At the conclusion of the October 23, 2014 session of the hearing, the ALJ established a schedule for the filing of the post-hearing evidentiary deposition of Amit O. Agarwala, M.D., and the rebuttal evidentiary deposition of I. Stephen Davis, M.D; and a continuation session of the hearing was set for January 16, 2015. Dr. Agarwala's deposition was taken on November 11, 2014 and filed on December 12, 2014. Dr. Davis' deposition was taken on November 13, 2014 and filed on November 21, 2014. At the conclusion of the January 16, 2015 session of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents,' giving Claimant's counsel 2 working days within which to object or approve as to form. The proposed decision was filed on January 27, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJH has modified it and hereby issues the following decision.

## ISSUE

The sole issue to be determined by this decision is whether the surgery recommended by Dr. Agarwala is reasonably necessary to cure and relieve the effects of the Claimant's admitted low back injury of November 18, 2010.

## FINDINGS OF FACT

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

### Preliminary Findings

1. The Claimant was employed by the Employer, a manufacturer of contact lenses, at the time of the admitted low back injury. In 2005, the Claimant went to Dr. Kenneth Sheridan D.C., for chiropractic care. On his initial visit with Dr. Sheridan, D.C., the Claimant noted that he had experienced low back for "20" years. Over the next five years, the Claimant treated with Dr. Sheridan, D.C., on a regular basis. At times, the Claimant's low back pain would wax and wane but it was noted that the pain would radiate into his buttocks and legs.

2. On November 18, 2010, the Claimant lifted a box and slipped and fell. He noted an increase in back pain at that time.

3. The Respondents filed the latest Amended Final Admission of Liability (FAL), dated January 26, 2012, admitting for a maximum medical improvement (MMI) date of July 28, 2011; permanent partial disability (PPD), based on 10% whole person impairment; and, denying post-MMI medical care and treatment..

4. The Claimant presented to Thomas Maino, M.D., in February 2011. Dr. Maino reviewed the chiropractic notes and noted that the Claimant felt a dull aching pain. Dr. Maino diagnosed the Claimant with low back pain, possibly muscle related.

5. The Claimant was seen by Karen Knight, M.D., physiatrist, on March 14' 2011. Due to the ongoing pain, Dr. Knight reviewed the MRI (magnetic resonance imaging). The MRI finding was primarily degenerative changes in the lumbar spine, it was noted that the Claimant had incurred a ruptured disc at L-4-5, specifically Dr. Knight noted a paracentral disc protrusion.

6. The Claimant underwent an epidural steroid injection (ESI) on April 14, 2011, at L-4-5. Physical therapy (PT) continued over the next several weeks and the Claimant noted improvement. The ALJ finds that the specific injury to the Claimant's low back was the L4-5 disc extrusion. The Claimant had pre-existing degenerative disc disease in the lumbar spine at multiple levels and this had been treated actively for the five years preceding the admitted injury herein. On the date of the admitted low back injury, the Claimant experienced an acute injury and not an exacerbation/aggravation of a pre-existing condition.

7. The Claimant improved with PT and was placed at MMI on July 28, 2011. Dr. Knight noted that the Claimant's complaints had subsided, but that his symptoms appeared to continue to wax and wane. Range of Motion (ROM) measurements were performed on October 17, 2011. Dr. Knight found that the Claimant had a 3% loss of ROM. Her final diagnosis was lobular left Para central disc extrusion at L4/5 and the likely source of radiculapathy was that it compressed the root.

8. Eventually, the Claimant returned to Dr. Knight and she assigned him a 10% whole person rating. This was based on a combination of the 3% ROM loss and a 7% specific disorder for the L4-5 disc. This rating was admitted.to by the Respondents. There was no Division Independent Medical examination (DIME).

9. The Claimant returned to Dr. Knight on March 9, 2012. He had undergone a post-MMI ESI and reported doing very well. Dr. Knight was of the opinion that the Claimant's care was complete, but that he could return for additional ESIs. The Claimant underwent a second MRI on March 12, 2012. The findings were essentially the same as those from the prior MRI.

10. The Claimant presented to Dr. Agarwala, orthopedic surgeon, on April 13, 2012. Dr. Agarwala noted the history of the industrial injury of November 2010, but did not make note of the care preceding the injury. Dr .Aragawala had the Claimant return so the doctor could review the MRI. Dr Aragawala noted that there was the disc bulge at L4/5, but that there was no neuro compression. He recommended that the Claimant return to work without restrictions. After further injections and PT, on September 10, 2013, Dr Agarwala stated the opinion that there was nothing surgical to be performed.

The ALJ finds that the Claimant had returned to his base line level of symptoms prior to the November 2010 admitted injury.

11. The Claimant returned to Dr. Knight on April 1, 2013. He noted a sudden onset of pain Dr. Knight was of the opinion that there was no need for further imaging and that there was no surgical indication at that time .Repeat injection was ordered and the Claimant noted that the injections helped generally. It was noted that average daily living activities aggravated the Claimant's symptoms. By July 2013, the Claimant's symptoms continued to wax and wane, and Dr. Knight ordered a repeat MRI.

12. The Claimant presented to Shay Bess, M.D., an orthopedic surgeon, for evaluation on August 14, 2013. Dr. Bess noted the history of the industrial injury and performed a physical exam. 5/5 strength was noted and the straight leg raise was negative. In reviewing the previous MRI, Dr Bess noted that X-rays showed degenerative changes at L4/5, but agreed to obtain a third MRI.

13. The third MRI was performed on August 23, 2013. A comparison was made with previous imagining studies. The radiologist was of the opinion that the previously identified disc extrusion at L4/5 was no longer present. The final assessment was multilevel degenerative changes.

14. The Claimant returned to Dr. Bess on August 2013. Dr. Bess reviewed the films and noted degeneration at the L4/5 facets. Dr. Bess' physical exam was identical the exam on the previous visit. Dr. Bess recommended a series of facet injections. Dr. Bess expressed no opinion concerning surgery.

**Dr. Agarwala's Recommendation**

15. Instead of undergoing the care as prescribed by Dr. Bess, the Claimant returned to Dr. Agarwala. Dr. Agarwala was of the opinion that the Claimant had failed six months of conservative treatment. Therefore, Dr. Agarwala recommended a two level laminectomy at L3/4 and L-4/5, despite a normal neurological exam. Pre-authorization of the surgery was requested and the Respondents denied the surgery request, pursuant to Workers Compensation Rules of Procedure (WCRP) Rule 16, 7 CCR 1101-3.

**Independent Medical Examination by I. Stephen Davis, M.D.**

16. At the request of the Respondents, the Claimant was seen by Dr. Davis, orthopedic surgeon, for an IME. Dr. Davis reviewed the history with the Claimant. He noted that the Claimant had prior chiropractic treatments with Dr. Sheridan, D.C., before the admitted injury. Dr. Davis reviewed the medical records and personally reviewed the imaging studies. On physical exam, Dr. Davis noted that the most remarkable finding was irritation in the left hip. It was Dr. Davis' opinion that the Claimant had

incurred an injury to his lumbar spine in November of 2010 and that the pain complaints had varied since that time. Dr. Davis wanted to review the prior chiropractic records in light of the degenerative changes at the discs. He also recommended an examination of the non-work related hip condition. Dr. Davis requested the prior records of Dr. Sheridan, D.C.

17. Dr. Davis was of the opinion that the injured disc at L 4/5 had retracted and that presently there was no imaging study suggesting a nerve root compression. He noted that the degenerative changes found in the spine were age related and not related to the work injury. He specifically disagreed with Dr. Agarwala's surgery recommendation. The ALJ finds the opinions of Dr. Davis to be credible, persuasive and corroborated by the totality of the evidence.

**Other Medical**

18. The Claimant underwent hip injections which were non-diagnostic and unfortunately the Claimant was diagnosed with prostate cancer and the treatment for his spine was delayed due to that condition.

19. The Claimant presented to Kyle Morgan, D.O., on March 18, 2014. Dr. Morgan reviewed records and history, as well as performing a physical examination. Dr. Morgan noted multilevel degenerative changes and spondylosis. Dr. Morgan noted that the Claimant also had arthritis in the hip. He prescribed medications and physical therapy.

20. The Claimant continued to treat with Dr. Morgan. Functional improvement and improved pain were noted with exercise and medications. Stable pain was noted on the Claimant's last visit in August of 2014.

21. The Clamant had a 25 year history of low back pain preceding the injury of November 2010. He incurred a specific injury to L4/5 in the form of an extruding disc on the date of injury herein. No other body parts or levels of the spine were injured in the incident. All other findings on the MRI of March 3, 2011 are degenerative in nature and more than likely pre-dated the industrial injury for which the Claimant was symptomatic. Both Dr. Davis and Dr. Aragawala stated that while it is difficult to state when a degenerative change occurred, the degenerative changes found at other levels than L4/5 were not caused by the industrial injury.

22. The Claimant returned to his baseline pre-injury status at the time of MMI. Given that his most recent imaging study shows that the extruding disc has now recessed, the Claimant's spinal condition is now degenerative in nature and not directly caused by the industrial injury. The proximate chain of causation has been broken, and the Claimant reverted to the natural progression of his degenerative condition after MMI.

23. The ALJ finds the opinions of Dr. Agarwala lacking in credibility and persuasiveness on multiple points. Dr. Agarwala is currently the only physician who is of the written opinion that the surgery he is requesting is causally related to the industrial injury. This is primarily based on the subjective complaints of the Claimant. Dr. Knight and Dr. Bess do not comment on the need for surgery. Dr. Knight had previously stated the opinion that surgery was not warranted in this case. At that time, the Claimant still had the extruding disc which is now no longer present. Dr. Agarwala agreed that the disc protrusion had healed itself. In that Dr. Agarwala is requesting to perform an **elective** surgery to not only L-4/5, but also to L-3/4 to correct the degenerative changes. The ALJ finds that this surgery is not casually related to the industrial injury. This is not a situation in which the injured disc has either caused damage to an adjacent level, or it is necessary to treat the adjacent level in order to achieve the desired results at the site of injury. The degenerative changes are not causally related to the industrial injury. The requested surgery is not reasonably necessary and causally related to the industrial injury.

24. Dr. Davis' opinions are consistent in his report and testimony. Dr. Davis reviewed the complete prior medical records of Dr. Sheridan, D.C., and the notes of Dr. Morgan. Dr. Aragawala had not reviewed the records of Dr. Sheridan, D.C., while formulating his opinion. During his deposition, Dr. Agarwala admitted that the Claimant had a pre-existing low back condition prior to the date of injury and that he was in an active care program prior to injury. Dr. Davis' opinion that surgery is not warranted was based on the normal neurological exam and lack of finding of a compressed nerve root on MRI. His opinion in this regard is credible and persuasive. His opinions are supported by the medical evidence contained in the record. Dr. Davis noted his own normal neurological exam as well as those of Dr. Bess and Dr. Agarwala. Dr. Davis consistently testified, even after being presented with new medical records and the testimony of Dr. Agarwala, that the surgery was not reasonably necessary and causally related to the industrial injury.

**Ultimate Findings**

25. For the reasons herein above stated, the opinions of Dr. Davis are more credible and persuasive than the opinions of Dr. Agarwala.

26. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Davis and to reject the opinions of Dr. Agarwala.

27. The Claimant has failed to prove, by preponderant evidence, that the **elective** surgery recommended by Dr. Agarwala is causally related to the admitted injury of November 18, 2010 and/or 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. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *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 opinions of Dr. Davis that the recommended surgery is not reasonably necessary or causally related to the admitted injury herein are more credible and persuasive than the opinions of Dr. Agarwala, primarily because Dr. Davis' opinions are corroborated by the totality of the evidence. Dr. Agarwala's opinions are not corroborated.

### 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, between conflicting medical opinions, to accept the opinions of Dr. Davis and to reject the opinions of Dr. Agarwala.

**Causally Related and Reasonably Necessary Recommended Surgery**

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the elective surgery recommended by Dr. Agarwala is not causally related to the admitted injury of November 18, 2010. Moreover, it is related to the Claimant's return to the base line of the natural progression of his degenerative back condition. 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 recommended **elective** surgery is neither warranted nor is it reasonably necessary to cure and relieve the effects of the Claimant's admitted low back injury.

d. A claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *See Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-mart Stores*, W.C. No. 4-669-654 [Indus. Claim Appeals Office (ICAO), January 28, 2008]. As found, the surgery recommendation is based on the natural progression of the Claimant's degenerative back condition and not as a direct and unbroken consequence of the admitted injury.

**Burden of Proof**

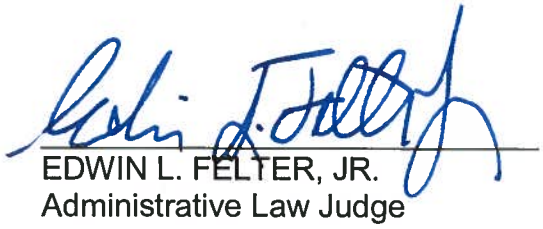
e. Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. 1997). Whether a claimant 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). In this case, the Claimant's burden is by a preponderance of the evidence, of establishing entitlement to the recommended surgery. §§ 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 failed to sustain his burden.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

The Claimant's request for the elective surgery recommended by Amit Agarwala, M.D., is hereby denied and dismissed.

DATED this 30 day of January 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*.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 7, 2014, in Denver, Colorado. The hearing was digitally recorded (reference: 1/7/14, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

The Claimant was present in person and represented by Michael P. Dominick, Esq. The Respondents were represented by Amanda J. Branson, Esq.

