions made by him despite Employer’s attempt to work with him. Whether or not to get a ride to work or to ask Employer for a ride was within Claimant’s control. Further, Claimant’s failure to communicate with Employer at any time after May 28, 2015 was also a volitional decision made by him. Under a totality of the circumstances Claimant’s conduct was the cause of his termination.

Respondents have established by a preponderance of the evidence that Claimant was responsible for termination of his employment on June 1, 2015. Claimant not only failed to get to work for modified employment that was within his work restrictions, but he failed to communicate whatsoever with Employer after May 28, 2015 to report whether or not he would be coming in to work. After several days of no communication whatsoever from Claimant and due to multiple dates where Claimant

failed to report for work that was within the work restrictions imposed by his authorized treating providers, Employer terminated his employment. Claimant's actions were volitional and Respondents have established Claimant was at fault for his termination.

ORDER

It is therefore ordered that:

1. Claimant is entitled to temporary partial disability benefits from February 11, 2015 through February 13, 2015 and from April 17, 2015 through May 29, 2015.

2. Claimant has failed to establish an entitlement to temporary total disability benefits. His claim for temporary total disability benefits is denied and dismissed.

3. Respondents have established that Claimant was responsible for his termination from employment on June 1, 2015.

4. 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: December 15, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-983-888-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

NON-INSURED.

Non-Insured Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 16, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 12/16/2015, Courtroom 1, beginning at 8:30 AM, and ending at 10:00 AM).

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. Because the Non-Insured Employer failed to appear or respond, there were no exhibits on behalf of the Employer.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether or not the Employer was and "employer," as defined by the Workers' Compensation Act (hereinafter the "Act"); whether the Claimant was an "employee," as defined by the Act;; whether the Employer failed to insure its liability for workers' compensation and is,

therefore, subject to a 50% penalty on indemnity benefits; and, whether the Employer is subject to penalties of up to one day's compensation for failure to timely admit or contest. If compensable, the additional issues concern medical benefits, average weekly wage (AWW); temporary total disability (TTD) benefits from April 30, 2015 through May 29, 2015, a subtotal of 30 days, both dates inclusive; temporary partial disability (TPD) benefits, based on a temporary wage loss of $310 per week, from May 30, 2015 through December 7, 2015, a subtotal of 192 days, both dates inclusive; TPD benefits, based on a temporary wage loss of $150 per week, from December 8, 2015 through the hearing date, December 16, 2015, a subtotal of 9 days, both dates inclusive, and continuing; and, daily penalties, up to one day's compensation, against the Employer for failure to timely admit or contest from July 29, 2015 (21 days after the Employer had notice of more than 3 days disability) through the hearing date of December 16, 2015, a subtotal of 141 days, and continuing; and, authorized, causally related and reasonably necessary medical expenses.

FINDINGS OF FACT

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

Notice

1. Notice of the hearing was sent to the Employer and Partner at its last known and regular address, addressed to Catalino Villalobos, 4912 Steele Street, Denver, CO 80216. The Claimant, in his sworn testimony, verified that this was the correct address for the Employer/Partner. The notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing of December 16, 2015 and failed to appear or respond in any fashion.

Employer/Employee

2. On April 30, 2015, the Claimant was working for the Employer as a laborer, which the ALJ infers and finds was under a verbal contract of hire. Therefore, the Respondents were an "employer," as defined by the Workers' Compensation Act (hereinafter the "Act"); and, the Claimant was an "employee" as defined by the Act.

Failure to Insure

3. On the date of injury, the Employer did not insure its liability for workers' compensation (*See* Claimant's Exhibit 5).

Compensability

4. The Claimant had worked for the Employer since November 2014. On April 30, 2015, while preparing to pour concrete, the Partner was sawing a board, which the Claimant was supporting on his right knee. The Claimant temporarily looked away and the saw went through the board, cutting the Claimant across the top of his right knee cap. The Employer/Partner witnessed the work-related accident and indicated that the Claimant should go to the hospital immediately. The Employer did not specify any specific hospital or medical provider.

Medical

5. Immediately after the work-related accident, the Claimant's girlfriend drove him to the emergency room (ER) of St. Anthony's North, where several stitches were placed across the Claimant's right knee cap, he was given crutches, and told not to do any heavy lifting, bending or squatting for the next month. The Claimant could not perform his job for the Employer as a laborer with these restrictions. The Claimant incurred medical bills of approximately $3,200 from St. Anthony's North and he has not yet been billed by the Clinica Campesino, where the stitches were removed at the on or about May 29, 2015.

Temporary Total Disability (TTD)

6. The Claimant could not work at his pre-injury job from April 30, 2015 through May 29, 2015, both dates inclusive, a total of 30 days, nor did he work or earn any wages during this period of time.

Additional Temporary Disability After the Claimant's Return to Work at Another Job

7. On May 30, 2015, the Claimant returned to work, fulltime, as a roofer, earning less wages than his pre-injury wage. Specifically, he was earning $11 an hour, or $440 per week, thus, sustaining a temporary wage loss of $310 per week. He received a raise to $15 an hour on December 8, 2015, which equates to $600 per week. It is unclear from the evidence whether there is a causal connection between the effects of the Claimant's compensable injury and his temporary wage loss after May 30, 2015. *See* § 8-42-103, C.R.S: *Liberty Heights at Northgate v. Indus. Claim Appeals Office,* 30 P.3d. 872 (Colo. App. 2001).

Daily Penalties for Employer's Failure to Timely Admit or Contest

8. It was the Claimant's undisputed testimony that he filed his workers' compensation claim on May 20, 2015. The Employer was aware and reasonably should have been aware that the Claimant has sustained more than three days

temporary total disability as of May 7, 2015, at which time the Employer had 20 days, or until May 27, 2015, within which to admit or contest liability. To this date, the Employer has not responded in any fashion. There is no evidence in mitigation or aggravation, however, in order to encourage the Employer to comply with this decision, the ALJ determines that a daily penalty of 2/3rds of the TTD benefit, or $100 per day is appropriate.

Bodily Disfigurement

9. The Claimant sustained bodily disfigurement, consisting of a raised, brownish, keloid scar transecting the Claimant's right knee cap, three inches long and 1/3 of an inch wide. It is plainly visible to public view when the Claimant is wearing a bathing suit.

Ultimate Findings

10. Notice of the hearing was sent to the Employer and Partner at its last known and regular address, addressed to Catalino Villalobos, 4912 Steele Street, Denver, CO 80216. The Claimant, in his sworn testimony, verified that this was the correct address for the Employer/Partner. The notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing of December 16, 2015 and failed to appear or respond in any fashion.

11. The Claimant's testimony was, essentially, undisputed, straight-forward, and credible. There was no persuasive testimony to the contrary.

12. The Claimant was an "employee" of the Employer herein on the date of injury, and the "Employer was an 'employer,' as defined by the Act.

13. On April 30, 2015, the Claimant sustained a compensable injury to his right knee, and the injury arose out of the course and scope of his employment for the non-insured Employer herein and was not intentionally self-inflicted.

14. The Employer was contemporaneously aware of the injury and told the Claimant to go to the hospital. The Employer made no specific medical referrals. The Claimant presented to the ER of St. Anthony's North, and his treatment there was of an emergent nature. Thereafter, the Claimant selected the Clinica Campesino for the removal of his stitches on or about May 29, 2015. All medical treatment and referrals emanating from St. Anthony's North and the Clinica Campesino for treatment of the right knee was authorized, causally related to the April 30, 2015 compensable injury, and reasonably necessary to cure and relieve the effects thereof.

15. The Claimant's AWW is $750, thus yielding a 50% penalized TTD rate of $720 per week, or $150 per day.

16. The Claimant was temporarily and totally disabled since from April 30, 2015 through May 29, 2015, both dates inclusive and total of 30 days. He is entitled to TTD benefits of $750 per week, or $150 per day, for this period, in the aggregate amount of $4,500.

17. Issues involving additional temporary disability benefits after May 30, 2015 should be reserved for future decision.

18. The Employer's failed to timely admit or contest from May 27, 2015 (21 days after the Employer had notice of more than 3 days disability) through December 16, 2015, both dates inclusive, a total of 204 days, and continuing. As found, a daily penalty of $100 is appropriate. The aggregate daily penalty to date is $20,400.00

19. The Claimant has sustained his burden of proof, by preponderant evidence, on all issues.

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CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions); the motives of a witness; whether the testimony has been contradicted; and, bias,

prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005 *Also see, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was, essentially, undisputed, straight-forward, and credible. There was no persuasive testimony to the contrary.

Notice

b. "The fundamental requisites of due process are notice and the opportunity to be heard." *Franz v. Indus. Claim Appeals Office,* 250 P.3d 755, 758 (Colo. App. 2010) [quoting *Hendricks v. Indus. Claim Appeals Office,* 809 P.2d 1076, 1077 (Colo. App. 1990)]. Workers' compensation benefits are a constitutionally protected property interest which cannot be taken without the due process guarantees of notice and an opportunity to be heard. *See Whiteside v. Smith,* 67 P.3d 1240, 1247 (Colo. 2003). Notice requirements apply to both parties. When an item is properly mailed through the U.S. Mails and is not returned as undeliverable, there is a legal presumption of receipt. *Olsen v. Davidson,* 142 Colo. 205, 350 P.2d 338 (Colo. 1960). As found, notice of the hearing was sent to the Employer and Partner at its last known and regular address, addressed to Catalino Villalobos, 4912 Steele Street, Denver, CO 80216. The Claimant, in his sworn testimony, verified that this was the correct address for the Employer/Partner. The notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing of December 16, 2015 and failed to appear or respond in any fashion, having had an opportunity to do so.

Non-Insurance and Employee Status

c. Section 8-43-408 (1), C.R.S., provides a 50% penalty on indemnity benefits for failure of an employer to insure its liability for workers compensation. As found, the Employer herein failed to insure its liability for workers' compensation and is, therefore, subject to a 50% increase in all indemnity benefits.

d. As found, the Claimant performed work for hire for the Employer herein and he was an "employee" within the definition of § 8-40-202, C.R.S., at the time of the compensable injury, and the Employer was an "employer as defined by § 8-40-203.

Compensability

e. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). 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). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury to his right knee on April 30, 2015, and this injury arose out of the course and scope of his employment.

Medical

f. Because this matter is compensable, the non-insured Respondent is liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer was contemporaneously aware of the injury and advised the Claimant to go to the hospital without making a specific referral. As further found, the Claimant first presented at the ER of St. Anthony's North for emergent care, which is exempt from the authorized chain of referrals. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Next, the Claimant first selected the Clinica Campesino for removal of the stitches on his right knee. This was the first non-emergent selection of medical providers which, as found, was made because the Employer failed to promptly tender medical care. Therefore, all of the Claimant's medical care and treatment for the right knee injury was authorized, causally related to the April 30, 2015 compensable injury, and reasonably necessary to cure and relieve the effects thereof.

g. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals emanating from the Clinica Campesino would be within the chain of authorized referrals.

h. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the right knee injury of April 30, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the April 30, 2015 compensable injury.

Average Weekly Wage (AWW)

i. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW is $750 which, ordinarily, would yield an insured TTD benefit of 2/3rds of $750, however, penalized by 50% for failure to insure the weekly TTD benefit is $750 per week, or $150 per day.

Penalized Temporary Disability Benefits

j. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). . There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant could not, and did not work or earn any wages from April 30, 2015 through May 29, 2015, both dates inclusive, a total of 30 days. The Claimant is, therefore, entitled to aggregate, penalized TTD benefits of $4,500.00 for this period of time.

Daily Penalty for Failure to Timely Admit or Contest

k. Section 8-43-203 (2) (a), C.R.S., provides for a daily penalty of up to one day's compensation for each day's failure to timely admit or contest, up to 365 days, 50% payable to the Subsequent Injury Fund and 50% payable to the Claimant. As found, the Employer's failed to timely admit or contest from May 27, 2015 (21 days after the Employer had notice of more than 3 days disability) through December 16, 2015, both dates inclusive, a total of 204 days, and continuing. As found, a daily penalty of $100 is appropriate. The aggregate daily penalty to date is $20,400.00.

Bodily Disfigurement

l. Section 8-42-108 (1), C.R.S., provides for a disfigurement award up to $4,000, plus an annual escalator based on the State Average Weekly Wage (AWW) [which is $4,840.14 for FY 15/16] plus the if the injury is to an area in public view and is permanent. Bodily disfigurement is assessed according to appearance not loss of function. *Arkin v. Indus. Comm'n. of Colorado,* 145 Colo. 463, 358 P.2d 879 (1961). Compensation beyond $4,840.14 is only appropriate if the disfigurement affects the face, is comprised of extensive body scars or burns, or manifests itself as stumps due to loss or partial loss of limbs. § 8-42-108 (2). Because facial deformities "are presumed to impact on an individual's social and vocational functioning." the statutory maximum award is appropriate. *See Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997). As found, in the present case, the Claimant's disfigurement affects the right knee, but is serious, unpleasant looking and plainly visible to public view in swimming trunks. It is not among the listed schedule disfigurements in § 8-42-108 (2), with an $9,678.66 maximum award for FY 15/16. It is within the purview of a maximum $4,840.14 for FY 15/16. Therefore, an award of $2,000, penalized by 50% for a total disfigurement award of $3,000 is appropriate.

Burden of Proof

m. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As

found, the Claimant has sustained his burden, by preponderant evidence, on all issues with the exception of entitlement to temporary disability benefits after May 30, 2015, which issue should be reserved for future decision.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent Non-Insured Employer, and Partner, individually, shall pay all of the costs of medical care and treatment for the Claimant's compensable right knee injury, subject to the Division of Workers' Compensation Medical Fee Schedule. Current liquidated medical costs equal approximately $3,200. Medical providers may no longer bill the Claimant directly. *See* § 8-42-101, C.R.S.