Hereinafter Camille L. LaFont shall be referred to as the "Claimant. Wellbridge d/b/a Colorado Athletic Club shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through C were admitted into evidence, without objection. The evidentiary deposition of John S. Hughes, M.D. (hereinafter "Depo." followed by a page number) was also admitted into evidence.

## ISSUE

The sole issue to be determined by this decision concerns the Claimant's request to overcome the Division Independent Medical Examination (DIME) of Hua Chen, M.D., concerning his rating of zero permanent medical impairment for the Claimant's admitted low back injury of February 4, 2013.

The Claimant bears the burden of proof by clear and convincing 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, and the ALJ finds, that the Claimants average weekly wage (AWW) is $473.38 per week. The AWW is a factor in the formula for determining who person permanent partial disability (PPD).

2. The Respondents filed a Final Admission of Liability (FAL), dated Augutst 18, 2014, admitting for zero PPD, pursuant to DIME Dr. Chen's rating.

3. The Claimant filed a timely objection to the FAL, and requested a hearing.

4. The Claimant was born on July 11, 1976. She was employed as a housekeeper by the Employer. On February 4, 2013 while rolling up a rubber mat in the locker room, suffered an admitted injury to her low back. She was initially seen at Arbor Occupational Medicine (the ATP) on February 11, 2013, by Richard Shouse, PAC (Physician's Assistant). The initial medical note lists the impression as "lumbar strain."

**Medical**

5. The Claimant continued seeing medical providers at Arbor Occupational Medicine until April 16, 2013. The final medical note at Arbor Occupational Medicine indicated that the Claimant's work related medical diagnosis as "L/S Strain/Pain."

6. David Yamamoto, M.D., assumed the Claimant's care as the primary ATP. Dr. Yamamoto's initial note of April 22, 2013 assessed the Claimant with a "Strain of Lumbar region NOS; Possible facet syndrome." Dr. Yamamoto's medical note of that date indicated that "pain is in the lower back in the L5/S1 level with tingling on the left leg… her pain level is 7 out of 10… she has quite a bit of pain with numbness down the posterior and lateral left leg. She complains of some numbness on the bottom of her left foot."

7. The Claimant continued treating with Dr. Yamamoto and his referrals. Ultimately Dr. Yamamoto placed the Claimant at maximum medical improvement (MMI) on February 24, 2014. At that time his assessment was: " Lumbar strain/ mechanical low back pain with persistent symptoms. Complaints of left leg pain and numbness." Dr. Yamamoto awarded the Claimant a Table 53 [American medical Association *Guides to the Evaluation of permanent Impairment,* 3d. ed., Rev.] rating of 5% and a range of motion (ROM) loss impairment of 9% for a combined final rating of 14% whole person (Claimants Exhibit 1). Dr. Yamamoto recommended that the Claimant should have post MMI maintenance treatment (*Grover* medicals). Dr. Yamamoto gave the Claimant permanent work restrictions, including a maximum lift of 8 pounds, repetitive lift of 5-7 pounds, carrying 5-7 pounds, pushing and pulling 8 pounds, avoid repetitive bending at the waist, and an additional 10 minute break per shift (Claimants Exhibit 1).

8. The Claimant was seen for an independent medical examination (IME) by Brian Shea, D.O., on June 27, 2014. Dr. Shea assessed the Claimant with a "lumbar strain with left leg radicular symptoms." Dr. Shea assigned a Table 53 rating of 5% and a ROM rating of 9% for a total of 14% whole person rating (Claimants Exhibit 2).

**The Division Independent Medical Examination (DIME)**

9. The Respondents challenged Dr. Yamamoto's MMI date and impairment rating. A DIME was scheduled with Dr. Chen for July 10, 2014. Dr. Chen's assessment was "Chronic back and leg pain without spine pathology or structural damage." Dr. Chen stated: "I believe patient did have work related soft tissue injury to her lower back and possible left leg. However with time and treatment she is expected to have complete recovery. Her current condition of non-specific pain without pathology does not qualify for permanent impairment." Dr. Chen stated: "I agree that patient has reached MMI. I agree that she was at MMI when Dr. Yamamoto evaluated her on 2/24/2014 with no further treatment required. There is no spine impairment rating since patient does not have spine disorder diagnosis. Consequently, no range of motion evaluation is applied to her case. Therefore she will receive no permanent impairment rating" (Claimants Exhibit 3).

10. After the FAL, the Claimant was seen for an IME by John S. Hughes, M.D., on September 17, 2014. Dr. Hughes's opinion was that the Claimant was suffering from: (1) "Lumbosacral spine sprain/strain secondary to [Claimant's] work related event of moving a rolled up mat on February 4, 2013; and (2) persistence of Left SI joint dysfunction secondary to number one". Dr. Hughes commented that he was "puzzled by Dr. Chen's failure to document a physical examination of [Claimant's] lumbar spine". Dr. Hughes stated that there were objective findings of consistent restrictions in right lateral flexion compared to left lateral flexion over time, considerable clinical consistency with previous examination findings of normal true lumbar flexion and restricted sacral flexion as well as mild to no restriction in lumbar spine extension. Dr. Hughes stated that objective findings were present in the Claimant's case as documented in sequential lumbar spine ROM tests.

11. Dr. Hughes stated: "My findings would support a range of motion impairment of 6% whole person. I agree with doctors Yamamoto and Shea that [Claimant] sustained: (1) A medically documented injury, (2) Six months of medically documented pain as well as, none to minimal degenerative changes seen [on the MRI (magnetic resonance imaging) scan]." Dr. Hughes stated: "In my opinion [Claimant's] lumbar spine injury satisfies these three criteria outlined in Table 53 II (B) for assignment of a 5% impairment of the whole person."

**Overcoming the DIME**

12. Dr. Hughes further stated: "It is my opinion that Dr. Chen failed to perform an adequate physical examination of the lumbar spine and that this was necessary for her to argue against objective physical examination findings outlined by other providers, including even Dr. D'Angelo, who documented [Claimant's] increased right low back pain with right lateral flexion. I feel there is a medical basis for assignment of a specific disorder impairment of 5% whole person, in accordance with the AMA Guides to the Evaluation of Permanent Impairment 3rd edition revised, as instructed by the Colorado Division of Workers Compensation in the level II accreditation course. Range of motion impairment varies over time, and on examination today, my findings would support a range of motion impairment of 6% whole person." Dr. Hughes's stated that the 5% table 53 disorder rating combined with a 6% range of motion rating would equal an 11% whole person impairment rating."

13. The Claimant's attorney took the evidentiary deposition of Dr. Hughes on December 17, 2014. Dr. Hughes testified in his deposition that he has been board certified in Occupational Medicine since 1988, that he had been Level II Accredited since the inception of that program in September 1992, and that he had served as an instructor for the Division of Workers Compensation (DOWC) on how to rate impairments in the Lumbar Spine.

14. According to Dr. Hughes, the Claimant met the requirements for obtaining a Table 53 low back impairment rating. Dr. Hughes stated that the Claimant had consistent restrictions in range of motion over time. He testified that; " in two separate examination performed 7 months apart [the first being the examination of Dr. Yamamoto for MMI in February 2014 and the second being Dr. Hughes' IME examination in September 2014] that we had some correlation that would be really, frankly, a little difficult to do behaviorally.

> I had found restricted right lateral flexion in excess of left lateral flexion with my measurements being right lateral flexion 20°, left lateral flexion 24°. Dr. Yamamoto identified that same pattern of right greater than left lateral flexion restriction with his specific measurements being 15° right lateral flexion and 17° left lateral flexion. That reveals a correlation that implies validity. Also implied is the fact that over the 7 month period, [Claimant's range of motion had gradually improved. And that is consistent with low grade but continued healing process…" (Hughes Depo. pp. 15 and 16). Dr. Hughes continued that the

> Claimant's improving ranges of motion and consistency over time "imply both validity and consistency of effort. They also imply biomechanical plausibility, meaning that it is consistent with a mechanical pain generator such as sacroiliac joint dysfunction" (Depo., pp. 16 and 17).

15. According to Dr. Hughes, Dr. Chen did not perform a physical examination of the spine in accordance with what is taught by the DOWC in Level II training. He noted that Dr. Chen should have "documented the appearance of the spine, palpation findings in the spine, range of motion findings in the spine, and any special tests that she might have considered necessary" (Depo. p. 18). Dr. Hughes is of the opinion that neither a positive MRI nor a positive EMG are required in order to have a Table 53 rating, since Table 53 provides for a rating with a medically documented injury and a minimum of six months of medically documented pain associate with **none** to minimal degenerative charges on structural test.

**Respondents' IME**

16. Kathleen D'Angelo, M.D., testified at the hearing by telephone. She had evaluated the Claimant on February 18, 2014 for a Respondents' IME. No written IME report by Dr. D'Angelo was submitted into evidence by the Respondents. Dr. D'Angelo testified to her understanding of the DOWC's Impairment Rating Tips. The Impairment Rating Tips were not submitted into evidence. Furthermore, even if submitted, rating tips do not even rise to the level of guidelines much less medical principles or rules. Dr. D'Angelo had not seen the Claimant since her (D'Angelo's) IME on February 18, 2014. Dr. D'Angelo held fast to her understanding of the Impairment Rating Tips as binding for her, and she did not demonstrate any persuasive clinical judgment in her testimony. The testimony of Dr. D'Angelo in support of the DIME physician's refusal to assign an impairment rating under Table 53 is highly unpersuasive and lacking in credibility.

17. The records review of Alison Fall, M.D. (Respondents' Exhibit B), likewise is unpersuasive and lacking in credibility. Dr. Fall did not testify and she simply agreed with the DIME doctor. Dr. Fall failed to demonstrate any persuasive clinical judgment. Therefore, her opinions are not credible.

**Ultimate Findings**

18. The opinions of Dr. Hughes are consistent with a totality of the evidence, well reasoned and, therefore, highly persuasive sand credible. The same is true for the

opinions of ATP Dr. Yamamoto. The opinion of DIME Dr. Chen is not credible because it is inconsistent with the totality of the evidence and lacking in an adequately explained medical basis. The opinions of Dr. D'Angelo and Dr. Fall are also inconsistent with the totality of the evidence and lacking in adequately explained medical bases, thus, they are not credible.

19. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Hughes and Dr. Yamamoto, and to reject the opinions of DIME Dr. Chen, and IME Drs. D'Angelo and Fall.

20. The ALJ finds that Dr. Chen did not do a complete lower back evaluation and did not follow the *AMA Guides* in performing her evaluation. Based on the totality of the evidence, including Dr. Hughes's IME report and the testimony of Dr. Hughes, the ALJ finds that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Chen's zero impairment rating is erroneous. Therefore, the Claimant has overcome the DIME opinion of Dr. Chen by clear and convincing evidence.

21. Having overcome the DIME opinion by clear and convincing evidence, the opinion of Dr. Hughes concerning the degree of permanent whole person impairment more credible and persuasive than the opinion of Dr. Yamamoto. Therefore, the Claimant has established, by preponderant evidence that the degree of the Claimant's permanent medical impairment is 11% whole person. The Claimant reached MMI on February 24, 2013, as admitted in the FAL.

22. The Claimant did not designate *Grover* medicals in her Application for Hearing, however, in ruling from the bench, the ALJ stated that this issue would be reserved for future decision, in order that the Respondents have a full and fair opportunity to defend on this issue.

## 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, *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 opinions of Dr. Hughes were consistent with a totality of the evidence, well reasoned and, therefore, highly persuasive sand credible. The same is true for the opinions of ATP Dr. Yamamoto. The opinion of DIME Dr. Chen was not credible because it was inconsistent with the totality of the evidence and lacking in an adequately explained medical basis. The opinions of Dr. D'Angelo and Dr. Fall were also inconsistent with the totality of the evidence and lacking in adequately explained medical bases, thus, they are not credible.

**Substantial Evidence**

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *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. Hughes and Dr. Yamamoto, and to reject the opinions of DIME Dr. Chen, and IME Drs. D'Angelo and Fall.

**Overcoming the Division Independent Medical Examination of Hua Chen, M.D.**

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). 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 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A 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 Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Dr. Chen did not do a complete lower back evaluation and did not follow the *AMA Guides* in performing her evaluation. Based on the totality of the evidence, including Dr. Hughes's IME report and the testimony of Dr. Hughes, the ALJ found that it was highly probable, unmistakable and free from serious and substantial doubt that Dr. Chen's zero impairment rating was erroneous. Therefore, as found, the Claimant overcame the DIME opinion of Dr. Chen by clear and convincing evidence. Also, as found,

**Burden of Proof on Degree of Permanent Partial Disability**

d. Once the DIME opinion of zero PPD was overcome, it became the Claimant's burden of proof, by a preponderance of the evidence, of establishing the degree of permanent partial disability.. §§ 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, having overcome the DIME by clear and convincing evidence, the Claimant has proven, by preponderant evidence that the degree of the Claimant's permanent medical impairment is 11% whole person

**Reservation of Post-MMI Medical Benefits Issue**.

e. In *Hire Quest LLC dba Trojan Labor v. Indus. Claim Appeals office, supra,* the Court explicitly held that issues that would otherwise be closed for failure to designate them in an application for hearing are **preserved** if the ALJ reserves the issue in the Order. The underlying reasons for this holding is that if the ALJ does not **reserve** the issue, the law makes a concession to the shortness of life by closing the case. In this case, the ALJ is explicitly reserving the issue of *Grover* medicals.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examiner (Hua Chen, M.D.) by clear and convincing evidence.