B. The Respondent Non-Insured Employer and Partner, individually, shall pay the Claimant temporary total disability benefits at the rate of $750.00 per week, or $150.00 per day, from April 30, 2015 through May 29, 2015, both dates inclusive a total of 30 days (penalized 50% for failure to insure) in the aggregate amount of $4,500.00, which is payable retroactively and forthwith.

C. For failing to timely admit or contest, Respondent Non-Insured Employer and Partner, individually, shall pay daily penalty benefits at the rate of $100.00 per day for the penalty period from May 27, 2015 (21 days after the Employer had notice of more than 3 days disability) through December 16, 2015, both dates inclusive, a total of 204 days, and continuing, in the aggregate amount of $20,400.00, 50% payable to the Subsequent Injury Fund of the Division of Workers' Compensation, and 50% payable to the Claimant.

D. For and account of the Claimant's bodily disfigurement, the Respondent Employer and Partner, individually, shall pay the Claimant the sum of $3,000.00 in addition to all other benefits due and payable.

E. The Non-Insured Respondent Employer and Partner, individually, shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein, including the entitlement to temporary disability benefits after May 30, 2015, are reserved for future decision.

G. In lieu of payment of the above compensation and benefits to the Claimant, the Respondent Employer and Partner, individually, shall:

a. Deposit the sum of $ 31,100.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the sum of $ 35,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:
   (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
   (2) Issued by a surety company authorized to do business in Colorado.
   The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Non-insured Respondent Employer and Partner, individually, shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the Non-Insured Respondent Employer and Partner, individually, of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

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

Division of Workers' Compensation
Sue.Sobolik@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant establish by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment on March 16, 2015?

FINDINGS OF FACT

1. Claimant is fifty-two (52) years old and has worked as a journeyman plumber for over thirty (30) years.

2. Claimant worked for Employer for approximately three years and testified that the job was very physical and demanding. Examples of the type of physical duties included lifting hot water heaters; lifting jackhammer drills in and out of window wells; using other power tools; moving sinks; and lifting cast iron tubs.

3. Claimant testified that he had no injuries before March 16, 2015 and stated that he had never experienced symptoms like this. Although he had previously experienced soreness, he attributed this to the physically demanding nature of his job. Prior to this, he never missed time from work due to an injury. Claimant stated he never filed a worker's compensation claim before. There was no record of a prior injury to Claimant's neck, back or right arm before the ALJ.

4. Claimant testified at hearing that his injury occurred on March 16, 2015, while he was moving a tub. He initially felt pain in his chest the next day and thought he was having a heart attack. It lasted for about five (5) minutes and pain then developed in his back. Claimant stated that he continued to work, but over time the pain worsened in both his back and chest. Claimant credibly testified that he first thought he had pulled a muscle.

5. Claimant testified that he discussed the injury with Employer[1], who gave him the name of his chiropractor. The ALJ infers that the Employer had notice of Claimant's injury and symptoms, as it is unlikely Mr. Bershinsky would have referred him to his chiropractor otherwise.

6. Claimant testified that his symptoms did not improve and got so intense that he could not bend over and was having trouble sleeping. Claimant related that Mr. Bershinsky said they would "put him on work comp". The worker's compensation claim

[1] Mr. Bershinsky attended the hearing, but did not testify. The ALJ infers that Claimant's statements regarding the discussions concerning the injury, the report of claim and referral to Mr. Bershinsky's chiropractor were accurate or Mr. Bershinsky would have been called to testify to refute these.

was then reported to Insurer. Claimant testified on cross-examination that he agreed the first report of injury[2] was made on April 21 or 22, 2015, although he did not recall the exact date. The ALJ finds this explanation to be credible, as Claimant was sent to Concentra thereafter. He was not sure whether he referenced the 3-16-15 date of injury when this report of injury was made.

7. Claimant was seen on April 29, 2015 at the University of Colorado Health-Poudre Valley Hospital Emergency Department. Claimant testified that there was a concern that he had a blood clot in his lungs, but did not remember what he said at that time. Claimant presented with chest wall pain and arm pain, along with shortness of breath. The emergency department notes reflected Claimant stated the symptoms had been ongoing for 2 weeks and developed abruptly when he sat up in bed. There was no reference to an injury at work in the Poudre Valley Hospital records.

8. On examination, Claimant had tenderness to palpation in the chest and right paraspinal thoracic region. Claimant had a chest x-ray and other diagnostic testing, which was performed in the emergency department, including blood tests and an EKG. Travis Brown, D.O. suspected the pain was musculoskeletal. Claimant was given an IV dose of Toradol, which reduced his pain, as well as a prescription for Lodine (anti-inflammatory) and Norco (at nighttime). Dr. Brown also wrote a work note.

9. Claimant next treated at Family and Sport Chiropractic on May 4, 2015. On the patient information form, there was the following question: "What type of injury are we seeing you for?" Claimant checked the box next to "Other". Claimant did not check the box next to "Work". Claimant complained of right-sided neck pain, with pain into his shoulder, and down into his arm. In the consultation/history, Claimant's chief complaint was listed as chest pain and there was a reference to right shoulder blade "'X' months ago". Claimant checked the boxes for back and neck pain or stiffness and numbness or pain in the arms. X-rays were taken and the neurological evaluation was normal. The assessment was neck pain with radiculopathy. Claimant received chiropractic treatment to his cervical spine.

10. Claimant returned to Family and Sport Chiropractic on May 5, 2015. It was noted that the x-rays showed multilevel degeneration at C4/5, C5/6 and C6/7. The assessment was the same as the 5/4/15 appointment. Claimant received treatment for his neck, including manual traction.

11. Claimant also received chiropractic treatment on May 6 & 8, 2015. On 5/6/15, pain was noted to be radiating down into his arm. The pain was lessened with traction. On 5/8/15, Claimant reported sleeping 6 hours per night after home traction. The assessment was radiculopathy. Although the notes said there was a follow-up appointment on Monday, no additional records were admitted from Family and Sport Chiropractic.

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[2] The ALJ notes that Claimant referenced a First Report of Injury in the Proposed Findings of Fact, Conclusions of Law and Order. (See paragraph 4). However, this document was not admitted into evidence.

12. Claimant was evaluated by Amber Payne, PA at Concentra Medical Center on May 23, 2015. Claimant testified that got to Concentra after he talked to "Bill", who said that they would "put him on work comp". The ALJ infers that Claimant was referred to Concentra (the ATP for Employer) after discussing his condition with Employer (Bill Bershinsky). On the 5/23/15 initial record from Concentra, Claimant's chief complaint was listed as a slipped disc at C-5[3], with pain shooting down the right arm. In the history section, the injury date was listed as March 17, 2015 as a result of lifting a 350 pound cast iron tub. Claimant noted that he felt right-sided chest and thoracic pain the next day. Claimant continued to work and the pain progressed, including pain under his right shoulder blade, down his arm to his finger tips. Claimant denied cervical pain. Claimant reported that he had 3-4 acupuncture visits[4] and 7 chiropractic treatments with two chiropractors (Drs. Ober and Wilburn)[5], but these treatments were not helpful.

13. On examination, tenderness was noted in Claimant's cervical spine-right rhomboid, but not the AC joint. Claimant's range of motion in the thoracic and lumbosacral spine was full. PA Payne's assessment was cervical radiculopathy at C7 and rhomboid muscle strain. PA Payne noted that she was unable to determine causality. Physical Therapy (PT) was ordered and Claimant was referred for an MRI of the cervical spine.

14. Claimant returned to Concentra on May 28, 2015, at which time he was complaining of back pain (right shoulder pain). He was also experiencing discomfort in his neck, near the scapula. PA Payne found tenderness in the rhomboid. No tenderness or muscle spasm was noted in the cervical spine; however, pain was noted on right rotation. Her assessment was rhomboid muscle strain and cervical radiculopathy at C7. Claimant was given work restrictions, including: may lift up to 5lbs constantly and may push/pull up to 5lbs constantly.

15. On June 3, 2015, Claimant presented at Fort Collins MRI, for an MRI of the cervical spine. The MRI films were read by Jay Kaiser, M.D. Dr. Kaiser's impression was C4-C5 mild bilateral facet arthropathy; C5-C6 disc degeneration with type 1 endplate changes, uncovertebral spurring with severe bilateral foraminal stenosis; C6-C7 disc osteophyte complex with mild thecal sac effacement, moderate left and mild right foraminal stenosis; C7-T1 uncovertebral spurring with moderate to severe right and moderate left foraminal stenosis with type 1 endplate changes. The ALJ concludes from the MRI that Claimant had degenerative changes in his cervical spine.

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[3] Claimant testified that Dr. Ober had told him he had this.

[4] No acupuncture treatment records were admitted at hearing.

[5] The ALJ notes that Dr. Wilburn was part of Family and Sport Chiropractic. The records from that facility document four (4) chiropractic treatments. Accordingly, The ALJ concludes that the Concentra note refers to two separate courses of chiropractic treatment, which was consistent with Claimant's testimony. However, no records from Dr. Ober were admitted at hearing.

16. Claimant was examined by Joel Schwartzkopf, M.D. at Concentra on June 3, 2015 for complaints of abdominal pain, which had been getting worse for 2-3 days. Claimant also had pressure in his neck following the MRI. Dr. Schwartzkopf's assessment was right upper quadrant abdominal pain and he referred Claimant to the ER. Dr. Schwartzkopf felt the complaint was not related to the Claimant's existing wc problem and discussed the issue with Dr. Pineiro.

17. Claimant then went to the Poudre Valley Emergency Department on June 3, 2015. Claimant presented with abdominal pain, which started three (3) days ago. Claimant's abdominal pain became worse after drinking heavily the night before. A history of chronic low back pain was also noted, as well as the fact that he had an MRI. Claimant was examined by Thomas McNally, PAC whose impression was abdominal pain and gastritis. Claimant was given prescriptions for Prilosec, Zofran and Norco.

18. Claimant was re-evaluated by PA Payne on June 5, 2015 and his symptoms were noted to be unchanged, including pain in the right arm in the C7 distribution. The MRI findings were discussed with Claimant. PA Payne's assessment was rhomboid muscle strain and cervical radiculopathy at C7. A referral to a massage therapist and a physiatrist was made.

19. A copy of a M-164 (initial exam) completed by Rosalinda Pineiro, M.D. on June 7, 2015 was admitted into evidence, although no narrative report was attached. [Exhibit 2, first page]. In that report, Dr. Pineiro noted that her objective findings were consistent with history and/or work-related mechanism of injury/illness. Claimant was to have therapy 3x/wk and medications. The ALJ credits Dr. Pineiro's opinion regarding whether Claimant's symptoms were related to a work injury.

20. Claimant returned to Concentra on June 15, 2015 and was examined by Keith Meier, FNP. Claimant reported that his symptoms were unchanged since the last visit and he was waiting for approval of massage therapy. Tenderness was noted in the cervical spine at C5-T1, as well as in the rhomboid, scapula, right paraspinal and trapezius muscles. Right-sided muscle spasms were also found, along with painful range of motion in the cervical spine. FNP Meier's assessment was cervical radiculopathy at C7 and rhomboid muscle strain. Claimant was given a prescription for Cyclobenzaprine and Hydrocodone-Acetaminophen.

21. Claimant was seen by Dr. Pineiro at Concentra on June 22, 2015 for a re-check of arm pain. Dr. Pineiro noted Claimant had been discharged from PT and was taking medications. Loss of normal lordosis was noted in the cervical spine on examination, as well as tenderness at the C5-7 levels and bilateral muscle spasms. ROM was noted to be full, but painful on flexion, extension and left side bending. Dr. Pineiro's assessment was cervical radiculopathy at C7 and rhomboid muscle strain. She continued Claimant's work restrictions and agreed with the referral to Dr. Pouliot.

22. Claimant was examined by Matthew Pouliot, D.O on July 6, 2015. His chief complaints were neck and right arm pain. Mild to moderate cervical tenderness was noted, along with a negative Spurling test on the right, which produced arm pain. Sensation was slightly decreased to light touch over the 6th and 7th dermatomes.

23. Dr. Pouliot's assessment was: 1. 52-year-old male with injury on 3/16/15, reported on 3/17/15, lifted a heavy cast iron tub as a plumber up to the 2nd floor with resultant ongoing cervical and radicular type pain in the C6 and C7 distributions; 2. MRI evidence of multilevel disease, which is likely preexisting, although he was not symptomatic prior to this injury. The treatment plan was a cervical epidural to be performed at C6-7 on the right, with an EMG of the right upper extremity. Claimant testified that the epidural injection was not authorized. The ALJ infers that Dr. Pouliot concluded Claimant's symptoms were consistent with his report of injury.

24. Michael J. Rauzzino, M.D. from Front Range Spine & Neurosurgery reviewed Claimant's medical records and issued a report, dated July 30, 2015. Dr. Rauzzino noted Claimant had chronic degenerative cervical disc disease, worst at C5-C6 and C6-C7. Dr. Rauzzino opined there was no evidence of acute injury, as the MRI that was done did not show any acute structural change to the spine. There were chronic degenerative cervical spine changes which argued against an acute injury and the history that the Claimant described. Dr. Rauzzino also concluded that the medical records did not support a work-related injury, saying that the history he related to his doctors at Concentra was not supported by the medical records. There was no documentation to his treating providers (prior to presenting to Concentra), that he had any sort of work-related injury; in fact, the documentation supports that he did not have a work-related injury.