B. The Claimant's average weekly wage is $473.38.

C. The respondents shall pay the Claimant permanent partial disability benefits, based on 11% whole person, from February 24, 2014 and continuing until paid in full.

D. 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.

E. The issue of post-maximum medical improvement maintenance medical benefits is reserved for future decision.

DATED this 19 day of February 2015.

EDWIN L. PELTER, 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*.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, to be filed, electronically, giving the Claimant 2 working days within which to file objections. The proposed decision was filed, electronically, on February 3, 2015. On February 5, 2015, Claimant filed objections which, essentially, argue that the Claimant was an "employee," and which placed an adversarial spin on suggested modifications to the proposed decision. The central issue in dispute is whether the Claimant was an "employee" sat the time of his injury. 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 primary issue to be determined by this decision concerns whether the Claimant was an "employee" of the Employer at the time he suffered an injury to his left lower extremity (LLE) on March 10, 2013, or was he a volunteer. The Claimant argues that he was an "employee" of the Employer, and was also in the course and scope of that employment at the time of his injury.

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:

### Course and Scope of Employment

1. The Claimant, a 64 year old male, suffered an injury to his left leg when he was struck by the alleged Employer's backhoe/forklift on Sunday, March 10, 2013. This incident happened at the alleged Employer's personal residence in Denver, where the Claimant was temporarily residing in a basement with his Uncle. The alleged Employer operates a small business out of his home. According to the Claimant, he had moved to Denver from Brighton to work with the Employer. According to the Employer, he did not request the Claimant to move into his basement or request him to work for him. Rather the Employer allowed him to stay at his home as a family courtesy.

2. On Sunday, March 10, 2013, the Claimant was at the alleged Employer's home, involved in various activities, including cooking, and relaxing. At approximately 5:00 PM, on March 10, 2013, the Claimant heard the alleged Employer, and the alleged Employer's 90 year old father, working outside in the driveway. The Claimant came outside in his pajamas and offered to assist the alleged Employer in directing a ladder rack onto a small truck. The alleged Employer was using a backhoe/forklift to assist

with putting the ladder rack on the vehicle. The alleged Employer confirmed that the Claimant provided some limited help, but had not been requested to help, nor was his help really needed. There was no agreement to pay the Claimant for his limited assistance on March 10, 2013. The Claimant confirmed that he had no anticipation of working or receiving pay for his assistance with the ladder rack that Sunday.

3. The evidence establishes that the Claimant performed some work for the alleged Employer, on a case-by-case basis, while staying as a guest at the alleged Employer's home during the weeks before his injury. Specifically, the Claimant worked for the alleged Employer on March 8, 2013, and March 9, 2013, assisting with the installation of a sewer line pipe. The Claimant worked with the alleged Employer's son (owner of a separate construction company), and another worker. According to the Claimant, he received $50 cash at the end of each day of work. The alleged Employer confirmed that he provided very limited work to the Claimant on an as-needed, day to day basis. The alleged Employer confirmed that there were many days when no work was available or offered, and that the Claimant had only worked with them a few days during the entire time that he stayed at the alleged Employer's home. The majority of the time during the Claimant's stay, he did not work with the alleged Employer in any capacity.

4. Although the Claimant agrees that he did not expect to get paid for his assistance on Sunday, March 10, 2013, he stated that he had a vague belief that the alleged Employer may have some work for him in the weeks following March 10, 2013. Thus, the Claimant argues that his limited assistance with the ladder rack on Sunday, March 10, 2013, placed him within the course and scope of some future employment to occur in the upcoming weeks. There was no express or implied contract for hire, however, nor was there an agreement between the alleged Employer and the Claimant related to the limited help provided on Sunday, March 10, 2013. The Claimant did not have any expectation of pay, no understanding of any obligation, and was not asked to help by the alleged Employer. Moreover, the Claimant's expectations of work in the future were uncertain at best, and would have only been on a daily basis if needed at all.

5. The alleged Employer confirmed that there was no specific anticipated work during the week following March 10, 2013, and that the placing of the ladder rack on his little truck had nothing to do with any specific future work that the Claimant may have been offered. The alleged Employer stated that the little truck on which he was placing the ladder rack was used by him to do various errands, including those related to his rental business. The little truck was used by the alleged Employer himself for small errands because it got better gas mileage. The little truck was not used by the alleged Employer's workers, it did not have his company name on it, and it was not going to be used by the Claimant. The Claimant had not been told that he should expect work during the week following March 10, 2013. The Claimant did not

demonstrate that he had been offered any specific work in the future or that he would have some reason to expect work during the week of March 10, 2013.

6. Following his injury, the Claimant was transported to Denver General Hospital where he underwent multiple medical procedures. After the Claimant was released from the hospital, he followed up with the Salud Family Health Centers where he received limited treatment including removal of his stitches. Although the parties stipulated, and the ALJ found, that Denver General Hospital and Salud Family Health Centers were authorized providers if the matter was found to be compensable, medical benefits are moot because the Claimant was not an "employee" of the alleged Employer.

**Ultimate Findings**

7. The Claimant has failed to prove by a preponderance of the evidence that there was an employer-employee relationship between the alleged Employer and the Claimant on March 10, 2013, at the time he was injured. The Claimant was a volunteer at the time.

8. The Claimant has failed to prove by the preponderance of the evidence that he was within the course and scope of any employment that may have existed before March 10, 2013, or that may have been anticipated in the future.

9. Because the Claimant was not an "employee," all other issues are moot.

## CONCLUSIONS OF LAW

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

**Credibility**

a. The facts and circumstances of the March 10, 2013 incident are undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

**Employer-Employee Relationship**

b. For the purposes of the Colorado Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." § 8-40-202 (1) (b), C.R.S; *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991). The essential elements of the contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *See*

*Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. 1957); *Anna Kay Tressell Deceased, John Tressell Claimant v. Alpha Therapy Services, LLC*, W. C. No. 4-322-755[Indus. Claim Appeals Office (ICAO), December 15, 1999]. In *Aspen Highlands Skiing Corp. v. Apostolou,* 854 P.2d 1357 (Colo. App. 1992) aff'd, 866 P.2d 1384 (Colo. 1994), the Colorado Supreme Court, citing *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963), noted that if the services are volunteered without any expectation of compensation in return, the fact that the alleged employer may provide some benefit on a gratuitous basis will not convert a volunteer into an employee. *See Dell v. Jaz Con,* W.C. No. 4-777-941 (ICAO, November 4, 2009). Where the parties ascribe different meanings to a material term of the contract and that term is ambiguous, the parties have not "manifested mutual assent" and there has been no "meeting of the minds" and no valid contract exists. *Westerman v. Manitou and Pikes Peak Railway and/or High Bridge Saloon*, W. C. Nos. 3-903-645, 4-407-473 (ICAO, November 17, 2000). *See Sunshine v. M. R. Mansfield Realty, Inc.*, 575 P.2d 847 (Colo. 1978). As found, the Claimant failed to establish that a contract for hire or an employer-employee relationship existed at the time of his injury on March 10, 2013, thus, he was a volunteer and not an "employee.".

**Course and Scope of Employment**

c. Generally, an activity arises out of and in the course of employment if it is "sufficiently interrelated to the conditions and circumstances under which the employee usually performs his job functions that the activity may reasonably be characterized as an incident of employment, even though the activity itself is not a strict obligation of employment and does not confer a specific benefit on the employer." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The 'arising out of' requirement refers to the origins and causes of an injury while the words 'in the course of' refer to the time, place, and circumstances under which the injury occurred. *Deters v. Times Publishing Company*, 38 Colo. App. 48, 552 P.2d 1033 (1976). In determining whether an injury occurred in the course or employment, 'the totality of the circumstances' must be examined to determine whether there is a 'sufficient nexus' between the employment and the injury. *City and County of Denver School District No. 1 v. Indus. Comm'n*, 196 Colo. 131, 581 P .2d 1162 (1978). As found, although the Claimant may have been involved in some case-by-case work for the Employer in the past whereby he was paid $50 for each task, he was not involved in those activities on March 10, 2013, and he did not have a reasonable expectation of work or pay at that time, nor did he have a reasonable expectation of employment during the week following his injury. Because the Claimant was **not** an "employee" of the alleged Employer at the time of his injury on March 10, 2013, he was **not** in the course and scope of employment when he was injured.

**Burden of Proof**

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to

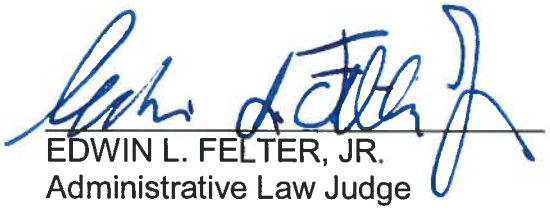
benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden of proof.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this 9 day of February 2015.



EDWIN L. FELTER, JR.
Administrative Law Judge

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At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be filed, electronically, with 5 working days. No timely proposed decision having been filed, the ALJ hereby issues the following decision.

## ISSUE

The sole issue to be determined by this decision concerns the Respondents' request to overcome the Division Independent Medical Examination (DIME) of David Yamamoto, M.D., whereby Dr. Yamamoto is of the opinion that the Claimant has not reached maximum medical improvement (MMI).

The Respondents bear the burden of proof by clear and convincing evidence.

## FINDINGS OF FACT

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

### Preliminary Findings

1. The Claimant, a 45-year old Welder-Framer (d.o.b. 05/19/1969), walked up some stairs on July 30, 2013, moved a sheet of plywood and fell approximately 14-feet through a hole from the 2nd floor to the 1st floor, primarily injuring his right thoracic region and shoulder.

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), admitting for medical benefits, an average weekly wage (AWW) of $800; temporary total disability (TTD) and temporary partial disability (TPD) benefits through May 5, 2014; an MMI date of June 4, 2014; and permanent partial disability (PPD) benefits, based on whole person permanent impairment of 7% working unit and scheduled permanent impairment of 19% of the right upper extremity (RUE). The FAL was based on the opinion of authorized treating physician (ATP) John J. Aschberger, M.D.

3. There was a timely request for a DIME and David Yamamoto, M.D., was selected as the DIME Physician.

### Division Independent Medical Examination (DIME) of Dr. Yamamoto

4. Dr. Yamamoto examined the Claimant on September 23, 2014, issued a report on October 13, 2014, and testified by telephone at the hearing, having been called by the Respondents as an adverse witness.

5. Dr. Yamamoto's assessment was:

1. Compression fractures at T8, T9 and T12, stable.
2. Right shoulder, SLAP tear, **symptomatic** (emphases supplied)
3. Right shoulder acromioclavicular athrosis.
4. Multiple finger sprains including a dislocation of the right fifth finger PIP joint with subsequent moderate loss of range of motion and loss of grip strength.
5. Secondary depression.

6. Dr. Yamamoto is of the opinion that the Claimant is not at MMI because: (1) the Claimant should have a second opinion orthopedic evaluation regarding the right shoulder SLAP tear; also, because the Claimant may be a candidate for distal clavicle excision as the Claimant "is quite symptomatic over the acromioclavicular joint; and, (2) Dr. Yamamoto believes that the Claimant's depression, secondary to his lack of right shoulder function, should be addressed. Ultimately, it was Dr. Yamamoto's opinion that the Claimant's condition has been exacerbated, attributable to the admitted injuries of July 30, 2013.

7. The Claimant's secondary depression has never been addressed by a referral to a psychologist, psychiatrist, or any kind of a counselor.

**Record Review by Deborah Saint-Phard, M.D.**

8. The limited task of Dr. Saint-Phard was to do a paper review of the request to have orthopedic specialist, Dr. Hewitt, look at the Claimant. Dr. Saint-Phard did not physically examine the Claimant nor did she perform a full-scale independent medical examination (IME). She states "...this right shoulder injury needs to be pursued as a completely separate work injury circumstance and completely unrelated to the date of injury of the workers' compensation claim from 07/30/13." She recommended denial of this request because she was of the opinion that the Claimant had sustained a new injury with the new employer after June 4, 2014. The ALJ infers and finds that Dr. Saint-Phard, in arriving at her ultimate opinion, relied on Dr. Aschberger's note of July 28, 2014, wherein Dr. Aschberger stated that the Claimant had gone back to work with a new employer and was reporting "worsening symptomatology at the right shoulder." Dr. Saint-Phard did not mention that Dr. Aschberger, in the next sentence, stated: **"He** (Claimant) **had not had a new injury."** The ALJ infers and finds that Dr. Saint-Phard disagrees with Dr. Aschberger. While Dr. Saint-Phard's opinion borders on the line between a legal conclusion and a medical opinion of non-work relatedness, the ALJ finds that the opinions of ATP Dr. Aschberger and DIME Dr. Yamamoto significantly outweigh Dr. Saint-Phard's opinion because they are based on dealing with the

Claimant more frequently, plus more thorough knowledge of the Claimant's medical case and more detailed explanations for their opinions.

**New Compensable Injury after Return to Work for Different Employer or Exacerbation in the Natural Progression of the Admitted Injuries**

9. Dr. Aschberger had released the Claimant to return to work, effective May 14, 2014 and placed him at MMI on June 4, 2014. On July 28, 2014, the Claimant returned to see Dr. Aschberger and Dr. Aschberger noted that the Claimant had gone back to work with a new employer and was reporting "worsening symptomatology at the right shoulder." Dr. Aschberger explicitly indicated: **"He had not had a new injury."** Dr. Aschberger further noted: He is performing overhead work and lift, which has resulted in some aggravation for him." The Respondents theory concerning why Dr. Yamamoto's DIME opinion is in error is that the Claimant sustained a new, compensable injury or occupational disease after MMI of June 4, 2014, with the new employer. Regardless of whether or not Dr. Aschberger's indication of "no new injury," seems to border between a legal conclusion and a medical opinion, there is sufficient background information in Dr. Aschberger's reports that reveals that he had a thorough understanding of, and appreciation for, the severity of the Injuries of July 30, 2013. The same is true of Dr. Yamamoto's opinions.

10. Due to the medical severity of the admitted, compensable injury to the right shoulder of July 30, 2013, the ALJ infers and finds that Dr. Aschberger's and Dr. Yamamoto's references to an "aggravation," after June 4, 2014, are meant to convey the idea of an exacerbation in the natural progression of the originally admitted right shoulder injury, thus, it would amount to speculation to infer that these two doctors meant to imply that the Claimant had sustained a new injury or occupational disease to the right shoulder after working for the new employer. The only support for the "new injury" theory is in Dr. Saint-Phard's cursory and conclusory opinion, which the ALJ rejects.

**Ultimate Findings**

11. DIME Dr. Yamamoto's testimony, reports and opinions were straight-forward, persuasive and credible. Indeed, the substance of Dr. Aschberger's latest opinion of July 28, 2014 corroborates the idea that the Claimant is not at MMI. Because both Dr. Yamamoto and Dr. Aschberger exhibit a thorough understanding and appreciation of the Claimant's medical case, the ALJ finds their opinions to be credible and to significantly outweigh the opinion of Dr. Saint-Phard. The ALJ finds that opinion of Dr. Saint-Phard to be inadequately supported by credible evidence and, therefore, lacking in credibility.

12. Contrary to Dr. Saint-Phard's assertions, the weight of the medical evidence establishes that the Claimant **did not** sustain a new compensable aggravation of a pre-existing injury, to wit, the admitted injury of July 30, 2013. Moreover, the weight of the evidence establishes that the worsening of the Claimant's right shoulder condition is attributable to an exacerbation in the natural progression of the admitted injury of July 30, 2013.

13. Although there may be differences of opinion, the Respondents have failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's DIME opinion that the Claimant is not at MMI is erroneous. The bases of his opinion are multifold: (1) the Claimant should have an orthopedic second opinion; and, (2) the Claimant's work-related depression should be evaluated and addressed.

14. The weight of the evidence establishes that the Claimant has not reached MMI.

## CONCLUSIONS OF LAW

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

### Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo.

275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *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, DIME Dr. Yamamoto's testimony, reports and opinions were straight-forward, persuasive and credible. Indeed, the substance of Dr. Aschberger's latest opinion of July 28, 2014 corroborates the idea that the Claimant is not at MMI. Because both Dr. Yamamoto and Dr. Aschberger exhibit a thorough understanding and appreciation of the Claimant's medical case, as found, their opinions are credible and significantly outweigh the opinion of Dr. Saint-Phard. As further found, the opinion of Dr. Saint-Phard is inadequately supported by credible evidence and, therefore, lacks credibility.

**Overcoming the Division Independent Medical Examination (DIME)**

b. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005**). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence."** *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411, 412 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21, 24 (Colo. App. 1995). 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 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A 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 Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, although there may be differences of opinion, the Respondents have failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's DIME opinion that the Claimant is not at MMI is erroneous. The bases for his opinion are multifold: (1) the Claimant should have an orthopedic second opinion; and, (2) the Claimant's work-related depression should be evaluated and addressed.

**Maximum Medical improvement (MMI)**

c. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 (ICAO, October 27, 2011). .As found, the Respondents failed to overcome, by clear and convincing evidence, the DIME physician's opinions regarding "not at MMI." The weight of the evidence establishes that the Claimant has not reached MMI. As found, Dr. Yamamoto supports his opinion, among other things, on two principal bases: (1) the Claimant should have an orthopedic second opinion; and, (2) the Claimant's work-related depression should be evaluated and addressed.

## ORDER

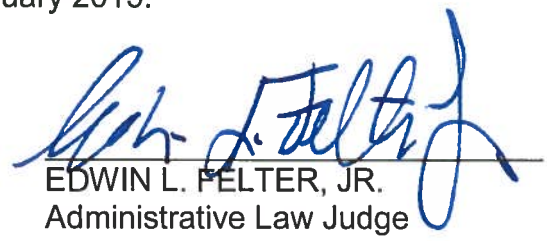
IT IS, THEREFORE, ORDERED THAT:

A. The Respondents have failed to overcome the Division Independent Medical Examination opinion of David Yamamoto, M.D., that the Claimant is **not** at maximum medical improvement.

B. The Claimant is not at maximum medical improvement.

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

DATED this 18 day of February 2015.



EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be filed, electronically, giving counsel for the Respondent 2 working days within which to file objections. The proposed decision was filed, electronically, on February 4, 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 issue to be determined by this decision is whether the Claimant suffered a compensable injury to his right shoulder (RUE) on September 17, 2013, in Mexico City, while in the course and scope of employment while on travel status with Employer.

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

## FINDINGS OF FACT

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

1. The Claimant (D.O.B. 07/13/1965) is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.

2. The Claimant is a sixteen year pilot for the Employer. He flew to Mexico City on assignment by Employer on September 17, 2013, where he suffered an injury to his right knee (RLE) and right shoulder (RUE) at the Mexico City airport and in an exercise facility at the hotel in which the Employer placed the Claimant. His injury began occurring when he slipped on slick granite flooring while toting baggage weighing approximately 40-50 lbs. He caught himself and torqued his right arm and shoulder, injuring both his right shoulder and his right knee. He suffered immediate pain.

3. The Claimant spent the night at the Employer's designated hotel. Approximately eight hours later (September 18, 2013) he attempted his regular exercise regime hoping to relieve his continuing right shoulder pain through a workout. He also wanted to maintain his regular workout regime to remain fit as a pilot while on travel status.

4. During exercise in the hotel gym, the Claimant experienced additional tearing in his right shoulder.

5. When the Claimant returned to the United States, he sought treatment from authorized treating physician (ATP), Wayne K. Gersoff, M.D. ATP Dr. Gersoff had treated the Claimant previously and had performed surgeries on the Claimant's right knee and right shoulder.

6. ATP Dr. Gersoff's Report of September 26, 2013, confirms that the Claimant was complaining of pain in both his right knee and right shoulder, occurring when he had slipped on marble floors while in Mexico, D.F., in between flights (Claimant's Exhibit 2, bate stamp 12).

7. ATP Dr. Gersoff found weakness in the Claimant's right shoulder rotator cuff and he sent the Claimant for MRIs (magnetic resonance imaging) on both his right shoulder and right knee. *Id.* These were performed on September 24, 2013 (Claimant's Exhibits 3 and 4).

8. The MRI of the Claimant's right shoulder found a large tear in the supraspinatus and infraspinatus tendons, synovitis changes in the subacromial and subdeltoid spaces, progression of tendinosis-tendinopathy in the subscapularis tendon (Claimant's Exhibit 4, bate stamp 17).

9. ATP Dr. Gersoff recommended right shoulder surgery which was performed on October 8, 2013, for a repair of a "massive rotator cuff tear" (Claimant's Exhibit 5, bate stamp 19) [The Claimant also underwent a right knee arthroscopy at the same time]. The Claimant had a post-operation right shoulder infection and underwent a subsequent surgery (Respondent's Exhibit E, bate stamp 30).

10. The Respondents filed General Admissions of Liability (GAL) on October 24, 2013, and March 26, 2014, admitting that the Claimant suffered a compensable right knee (RLE) injury on September 17, 2013, but denying liability for the right shoulder (RUE) component of the Claimant's injury.

11. As the result of the denial of liability for the Claimant's right shoulder injury, the Claimant had significant unreimbursed out-of-pocket expenditures for the treatment recommendations of ATP Dr. Gersoff (Claimant's Exhibit 7, bate stamp 26).

12. Prior to his injury of September 17, 2013, the Claimant had undergone surgery on his right shoulder. He recovered and was able to return to full duty as a pilot, without restrictions. He also had follow up evaluations with ATP Dr. Gersoff between 2004 and April 2013, and underwent several rounds of physical therapy (PT). He was able to continue to perform his profession as a pilot, full duty

13. Additionally, on April 24, 2013, the Claimant was assigned by the Employer to fly a Boeing 737 to Hawaii. As he was removing his flight bag from an area in the cockpit, he pulled his right shoulder and he experienced some discomfort

(Claimant's Exhibit 9). He did not file a workers' compensation claim. Rather, he sought PT on his own. This was covered by co-pays and health insurance between June and July 2013 (Claimant's Exhibit 6, bate stamp 25).

14. Between April 24, 2013, and the date of his injury on September 17, 2013, the Claimant had occasional discomfort with his right shoulder. This, however, did not interfere with his ability to perform his regular activities for the Employer while in the course and scope of employment.

15. After the Claimant's injury in September 2013, his right shoulder dramatically worsened and he was functionally unable to perform his pilot duties. Subsequently, he was out of work due to the combined effect of his right shoulder and right knee injuries for approximately six months, between September 24, 2013, and March 11, 2014 (Claimant's Exhibit 1).

**Respondent's Independent Medical Examination (IME) by Timothy S. O'Brien, M.D.**

16. Dr. O'Brien was accepted as an expert in the field of orthopedics, treating work related injuries, and being a Level II accredited physician.

17. Dr. O'Brien acknowledged that the Claimant had an extensive tear as evidenced by the September 24, 2013 MRI; and, that this MRI showed that there had been significant changes in right shoulder findings between an earlier MRI in 2008 and the one on September 24, 2013.

18. It was Dr. O'Brien's opinion that the Claimant's massive tear was the result of a natural progression of symptomatology dating back to 2004 or 2008, or thereabouts. Dr. O'Brien did not dispute the fact that the Claimant's right shoulder surgery was reasonably necessary. He also was of the opinion that the Claimant's right knee problems were not work related despite the GAL dated March 26, 2014, which is *res judicata* concerning the work-relatedness of the right knee condition (Respondent's Exhibit C, bate stamp 18). The Respondents have not moved to withdraw this admission.

19. Dr. O'Brien's ultimate opinion is that neither the Claimant's slip at the Mexico City airport, nor the weight lifting episode occurring during exercise were clinically significant to the Claimant's right shoulder pathology. Yet he agreed with the Claimant that the tearing sensation the Claimant experienced while working out was probably the most significant episode of the two (Respondent's Exhibit D, bate stamp 18).

20. In March 2014, the Claimant returned to work full duty and is currently working as a full-time pilot for the Employer.

**Ultimate Findings**

21. The Claimant's testimony was straight-forward and credible throughout. Dr. O'Brien's opinions are contrary to the weight of the evidence and are specifically outweighed by the Claimant's testimony. Therefore, the ALJ finds that Dr. O'Brien's opinions lack credibility.

22. In resolving the conflict between the Claimant's testimony and Dr. O'Brien's opinions, the ALJ makes a rational choice to accept the Claimant's testimony and the plausible inferences drawn there from, and to reject the opinions of Dr. O'Brien.

23. The Claimant's testimony, and the totality of circumstances, credibly established that he had pre-existing right shoulder problems which were significantly aggravated by the events occurring in Mexico City in September 2013. As a consequence, the ALJ rejects the opinion of Dr. O'Brien, and accepts the position of the Claimant, that he suffered a significant aggravation to his right shoulder in Mexico, D.F., while on travel status with the Employer.

24. The ALJ also rejects the Respondent's argument that the Claimant's exercising in the hotel gym in Mexico City after the initiating injury, constituted a personal errand which constituted a substantial deviation from his travel status.

25. The Claimant has proven, by a preponderance of the evidence that he sustained a compensable aggravation of his pre-existing right shoulder condition as herein above described. The compensable aggravation of his RLE condition was admitted by the GAL, dated March 26, 2014.

## CONCLUSIONS OF LAW

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

**Credibility**

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *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 straight-forward and credible throughout. Dr. O'Brien's opinions are contrary to the weight of the evidence and are specifically outweighed by the Claimant's testimony. Therefore, the ALJ finds that Dr. O'Brien's opinions lack credibility.

**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 to accept the Claimant's testimony and the plausible inferences drawn there

from, and to reject the opinions of Dr. O'Brien. Despite medical opinion to the contrary, a claim may be supported by lay testimony alone. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

**Compensability**

c. An injury is compensable under the Workers' Compensation Act if incurred by an employee in the course and scope of employment. § 8-41-301(1) (b), C.R.S.; *Price v. Indus. Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). A claimant must show a connection between the employment and the injury such that the injury has its origin in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. See *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). As found, carrying the bag at the airport in Mexico, D.F., and exercising in the hotel gym, while on travel status, had its origins in the Claimant's employment as a pilot.

d. The Respondent cites to *Price, supra,* in support of its argument that exercise to remain fit for employment is not within the course and scope of employment. The fallacy with this argument is that the worker was not on travel status 24/7. Thus, the analogy does not hold up.

. e. To prove causation medical evidence is not necessary and the Claimant's testimony, as well as the constellation of facts surrounding the Claimant's injury, suffice to establish the requisite *nexus* between his injury and his travel status. See *Lymburn v. Symbios Logic, supra.*

f. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P .3d 999, 1001 (Colo. App. 2004); § 8-42-104(1), C.R.S. Thus, if an industrial injury **aggravates, accelerates, or combines** with a pre-existing condition so as to produce disability and the need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Siefried v. Indus. Comm'n*, 736 P .2d 1262, 1263 (Colo. App. 1986). As found, the Claimant's RUE and RLE injuries of September 17/18, 2013, aggravated and accelerated his pre-existing conditions.

g. An employer takes an employee as it finds him and bears responsibility for any increased disability caused by a pre-existing weakened condition. *Cowin v. Medina*, 860 P .2d 535, 538 (Colo. App. 1992). Aggravation of pre-existing condition has long been held to be compensable, and compensation does not depend on the state of an employee's health or the employee's freedom from weakness or latent tendency. *Indus. Comm'n v. Newton Lumber & Mfg. Co.,* 135 Colo. 594, 601, 314 P .2d 297, 301 (1957); § 8-42-104(1), C.R.S.