25. Dr. Rauzzino concluded Claimant had subjective complaints of neck and radicular pain. Claimant presented with symptomatic cervical degenerative disc disease. Disc degeneration was related to aging and occurred in the normal population outside of any work-related activity. Dr. Rauzzino opined that the fact that he worked as a plumber did not necessarily mean that his occupation caused or accelerated his disease. Dr. Rauzzino stated: "In my neurosurgery practice, we see cervical degenerative disc disease routinely in an association with aging and unrelated to specific work activities. There is no causality to his job as a plumber to him having cervical degenerative disc disease as people who do not work as plumbers in other physical labor capacities develop the same type of disease."

26. The ALJ notes that Dr. Rauzzino's credibility is undercut by the fact that he did not examine Claimant. In addition, Dr. Rauzzino did not address whether the act of lifting a tub could cause an aggravation of Claimant's previously asymptomatic degenerative cervical spine changes, which also undermines his credibility. Dr. Rauzzino did not consider whether Claimant tried to initially work through the pain, but could not, as a possible explanation why he delayed in seeking treatment. The ALJ was not persuaded by the opinions expressed by Dr. Rauzzino that Claimant's symptoms were not related to a work injury.

27. Claimant underwent EMG testing on August 25, 2015 at Orthopaedic & Spine Center of the Rockies. Raymond P. van den Hoven's impression was: subtle changes on EMG, right upper extremity, that suggest minor right C6 and C8 root impingement (chronic and/or old), but no acute denervation; suspected acute superimposed irritation, especially of the C8 nerve root on the right side; no carpal tunnel syndrome or ulnar neuropathy-right upper extremity; no peripheral neuropathy. Dr. van den Hoven thought an epidural injection would be appropriate, along with aggressive cervical extensor strengthening exercises. He did not recommend surgical intervention.

28. Claimant testified that he has symptoms, which he described felt like a "knife in his back". It is located below the neck between his shoulder blades and radiates into his right arm.

29. Claimant continues to work part time for Employer, performing light duty.

30. The ALJ credits Claimant's testimony concerning the circumstances of his injury. Although Claimant did not initially report his injury as work related, no contrary evidence presented to refute his direct testimony that he was lifting a tub on the day in question. The ALJ found Claimant to be credible when he testified that he thought he pulled a muscle, which was why he did not initially seek treatment.

31. The ALJ finds that Claimant proved that it is more probable than not that he sustained a compensable injury while working for Employer.

32. The evidence and inferences inconsistent with 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).

Compensability

Claimant contends that he suffered an injury on March 16, 2015 and initially thought his symptoms would resolve, which was why he delayed seeking treatment. Claimant averred that the Employer was aware that had been injured and initially gave him the name of a chiropractor. When his symptoms persisted, Claimant made a formal worker's compensation claim through the Employer. Although Claimant had pre-existing degenerative changes in his cervical spine, Claimant argued that he did not have symptoms of this type until his work-related injury.

Respondents argued that Claimant failed to satisfy his burden of proof with regard to the claimed industrial injury. Respondents contended that Claimant gave an inconsistent history and did not mention that it occurred at work either at the Poudre Valley Hospital ER or at Family and Sport Chiropractic. Respondents urge that the claim should be denied due to a lack of credibility on the part of Claimant.

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." *See CF & I Steel Corp. v. Industrial Commission,* 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. (term "injury" includes disability resulting from accident or occupational disease.

The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment 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) (proof of causation is threshold requirement that must be established before any compensation is awarded); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999) (Claimant seeking benefits for occupational disease

must establish existence of the disease and that it was directly and proximately caused the conditions of employment).

As a preliminary matter, the ALJ concludes that the evidence does not support a finding that Claimant suffers from an occupational disease, which was raised by Respondents as an affirmative defense[6]. Rather, Claimant's testimony coupled with the medical records frame the issue as whether Claimant suffered a traumatic injury which caused underlying degenerative changes in his cervical spine to become symptomatic.

In making the determination on compensability, the ALJ first considered what evidence tended to show Claimant was injured as alleged. This included the following:

- Claimant testified that he lifted a bath tub.
- Claimant testified that he told Mr. Bershinsky that he was injured and was having symptoms.
- Claimant's testified that Mr. Bershinsky gave him the name of his chiropractor.
- Claimant's testimony that the report of injury was made to Insurer after he talked to Employer and was told that they would "put him on work comp".

This testimony was direct evidence that the injury occurred as alleged by Claimant. It also provided support for his claim that Employer knew of his injury, as well as how he initially treated with a chiropractor and then Concentra. Significantly, no contrary evidence was presented which rebutted these facts.

Second, the ALJ considered whether the medical evidence supported a finding of compensability. This included:

- Claimant had no prior injuries that caused the same type of symptoms in his neck, back or right arm. [Finding of Fact No. 3].
- Dr. Pineiro concluded that the physical findings made upon examination were consistent with the reported injury. [Finding of Fact No. 19].
- Dr. Pouliot found objective findings of injury upon examination, including reduced sensation in the 6th and 7th dermatomes. The inference derived from this was that Dr. Pouliot opined that Claimant's symptoms were consistent with an injury of this type. [Finding of Fact No. 23].
- Claimant's radiculopathy, with symptoms going down his right arm were noted consistently in the Concentra records. Claimant had no such

[6] Respondents appear to have abandoned this affirmative defense, as they did not argue it in Respondents'' Position Statement and Proposed Findings of Fact, Conclusions of Law and Order.

symptoms or treatment prior to March, 2015. [Finding of Fact Nos. 12-14, 18-21].

- Claimant's symptoms, including right arm pain, were consistent with a trauma superimposed on degenerative changes in the cervical spine as shown on the MRI and EMG testing.

As found, the medical evidence, as well as the inferences therefrom lead to the conclusion that while Claimant had preexisting degenerative changes in his cervical spine, these became symptomatic after he suffered an industrial injury while working for Employer. The trauma combined with the degeneration in the cervical spine led Claimant to seek medical treatment.

Third and finally, the ALJ considered Claimant's credibility, which is a significant issue in the case. Claimant was not a good historian, particularly since he did not initially report describe the work incident at either Poudre Valley Hospital ER or at Family and Sport Chiropractic. Claimant did not recall a number of dates, nor did he remember what was said at the aforementioned facilities. This hurt his credibility.

However, the ALJ found Claimant to be credible on other key issues, including his discussion with Employer. Claimant's explanation that he thought it was a muscle injury and would resolve was plausible. Also, Claimant had not experienced symptoms of this type and that coupled with the objective medical records satisfies Claimant's burden of proof. [Findings of Fact Nos. 24-25]. In considering the evidence, Claimant proved it was more probable than not that he suffered and a compensable injury and is entitled to benefits

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable industrial arising out of and in the course and scope of his employment with Employer.

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: December 7, 2015

Digital signature

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

ISSUES

The issues presented for consideration at hearing are whether Claimant proved by a preponderance of the evidence that she suffered injury to her left upper extremity in the course and scope of her employment for Employer and whether Claimant is entitled to reasonably necessary and related medical benefits.

Claimant's claim for benefits comes forward on an expedited application for hearing. Claimant raised the additional issues of average weekly wage and penalty under Section 8-43-304, C.R.S. These issues are reserved for future determination. Section 8-43-203(1), C.R.S.

FINDINGS OF FACT

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

1. Claimant is a 32 year old right hand dominant female who has been employed by the Employer for three years. Claimant is employed by Employer performing numerous jobs including cashier, sales associate in the drapery department, customer service representative and stocker.

2. Claimant testified that her assigned duties in the various positions required her to use her left arm repetitively, rotating her wrist occasionally and lifting items frequently. Claimant experienced numbness and tingling first in the palm of her left hand, then in the left arm and left fingers. Claimant did not testify when the symptoms first appeared in the left arm.

3. Claimant testified that she experienced the onset of her disability on May 27, 2015, when she saw a physician's assistant (PA) at Swedish Family Medical Center, Cassandra Rusche. The PA recommended that Claimant wear a brace and undergo a course of occupational therapy. Claimant attended occupational therapy one time per week starting on or about June 3, 2015, and continuing through July 29, 2015.

4. Claimant was initially diagnosed with carpel tunnel syndrome by the PA. Subsequently, when Claimant did not respond to treatment for carpel tunnel syndrome, Claimant underwent an EMG and it was determined that Claimant did not have carpel tunnel syndrome but did have cubital tunnel syndrome. The PA referred Claimant to Dr. Clinkscales.

5. On September 14, 2015, Claimant underwent surgery, an ulnar nerve procedure, performed by Dr. Clinkscales. Claimant remained off work for three weeks through October 3, 2015, recovering from the surgical procedure.

6. On October 8, 2015, Claimant saw Dr. Montano, a "workers' compensation doctor," on referral from Dr. Clinkscales. Dr. Montano noted that Claimant was experiencing steady improvement following the ulnar nerve procedure. However, the doctor reported that Claimant continued to have pain in the whole left arm.

7. Dr. Montano did not offer an opinion regarding the cause of Claimant's condition and recommended that Claimant undergo a job site evaluation for use in determining causality and worksite recommendations. Dr. Montano recommended ongoing physical therapy and an orthopedic evaluation.

8. Claimant did not present credible or persuasive evidence that her condition, cubital tunnel syndrome, was caused by her work duties. Claimant testified that she could not obtain a job description for her position from Employer despite her repeated requests. Claimant did not present credible or persuasive evidence that her symptoms arose from activities at work which involved holding a tool in position with repetition for six hours during her work day. Nor was their evidence that, for four hours periods during the work day, Claimant had duties requiring her to wrist bend and/or full elbow flexion/extension with vibration, repetitive pronation of the forearm or sustained pressure at the cubital tunnel.

9. Claimant did not provide evidence of specific repetitive work activity or the frequency with which she performed any work duty. Claimant testified generally that she performed duties as a cashier, a stocker, a customer service representative and a sales representative. Claimant did not provide information how the specific use of her non-dominant arm caused cubital tunnel syndrome.

CONCLUSIONS OF LAW

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

1. The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). 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).

2. The Colorado Department of Labor and Employment, Division of Workers' Compensation promulgates rules of procedure pertaining to many aspects of the workers' compensation process. Workers' Compensation Rules of Procedure, 7 CCR 1101-3. Rules 17 contains the Medical Treatment Guidelines (MTG). Rules 17-1 (A) provides,

17-1. STATEMENT OF PURPOSE

(A) In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these "Medical Treatment Guidelines." This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

3. Rule 17-7 of the MTG includes "Exhibits" which pertain to the diagnosis, treatment and causal analysis of specific conditions, including the condition of cubital tunnel syndrome at Exhibit 5.

4. Exhibit 5(3) provides a physician treating an injured worker with guidance regarding the assessment of work relatedness.

MEDICAL CAUSATION ASSESSMENT FOR CUMULATIVE TRAUMA CONDITIONS (CTC)

General Principles of Causation Assessment

The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic

condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related. In some cases, the clinician may need to order diagnostic testing or jobsite evaluations to make a judgment on medical probability. The following steps should be used to evaluate causality in CTC cases:

Step 1: Make a specific and supportable diagnosis. Remember that cumulative trauma, repetitive strain and repetitive motion are not diagnoses. Examples of appropriate diagnoses include: specific tendonopathies, strains, sprains, and mono-neuropathies. Refer to Sections F (Specific Musculoskeletal Disorders) and G (Specific Peripheral Nerve Disorders) for the specific findings of common CTCs.

Step 2: Determine whether the disorder is known to be or is plausibly associated with work. The identification of work-related risk factors is largely based on comparison of risk factors (as described in Section D.3. a. & b. Foundations for Evidence of Occupational Relationships and Using Risk Factors to Determine Causation) with the patient's work tasks.

Step 3: Interview the patient to find out whether risk factors are present in sufficient degree and duration to cause or aggravate the condition. Consider any recent change in the frequency or intensity of occupational or non-occupational tasks. In some cases, a formal jobsite evaluation may be necessary to quantify the actual ergonomic risks. Refer to the Jobsite Evaluation Section E.6.c.

Step 4: Complete the required match between the risk factors identified on the Risk Factor Table and the established diagnosis using the system described in Section D. 3. b.

Step 5: Determine whether a temporal association exists between the workplace risk factors and the onset or aggravation of symptoms.

Step 6: Identify non-occupational diagnoses, such as rheumatoid arthritis, obesity, diabetes, as well as avocational activities, such as golf and tennis. This information infrequently affects the work-related causation decision. It may be applicable when exposure levels are low and the case does not meet evidence-based criteria.

5. The MTG in Exhibit 5 provide direction to the clinician to collect information from the injured worker regarding duties, to collect the information regarding duties from the employer’s job description and from a jobsite evaluation in order to ascertain whether the work injury is caused, aggravated or accelerated by work duties. The MTG identify risk factors which may be present on the injured worker’s job and support the claim of work relatedness. These medically documented risk factors consider the worker’s job duties with a specificity regarding the repetitive movement of upper extremity, the posture

of the worker, the force utilized by the workers' extremities to perform the work duties and the cumulative nature of all these factors.

6. At hearing in this case, Claimant failed to establish by a preponderance of the evidence that her duties as stocker, sales representative or cashier caused her cubital tunnel syndrome. There was no credible or persuasive evidence presented from which it could be concluded that Claimant's job duties required her to spend 4 to 6 hours of her work day using her non-dominant arm in an awkward position, exerting repetitive force with the left arm, using vibratory tools, or working in a cold environment. These risk factors were not established to be present in Claimant's position with this Employer.

7. Claimant failed to establish that it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in this case is due to a work-related exposure or injury.

ORDER

It is therefore ordered that:

1. Claimant's claim 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: _November 27, 2015_____

DIGITAL SIGNATURE:

Margot W. Jones

_____

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

ISSUES

- 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?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from June 4, 2015 and continuing?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of medical benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant testified at hearing that on June 3, 2015 he was employed with employer performing demolition of a building. Claimant testified he was paid $13 per hour for his work with employer and worked between 65-66 hours per week.

2. Claimant testified that on June 3, 2015 at approximately 11:00 a.m., he was using a pick and hit a rock and injured his left shoulder and right hand. Claimant testified he experienced strong pain after hitting the rock with his pick. Claimant testified his injury was witnessed by "Darwin" and "Mr. Luiz".

3. Claimant testified he went to lunch and another worker named Mike Losey, a contractor at the work site, asked claimant to take him to Vail to get his truck. Claimant testified he took Mr. Losey to get his truck and when he returned to employer, he was working light duty.

4. Claimant testified Mr. Losey was not his supervisor. Claimant testified that during the drive to get Mr. Losey's truck, he told Mr. Losey that he had hurt himself. Claimant also testified that on the date of his injury he informed Eric Coronado of his injury. Claimant testified Mr. Coronado was his supervisor. Claimant testified Mr. Coronado told claimant to be careful.

5. Claimant testified he continued to work on June 3, 2015 and finished his shift. Claimant testified he went home but could not sleep that night because he was in too much pain.

6. Claimant testified he went to work the next day and told Mr. Coronado that morning that he needed medical attention. Claimant testified Mr. Coronado called the owner who told Mr. Coronado to send claimant home and they would pay him for 4 hours worth of work that day and to return to work when he felt better.

7. Claimant testified Mr. Coronado later informed him that they were not going to pay claimant for the previous week and a half of work he had performed for employer. Claimant testified he called Mr. Coronado who informed him that there was no longer any work for claimant to perform for employer.

8. Claimant testified that he has not worked since June 4, 2015 due to the pain in his left shoulder.

9. Claimant testified that on or about July 15, 2015 he contacted employer and demanded that he be paid for the time he worked for employer, but employer told claimant that they couldn't pay him because he had an attorney.

10. Claimant testified that he hand delivered his workers' compensation paperwork to Richard Molina, another supervisor for employer, on October 23, 2015.

11. According to the records entered into evidence in this case, the application for hearing was mailed to employer at the following address: 8101 E. Prentice Ave., Suite 800, Greenwood Village, CO 80111 on July 10, 2015. The Notice of Hearing was mailed to this same address by the Office of Administrative Courts on September 10, 2015.

12. Interrogatories and an entry of appearance were sent to employer at the following address: 2618 West 13th Ave., Denver, CO 80204.

13. Certified letters were delivered by claimant to employer on October 24, 2015 at 9:47 a.m. and 12:44 p.m. Employer did not appear at the November 12, 2015 hearing in Glenwood Springs to defend this claim, however.

14. The ALJ credits claimant's testimony at hearing that he sustained an injury to his left shoulder and right hand on June 3, 2015 while performing work for employer and that claimant requested medical treatment from employer on June 4, 2015. The ALJ finds that claimant has proven through his testimony that it is more probable than not that he sustained a compensable injury arising out of his employment with employer.

15. The ALJ finds that claimant has demonstrated that it is more likely than not that as a result of the injury, he sought a referral for medical treatment from employer but was not referred by employer for any treatment. The ALJ finds claimant has proven that it is more likely than not that as a result of the injury, claimant needs to be evaluated by a medical physician for the purposes of receiving medical treatment.

16. The ALJ notes that employer has failed to refer claimant for medical treatment and determines that the right to select a physician to treat claimant for his

injuries has passed to claimant. Claimant is therefore allowed to choose a physician to treat his injuries resulting from the June 3, 2015 work injury.

17. The ALJ credits claimant's testimony that he has not been able to work since the injury due to the pain in his left shoulder and finds that claimant has proven that it is more probable than not that he is entitled to an award of TTD benefits as a result of his work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2008. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that 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., 2008. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment with employer. As found, the ALJ credits the testimony of claimant at

hearing and determines that claimant sustained an injury on June 3, 2015 that resulted in his missing time from work.

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

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2014. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

7. As found, claimant has demonstrated that he is in need of medical treatment for his work injury. As found, employer failed to refer claimant to a physician willing to treat claimant for his injury after being informed of claimant's injury and, therefore, the right to select a physician or chiropractor has passed to claimant pursuant to Section 8-43-404(5)(a), C.R.S.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant has proven by a preponderance of the evidence that his injury resulted in disability that resulted in his inability to perform his job for employer. Claimant's testimony in this regard is credited with establishing this finding that claimant's injury resulted in his inability to perform his regular employment. As found, claimant is entitled to an award of TTD benefits commencing June 4, 2015 and continuing until terminated by law.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant testified he was paid an hourly rate of $13.00 per hour and worked approximately 65 to 66 hours per week. As found, claimant's testimony is not contradicted by any credible evidence at hearing. As found, the ALJ determines that claimant's appropriate AWW should be $845.00 per week based on the hourly rate of $13.00 per hour multiplied by 65 hours per week.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits commencing June 4, 2015 and continuing until terminated by law based on an AWW of $845.00

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury provided by physicians authorized to treat claimant for his work injury.

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

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

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

DATED: December 2, 2015

Keith E. Mottram

_____

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on June 9, 2015 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

3. . Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to designate a medical provider.

4. A determination of Claimant's Average Weekly Wage (AWW).

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period June 9, 2015 until terminated by statute.

FINDINGS OF FACT

1. Employer is in the business of tree trimming. Claimant essentially worked for Employer as a lumberjack who used a chainsaw to remove trees and brush. He was initially hired by Employer in the position of Groundsman. Claimant earned between $14.00 and $15.00 per hour. One or two months after his date of hire Claimant was promoted to a Trimmer D and then in late 2014 or early 2015 he was promoted to a Trimmer C. Each of Claimant's promotions included a raise in his hourly rate of pay. When Claimant was promoted to Trimmer C, he earned approximately $17.00 per hour. Claimant worked about 40 hours each week.

2. Claimant testified that on June 9, 2015 he was working with coworker Mario and foreman Justin to remove trees and debris near power structures in Sedalia, Colorado. Claimant explained that shortly after lunch he was walking towards his coworkers while carrying his chainsaw and supplies. Claimant slipped, fell and landed on his tailbone. He immediately experienced pain in his tailbone area as well as tingling in his legs. Claimant estimated he was approximately 300-400 yards away from his coworkers when he fell.

3. Claimant explained that he told Justin that he had fallen and was injured. Justin descended the tree on which he had been working in order to assist Claimant. Justin contacted General Foreman Frank Calhoun by telephone and inquired about

possible medical treatment for Claimant. Mr. Calhoun instructed Justin to have Claimant wait at the jobsite until he arrived to take Claimant to a doctor.

4. Claimant sat and waited for Mr. Calhoun for approximately four hours before he arrived at approximately 5:00 p.m. Claimant testified that Mr. Calhoun offered to take him to a physician. However, Claimant responded that he could not go with him to seek immediate medical care because he had to go home and care for his dog. Claimant commented that he always let his dog out at the end of the day because there was no one else in his household. He thus notified Mr. Calhoun of his intention to seek medical care after letting his dog out. Mr. Calhoun did not provide Claimant with any information regarding where to seek medical care. At no point did Respondents provide Claimant with any information about where to obtain medical treatment.

5. After Claimant arrived home and checked on his dog he visited a Nextcare Urgent Care facility near his home in Golden, Colorado for medical treatment. The medical record reflects that Claimant fell while carrying his chainsaw and attempting to step over a log when working for Employer. Erick Gomer, M.D, conducted a physical examination and took x-rays of Claimant's coccyx. The x-rays did not reveal any acute fractures. He determined that the objective findings upon examination were consistent with a work-related mechanism of injury. Dr. Gomer prescribed medications, took Claimant off work completely from June 10-11, 2015 and assigned modified duty employment until June 23, 2015.

6. Dr. Gomer assigned Claimant lifting, carrying, climbing and squatting restrictions. Claimant testified that the restrictions were never lifted. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and unable to earn wages since his date of injury. Claimant noted that he has not received benefits or wages from any source since June 9, 2015.

7. Claimant subsequently received follow-up treatment and physical therapy through Nextcare. He was diagnosed with an injury to the coccyx and received a sacral doughnut pillow for sitting. In a June 15, 2015 telephone visit, Dr. Gomer specifically diagnosed Claimant with a work-related sacral contusion, sacral pain and coccydynia. After June 26, 2015 medical treatment through Nextcare ceased because Respondents denied Claimant's Workers' Compensation claim.

8. Claimant explained that, because of the denial of his claim, inability to work and earn wages, he could not continue to pay rent in Colorado. He thus moved to California to live with family. On August 6, 2015 Claimant's counsel filed a Notice of Change of Address reflecting Claimant's out-of-state move. Respondents have not designated a California Authorized Treating Physician (ATP) for Claimant. Claimant has thus not obtained medical treatment in California for his June 9, 2015 injuries. He noted that he still suffers substantial pain involving his hip and buttocks/tailbone area.

9. Claimant commented that prior to his June 9, 2015 accident he had never suffered from an injury or illness involving his hip or buttocks/tailbone. Claimant's discovery responses reflect that he was involved in motor vehicle accidents in 2007 and

again in 2011 that involved injuries to his back. Claimant explained that he received some medical treatment and physical therapy for each of the injuries including emergency examination and physical therapy. The treatment was minimal and he was no longer receiving care for either of the injuries at the time of his June 9, 2015 work incident.

10. Claimant has established that it is more probably true than not that he suffered compensable injuries on June 9, 2015 during the course and scope of his employment with Employer. Claimant credibly explained that on June 9, 2015 he was working to remove trees and debris near power structures in Sedalia, Colorado. Shortly after lunch he was walking towards his coworkers while carrying his chainsaw and supplies. Claimant attempted to step over a log and slipped. He fell to the ground and landed on his tailbone. Claimant immediately experienced pain in his tailbone area and tingling in his legs. Dr. Gomer diagnosed Claimant with a work-related sacral contusion, sacral pain and coccydynia. Claimant's credible testimony in conjunction with the consistent medical records reveal that Claimant injured his tailbone area while performing his job duties for Employer.

11. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Although Claimant initially declined medical care, he notified Mr. Calhoun of his intention to seek medical care after letting his dog out. On the evening of June 9, 2015 Claimant sought emergency treatment at Nextcare. He continued to receive medical treatment through Nextcare until treatment ceased after June 26, 2015. At no point did Employer provide Claimant with any information about where to obtain medical treatment. Specifically, Employer never provided Claimant with a written list of at least two designated medical providers. The right to select a physician thus passed to Claimant. Accordingly, the treatment Claimant received at Nextcare was authorized, reasonable and necessary to cure or relieve the effects of his June 9, 2015 industrial injuries.

.12. Claimant has established that it is more probably true than not that the right of medical selection passed to him because Respondents failed to designate a medical provider. On August 6, 2015 Claimant informed Respondents that he had relocated to California. When Claimant moved to California, Respondents had a duty to designate a medical provider because it had some knowledge of facts that would lead a reasonably conscientious respondent to believe that Claimant was relocating and would require treatment in California. However, Respondents failed to designate a new ATP in California. The right of selection has thus passed to Claimant.

13. Claimant received a promotion and pay raise in approximately late 2014 or early 2015. The best method for calculating Claimant's AWW to ascertain his diminished earning capacity is to consider the wages he earned after receiving his raise. Considering the dates from January 3, 2015 through May 30, 2015 yields an AWW of $643.03. An AWW of $643.03 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

14. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period June 9, 2015 until terminated by statute. On June 9, 2015 Dr. Gomer assigned Claimant lifting, carrying, climbing and squatting restrictions. Claimant testified that the restrictions were never lifted. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and has not earned any wages since June 9, 2015. Claimant's industrial injury caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached Maximum Medical Improvement (MMI) and has been unable to return to regular work due to the effects of his June 9, 2015 industrial injury.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries on June 9, 2015 during the course and scope of his employment with Employer. Claimant credibly explained that on June 9, 2015 he was working to remove trees and debris near power structures in Sedalia, Colorado. Shortly after lunch he was walking towards his coworkers while carrying his chainsaw and supplies. Claimant attempted to step over a log and slipped. He fell to the ground and landed on his tailbone. Claimant immediately experienced pain in his tailbone area and tingling in his legs. Dr. Gomer diagnosed Claimant with a work-related sacral contusion, sacral pain and coccydynia. Claimant's credible testimony in conjunction with the consistent medical records reveal that Claimant injured his tailbone area while performing his job duties for Employer.

Medical Benefits

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

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Although Claimant initially declined medical care, he notified Mr. Calhoun of his intention to seek medical care after letting his dog out. On the evening of June 9, 2015 Claimant sought emergency treatment at Nextcare. He continued to receive medical treatment through Nextcare until treatment ceased after June 26, 2015. At no point did Employer provide Claimant with any information about where to obtain medical treatment. Specifically, Employer never provided Claimant with a written list of at least two designated medical providers. The right to select a physician thus passed to Claimant. Accordingly, the treatment Claimant received at Nextcare was authorized, reasonable and necessary to cure or relieve the effects of his June 9, 2015 industrial injuries.

Right of Selection

9. 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(D) 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).

10. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

11. A respondent's duty to designate a medical provider when a claimant moves to another state is triggered when the respondent has some knowledge of facts that would lead a reasonably conscientious manager to believe the claimant was relocating and would require continuing medical treatment. *See Bunch*, 148 P.3d at 383.; *In Re Ries,* W.C. No. 4-674-408 (ICAP, Jan. 12, 2011). The resolution of whether a respondent has timely fulfilled its duty to designate a medical provider in another state is one of fact for resolution by an ALJ. *See Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997); *In Re Ries,* W.C. No. 4-674-408 (ICAP, Jan. 12, 2011).