**Travel Status**

h. The Respondents argue that the Claimant's injury of September 17, 2013, is not compensable because the Claimant was deviating from travel status when he was performing exercise at the Employer's chosen Mexico City hotel gym on September 18, 2013. As determined in the Employer's GAL, the Claimant's right knee injury in Mexico City injury was undisputed, while the Claimant was in travel status on September 17/18 2013 (Claimant's Exhibit). Injuries occurring when travel confers a benefit on an employer are compensable. See generally, *Madden v. Mountain West Fabricators, supra at* 865. There is no question that the Claimant's travel while piloting a flight to Mexico City conferred this benefit.

i. The Respondent argues that the Claimant's exercise on September 18, 2013 was a non-compensable deviation from normal travel status, citing *Silver Engineering Works, Inc. v. Simmons,* 180 Colo. 309, 505 P.2d 966 (Colo. 1973). In *Silver Engineering,* the worker met his death when the Mexican plant where he was working shut down and he and other employees drove over a difficult road to a remote beach to swim and fish. The decedent went swimming in the outlet of a river and met his death. The analogy to the facts in the present case is so attenuated that it is not a valid analogy.

j. When an employee is in travel status the employee is under continuous workers' compensation coverage unless engaged in a distinct departure on a personal errand. *See Pacesetter Corp., v. Collett*, 33 P.3d 1230 (Colo. App. 2001), (reh. den and cert. den.). The risk associated with the necessity of eating, sleeping, ministering to personal needs while away from home are considered incidental to and within the scope and course of the traveling employee's employment. *Pacesetter, supra* at 1233. The exception is when an employee in travel status deviates from employment in a manner **so substantial** as to remove it from the employment relationship. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 990 (Colo. App. 2006). As found, exercise to stay fit as a pilot, while on travel status is not a substantial deviation from the pilot/airline employment relationship. Further, the exercise benefited the Employer by potentially reducing the Claimant's extent of injury and by assuring that he was in top notch physical status as a pilot while in travel status.

**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). A

"preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden concerning the compensability of the RLE and RUE aggravating injuries of September 17/18, 2013.

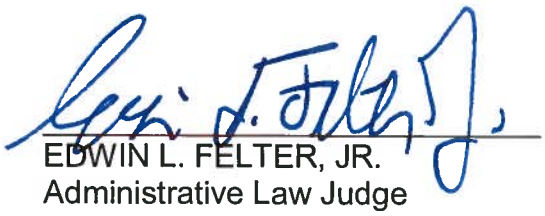
## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's right shoulder and right knee injuries of September 17/18, 2013, 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 11 day of February 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*.

At the conclusion of the hearing, counsel for the Respondents moved for a judgment in the nature of a directed verdict. The Motion was granted and the ALJ ruled from the bench, referring preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on February 2, 2015. On the same date, counsel for the Claimant indicated no objections. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

## ISSUES

The issues designated for hearing concerned the compensability of a mental-mental stress reaction on the job on July 14, 2014, pursuant to § 8-43-301 (2) (a), C.R.S. If compensable, additional issues included medical benefits; average weekly wage (AWW); and, temporary total disability (TTD) from July 14, 2014 and continuing.

## FINDINGS OF FACT

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

### Preliminary Findings

1. The Employer employed the Claimant as a part-time un-loader at their Centennial-Englewood facility. The Claimant normally worked at night. At some point in early January 2014, he obtained a job transfer from an un-loader position to a full-time package car driver position working out of the same facility. The package car position provided for higher pay, but required the Claimant to work from about 8:30 a.m. until the job was completed.

2. The Claimant underwent a one week in-class training course to become a package car driver. He then successfully completed a 30 day "on the ground" training course. The training route the Claimant drove for the training course was a Castle Rock route mixed with business and residential delivery stops.

3. Following his completion of his training course, the Claimant's job was that of a "swing driver." A swing driver is not assigned to a dedicated route. Rather, the swing driver is provided a route at the beginning of the shift. The Claimant worked as a swing driver from early March 2014 through July 14, 2014.

4. Package car drivers normally work alone. The route stops are organized and up-loaded on the driver's "diad" computer. The Claimant was aware that if he required assistance completing a route, he could call dispatch and the Employer would send him assistance.

5. As part of the Claimant's job, he was required to deliver air packages and other packages with sensitive delivery times. As part of the Claimant's job, he was assigned new routes daily. According to the Claimant, he had delivered air packages prior to July 14, 2014. He stated that the potential employee discipline for not delivering air packages was merely a discussion with management. The Claimant had not been disciplined in the past and did not have any problems between March and July meeting his deadlines on swing routes.

6. Prior to working for the Employer, the Claimant served three tours of duty in the U.S. Marines serving in Iraq. He underwent basic training and learned time management skills. He specialized in driving assault combat vehicles, and he learned time management skills while undergoing combat training.

**The Incident of July 14, 2014**

7. On the morning of July 14, 2014, the Claimant sent a text message to his manager, Dennis Messer. The Claimant requested the day off. Messer directed the Claimant to come to work. The Claimant arrived at the Employer's facility. The Employer provided the Claimant his daily route. The Claimant's swing route was a mixed business and residential route in suburban Castle Rock. Prior to starting his route around 9 AM, the Claimant took an "energy pill," which is not relevant to whether or not he suffered stress, job related or otherwise. The Claimant had until 10:30 AM to deliver the air packages.

8. Around 10:00 AM, the Claimant contacted Messer by telephone. He told Messer that he could not breathe. Messer instructed the Claimant to call 911. He did so and thereafter, he was taken to the emergency room (ER). He was diagnosed with a panic attack.

9. The Claimant indicated that there was nothing out of the ordinary on the morning of July 14, 2014. He stated that the pressure of finishing his air package deliveries on an unknown route caused him to suffer a panic attack. He further stated, however, that he spoke with Messer in the days following the panic attack. He told. Messer at that time he did know what caused the panic attack.

**The Aftermath of July 14, 2014**

10. The Claimant's treating physicians took him off work from July 15, 2014 through December 3, 2014. During that period, the Claimant applied for short-term disability (STD) benefits. The STD carrier, however, denied STD benefits on the ground the Claimant sustained a work related injury.

11. The Claimant returned to work for the Employer in the capacity of an overnight un-loader on December 3, 2014.

12. After a review of the medical records contained in the Claimant's Exhibits, except for Exhibit No. 6 (which was not admitted into evidence), the ALJ finds that though the authorized treating physician (ATP), Alisa M. Koval, M.D., stated the opinion that the Claimant sustained a work-related panic attack, the determination of whether the Claimant sustained a legally sufficient stress-related panic attack is within the purview of the ALJ and not the ATP in this instance.

13. Robert E. Kleinman, M.D., a board certified psychiatrist, who performed an independent medical examination (IME) at the behest of the Respondents, was of the opinion that the Claimant suffered from "an adjustment disorder with anxiety, resolved; and, a panic attack, single episode, resolved. Further, Dr. Kleinman was of the opinion that the incident of July 14, 2014 would not evoke symptoms of distress in a worker under similar circumstances.

**Ultimate Findings**

14. Dr. Kleinman's opinions are more persuasive and credible than all of the other medical opinions contained in the medical records.

15. The Claimant failed to prove that he sustained a legally sufficient work-related mental impairment "panic attack." The reason the Claimant sustained a panic attack was based upon his fear of not being able to complete his job on July 14, 2014, a fear that is not outside of a worker's usual experience that would evoke similar symptoms of distress in a package delivery driver in similar circumstances. The fear of not being able to complete a job related task is a personal, existential condition that is common to all fields of employment. The Claimant is a military combat veteran who served three tours as a combat assault vehicle driver. The fear of not being able to deliver packages on time with little or no disciplinary consequences, which the Claimant would have faced in this instance would this be a legally sufficient psychologically traumatic event, as measured by a worker in similar circumstances. The Claimant's reaction to the situation in question was unusually personal and would not evoke symptoms of distress in a similarly situated package delivery driver.

16. At the conclusion of the Claimant's case-in-chief, the Claimant had failed to establish a *prima facie* case. The Claimant's evidence could not get any better at that juncture, and a preponderance of the evidence was not there.

17. The Claimant has failed to prove, by a preponderance of the evidence, that he sustained a legally sufficient mental impairment claim as defined by § 8-41-301 (2) (a), C.R.S. The Claimant's claim is based on his emotional reaction to a situation that is common to all similarly situated package delivery drivers for the Employer.

18. Nonetheless, the Claimant clearly has a valid claim for short term disability (STD) benefits because the Claimant was medically disabled for non-work related reasons. The STD administrator should re-evaluate that Claimant's claim for STD benefits for the period from July 14, 2014 through December 3, 2014.

## CONCLUSIONS OF LAW

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

### Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the conclusion of the Claimant's case-in-chief, the Claimant had failed to establish a *prima facie* case. The Claimant's evidence could not get any better at that juncture and a preponderance of the evidence was not there.

### Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *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, Dr. Kleinman's opinions are more persuasive and credible than all of the other medical opinions contained in the medical records because Dr. Kleinman has the most specific expertise in the field of mental impairments.

**Compensability of Mental-Mental Claim**

c. The Workers' Compensation Act provides that an injured worker must prove several additional statutory elements when the claimant's claim falls within the scope of a mental-metal injury. A mental-mental injury is one that is caused by mental impairment solely from an emotional stimulus. *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo.App.1996). As stated in *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo.App.2012), "an injury that is 'the product of purely an emotional stimulus that results in mental impairment requires a 'heightened standard of proof' to 'help prevent frivolous or improper claims'" [*citing Davison v. Indus Claim Appeals Office,* 84 P.3d 1023, 1029 (Colo. 2004)].

Section 8-41-301(2) (a), C.R.S., requires that:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no

> physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

Section 8-41-301 (2 ) (b) further provides that:

> Notwithstanding any other provision of articles 40 to 47 of this title, where a claim is by reason of mental impairment, the claimant shall be limited to twelve weeks of medical impairment benefits, which shall be in an amount not less than one hundred fifty dollars per week and not more than fifty percent of the state average weekly wage, inclusive of any temporary disability benefits; except that this limitation shall not apply to any victim of a crime of violence, without regard to the intent of the perpetrator of the crime, nor to the victim of a physical injury or occupational disease that causes neurological brain damage; and nothing in this section shall limit the determination of the percentage of impairment pursuant to section 8-42-107 (8) for the purposes of establishing the applicable cap on benefits pursuant to section 8-42-107.5.

The Workers' Compensation Act does not permit compensation to an injured worker when "[t]he claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment." § 8-41-301(2) (c), C.R.S. As found, the Claimant's claim is based on his emotional reaction to a situation that is common to all similarly situated package delivery drivers for the Employer.

**<u>Burden of Proof</u>**

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

"preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden of proof with respect to a legally sufficient work-related mental impairment.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for work-related mental impairment are hereby denied and dismissed.

DATED this 3 day of February 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*.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be filed electronically, giving the Respondent 2 working days thereafter within which to file objections. The proposed decision was filed, electronically, on March 4, 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 or not the Claimant has the right to a Division of Workers Compensation Independent Medical Evaluation (DIME) although the Respondent has not filed either a General Admission (GAL) or a Final Admission of Liability (FAL), under the unique circumstances whereby the Respondent paid the Claimant's medical bills, designated an authorized treating physician (ATP), Sander Orent, M.D., determined that the Claimant had reached maximum medical improvement on October 18, 2014, with zero permanent partial disability (PPD). It is the Respondent's position that an FAL is a prerequisite to filing a request for a DIME, and Dr. Orent's opinion closes the case.

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

## FINDINGS OF FACT

Based on the documentary evidence, judicial admissions and arguments of counsel presented at hearing, the ALJ makes the following Findings of Fact:

### Stipulations and Preliminary Findings

1. At the beginning of the hearing, the parties stipulated that the Claimant had injured her low back lifting boxes at work on March 24, 2014. This stipulation is accepted and the ALJ so finds.

2. The parties further stipulated that the Claimant had no compensable lost time since her work restrictions were accommodated by the Respondent, and the ALJ so finds.

3. It is the Respondent's position that although the injury is work-related, it is not a legally **compensable** work-related injury because there was no lost time and no

permanent disability, according to ATP Dr. Orent, thus, the case is closed and the Claimant has no further recourse.

4. The Claimant is a 31 year old woman who was employed as an Administrative Aide for the Employer's Head Start Program (Claimant's Exhibit 2).

5. The Claimant suffered an injury/occupational disease to her low back and neck on March 24, 2014 moving heavy boxes of school books and other school items down stairs on behalf of the Employer at work (Claimants Exhibit 2 and Stipulation). The Respondent made a judicial admission that the medical records support these circumstances of injury.

**Medical Treatment**

6. The Claimant was first seen by Respondent's designated provider, Arbor Occupational Medicine (hereinafter " Arbor"), on April 7, 2014. At Arbor, the Claimant came under the care of sander Orent, M.D. (hereinafter "authorized treating physician," "ATP," or "Dr. Orent"). Dr. Orent's initial impression was "cervical and lumbar strains, related to a lot of carrying and lifting at work." Dr. Orent gave the Claimant lifting restrictions and advised her to avoid twisting and forward bending at the waist (Claimant's Exhibit 6, Note of April 7, 2014).