12. As found, Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to designate a medical provider. On August 6, 2015 Claimant informed Respondents that he had relocated to California. When Claimant moved to California, Respondents had a duty to designate a medical provider because it had some knowledge of facts that would lead a reasonably conscientious respondent to believe that Claimant was relocating and would require treatment in California. However, Respondents failed to designate a new ATP in California. The right of selection has thus passed to Claimant.

AWW

13. 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).

14. As found, Claimant received a promotion and pay raise in approximately late 2014 or early 2015. The best method for calculating Claimant's AWW to ascertain his diminished earning capacity is to consider the wages he earned after receiving his raise. Considering the dates from January 3, 2015 through May 30, 2015 yields an AWW of $643.03. An AWW of $643.03 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

TTD Benefits

15. 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). Temporary disability benefits continue until the occurrence of one of the four terminating events specified in §8-42-105(3), C.R.S. *PDM Molding, Inc.*, 898 P.2d at 549-50.

16. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period June 9, 2015 until terminated by statute. On June 9, 2015 Dr. Gomer assigned Claimant lifting, carrying, climbing and squatting restrictions. Claimant testified that the restrictions were never lifted. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and has

not earned any wages since June 9, 2015. Claimant's industrial injury caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached MMI and has been unable to return to regular work due to the effects of his June 9, 2015 industrial injury.

ORDER

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

1. Claimant suffered compensable injuries during the course and scope of his employment with Employer on June 9, 2015.

2. Respondents are financially responsible for the medical treatment Claimant received at Nextcare following his June 9, 2015 industrial injuries.

3. The right of selection to choose a California ATP passed to Claimant. Respondents shall pay for reasonable and necessary medical treatment designed to cure and relieve the effects of Claimant's June 9, 2015 industrial injuries.

4. Claimant earned an AWW of $643.03.

5. Respondents shall pay Claimant TTD benefits for the period June 9, 2015 until terminated by statute.

6. 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: December 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

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ISSUES

The issues to be determined were:

1. Whether the claimant established by a preponderance of the evidence that he suffered a compensable injury on June 8, 2015 arising out of and in the course of his employment with the respondent-employer; and,

2. If so, whether the claimant has established by a preponderance of the evidence that he received authorized medical treatment that was reasonable and necessary to cure and relieve him from the effects of his industrial injury.

FINDINGS OF FACT

1. The claimant has been employed by the respondent-employer as a nurse since April 18, 2011.

2. On May 26, 2015, the claimant called off of work from the respondent-employer because he could not lift his left arm. That day, Ms. Cynthia Miller, the claimant's operating room director, called the claimant to see how he was doing and to find out if something occurred at work that contributed to his condition. The claimant told Ms. Miller he had neck and left arm issues, he was not injured at work, he was going to see his personal physician, and after seeing that physician he would let Ms. Miller know if he would be able to work the following day.

3. The claimant sought medical care from Matthew Furman, D.O. In a report dated May 26, 2015, Dr. Furman reported that the claimant had neck pain, left shoulder pain, numbness down his left arm to his pinky, and upper thoracic pain. Dr. Furman diagnosed the claimant as having cervical radiculopathy. Dr. Furman administered a C6-7 epidural steroid injection, and post injection osteopathic manipulation.

4. Despite the injection, the claimant had to take a second day off of work. The claimant returned to work on May 28, 2015. When the claimant saw Ms. Miller on May 28, 2015, he told her he was doing better.

5. On Monday June 8, 2015, the claimant was working in the operating room, helping position a patient, when he felt a small pop in his neck and upper back. The claimant experienced pain in his left scapula and neck, and he experienced numbness down his left arm into his fingers.

6. Following this incident, the claimant continued to work full duty on June 8, 2015, and he also worked full duty on June 9, 2015, and June 10, 2015. The claimant did not report an injury or seek medical care on those dates.

7. On June 11, 2015, the claimant woke up with left scapular pain and neck pain, he took a shower, and the claimant reported that the shower "set something off." The claimant called the respondent-employer to call off of work and to report a claim, and he was asked to come to work to complete workers' compensation paperwork.

8. Later that morning, the claimant met with Ms. April Baudino, the claimant's direct supervisor, Ms. Miller, and Ms. Tisha DeNiro, an employee health nurse for the respondent-employer, who handled the respondent-employer's workers' compensation claims. The claimant completed workers' compensation claim paperwork at that time. The claimant was given a designated provider list, and he chose Terrance Lakin, D.O., at Southern Colorado Clinic as his designated provider because Dr. Lakin was able to see him that day.

9. On June 11, 2015, Dr. Lakin obtained a medical history and examined the claimant. Dr. Lakin noted that the claimant reported that his neck popped on Monday, June 8, 2015, but that he awoke the morning of June 11, 2015 and was unable to move his neck. Dr. Lakin obtained a cervical x-ray which showed significant narrowing at C6-7, and significant degeneration at C6 and C7. Dr. Lakin reviewed Dr. Furman's May 26, 2015 report and findings, and documented those findings within his report. The claimant admitted to Dr. Lakin that he had similar symptoms prior to June 8, 2015, that he had received an ESI at C6-7, but he claimed he became pain free on Friday, June 5, 2015, just three days before the work incident.

10. On June 11, 2015, after taking the claimant's history and clinical findings into consideration, Dr. Lakin opined that ". . . with (his) history and presentation this appears to be exacerbation of pre-existing condition with delay in acute onset, would not be considered specificly (sic) work comp injury."

11. After being told that he did not have a work related injury, and that he would need to seek care outside of the workers' compensation system, the claimant set an appointment to be seen by his colleague, Jan Davis, M.D. that same day. Dr. Davis

works with the claimant at the respondent-employer, and they have a close working relationship. In a report dated June 11, 2015, Dr. Davis documented that the claimant had an onset of symptoms on June 8, 2015 after positioning a patient at work. There is no indication that Dr. Davis was aware that the claimant had similar symptoms on May 26, 2015, that the claimant was previously diagnosed with cervical radiculopathy, or that the claimant had a cervical ESI two weeks earlier. Dr. Davis' assessment was cervical radiculopathy. He ordered a cervical MRI, and he asked the claimant to follow-up with him after the cervical MRI.

12. On June 12, 2015, the claimant had cervical spine x-ray, and thoracic spine x-rays. The cervical spine x-ray series was read as showing diffuse degenerative changes and moderately severe neural foraminal stenosis at C6-7, and Grade 1 anterolisthesis of C5 on C6. The thoracic x-rays were read as showing diffuse degenerative disc disease, disc bulges and osteophytes, resulting in mild to moderate central spinal stenosis, and moderately severe left neural foraminal stenosis.

13. On June 13, 2015, the claimant underwent a cervical CT scan, which Dr. Volk reported as showing an anterior C5 subluxation, mild focal C5-6 kyphosis, and moderate-sized osteophytes extending around the C5-6, 6-7 and C7-T1.

14. The claimant's June 15, 2015 cervical MRI was compared to the June 13, 2015 cervical CT scan, and read by Dean Volk, M.D., as showing (1) severe bilateral C6-7 and moderate left C7-T1, bilateral C5-6, bilateral C4-5, and right C3-4 neural foraminal stenosis, (2) cervical spinal canal stenoses were moderate at C5-6 and mild at C3-4, C4-5, C6-7 and C7-T11, (3) left sided C7-T1 lateral recess stenosis may be effecting the C8 nerve roots, and (4) diffuse cervical intervertebral disc degeneration moderate at C5-6, C6-7, and C7-T11, and (5) degenerative mild anterior C5 subluxation. Dr. Volk did not characterize any of these findings as acute.

15. On June 29, 2015, Dr. Davis reviewed the cervical CT, and reported that he thought the claimant's C7-T1 neural foraminal stenosis was the result of an acute herniation, disagreeing with Dr. Volk's interpretation that this was a chronic disc osteophyte complex. Dr. Davis did not provide a causation opinion as to when or how the alleged herniation occurred.

16. Dr. Davis inaccurately noted that the onset of the claimant's cervical radiculopathy symptoms was June 8, 2015. Dr. Davis makes no mention of the claimant's prior cervical radiculopathy diagnosis and care. To the extent Dr. Davis' report can be interpreted as providing an opinion that the claimant's issues were related

to the June 8, 2015 incident, his opinion is based upon incomplete and inaccurate information, and is rejected as unpersuasive.

17. On September 2, 2015, Dr. F. Mark Paz issued a record review IME report. Within his report, Dr. Paz documented the medical records and employment records he reviewed as part of his IME. At that time, Dr. Paz did not have copies of Dr. Davis' reports, nor Dr. Furman's May 26, 2015 report, but he did have Dr. Lakin's June 11, 2015 report within which Dr. Furman's report and care was discussed. He also had access to the claimant's cervical and thoracic x-ray reports, cervical CT scan report, and cervical MRI report.

18. Dr. Paz opined it is not medically probable that the claimant's cervical degenerative disc disease at C6-7 and left sided radiculopathy were causally related to the June 8, 2015 event. Under the heading "Causation Analysis", Dr. Paz opined and explained:

> Based on reasonable medical probability, it is not medically probable that the June 8, 2015 reported event, is the etiology of the left-sided cervical radiculopathy. The left-sided cervical radiculopathy was a pre-existing condition. In addition, based on reasonable medical probability, it is not medically probable that the June 8, 2015, reported event aggravated or accelerated the pre-existing cervical radiculopathy.
>
> The etiology of the left-sided cervical radiculopathy symptoms which were treated on May 26, 2015, are not documented to have been associated with a traumatic event, a lifting event, or activities of daily living. The symptoms which developed prior to, and were treated on May 26, 2015, were a result of the natural history and evolution of cervical degenerative disc disease and degenerative joint disease of the cervical spine.
>
> [The claimant] documented that he was assisting with at least one coworker, if not more, to transition a 130 pound patient in bed. In my medical opinion, the documented physical activity reported to have occurred on June 8, 2015, is inconsistent with a mechanism of injury which is medically probable to have aggravated or accelerated the preexisting C6-7 cervical spine foraminal stenosis. In addition, predictably, the natural history of cervical spine degenerative disc disease and degenerative joint disease will continue to evolve and deteriorate. This is further emphasized given the advanced stages of the thoracic and cervical degenerative disc disease and degenerative joint disease evident on radiographic imaging.

19. After the issuance of his September 2, 2015 report, Dr. Paz was provided, and reviewed, Dr. Furman's May 26, 2015 records, Dr. Davis' medical reports, the claimant's interrogatory answers, and the actual cervical and thoracic imaging. Dr. Paz also heard the testimony of the claimant, Ms. Miller, and Ms. DeNiro. Dr. Paz opined that based upon his review of the new materials, and with consideration of the hearing testimony, it remained his opinion that the claimant's left sided cervical radiculopathy and need for medical care was preexisting, and not related to the June 8, 2015 incident. Dr. Paz opined the June 8, 2015 incident did not cause, aggravate or accelerated the preexisting condition.

20. Dr. Paz did not agree with Dr. Davis' interpretation of the cervical MRI as showing an acute herniation, and he noted that even if Dr. Davis was correct, he would not conclude the herniation was related to the June 8, 2015 incident, as the claimant had symptoms consistent with cervical radiculopathy prior to June 8, 2015. He noted that the cervical CT scan suggested the problem was not acute, and was longstanding, and related to the osteophyte complex. Dr. Paz's opinions, which were stated to a reasonable degree of medical probability, are supported by the great weight of the evidence, and are credible and persuasive.

21. The ALJ finds the opinions and analyses of Dr. Paz to be credible and more persuasive than medical opinions to the contrary.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury on June 8, 2015 arising out of and in the course of his employment with the respondent-employer.

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."). 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).

2. 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).

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. 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).

5. 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).

6. 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).

7. 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).

8. The ALJ concludes that Dr. Paz's analyses and opinions are credible and more persuasive than analyses and opinions to the contrary.

9. As found above, the claimant has failed to establish by a preponderance of the evidence that on or about June 8, 2015 he sustained a compensable injury arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

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

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

DATE: December 21, 2015

/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 sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his work-related injuries.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 15, 2015 until terminated by statute.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is a 56 year old male who has worked for Employer as a Cement Truck Driver for approximately 15 years. His job duties involved driving a truck equipped with an auxiliary concrete mixer to deliver concrete to job sites. Claimant explained that he operates an auger on his truck by pushing levers to release concrete into designated locations at job sites. He remarked that he frequently moved an approximately 100 pound cement chute into various positions to deliver cement from the mixer. Claimant also used a pneumatic tool to clean surfaces after cement deliveries to prevent material from hardening in the mixer and on the truck.

2. Claimant testified that he earned $21.00 per hour and worked approximately 35-40 hours each week for a total AWW of $840.00. However, he noted that his position as a Cement Truck Driver was a seasonal job that typically began in late March and ended in late November. Claimant collected unemployment compensation benefits during the winter months when he was not working for Employer. Respondents thus assert that the period from January 1, 2015 through July 14, 2015 constitutes a more appropriate measure of Claimant's AWW. Respondents gross wages during the preceding period total $11,018.17. Dividing $11,018.17 by 27 and 6/7 weeks yields an AWW of $395.52. Respondents therefore contend that $395.52 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant suffered a previously admitted Workers' Compensation injury to his hands in 2014. He explained that his hand pain gradually migrated into his right shoulder area. On July 14, 2015 Claimant visited the University of Colorado Emergency

Room. He explained that he was suffering right shoulder pain that he attributed to his repetitive job duties. The pain began in his right hand and emanated through his wrist and elbow up to his right shoulder. Claimant was diagnosed with a possible right rotator cuff injury.