7. The Claimant continued her treatment at Arbor with Dr. Orent until October 8, 2014. The medical records at Arbor over that time period from April 7 – October 8, 2014 indicated a cervical and lumbar strain, which waxed and waned (Claimant's Exhibit 6). Dr. Orent imposed physical restrictions, which the Respondent accommodated (Claimant's Exhibit 6). The Respondent paid the Claimant at her regular hourly rate for the time she missed work for doctor appointments. This finding is based on judicial admissions by both parties.

8. On October 8, 2014, the Claimant had her final visit with Arbor. The Arbor doctor, Dr. Orent, noted that the Claimant had "both neck and lumbar pain with paraspinous spasm but the pain generators are very diffuse and virtually impossible to identify and treat." Dr. Orent noted that the Claimant appeared to be sad and depressed. He placed the Claimant at MMI. Dr. Orent stated **"there is no ratable impairment here."** He then gave the Claimant permanent lifting restrictions of 10-15 pounds maximum weight, no crawling, and no climbing ladders. He recommended maintenance medical care after MMI (Claimants Exhibit 6, Note of 10/8/2014).

9. Arbor records indicate that on two occasions the Claimant requested either x-rays or an MRI (magnetic resonance imaging) study of her cervical spine and lumbar spine. No MRI or x-rays of the Claimant's back were ever done (Claimant's Exhibit 6, Notes dated 6/3/2014, and 8/1/2014).

10. The final report from Arbor on October 8, 2014 states under physical examination: "paraspinous tenderness and tightness continue on physical examination." The Assessment/Plan in the final note reads: "I [Dr. Orent] believe that [Claimant] is, indeed, at maximum medical improvement. I do not think there is anything more we can offer her. She did not benefit from the therapeutic dry needling. I reviewed with her all of the various treatments that we have done and there frank lack of success. I have encouraged her to be as active as possible, explaining to her that movement is not going to cause structural damage but would likely benefit her considerably in terms of her conditioning, bone density and other issues of that nature. There is no ratable impairment here. In my view we have been unable to isolate structural abnormalities here. The pain is diffuse. As stated, I do not have anything further to offer her. I think her ongoing symptoms are much more related to static posturing in her classes, driving, etc., but it is hard to attribute her worsening to her previous work issues" (Claimant's Exhibit 6, Note 10/8/2014).

11. Based on the medical records and the statements and judicial admissions of counsel at the hearing, the ALJ finds that the Claimant's work injury was a significant injury. But for the Respondent's decision to accommodate the Claimant's work restrictions and to pay the Claimant her regular wage for the time she missed attending medical appointments, the ALJ draws a plausible inference and finds that the Respondent would have had to pay indemnity benefits to the Claimant for the time missed from work because of the injury/occupational disease. Also, ATP Dr. Orent recommended post-MMI medical maintenance care.

**Procedural Posture**

12. On October 10, 2014, the Claimant filed a Worker's Claim for Compensation (Respondent's Exhibit A) with the Division of Workers Compensation (DOWC). On October 21, 2014, the Respondent filed a Notice of Contest for Further Investigation," review of medical records" (Respondent's Exhibit C).

13. On October 27, 2014, the Claimant filed a Notice and Proposal to Select a Division IME, indicating that she wished to challenge the zero impairment rating given by ATP, Dr. Orent. The Respondent filed a Motion to Strike Claimant's Notice and Proposal

(Respondent's Exhibit E). The Claimant filed a Response to Respondent's Motion to Strike (Respondent's Exhibit F). On November 13, 2014, Prehearing ALJ (PALJ) Thomas DeMarino entered an order denying Respondent's Motion to Strike (Respondents Exhibit G). Thereafter, the Respondent filed a Motion for Reconsideration of the Order Permitting Claimant to Obtain a DIME (Respondents Exhibit I). The Claimant filed a Response to the Respondent's Objection (Respondent's Exhibit K).

14. On February 18, 2015, PALJ DeMarino entered a Prehearing Conference Order striking the DIME Application. PALJ DeMarino indicated that "both sides have stated valid arguments for their positions." **PALJ DeMarino resolved the dispute in favor of the Respondent's Motion to Strike, stating that a "condition of a DIME is that it has no application in a workers' compensation case where compensability as an issue has been contested. A DIME only applies in a workers compensability case where the compensability issue has been determined or judicially admitted in favor of a claimant. ...no DIME will be conducted in the case until the issue of compensability has been determined judicially in favor of the claimant"** (emphasis supplied) [Respondent's Exhibit M].

**Ultimate Findings**

15. The Claimant sustained a legally sufficient work-related injury/occupational disease on March 25, 2014, which necessitated significant medical treatment for at least six months thereafter, permanent physical restrictions, and ATP recommended post-MMI maintenance medical treatment.

16. Arbor and Dr. Orent were the Claimant's authorized treatment providers.

17. On October 8, 2014, ATP Dr. Orent placed the Claimant at MMI with zero PPD, he gave the Claimant permanent physical restrictions causally related to the work injury of March 25, 2014, and he recommended post-MMI maintenance medical treatment.

18. Upon receipt of ATP Dr. Orent's MMI and PPD opinions, the Claimant filed a timely Notice and Proposal to Select a DIME as herein above found and required by the Workers Compensation Act (hereinafter the "Act"). The ALJ infers and finds, based on PALJ DeMarino's Prehearing Conference Order, that the DIME request requirements place the Claimant between a "rock and a hard place" because a formal, legalistic determination of "compensability" had not yet been made, as is being made herein. The Respondent implicitly argues that the Claimant's claim was contested until the ruling herein.

19. After the Claimant filed a Worker's Claim for Compensation, dated October 10, 2014, the Respondent filed a timely Notice of Contest on October 21, 2014.

**The Claimant's Argument**

The Claimant argues that by definition she has suffered a legally compensable injury. The Respondent stipulated that the Claimant was injured at work and that she incurred, and Respondent paid, medical treatment through the ATP, Dr. Orent at Arbor. The Claimant argues that § 8-42-107.2 (2) (b), C.R.S., allows for a DIME in these circumstances. That statue reads: "if any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME... Unless such Notice and Proposal are given within thirty days after the date of mailing of the final admission of liability **or** the date of mailing or delivery of the disputed findings or determination as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physicians finding and determinations shall be binding on all parties and on the division" (emphasis supplied). The Claimant argues that in this case the ATP's disputed findings and determination were mailed on October 8, 2014 and that the Claimant was required to file a Notice and Proposal within thirty days in order to preserve her right to a DIME. The Claimant filed her Notice and Proposal on October 27, 2014. The Claimant argues that the statutory trigger for a DIME is in the disjunctive by virtue of the word "**or**" being used. Consequently, there are two alternative triggers for a DIME and the Claimant chose the second trigger.

**The Respondent's Argument**

The Respondent argues that if there was no lost compensable time, no indemnity benefits paid, and no impairment rating at the end of treatment, therefore, by definition the injury cannot be considered to be a legally **"compensable injury"** requiring the Respondent's to file a FAL. The Respondent further argues that a FAL is the only trigger allowing a claimant to seek a DIME, and since the Respondent is not required by § 8-43-101 and 8-43-103, C.R.S., to file any report with the Division of Workers Compensation (DOWC), the Claimant, therefore, cannot obtain a DIME and cannot challenge the ATP's MMI determination and zero percent rating. The Respondent argues that to hold otherwise would lead to a deluge of claims for minor injuries that would have to be processed by insurance companies and the DOWC (this argument is not supported by any studies or statistics).

## CONCLUSIONS OF LAW

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

### Judicial Admissions

a. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986); *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP,* 230 P.3d 1275, 1283 (Colo. App. 2010). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. Stipulations are a form of judicial admission and are binding on the party who makes them. *Maloney v, Brassfield,* 251 P.3d 1097, 1108 (Colo. App. 2010). As found and concluded, the Respondent stipulated to certain facts and these stipulations constitute judicial admissions. As further found and concluded, the Respondent made unequivocal judicial admissions in its arguments as herein above and herein below referenced.

### Compensability

b. The parties have stipulated that the Claimant did not have any lost time from work as a result of the injury in excess of three shifts or calendar days. . *See* § 8-43-101, C.R.S. Notice of Injury- time limit. (1) "*Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days…".* Consequently the Respondent was not required to file any forms with the DOWC reporting the injury.

c. The parties agree that the Respondent furnished the Claimant medical care and treatment for the work injury/occupational disease without admitting or denying liability. § 8-43-103, C.R.S. Notice of Injury- time limit. "*(2) The furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section."* The statute, §. 8-43-103 (2), is a statute of limitations which would prevent a claimant from making any claim within two years after the date of the injury even if she received medical benefits. Insofar as it is a statute of limitations, the critical milestone from which the time is measured is the date of the **compensable** event. The ALJ concludes that the statute does not stand for the proposition that a claim is not compensable if only medical benefits are provided. As

found, the Claimant filed her Application for Hearing on the issue of compensability after PALJ DeMarino ruled that no DIME could be held until compensability of the underlying injury had either been determined or judicially admitted. Arguably, under § 8-43-101 the Respondent was not required to file a Response to the Claimant's Application for Hearing. Nonetheless, the Respondent filed a "*Notice of Contest for further investigation, medical records review*". Ultimately, at the hearing, as found, the Respondent stipulated and agreed in oral argument, which constitutes a judicial admission, that the Claimant had suffered a work injury which required medical benefits that were paid by the Respondent.

d. The Respondent argues that under the statutory scheme of the Act, they are not required to file a Final Admission of Liability (FAL) and , consequently, the Claimant is absolutely barred from asking for a DIME. The Respondent relies on § 8-42-107.2 (2)(a), C.R.S., which reads: "*(I)Except as otherwise provided in subparagraph (II) of this paragraph (a), the time for selection of an IME* (DIME) *commences as follows, depending on which party initiates the dispute:*

> *(A) For the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer or self-insured employer that includes an impairment rating issued in accordance with section 8-42-107."*

e. The Claimant argues that she is entitled to a DIME pursuant to § 8-42-107.2 (2) (b) which reads: "*<u>If any party disputes a finding or determination</u> of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the Division by rule… Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability* ***<u>or</u>*** *the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division"* (emphasis supplied). The Respondent argues that this section only applies to respondents, despite the wordage that states *"any party."* As found, the Claimant began the process for requesting a DIME, within 30-days of the receipt of ATP Dr. Orent's opinion of MMI with zero PPD. For the Claimant to wait for the herein determination of compensability, pursuant to PALJ DeMarino's order that a DIME could not be pursued until there was a determination of compensability would be to risk exceeding the statutory time limit to request a DIME, thus, lending the Respondent the argument that the Claimant was too late to request a DIME. The only logical resolution of the dilemma is to relate the request for a DIME forward to the herein finding of compensability

f. Section. 8-40-20, C.R.S<u>. Definitions</u>, states: "*(2) "Accident"," injury", or" injuries" includes disability or death resulting from accident or occupational disease as*

*defined in subsection (14) of this section."* Subsection (14) states *"Occupational disease means 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."* Indeed, the definitions do not state that there is no compensable injury if an employer/insurance carrier pays medical benefits and regular wages, during time off work, without admitting or denying liability.

g. In *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App 1991), the Court stated "the term injury has been construed by our Supreme Court to mean a compensable injury. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *See generally* 1B A. Larson Workman's Compensation Law Section 42.00 (1991). Consistent with the statutory definition and judicial construction, our court has consistently held that an occupational disease is compensable only if it results in disablement and that rights and liabilities for occupational disease are governed by the law in effect at the onset of disability" (emphasis supplied). As found, the Claimant's injury/occupation disease resulted in her "disablement" –but her Employer paid regular wages when she was off work and the insurance carrier paid medical benefits without admitting or denying liability. The ALJ infers and finds that ATP Dr. Orent's permanent physical restrictions amount to "disablement."

h. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc., supra. Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment **or** be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. In *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002), ICAO stated *"A compensable industrial accident is one which results in an injury requiring medical treatment **or** causing disability."* In *Wherry,* ICAO upheld the ALJ who had found that the claimant's injury was an incident which was *"sufficiently insignificant"* that it did not cause an *"injury"* to the Claimant. As found, the Claimant's injury in the present case was **not** insignificant. *Au contraire,* her injury was significant to the extent that she was given permanent work restrictions and but for the altruistic actions of her Employer, she would have been entitled to indemnity benefits for her time off work.

i. In *Price v. Indus. Claim Appeals Office*, 919 P.2d 207 (Colo. 1996), the Court held: *"To be compensable under the Workers Compensation Act, an injury incurred*

*by an employee must arise out of and in the course of the employee's employment.* The ALJ concludes as a matter of statutory construction, that the Claimant in this case suffered a *"***compensable injury***".* The injury suffered by the Claimant was not a minor cut finger or a stubbed toe. It was sufficiently serious to require medical treatment and permanent work restrictions. But for the Respondent's accommodation of the Claimant's work restrictions, the Claimant would have been entitled to indemnity benefits. In this case, as found, the Claimant suffered an injury to her low back and neck, she was treated for approximately six months, she was given permanent work restrictions, and ATP Dr. Orent recommended post-MMI medical maintenance care.