4. Claimant reported his injury to Employer and was directed to Concentra Medical Centers for an examination. On July 17, 2015 Claimant visited Concentra and reported progressively worsening right shoulder pain over the previous several weeks. Claimant was diagnosed with right shoulder pain and taken off of work.

5. On July 24, 2015 Claimant visited Authorized Treating Physician (ATP) Brian Counts, M.D. at Concentra for an examination. Claimant reported that he had been experiencing right shoulder pain since November 2014. Dr. Counts noted that Claimant "regularly mixes the concrete with vigorous use of the right arm and shoulder." He diagnosed Claimant with right shoulder pain and impingement syndrome. Dr. Counts recommended a right shoulder MRI. He explained that, because Claimant had not suffered any prior right shoulder problems, there was a greater than 50% probability that Claimant's work activities caused his right shoulder symptoms. Dr. Counts changed Claimant's work restrictions to occasional lifting up to one pound, no driving his company vehicle because of functional limitations and no lifting above the shoulders.

6. On August 3, 2015 Claimant underwent a right shoulder MRI. The MRI revealed mild supraspinatus and infraspinatus tendinosis.

7. On August 7, 2015 Claimant returned to Dr. Counts for an examination. Dr. Counts recounted that Claimant engages in mechanical work involving pneumatic scrapers with a significant vibratory component. He noted that the vibrations triggered Claimant's hand and shoulder pain. Dr. Counts also remarked that Claimant pulls an overhead lever twice on each stop with his concrete truck. He commented that pulling on the lever requires significant force. He stated that the MRI revealed a sprain of the inferior glenohumeral ligament anterior and inferior labral scuffing and tendinosis of the supraspinatus and infraspinatus tendons. He diagnosed Claimant with right shoulder pain, impingement syndrome and tendinitis.

8. On August 13, 2015 Claimant visited Orthopedic Surgeon Mark S. Failinger, M.D. for an evaluation. Claimant reported that he began experiencing right wrist pain in November 2014 that progressed into his elbow and right shoulder. He noted that in the previous five weeks it had been difficult to raise his right arm. Dr. Failinger reviewed Claimant's MRI and conducted a physical examination. He determined that Claimant suffered right shoulder range of motion deficits. Dr. Failinger diagnosed Claimant with adhesive capsulitis and expected his pain to decrease with stretching.

9. On September 21, 2015 Claimant underwent an independent medical examination with Jon M. Erickson, M.D. After reviewing Claimant's medical records and conducting a physical examination Dr. Erickson responded to several of Respondents' questions. He remarked that an MRI reflected objective evidence of a right shoulder

injury. Dr. Erickson determined that Claimant did not suffer an acute right shoulder injury at work but instead suffered an occupational disease based on 15 years of heavy-duty work for Employer. He specifically remarked that Claimant's job involves a great deal of extremely heavy lifting, pushing and pulling. Dr. Erickson also noted that Claimant was older, under-muscled and drove a type of truck that exposed him to occupational risk factors.

10. Dr. Erickson concluded that Claimant's right shoulder condition was caused by his occupational activities for Employer. He explained:

> It is my opinion, to a reasonable degree of medical probability, that 15 years of driving a cement truck, with repeated heavy overhead lifting and pulling, commonly involving awkward positions, coupled with repeated use of a heavy jackhammer, resulted in a cumulative trauma disorder to the right shoulder.

11. On November 7, 2015 Vocational Evaluator Joe Blythe performed a Job Demands Analysis. He assessed Claimant's work activities for purposes of quantifying the force and repetition involved. Mr. Blythe extrapolated his findings based on average workdays of 7.0, 8.0, 9.0 and 9.5 hours in length. He applied his data to the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5 Cumulative Trauma Conditions (*Guidelines*). The purpose of his evaluation was to obtain the correct measurements and data necessary to determine whether Claimant's work activities meet the criteria set forth in the *Guidelines*. Mr. Blythe observed one of Claimant's coworkers perform the job duties of a Cement Truck Driver over a five hour period and recorded the length of each activity.

12. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater. Finally, the *Guidelines* define a cold environment as one with an ambient temperature of less than 45 degrees for four hours or more "such as handling frozen foods that are 10 degrees."

13. Mr. Blythe drafted a vocational report evaluating the job site for primary and secondary risk factors for cumulative trauma. He did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He

noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture, repetition/duration (elbow flexion) and a cold working environment. Mr. Blythe concluded that in an 8.0 hour day Claimant would meet the force time risk factor only 1.94 hours per day or far less than the required six hours. Even in a 9.5-hour day the force measurement only reached 2.3 hours per day. Similarly, Mr. Blythe concluded that in an 8.0-hour day Claimant would meet the elbow flexion risk factor only 58.4 minutes per day or far less than the required six hours. Even in a 9.5 hour workday the elbow flexion measurement only reached 1.2 hours each day. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Finally, cold working environment was a potential risk factor because Claimant averaged 54% of his time or 4.32 hours of an eight hour workday in a cold environment based on mean temperatures for Denver, Colorado. However, Claimant explained that his position as a Cement Truck Driver is a seasonal job that typically begins in late March and ends in late November. He thus does not typically work for Employer during the colder months. Accordingly, although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration.

14. On November 11, 2015 Dr. Erickson issued an addendum report to his initial independent medical examination after reviewing Mr. Blythe's job demands analysis. He remarked that Mr. Blythe's report adequately analyzed all aspects of Claimant's job duties. Dr. Erickson explained that Mr. Blythe considered Claimant's work activities against various occupational risk factors including force and repetition, awkward posture and repetition, computer work, use of vibratory power tools and a cold working environment. He summarized that none of the occupational risk factors applied to Claimant. Dr. Erickson concluded that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. He noted that "it is quite clear that [Claimant] may have overstated the strenuous nature of his occupation, which caused me to conclude that his right shoulder difficulties are work-related." Dr. Erickson commented that Mr. Blythe's job demands analysis forced him to alter his conclusion. He thus summarized that Claimant's right shoulder symptoms "are much more likely due to non-occupational risk factors than his work activities as a cement truck driver." The non-occupational risk factors included Claimant's age, smoking history, comorbidity in the form of CREST syndrome, the hooked nature of his acromion and psychosocial factors.

15. Dr. Erickson testified at the hearing in this matter consistently with his addendum report. He explained that he initially relied on Claimant's representations of his job duties in concluding that Claimant suffered a work-related occupational disease to his right shoulder. However, relying on Mr. Blythe's comprehensive job analysis, Dr. Erickson determined that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. .Specifically, Claimant did not use a jackhammer and did not perform as much shoveling as Dr. Erickson originally believed. Although Claimant engaged in forceful activities at times in his job, his duties did not meet the minimum threshold of force, repetition and duration

to develop right shoulder pathology. Dr. Erickson concluded that Claimant's MRI reflected that his right shoulder condition was consistent with the natural degenerative process rather than an occupational exposure.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of his employment with Employer. Although Claimant attributed his symptoms to his work activities, a review of his job duties as a Cement Truck Driver reflects that they lacked the requisite force or repetition to cause his symptoms. Claimant engaged in a variety of tasks throughout each shift. The persuasive reports and testimony of Mr. Blythe and Dr. Erickson reveal that, although Claimant engaged in some forceful activities, his job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

17. Mr. Blythe drafted a vocational report evaluating the job site for primary and secondary risk factors for cumulative trauma. He did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time), awkward posture, repetition/duration (elbow flexion) and a cold working environment. Mr. Blythe concluded that even in a 9.5-hour day the force measurement only reached 2.3 hours per day. Similarly, Mr. Blythe concluded that in a 9.5 hour workday the elbow flexion measurement only reached 1.2 hours each day. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Finally, cold working environment was a potential risk factor because Claimant averaged 54% of his time or 4.32 hours of an eight hour workday in a cold environment based on mean temperatures for Denver, Colorado. However, Claimant explained that his position as a Cement Truck Driver is a seasonal job that typically begins in late March and ends in late November. He thus does not typically work for Employer during the colder months. Accordingly, although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration.

18. Dr. Erickson initially concluded that Claimant's right shoulder condition was caused by his occupational activities for Employer. He noted that Claimant's job involved a great deal of extremely heavy lifting, pushing and pulling over a period of 15 years. Dr. Erickson was under the impression that Claimant repeatedly used a jackhammer to perform his job duties and did not have Mr. Blythe's report detailing the duration, force and repetition of Claimant's job activities.

19. Dr. Erickson subsequently issued an addendum report to his initial independent medical examination after reviewing Mr. Blythe's job demands analysis. He remarked that Mr. Blythe's report adequately analyzed all aspects of Claimant's job duties. Dr. Erickson explained that Mr. Blythe considered Claimant's work activities against various occupational risk factors including force and repetition, awkward posture and repetition, computer work, use of vibratory power tools and a cold working environment. He summarized that none of the occupational risk factors applied to

Claimant. Dr. Erickson concluded that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. He noted that "it is quite clear that [Claimant] may have overstated the strenuous nature of his occupation, which caused me to conclude that his right shoulder difficulties are work-related." He summarized that Claimant's right shoulder symptoms were much more likely related to non-occupational risk factors.

20. In contrast, ATP Dr. Counts explained that, because Claimant had not suffered any prior right shoulder problems, there was a greater than 50% probability that Claimant's work activities caused his right shoulder symptoms. However, Dr. Counts did not conduct a causation analysis pursuant to Rule 17, Exhibit 5 of the *Guidelines*. Furthermore, Dr. Counts did not consider the jobs demands analysis performed by Mr. Blythe in reaching his conclusion. The record reflects that, although Claimant engaged in forceful activities at times in his job, his duties did not meet the minimum threshold of force, repetition and duration to develop right shoulder pathology pursuant to the *Guidelines.* Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

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

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

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the

development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. Rule 17, Exhibit 4 specifically includes factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of his employment with Employer. Although Claimant attributed his symptoms to his work activities, a review of his job duties as a Cement Truck Driver reflects that they lacked the requisite force or repetition to cause his symptoms. Claimant engaged in a variety of tasks throughout each shift. The persuasive reports and testimony of Mr. Blythe and Dr. Erickson reveal that, although Claimant engaged in some forceful activities, his job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

10. As found, Mr. Blythe drafted a vocational report evaluating the job site for primary and secondary risk factors for cumulative trauma. He did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time), awkward posture, repetition/duration (elbow flexion) and a cold working environment. Mr. Blythe concluded that even in a 9.5-hour day the force measurement only reached 2.3 hours per day. Similarly, Mr. Blythe concluded that in a 9.5 hour workday the elbow flexion measurement only reached 1.2 hours each day. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Finally, cold working environment was a potential risk factor because Claimant averaged 54% of his time or 4.32 hours of an eight hour workday in a cold environment based on mean temperatures for Denver, Colorado. However, Claimant explained that his position as a Cement Truck Driver is a seasonal job that typically begins in late March and ends in late November. He thus does not typically work for Employer during the colder months. Accordingly, although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration.

11. As found, Dr. Erickson initially concluded that Claimant's right shoulder condition was caused by his occupational activities for Employer. He noted that

Claimant's job involved a great deal of extremely heavy lifting, pushing and pulling over a period of 15 years. Dr. Erickson was under the impression that Claimant repeatedly used a jackhammer to perform his job duties and did not have Mr. Blythe's report detailing the duration, force and repetition of Claimant's job activities.

12. As found, Dr. Erickson subsequently issued an addendum report to his initial independent medical examination after reviewing Mr. Blythe's job demands analysis. He remarked that Mr. Blythe's report adequately analyzed all aspects of Claimant's job duties. Dr. Erickson explained that Mr. Blythe considered Claimant's work activities against various occupational risk factors including force and repetition, awkward posture and repetition, computer work, use of vibratory power tools and a cold working environment. He summarized that none of the occupational risk factors applied to Claimant. Dr. Erickson concluded that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. He noted that "it is quite clear that [Claimant] may have overstated the strenuous nature of his occupation, which caused me to conclude that his right shoulder difficulties are work-related." He summarized that Claimant's right shoulder symptoms were much more likely related to non-occupational risk factors.

13. As found, in contrast, ATP Dr. Counts explained that, because Claimant had not suffered any prior right shoulder problems, there was a greater than 50% probability that Claimant's work activities caused his right shoulder symptoms. However, Dr. Counts did not conduct a causation analysis pursuant to Rule 17, Exhibit 5 of the *Guidelines*. Furthermore, Dr. Counts did not consider the jobs demands analysis performed by Mr. Blythe in reaching his conclusion. The record reflects that, although Claimant engaged in forceful activities at times in his job, his duties did not meet the minimum threshold of force, repetition and duration to develop right shoulder pathology pursuant to the *Guidelines.* Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-*

070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 22, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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ISSUES

1. Whether the claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with the respondent-employer;

2. If so, whether she is entitled to any and all reasonable and necessary medical benefits for her compensable injury; and,

3. If so, whether the treatment rendered at CCOM is reasonable and necessary medical treatment for the compensable injury.

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

FINDINGS OF FACT

1. The claimant is a case worker manager for the respondent-employer. The claimant is a professional who, in turn, supervises professionals.

2. The essential functions of the claimant's job duties include:

   a. Supervise a full range of intake and ongoing social case work services for a variety of programs.

   b. Supervise a service area consisting of support units, staffed by professional social case workers and paraprofessionals.

   c. Oversee staff scheduling.

   d. Conduct individual group conferences to set and monitor deadlines.

   e. Establish unit goals and tables.

   f. Meet with administration as needed to participate in program meetings.

g. Organize the work within the unit to assure coverage and efficiency in case load handling.

h. Oversee the budget.

i. Determine the resources required to achieve the goals of the unit.

j. Provide written and verbal instructions to subordinates of program issues.

k. Meet with workers individually and in groups to explain rules, policies, procedures, and laws.

l. Monitor the work of subordinates and review the work of the total unit's effectiveness with regards to plans and programs.

m. Train social workers.

n. Review the performance of workers on a periodic basis and complete their annual performance reviews.