j. The Respondent argues that the case of *Harmen-Bergstedt v. Loofbourrow,* 320 P.3d 327 (Colo. 2014) stands for the proposition that there can be no DIME without a FAL. The ALJ notes that there is a great deal of *dicta* in the *Loofbourrow* case. The Court itself stated: *"the sole issue before this court is whether Loofbourrow could be entitled to an award of temporary disability benefits without having challenged, by means of a division sponsored independent medical examination, the initial treating physician's assessment that she had reached maximum medical improvement."* The facts in the *Loofbourrow* case are significantly distinguishable from the facts in this case, and the *dicta* in the opinion was unnecessary for its ultimate disposition. The *Loofbourrow* opinion is neither dispositive nor helpful to the resolution of this case.

k. Reading the statutory provisions in the way argued by the Respondent would allow employers/insurance carriers to deny DIMEs by having an employer accommodate the restrictions no matter what they might be if the ATP (chosen by the employer) declared that the Claimant had reached MMI with no impairment. If the Employer in this case had decided to not accommodate the Claimant's work restrictions, the Respondent would have had to pay indemnity benefits and the Claimant would have had the unquestionable right to a DIME. In *Vargo v. Indus. Comm'n*, 626 P.2d 1164 (Colo. App.1981), the Court noted the general "*beneficial intent"* of the Workers Compensation Act. In *Loofbrourrow, supra,* the Court implicitly acknowledged the beneficial intent of the act by concluding that the term "*Maximum Medical Improvement as a statutory term of art, therefore has no applicability or significance for injuries* <u>*insufficiently serious*</u> *to entail disability indemnity compensation in the first place"* (emphasis supplied). Based on this statutory interpretation, the *Loofbourrow* Court decided that the injured worker did not need a DIME before receiving temporary disability benefits despite the fact that she had been placed at MMI. To allow a respondent to avoid a DIME in situations such as this where a claimant has suffered an admitted (but Respondent argues –not a legally **compensable** injury) serious injury, has received substantial medical care, has been given permanent work restrictions with a zero medical impairment rating, and has been prescribed post-MMI medical maintenance benefits, would produce an inequitable and unjust result that would subvert the beneficent intent of the Workers Compensation Act by closing the door to challenge, based on a tortured and mechanistic interpretation of the interplay between provisions of the Act.

l. A statute which prevents a claimant from exercising her rights to administrative or judicial review of an employer selected physician would violate due process concepts. *See Whiteside v. Smith,* 67 P.3d 1240 (Colo.2003). Equal protection is violated when a challenged procedure results in dissimilar treatment for similarly situated individuals. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). As stated in *Henderson, supra: "We must presume the general assembly intended a just and reasonable result. ...If a statute is susceptible to two interpretations, one would uphold the statue and its constitutionality, the other would strike it down, it is the court's duty to apply a constitutional interpretation. People v. Fagerholm,* 768 P.2d 689 (Colo. 1989). The ALJ concludes that § 8-42-107.2 (2 ) (b), C.R.S., and 8-42-107(8) (b ) (II) and (8) (c) should be interpreted in a manner that would allow a claimant who has suffered an admitted or judicially determined consequential work injury or occupational disease to a DIME even if the respondents are not obligated under the relevant statutes to file a FAL.

**<u>The Historic Compact and Liberal Interpretation of Statutory Provisions</u>**

m. Section 8-40-102 (1), C.R.S. declares:

> It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers...recognizing that the workers' compensation system in Colorado is based on a mutual **renunciation** (emphasis supplied) of common law rights and defenses by employers and employees alike.

*See* "Erosion of the Exclusive Remedy in Workers' Compensation," Felter. Edwin L., Jr. and Hubbard, Sarah A., 31 *The Colorado Lawyer* 83 (2002). The Act "is highly remedial and beneficent in purpose, and should be **liberally** (emphasis supplied) construed so as to accomplish its evident intent and purpose. *Indus. Comm'n v. Johnson,* 64 Colo. 461, 172 P. 422 (1918); *Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo. 1996). While the law is to be liberally construed, the facts are on a "level playing field" of appropriate evidentiary standards of proof. To accept the Respondent's interpretation of DIME triggers in such a way that an injured worker can be "slam dunked" out of the right to a DIME when an employer pays medical benefits and regular wages for a significant work-related injury, without admitting or denying liability, and then refer the worker to an authorized treatment provider that places the worker at MMI with zero PPD, would be to strictly and technically construe the DIME provisions to preclude further recourse by the injured worker. Such a construction hardly works to achieve the beneficent purposes of the Act to "assure the quick and efficient delivery of ...benefits." Indeed, such an interpretation, although providing a "full employment act" for attorneys to argue about technical, procedural constructions of the Act, it does nothing to advance the speedy and efficient delivery of benefits to an injured worker.

n. PALJ DeMarino's Prehearing Conference Order to the effect that there can be no DIME until "compensability" is determined is correct, however, it does not mean that the previous sequencing of the DIME process should be negated and start on the date of this decision wherein "compensability' has been determined. Consequently, the Notice and Proposal, filed on October 27, 2014, should proceed from today forward. The most logical way to accomplish the beneficent purposes of the Act to provide the speedy and efficient delivery of benefits is to consider the DIME process as having begun on the date of this decision and move forward from today.

**Burden of Proof**

o. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to a legally compensable injury and the appropriate trigger to begin the DIME process.

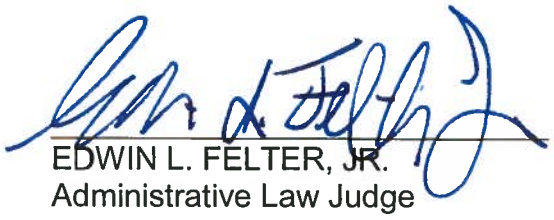
## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has the right to a Division Independent Medical Examination (DIME), pursuant to the Workers Compensation Act and the Division of Workers Compensation Rules, and the DIME process, having commenced on October 27, 2014, shall be considered to have commenced from the date of this decision and shall move forward accordingly.

B. Any and all issues not determined herein, including average weekly wage, are reserved for future decision.

DATED this 12 day of March 2015.



EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

## ISSUES

Whether Claimant has established by a preponderance of the evidence entitlement to ongoing maintenance medical care.

## FINDINGS OF FACT

1. Claimant suffered a work related injury to her upper left extremity on November 15, 1993.

2. Claimant was placed at maximum medical improvement (MMI) on June 12, 1995 and began receiving permanent total disability benefits and maintenance medical benefits.

3. Respondents admitted to reasonable, necessary, and related maintenance medical benefits in their final admission of liability. Respondents now are challenging whether Claimant's numerous medications and continuing treatment are reasonable, necessary, and related to her 1993 work injury.

4. Claimant has been receiving medical maintenance treatment since 1995 with very little success.

5. Prior to Claimant's work related injury in 1993, Claimant had significant medical problems. She was involved in a motor vehicle accident in 1978 that resulted in severe headaches. She had a second motor vehicle accident in 1992 and developed pain, numbness, and tingling in the entire left arm and hand. In 1992 she also had an MRI of the cervical spine that showed a disc bulge at C5-C6. Claimant also was diagnosed with carpal tunnel syndrome and thoracic outlet syndrome in 1992.

6. On November 30, 1994 Richard Grenhart, Psy.D., diagnosed Claimant with: adjustment disorder with mixed emotional features; provisional somatoform pain disorder; and history of personality disorder with narcissistic and dependent traits. Dr. Grenhart opined that Claimant was a poor candidate for pain management treatment and recommended against prescribing ongoing pain medications.

7. In March of 1995 Claimant attended an intensive outpatient pain management program and it was noted by psychiatrist Howard Entin, M.D. that

Claimant's pain behaviors showed a dramatic decrease and that the program helped significantly.

8. On June 7, 1995 Henry Roth, M.D. diagnosed Claimant with somatization disorder with chronic pain. He opined that the enormity of the complaints and dysfunction Claimant presented with were not related to her Workers' Compensation claim. Dr. Roth noted that Claimant had the same chronic pain syndrome and same distribution of symptoms prior to this claim.

9. On June 13, 1995 Dr. Roth noted Claimant's history of chronic pain involving the left upper quarter since a 1993 motor vehicle accident.

10. On September 27, 1997, Gary W. Jay, M.D. saw Claimant in a pain medicine consultation appointment and recommended she discontinue medications.

11. On May 8, 1998, Edwin Healey, M.D. performed an Independent Medical Evaluation. He noted Claimant was requiring multiple medications without an improvement in her symptoms. He opined that her chronic pain syndrome began with her history of traumatic emotional and physical abuse in childhood. He opined that Claimant had severe symptom magnification, chronic pain, and a desperate need to manipulate her environment and family with her pain.

12. On May 12, 1998 Howard Entin, M.D. performed an Independent Medical Evaluation. He opined that Claimant had a preexisting personal susceptibility to depression and somatization and had ongoing mild depression.

13. On August 21, 2001 Claimant underwent a psychiatric Independent Medical Examination by Burt Furmansky, M.D. He assessed Claimant with major depressive disorder, chronic pain disorder, posttraumatic stress disorder, preexisting due to abuse, and personality disorder.

14. On April 6, 2004, Thomas Whalen, M.D. noted that despite a marked increase in opiate medications, there was no evidence of any improvement in pain or functional capacity. Dr. Whalen recommended Claimant immediately stop all of her opiate medications and begin to wean her other medications.

15. On July 27, 2004, Brian Lambden, M.D. performed an Independent Medical Examination (IME) of Claimant. Dr. Lambden recommended reducing and hopefully discontinuing Claimants opioid use and indicated that Claimant's current medication regimen was not appropriate.

16. Following the IME, Dr. Lambden became Claimant's authorized treating physician upon agreement of the parties. At this time, Claimant was living in New Mexico but flying to Denver every four to six months to see Dr. Lambden. Per his recommendations and opinion, Dr. Lambden decreased Claimant's use of OxyContin from 500 mg to 100 mg from 2004-2006.

17. At a March 16, 2006 appointment, Claimant filled out a progress questionnaire. In the pain diagram to indicate where she felt pain, Claimant scribbled in and blacked out almost the entire body diagram. Claimant wrote that since her last appointment she felt worse, nothing was better, and everything was worse.

18. On June 14, 2006, Brian Lambden, M.D. submitted a letter to Pamela Black, M.D. who was to be taking over Claimant's care. Dr. Lambden indicated in the letter that Claimant has a long history of pain dating back to 1978. Dr. Lambden noted that Claimant did not have chronic regional pain syndrome, but a very complex medical history with significant chronic pain syndrome/somatoform pain disorder complicated by opioid dependence.

19. Dr. Black took over Claimant's maintenance medical care in New Mexico on May 30, 2006 and continues to prescribe opioid medications to Claimant.

20. Since May 30, 2006, Claimant's function has not improved despite the continuing medication and opioid use.

21. On April 7, 2014 Dr. Lambden again noted his opinion that Claimant had chronic pain symptoms that were not due to underlying organic tissue pathology but due to chronic pain syndrome and somatoform pain disorder, which had been present since the 1970's, complicated by her depression, personality disorder, and opioid dependence.

22. Dr. Lambden opined that Claimant's opioid dependence would be best served by slowly tapering off and discontinuing opioid agents. Dr. Lambden opined that Claimant's continued use of opioids is not appropriate because her functionality is not improving.

23. Dr. Black reviewed Dr. Lambden's recommendations, and opined in a report that she was open to weaning Claimant off narcotic medication or substantially reducing Claimant's narcotic medication, but that she did not have time in her schedule immediately to take that on.

24. Dr. Lambden's opinion that Claimant's depression, somatoform pain disorder, and chronic headaches all existed prior to her work injury in 1993 is credible, persuasive, and supported by the extensive medical records as well as the opinions of several other physicians as found above.

25. The following medications are not related to Claimant's 1993 work injury: wellbutrin, an antidepressant; valium, an anxiety medicine; trazedone, an antidepressant used for sleep issues; simvastatin, a cholesterol medication; lyrica, an anti-seizure/pain medication; levothyroxine, a thyroid medication; calan, a headache medication; diazide, for swelling; and fioricet, a headache medication.

26. Dr. Lambden's opinion that the above medications are not related to Claimant's 1993 work injury is found credible, persuasive, and supported by the extensive medical records.

27. Claimant began using opioids due to her 1993 work injury. She continues to use opioids and has an opioid addiction due to her work injury.

## 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. (2003). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2003). 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).

### *Maintenance Medical Benefits*

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. 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).

In cases 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,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Respondents have challenged Claimant's request for ongoing maintenance treatment and medications in this matter. Claimant argues that all of her current medications are reasonably necessary to relieve the effects of her November, 1993 injury and to prevent further deterioration of her condition. Claimant's argument and testimony is not persuasive. As found above, Claimant suffered a left upper extremity work related injury in 1993. Although this injury required treatment, Claimant had significant medical issues including depression, somataform pain disorder, and chronic headaches prior to the work injury as documented and opined credibly by Dr. Roth, Dr. Healey, and Dr. Lambden. These significant pre-existing problems continue to date. The testimony of Dr. Lambden is found credible and persuasive that other than the opioid/pain medication and the stool softener (due to opioid use), all the other medications Claimant currently takes are not related to Claimant's work injury. Claimant was unable to testify or recall from memory what types of medications she currently takes or explain how they were related to her 1993 upper extremity work injury. The medical records, as found above, show significant medical issues unrelated to the work injury that cause the need for most of Claimant's current medications. Claimant has failed to meet her burden to specifically show that the following medications that Respondents have challenged are, more likely than not, related to her 1993 work injury: wellbutrin, valium, trazadone, simvastatin, lyrica, levothyroxine, calan, diazyde, and fioricet.