3. The claimant is not considered a word processor or an individual who does nothing but perform data entry.

4. The claimant also described a special project that she performed from January 2015 through May 2015. According to the claimant, this project required her to review numerous disks in preparation for a court proceeding. Specifically, the claimant was required to review these disks on the computer, and, because she is a professional, analyze the information on the disks.

5. According to the Employer's First Report of Injury completed by the claimant, the claimant complained that she developed bilateral upper extremity wrist pain as a result of her work activities. The claimant reported that the onset of these symptoms began on July 21, 2015.

6. Following the report of the injury, the claimant was referred to Emergicare and was seen by Dr. Bradley as the authorized treating physician. Dr. Bradley eventually referred the claimant to Dr. Primack for an evaluation. Dr. Primack indicated that he had spoken with Dr. Bradley subsequent to the referral to ascertain the purposes of the evaluation. Dr. Primack reported that Dr. Bradley was requesting a causality analysis of the claimant's upper extremity complaints.

7. As part of her treatment, the claimant had an MRI performed of her right wrist on August 24, 2015. The MRI revealed that there was no tendon sheath fluid collection. The MRI did reveal that there were three compartment joint effusions identified in the wrist.

8. On August 6, 2015, Sara Nowotny, a qualified rehabilitation counselor, performed a job analysis of the claimant's position. A job analyses is a report to provide a quantitative, accurate assessment of the physical demands of the job, either for assessing risk factors, return to work, or ergonomic considerations. With regards to the job analysis that she performed of the claimant's position, Ms. Nowotny obtained the information about the claimant's essential job functions directly from the claimant. Prior to the evaluation, Ms. Nowotny explained to the claimant that the purpose of the evaluation was to determine the physical demands of her occupation. The claimant also testified as to the job analysis evaluation. The claimant acknowledged that Ms. Nowotny asked questions to her about what the claimant did in her job. The claimant acknowledged that she provided honest, accurate information to Ms. Nowotny during this job evaluation. Ms. Nowotny spent over one hour of time questioning the claimant concerning her general work activities.

9. Ms. Nowotny was of the opinion that her job analysis accurately described the physical requirements of the claimant's general work activities.

10. The ALJ finds Ms. Nowotny to be credible and persuasive concerning the functions of the claimant's position with the respondent-employer.

11. As identified by the claimant in her job analysis, the following represent the essential functions of her job as a case worker manager:

a. Participate in staff, supervisory, and community meetings (approximately 10, one to one and a half hour meetings per week) (20-25% of work activity).

b. Process referrals on the computer (25% of work activity).

c. Case/document review, consisting of answering complaints in person, by telephone, or by computer (20-25% of work activity).

d. Attend home visits (1-3 times per month), including driving 30-50 miles a month.

e. Distributing mail by placing paperwork in employee bins outside of their cubicle (5-10% of work activity).

f. Attend court hearings (4-5 times per month) (10% of work activity).

12. According to the job analysis completed by the claimant and Sara Nowotny, the following represents the claimant's job tasks and corresponding physical demands:

a. Meeting attendance – involving taking notes by hand 2-3 pages per hour per meeting.

b. Processing referrals on computers – reviewing information approving activities primarily with mouse operation.

c. Case/document review – read and review files to verify compliance with guidelines. May circle items for change and initial/date document. Places notes on files and returns to table for storage.

d. Home visit attendance – drive to residence and communicate with clients about services or concerns.

e. Mail distribution – may occur several times a day when pages of documentation are delivered around the office to bens next to cubicle.

f. Court hearing attendance – involving preparation of documents for presentation at hearing. Sitting and listening/participating in court proceedings.

13. Based on a combination of Ms. Nowotny's interview of the claimant, as well as her measurement and observation of work activities, Ms. Nowotny determined that, on average, the claimant uses her mouse 2.1 hours per day and uses a keyboard .35 hours per day.

14. Within the Medical Treatment Guidelines for the category of Cumulative Trauma Disorder, the Division has promulgated primary risk factors and secondary risk factors associated with Cumulative Trauma Disorders of the upper extremities. *W.C.R.P. 17, Exhibit 5, Section D.3.b.* The primary risk factors and the secondary risk factors identified in the Medical Treatment Guidelines are also listed in the claimant's job analysis. Based on Ms. Nowotny's professional experience, the claimant's work activities did not rise to the level of the presence of any of the primary risk factors and secondary risk factors listed in the Medical Treatment Guidelines.

15. The ALJ finds that the claimant's testimony is consistent with the August 6, 2015 job analysis completed by the claimant and Ms. Nowotny. The claimant testified that the physical tasks that she performs vary from day to day. The claimant testified that although there are days where she may be required to mouse more than 6 hours

per day, she also stated that depending on her job functions on a particular day, she would be mousing significantly less that day, or not at all.

16. The claimant was evaluated by Dr. Primack on September 8, 2015. In his September 8, 2015 report, Dr. Primack noted that he had reviewed a "physical demands analysis." At hearing, Dr. Primack confirmed that the "physical demands analysis" that he reviewed was the job analysis performed by Sara Nowotny. In addition, Dr. Primack confirmed that the information identified in the section entitled "Right Upper Extremity" of page 2 of his report was information that he obtained directly from the job analysis. Dr. Primack opined in his September 8, 2015 report that the claimant's ongoing upper extremity problems were not related to her employment.

17. Dr. Primack provided testimony at hearing in explanation of his opinion. Dr. Primack noted that the August 24, 2015 MRI did not show any fluid along the tendons or within the tendon sheath. Although the MRI did show fluids in the wrist, the MRI did not show any fluid in the tendons, which would lead to the conclusion that the symptoms that the claimant is reporting are not because of repetitive motion. In addition, the MRI did not show that the claimant had any inflammation in the tendons of her hand. As a result, Dr. Primack was of the opinion that based on objective medical evidence the claimant did not have a pathology consistent with repetitive motion.

18. Dr. Primack was of the opinion that based on his review of the job analysis, the claimant did not have a sufficient amount of repetitive motion that would rise to the level of a compensable occupational disease. Dr. Primack testified that the job analysis indicated that the claimant had variability of job tasks. Dr. Primack noted that the claimant writes, she uses a computer, she talks, she walks, and does many other things throughout the day. Dr. Primack further testified that the variability of her tasks would result in different loads across her fingers, in different positions across her fingers, and also rest cycles. As it pertains to rest cycles, Dr. Primack noted that with the variability in tasks, the rest cycles in between the variability allows her tendons to rest. Because the tendons are allowed to rest, these tendons will not get inflamed, which is correlated with the MRI findings.

19. The claimant's counsel, during cross examination, suggested to Dr. Primack that the claimant's work activities aggravated her pre-existing de Quervain's tenosynovitis. However, Dr. Primack disagreed that the claimant properly carried the diagnosis of de Quervain's tenosynovitis. Specifically, Dr. Primack testified that in order to properly diagnose a person with de Quervain's tenosynovitis, the MRI must disclose fluids in the tendon, as well as different types of dimensions of the tendon to ascertain any changes in the size of tendons. Because the August 24, 2015 MRI did not show

these pathological findings, he reached the conclusion that the claimant did not have de Quervain's tenosynovitis. Even if the claimant did carry the diagnosis of de Quervain's tenosynovitis, Dr. Primack rendered the opinion that, because of the variability of tasks in the claimant's job activities, the claimant would not have the necessary force, load, and cycle necessary for her work activities to cause or aggravate her de Quervain's tenosynovitis.

20. The ALJ finds that Dr. Primack's analyses and opinions are credible and more persuasive than medical evidence to the contrary.

21. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant suffers from an occupational disease arising out of and occurring in the course of her employment with the respondent-employer.

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. 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.

2. 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.

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. Section 8-40-201(14) C.R.S. (2015) 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.

7. 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). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. The hazardous conditions of employment need not be the sole cause of the disease. The existence of a preexisting condition does not defeat a claim for an occupational disease unless it can be shown that a non-industrial cause was an equally exposing stimulus. A claimant is entitled to recovery if he or she demonstrates that the

hazards of employment cause, intensify or aggravate to some reasonable degree, the disability. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *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).

9. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

10. Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office*, N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

11. Of particular note in the Claimant's case, as this is a right upper extremity claim, is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

12. Rule 17, Exhibit 5 (D)(3) provides that,

> The clinician must determine if it is medically probable (greater than 50% likely or

> more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related.

13. The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation.

14. As outlined above, Ms. Nowotny spent an hour obtaining information from the claimant as to her job activities, and the physical demands of each of these job activities. The claimant confirmed that she provided accurate information to Ms. Nowotny during this evaluation.

15. The claimant testified that she needs to perform certain activities frequently and repetitively. However, the claimant also acknowledged that her job activities vary on a daily basis. The claimant also acknowledged that she is a professional, who is supervising professionals. The claimant is not a word processor, or someone that does nothing but data entry. The claimant reviews and analyzes information on a regular basis. Consequently, the claimant’s job is not a position where she is continuously performing repetitive activities of her upper extremities with any kind of force or duration.

16. As outlined above, Dr. Primack reviewed the job analyses and, based on the contents of the job analyses, did not believe that the claimant’s work activities rose to the level of a compensable occupational disease. As testified to by Dr. Primack, the basis of his opinion is multi-factorial.

17. Dr. Primack’s opinion is supported by the Medical Treatment Guidelines. The claimant does not meet any primary risk factors or secondary risk factors articulated in the Medical Treatment Guidelines.

18. The ALJ concludes that Ms. Nowotny is credible and persuasive.

19. The ALJ concludes that Dr. Primack's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

20. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffers from an occupational disease arising out of and in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

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

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

DATE: December 31, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant establish by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course and scope of her employment on December 23, 2014?

- If Claimant suffered a compensable injury, did she establish by a preponderance of the evidence that she is entitled to Temporary Total Disability benefits from December 23, 2014 and continuing?

- If compensable, what medical treatment is Claimant entitled to in order to cure and relieve the effects of the December 23, 2014 industrial injury?

FINDINGS OF FACT

1. Claimant initially started working for Employer as a temporary employee. She became a permanent employee after approximately six months in November, 2014. A new hire information packet was completed on or about November 11, 2014. Claimant's start date was December 2, 2014. Claimant's hourly pay rate was $9.00 per hour and it was a full-time position.

2. In this position, Claimant worked loading magazines into boxes that moved along a conveyor belt. Claimant testified that there were approximately 25 magazines in each box.

3. Claimant's medical history was significant in that she suffered a prior industrial injury to her low back on September 20, 2000 while employed for Metrex Research. Claimant confirmed that this injury occurred, but did not have a recollection concerning her treatment or whether she sustained a permanent medical impairment. This case was settled on a full and final basis.

4. Claimant also sustained injuries to her low back in a motor vehicle accident ("MVA") in 2008. She received treatment including physical therapy and injections for her 2008 injury.

5. An MRI of Claimant's low back was performed on May 9, 2008. The MRI showed degenerative disc disease at L4-5. No dural sac or root sleeve deformity was noted. The ALJ infers Claimant was having low back symptoms in 2008 which required the MRI scan to be performed.

6. Claimant testified that she could not recall her course of treatment, nor the symptoms she experienced in 2008. This undermined Claimant's credibility as she appeared evasive when questions concerning the MVA were posed.

7. Claimant stated that her job with Employer required her to frequently lift 25 pounds. She was occasionally required to lift between 25 and 50 pounds and occasionally lift more than 50 pounds. The job also required Claimant to frequently bend, squat down, stand and kneel, as well as occasionally reaching above her shoulder.

8. Claimant testified that the line was very heavy and the conveyor was moving fast on December 23, 2014, when she knelt down to pick up magazines to place in a box. She felt pain when she bent down and could not get up. The pain was in her back and went down her right leg. Claimant said she continued working with a back support and finished her shift. She notified her supervisor (Richard) that her back hurt, but did not specifically describe an injury. Claimant testified that Richard knew the loads were heavy.

9. Claimant went to work the next day (12/24/14), but could not continue. She testified that the line had to be stopped and the supervisor (Richard) sent her home. Claimant has not returned to work since that day. The ALJ notes that two time records from Employer were admitted into evidence, the first of which noted Claimant to be on a leave of absence as of 12/23/14 and the second which said the leave of absence began on 12/30/14.

10. Claimant thought it was 3 to 4 days before she received treatment. She testified that she went to the doctor, as she was not feeling well and was sent to Concentra by Employer. Claimant testified that she was not given a list of doctors. The ALJ infers that Concentra was the designated ATP for Employer.

11. Claimant completed a Report of Accident on January 30, 2015, which difficult to read. It said she was working on the main line and was lifting bundles in the totes when she was injured.

12. Claimant first went to Concentra Medical Center on December 30, 2014 and was evaluated by Lacie Esser, PA-C. Claimant reported that she was working quickly on an assembly line and developed back pain. She also had pain in her left arm and occasional numbness in her left hand. Claimant described the arm pain as going on "a long time". Claimant failed to give PA Esser a complete history, as she did not report the 2000 industrial injury, nor the 2008 MVA.

13. PA-C Esser recorded Claimant had tenderness at all levels of her lumbar spine-left and right paraspinal, left and right sciatica notch on examination. Exquisite tenderness to very light touch was noted and ROM testing could not be completed because of Claimant's pain complaints.

14. Claimant was given prescriptions and referred for physical therapy 2-3x/week for six visits. Claimant was also given restrictions of: may lift or push/pull up to 5 pounds occasionally; may bend, stand or engage in activities requiring trunk rotation occasionally; she was advised to change positions periodically and limited to mostly sedentary work and minimal bending at the waist.

15. An Employer's First Report of Injury was completed on or about January 6, 2015. The injury time was listed as 1:00 and noted that Claimant notified of the employer that same day. The description of the injury said Claimant was working as a tie-line picker and the injury occurred while she was up to the "in the main line and was lifting in the totes".

16. Claimant returned to PA-C Esser on January 26, 2015. At that time, she was having severe pain in her back, as well as pain going up her mid back and neck. Claimant had not attended PT for two (2) weeks. PA-C Esser's assessment was lumbar and cervical strain. She referred Claimant back to PT and renewed her prescriptions. Claimant's physical restrictions remained the same.

17. Claimant was evaluated by Kirk Holmboe, D.O. on February 9, 2015. She had complaints of pain in the lower back, with radiation into the upper lumbar area, along with increased pain with weight on her left foot. Claimant moved very slowly and had difficulty getting up from the chair.

18. Dr. Holmboe found very limited ROM in all planes and tenderness in the lower lumbar area. His assessment was lumbar strain. He continued Claimant's restrictions and made a referral to a massage therapist, along with a physical medicine and rehab physician referral.

19. Claimant was examined by Robert Kawasaki, M.D. on February 23, 2015, with complaints of low back pain. She described her injury to Dr. Kawasaki as the result of repeatedly lifting boxes over a period of time. Claimant stated that on December 23, 2014, she developed some pain in her chest and neck so she took a break. The ALJ notes these were new symptoms. She stated that she returned to work and began having increasing low back pain. Dr. Kawasaki noted "There did not appear to be a specific injury but increased pain from repetitive lifting." Claimant stated that she requested a lifting belt from a supervisor, which she was given, but it didn't really help.

20. On examination, Dr. Kawasaki noted that Claimant had significant pain behaviors including significant expression of pain with a light touch over the lumbar segments. It was also noted that she had an exaggerated antalgic gait pattern. "On neurologic examination, the patient has give-way pattern weakness with poor volitional effort on both sides."

21. Dr. Kawasaki's impressions included lumbar strain with poor core strength; significant pain behaviors and multiple Waddell signs seen; right lower extremity pain, numbness and tingling with radicular symptoms that were difficult to correlate; multiple red flags for non-physiologic nature of her injury-strong potential for

delayed recovery. He recommended an MRI and possible psychological evaluation for cognitive behavioral therapy.

22. Claimant was examined by PA Esser on March 2, 2015, at which time it was noted she was not doing well with a lot of pain in her low back and down her leg. PA-C Esser's assessment was lumbar and cervical strain. Claimant was noted to walk antalgically and had generalized exquisite tenderness. Claimant was to continue PT and reschedule missed massage therapy appointments

23. An MRI of the lumbar spine was done on March 18, 2015. The findings were normal lumbar alignment, no acute fracture seen. The impression by Charles Wennogle, M.D., who read the films, was L4-L5 minimal disc degeneration, mild to moderate bilateral facet arthropathy with facet articulation effusions, mild bilateral lateral recess and foraminal stenosis without nerve root deformity; L5-S1 mild disc degeneration with broad-based disc bulge and bilateral facet arthropathy, mild bilateral lateral recess and foraminal stenosis without nerve root deformity. The ALJ infers that the MRI showed degenerative changes in Claimant's lumbar spine, as opposed to an acute injury.

24. Dr. Holmboe examined Claimant on March 20, 2015 and noted that she still had back pain, but felt therapy had been helpful. Dr. Holmboe described her pain as "sharp" upon examination and he continued her treatment and work restrictions.

25. Claimant returned to Dr. Holmboe on April 17, 2015. Claimant reported pain at a 7/10 level- severe pain. Dr. Holmboe noted that Claimant sat on the edge of her chair with legs extended out in front of her. She had a cane and ambulated in a slow, guarded fashion. Dr. Holmboe's assessment was lumbar strain.

26. Claimant was seen on May 15, 2015 by Glenn Petersen, PA-C, who noted Claimant reported neck, lower back and right upper leg pain. Claimant reported pain at a 6/10 level-severe pain. PA Petersen stated "no therapy ordered as pt. not cooperating with therapist and trying to get better. Not cooperative with exam and unknown to me if pt. really has injury or not. F/U with provider who has followed pt." The note also indicated that MMI was anticipated in 1-2 months and Claimant was instructed to follow-up with Dr. Holmboe.

27. Dr. Kawasaki reevaluated Claimant on June 25, 2015. He noted that Claimant had some massage therapy, but none of his other recommendations from three (3) months prior were authorized. Claimant had an antalgic gait, as well as having some exaggerated gait patterns and exaggerated pain behaviors.

28. Dr. Kawasaki noted tenderness to palpation in the lower lumbar segments on the right side. His impressions were: lumbar strain with radicular symptoms down the right lower extremity; multiple Waddell signs and pain behaviors; multiple red flags of a non physiological nature and potential delayed recovery. Dr. Kawasaki recommended EMG/nerve conduction study the right lower extremity, a referral to

Walter Torres, Ph.D. for severe pain behaviors and a right L4-5 and L5-S1 transforaminal epidural steroid injection.

29. Claimant returned to Dr. Holmboe on June 5, 2015, reporting neck and back pain-7/10 in severity, self reported. Claimant stood up with some difficulty and had limited ROM of the lower back. Cyclobenzaprine was begun, along with Diclofenac. Claimant was to follow-up with Dr. Kawasaki.

30. Claimant was seen for an IME with Robert Larson, M.D. on August 20, 2015, which was requested by Respondents. Dr. Larson noted that Claimant subjectively reported pain with very minimal lumbar spine movement and she moved very slowly. Claimant had no lumbar spine flexion and limitations on extension.

31. Dr. Larson opined that Claimant did not have any documented anatomic injury. She had multiple non-physiologic signs/symptoms and did not require any specific treatment, diagnostic studies or interventions. Dr. Larson noted Claimant's symptoms did not appear to be related to a structural deficiency. He also believed that she was at maximum medical improvement without any ratable impairment.

32. Claimant was examined by John Hughes, M.D. on August 24, 2015 for an IME which was requested by her attorney. She told Dr. Hughes that on 12/23/14, she was lifting “heavy” packages of magazines into boxes and something was bothering her in the back. She experienced progressive pain as she worked that day. Dr. Hughes noted diffuse superficial touch tenderness throughout the low back. Claimant's active ranges of motion were restricted, particularly with regard to flexion.

33. Dr. Hughes’ assessment was past medical history of work-related and motor vehicle collision-related lumbar spine injuries with no documentation of permanent impairment existing prior to the work-related low back injury of December 23, 2014. Dr. Hughes felt Claimant had suffered a lumbar spine sprain/strain, with development of right lower extremity radicular symptoms, meriting further evaluation and treatment, as recommended by Dr. Kawasaki. He also diagnosed somataform pain disorder, which warranted further evaluation and treatment. Although he did not believe Claimant had reached MMI, he provided an estimate of permanent impairment, including a specific disorder impairment totaling 14% whole person.

34. Dr. Hughes issued a supplemental report on August 31, 2015, after he reviewed Dr. Larson's report. Dr. Hughes agreed with Dr. Larson's observations that Claimant manifested nonphysiologic signs on physical examination, noting that he documented the same. He stated these supported the diagnosis of somataform pain disorder. He disagreed with Dr. Larson that the presence of nonphysiologic signs merited dismissal of Claimant's injury claim. Dr. Hughes felt that Claimant's symptoms warranted medical treatment, which is why he endorsed the recommendations of Dr. Kawasaki.

35. Dr. Larson’s deposition was taken on September 24, 2015. Dr. Larson opined that Claimant did not suffer an injury while working. He testified that there was

no objective evidence of an injury, nor was there evidence to support Claimant's ongoing subjective complaints. This was consistent throughout the medical records. He also stated that her MRI showed degenerative changes and did not believe that the disc bulge at L4-5 represented an injury. Claimant's L5-S1 disc bulge with facet arthropathy was an arthritic change in this part of her spine. Dr. Larson noted that he could not complete range of motion studies, but this did not correlate to any structural injury, but rather a voluntary restriction on Claimant's part.

36. Dr. Larson also testified that Claimant's presentation was exaggerated and that the records did not support her pain allegations. Further, he noted that both Dr. Kawasaki and Dr. Holmboe agreed that Claimant's presentation had red flags. He disagreed with the treatment recommendations made because these were not supported by objective findings. He also found no basis for medical restrictions. The ALJ credited Dr. Larson's opinion that Claimant presentation did not support finding that she suffered an injury.

37. Claimant failed to prove by a preponderance of the evidence that she suffered an injury to her lumbar spine arising out of and in the course and scope of her employment on December 23, 2914

38. The evidence and inferences inconsistent with 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).

Compensability

Claimant alleged that she proved by a preponderance of the evidence that she suffered an industrial injury because she was performing her job duties of loading magazines into boxes on December 23, 2014. This caused her to experience symptoms in her low back. She argued that although she had previously hurt her low back, there was no evidence of any disability six (6) months before 12/23/14. She also argued that she had performed her job duties for that period of time and was not experiencing lumbar pain which required medical treatment.

Respondents contended that Claimant failed to prove she suffered a compensable injury. Respondents cited the report of Dr. Larson to support their contention that there was no objective evidence of an injury in this case. Respondents argued that Claimant was not a credible witness, noting there were multiple references in the medical records of exaggerated symptoms, inconsistent effort and the diagnosis of somatoform pain disorder from several providers.

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." *See CF & I Steel Corp. v. Industrial Commission,* 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

More particularly, the issue in this case is whether Claimant suffered an injury which aggravated , accelerated a preexisting condition. As a general rule, an injury is compensable if work activates, causes, aggravates, accelerates, or combines with nonindustrial factors to result in disability or the need for medical treatment. The mere existence of the pre-existing condition does not prevent the injury from "arising out of" the employment. *Merriman v. Industrial Comm'n*, 210 P.2d 448 (1949). Conversely, the mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the judge. *F.R. Orr Construction v. Ringa*, 717 P.2d 965 (Colo. App. 1985).

As found, Claimant failed to meet her burden of proof to show she suffered a compensable industrial injury. The ALJ had two primary bases for this determination.

First, Claimant's description of the alleged injury was not consistent. Sometimes she described a traumatic event, while other times she described a gradual onset of symptoms. Examples of the inconsistent description of the injury included:

- Clamant testified at hearing that on 12/23/14 she was injured while lifting magazines and felt such pain that she could not straighten up.

- However, when she first treated at Concentra, she told PA Esser that there was nothing different about that day of work.

- When Claimant was evaluated by Dr. Kawasaki, she told him that after working that day, she developed pain in her chest and neck. There did not appear to be a specific injury but increased pain from repetitive lifting.

- She told Dr. Larson that she had to bend down and squat to pick up packages to place then in boxes and felt pain. She felt strong pain in her back and could not move.

- She told Dr. Hughes that she would lift "heavy" packages of magazines into boxes and something was bothering her in the back. She experienced progressive pain as she worked that day.

In short, Claimant's description of the accident varied and was not consistent. Claimant's description her injury was different to PA Esser than what she told Dr. Kawasaki. This differed from what she described to Dr. Hughes, which varied from what she testified to at hearing. These variations undermined her credibility. In a case like this, where credibility is crucial, Claimant failed to persuade the ALJ that she suffered an injury which caused, aggravated or accelerated the condition of her low back.

Second, the medical evidence was replete with inconsistent and exaggerated symptoms reported by Claimant, as well as physical findings that did not correlate to an injury. This raised significant questions about whether Claimant was injured as alleged. Some examples included:

- 12/30/14: Claimant had exquisite tenderness to very light palpation at all levels of her lumbar spine-left and right paraspinal, left and right sciatica notch on examination. No range of motion testing performed because of pain. [PA Esser].

- 2/9/15: Claimant moved very slowly and difficulty getting up. Has very limited ROM in all planes and tender to the lower lumbar area. [Dr. Holmboe].[1]

[1] Dr. Holmboe also found extensive pain behaviors when he evaluated Claimant on 3/20/15, 4/17/15 and 6/5/15.

- 2/23/15: Claimant had tenderness to palpation in the lower lumbar segments on the right side,significant pain behaviors, multiple Waddell signs; multiple red flags for non physiolog nature of her injury- potential delayed recovery. [Dr. Kawasaki].[2]

- 5/15/15: Claimant was not cooperative with examination, reported pain in neck, back and leg. PA Petersen questioned whether she had an injury.

- 8/24/15[3]: Claimant manifested nonphysiologic signs on physical examination, noting that he documented the same. He stated these supported the diagnosis of somataform pain disorder. [Dr. Hughes].

In addition, the ALJ was persuaded by the opinions of Dr. Larson, who concluded that that there was no objective evidence of an injury, nor was there evidence to support Claimant's ongoing subjective complaints. (Finding of Fact Nos. 30, 34-35).

After considering the totality of the evidence, the ALJ concludes that Claimant failed to prove it is more probably true than not that she suffered a compensable industrial injury arising out of and in the course and scope of her employment.

In light of the finding on compensability, the ALJ need not address the issues of liability for TTD and medical benefits.

ORDER

It is therefore ordered that:

1. The claim for worker's compensation benefits in w.c. case no. 4-975-337-01 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

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[2] Dr. Kawasaki found exaggerated pain behaviors when he examined Claimant on 6/25/15.

[3] These were noted in the Dr. Hughes' 8/31/15 report.

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 17, 2015

Digital signature

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