Claimant has presented substantial evidence to show that future medical treatment is reasonably necessary to prevent further deterioration of her condition, only as it relates to her opioid addiction. Although Claimant is stable and performs very

basic daily living activities at the present, the heavy medication that she is currently taking is not preventing her deterioration but rather is making Claimant's opioid dependence worse. As found above, dating back to 1994, multiple providers have opined as to the necessity to discontinue medication and have documented that even with greater opioid use, Claimant is not seeing any functional improvement. In 1994, Dr. Grenhart recommended against prescribing ongoing pain medications. In 1997, Dr. Jay recommended Claimant discontinue medications. In 1998, Dr. Healey noted Claimant was requiring multiple medications without an improvement in her symptoms. In 2004, Dr. Whalen noted that despite a marked increase in opiate medications, there was no evidence of any improvement in pain or functional capacity and recommended Claimant immediately stop all of her opiate medications and begin to wean her other medications. Despite these warnings and recommendations of physicians, dating back 21 years, Claimant continues to take and use significant medications including opioids. Dr. Lambden is credible and persuasive that the opioids are not appropriate and Claimant should be tapered off the medications. Claimant's current treatment plan is not reasonable and necessary to maintain Claimant's condition and in fact is furthering Claimant's opioid addiction.

Claimant has shown by a preponderance of the evidence that she currently suffers from opioid addiction, and that this addiction is more likely than not related to her 1993 upper extremity work injury. To prevent further addiction, and further deterioration of her current addicted state, a rehabilitation program to address the opioid addiction is reasonably necessary and related to her work injury.

## ORDER

It is therefore ordered that:

1. Claimant's claim for maintenance medical care related to her November 15, 1993 injury is limited to in-patient rehabilitation and out-patient follow up treatment for her addiction to opioid medications, for up to one year from the date of this Order.

2. Claimant has failed to meet her burden to show she is entitled to further maintenance care for her November 15, 1993 injury other than treatment for opioid addiction.

3. Claimant has failed to meet her burden to show that the following medications are reasonable, necessary, or related to her November 15, 1993 work injury: Wellbutrin, Valium, Trazadone, Simvastatin, Lyrica, Levothyroxine, Calan, Diazyde, and Fioricet. Respondents are not responsible for the cost of these medications.

4. For one year following this order, Respondents shall continue to be responsible for the costs of any opioid medications, colace,

and any opioid replacement medications used for treatment of Claimant's opioid addiction.

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

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

DATED: February 20, 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 presented for determination are whether the Claimant is entitled to ongoing maintenance medical treatment in the form of medications and periodic examinations.

## FINDINGS OF FACT

1. The Claimant sustained a compensable injury to his neck on June 27, 1999. Claimant received medical treatment from various providers including Dr. John Charbonneau.

2. Dr. Charbonneau determined that Claimant reached maximum medical improvement (MMI) for the work injury on September 15, 2000. At that time, Dr. Charbonneau believed that Claimant had more wide spread physical complaints which he did not believe were related to the injury. With regards to maintenance care, Dr. Charbonneau referred Claimant back to Dr. David Reinhard for medication. Dr. Charbonneau noted that Claimant's medications at that time were Zestril; Ibuprofen; Ultram; Baclofen; and Vitamin E supplements. Historically, Claimant had tried Celebrex, Ibuprofen and Vioxx. Dr. Charbonneau outlined a treatment plan for Claimant that included medication and periodic evaluations: "I do want him to see Dr. Reinhard next week to address medication issues. He may need to see me or Dr. Reinhard or Dr. Burns for periodic surveillance in the future. I will be happy to make his medication available to him."

3. Claimant underwent a DIME with Dr. Ray Jenkins on February 27, 2001. Dr. Jenkins agreed with the date of MMI, and agreed that Claimant's thoracic and lumbar spine symptoms were unrelated to Claimant's work injury. Dr. Jenkins determined Claimant's impairment rating was 32% whole person with no apportionment. Dr. Jenkins' report specifically notes that the impairment rating was for an injury to the C5-6 level of Claimant's spine. Dr. Jenkins noted that Claimant's medications at that time included Baclofen, Neurontin, Ultram, Zestril, Lidoderm patch and Celexa. Dr. Jenkins noted that Claimant's current medications were reasonable.

4. In April 2003, the Claimant applied for hearing on the issue of permanent total disability. ALJ Barbara Henk denied Claimant's claim for permanent total disability and specifically stated that maintenance medical benefits were reserved for future determination.

5. On January 7, 2013, the Respondents referred the Claimant to Dr. Nicholas Olsen, for an independent medical examination. Dr. Olsen examined the Claimant, reviewed his medical records and issued a report. Dr. Olsen admittedly did

not review all of the medical records, particularly the surgical reports for the non-work related surgeries performed by Dr. Donner.

6. Claimant had problems in his cervical spine prior to the June 1999 injury. Specifically, Claimant underwent a cervical MRI on January 18, 1999. Dr. Olsen testified that this MRI revealed that Claimant had multiple herniated disks at this C4-5, C5-6, and C6-7 levels. Dr. Olsen testified that this level of degeneration at these levels was caused by the natural progression of his degenerative disk disease. Dr. Olsen also testified that, as of that time, it was probable that Claimant's degenerative disk disease at these levels would worsen over time. Dr. Hans Coester performed a fusion surgery at the C4-5 level of Claimant's cervical spine on January 29, 1999.

7. Claimant then had his June 27, 1999 work injury. Based on his review of the medical records, Dr. Olsen opined that the work injury resulted in pathology at the C5-6 level.

8. On August 16, 1999, Claimant had his second cervical surgery. Specifically, Claimant underwent cervical fusion at the C5-6 level.

9. Claimant saw Dr. Reinhard on September 20, 2000. At that time, Claimant was complaining of a constellation of pain symptoms. On physical examination, Claimant presented in a significantly disabled fashion. Specifically, Claimant walked stiffly in apparent discomfort and showed significant restrictions of range of motion both in his cervical and lumbar area. Claimant demonstrated tenderness over the cervical, thoracic, and lumbar spine. Dr. Reinhard did not have any further treatment recommendations for Claimant. Dr. Reinhard rendered the opinion that Claimant's cervical problems did not explain this constellation of pain symptoms. Rather, Dr. Reinhard believed that Claimant's recent deterioration was largely due to numerous psychological stressors. At that time, Claimant was only on Ultram and Baclofen. Dr. Olsen testified that Ultram is a very mild pain medication and Baclofen is a mild muscle relaxer. Claimant reported that the consumption of Ultram and Baclofen was very helpful.

10. Dr. Olsen agreed with the opinions of Dr. Charbonneau and Dr. Jenkins that Claimant's lumbar and thoracic problems were not related to his June 1999 work injury.

11. On October 20, 2004, the Claimant underwent a fusion procedure at the C6-7 level of his spine, which Dr. Jeffrey Donner performed. At the time of the surgery, Dr. Donner viewed the fusion performed at the C5-6 level (a fusion for the 1999 injury), and noted that the fusion was solid.

12. Dr. Olsen opined that the October 2004 surgery was performed to address the degenerative disc disease at the C6-7 level. Dr. Olsen also opined that the June 1999 injury did not in any way result in further pathology at the C6-7 level.

13. On February 6, 2006, Dr. Donner performed another surgical procedure on Claimant's cervical spine. As the operative report reflects, Dr. Donner performed this

procedure due to Claimant's development of pseudoarthrosis at the C6-7 level. Pseudoarthrosis is a non-fusion at the C6-7 level. The February 6, 2006 operative report again reflected that the fusion at the C5-6 level was still solid.

14. Dr. Donner performed a thoracic fusion at the T4 through T11 levels on September 19, 2005. Dr. Olsen noted that this procedure involved putting in pedicle screws at each of the levels from T4 through T11 and then joining them by using rods. Dr. Donner fused 7 out of the 12 thoracic vertebrae levels in this procedure. As found above, Dr. Olsen agreed with Dr. Charbonneau and Dr. Jenkins that Claimant's thoracic condition was not related to his work injury. Dr. Olsen testified, and the ALJ finds, that the need to perform this thoracic surgery was not in any way related to the June 1999 work injury.

15. On May 8, 2006, Dr. Donner then fused Claimant's L4 through S1 levels. With this procedure, Dr. Olsen noted that Dr. Donner then had fused 50% of Claimant's spine. Again, as found above, Dr. Olsen agreed with Dr. Charbonneau and Dr. Jenkins that Claimant's lumbar condition was not related to his 1999 work injury. Dr. Olsen testified, and the ALJ finds, that the need to perform the lumbar fusion was not related to Claimant's 1999 work injury.

16. Claimant began treating with Amy Gentry, a nurse practitioner, at the Fort Collins Pain Treatment Center, on June 4, 2008. Ms. Gentry treated the Claimant at a different clinic beginning in either 2000 or 2001.

17. Ms. Gentry confirmed that Claimant is taking long-acting opioids, Oxycontin 10 milligrams up to three times per day, and 5 milligrams of Percocet two times per day, and Valium for spasms in his upper extremities and for sleep.

18. According to Dr. Olsen, the medications Claimant was taking at the time of MMI and the DIME included Ultram, which is a non-narcotic mild pain reliever and Baclofen, which is a mild muscle relaxer. Since September 2000, the Claimant has graduated to Oxycontin and Percocet, which Dr. Olsen testified were "heavy hitters" in terms of narcotic pain medications.

19. Ms. Gentry testified that it is her belief that Claimant underwent three cervical spine surgeries related to his workers' compensation injury, and that she is treating him for pain management related to those surgeries. She also noted that Claimant has pain in his thoracic and lumbar spine as well as fibromyalgia. Ms. Gentry ultimately opined the ongoing pain medications are reasonable and necessary and relieve Claimant of the effects of his workers' compensation injury.

20. Ms. Gentry also agreed that she would continue to prescribe the same pain medications for Claimant's lumbar and thoracic spine pain complaints.

21. Claimant has completed multiple pain diagrams while seeking treatment with Ms. Gentry. Dr. Olsen testified that Claimant, as part of his evaluation, also completed a pain diagram for Dr. Olsen. Dr. Olsen, in comparing the pain diagram that Claimant completed for Ms. Gentry on October 27, 2011 with the pain diagram that

Claimant completed at Dr. Olsen's evaluation, indicated that these two pain diagrams are very similar.

22. Dr. Olsen noted that Claimant's pain diagrams indicates that Claimant has pain in his mid-back, his low-back, and pain extending down to his sacral area. Claimant also indicates that he has pain in both legs as well as arm pain.

23. Dr. Olsen stated that the arm pain could be the result of Claimant's thoracic symptoms, his fibromyalgia, or coming from his neck. Dr. Olsen, in his January 7, 2013 report, stated the following:

> To the degree that [Claimant] needs continued treatment including medications, I am unable to relate them to this second surgical surgery [the C5-6 fusion caused by the June 1999 injury] and ongoing needs for opiates as well as Valium can be related to [Claimant's] subsequent non-occupational fusions in both his thoracic and lumbar spine.

24. At hearing, Dr. Olsen testified that if Claimant's level of pain complaints in his low back and mid back is reliable, he would still need the medications prescribed by Ms. Gentry even if he had no cervical symptoms at all. To the extent that Claimant had symptoms in his cervical area, those symptoms are not being caused by the C5-6 pathology and subsequent fusion. The C5-6 fusion was successful based on Dr. Donner's examination following the surgery. Three or four years after reaching MMI, when it was re-explored surgically on two occasions, the C5-6 fusion was considered stable.

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

2. 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 (2005).

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

5. In this case, the Claimant has been receiving maintenance medical care for following placement at MMI, which occurred in September 2000. At that time, both Drs. Charbonneau and Jenkins had determined that periodic examinations and the prescription medications, Baclofen and Ultram, were reasonable for the Claimant. Approximately fourteen years later, the Claimant asserts that his need for opioid medication and periodic examinations is related to his work injury.

6. As found, Claimant's 1999 work injury was limited to the C5-6 level of his spine. The Claimant had a spinal fusion of the C5-6 level under this claim, which was determined to be stable during subsequent non-work related surgeries. Since then, the Claimant has had four additional surgeries to various other levels of his spine, including fusions of the majority of his lumbar and thoracic spine.

7. At the time Claimant was placed at MMI on September 15, 2000, he was being prescribed Baclofen and Ultram. As opined by Dr. Olsen, Ultram is a non-narcotic mild pain reliever and Baclofen is a mild muscle relaxer. Since September 2000, the Claimant has graduated to Oxycontin and Percocet, which Dr. Olsen testified were "heavy hitters" in terms of narcotic pain medications. The substantial evidence found in the medical records reflects that Claimant did not need these heavy duty narcotic pain medications and Valium until after he underwent the non-work related surgeries to other levels of his spine.

8. The Claimant now has widespread pain as evidenced by the pain diagrams admitted into evidence. The ALJ is not persuaded that the 1999 work injury is causing a level of pain that would necessitate opioids and Valium given the additional problems Claimant has had since the work-related fusion surgery. As both Dr. Olsen and Ms. Gentry testified, the Claimant would need these medications absent any injury to his cervical spine. Further, Claimant did not need opioids or Valium when he was placed at MMI. Clearly, his pain symptoms have progressed over the years and there is no persuasive evidence the 1999 work injury is contributing to his high levels of pain. As such, the ALJ concludes that the Claimant's ongoing need for narcotic pain medication (Oxycontin and Percocet) and Valium is not related to his 1999 industrial injury.

## ORDER

It is therefore ordered that Respondents are no longer liable for ongoing narcotic pain medication, Valium and periodic medical examinations related to the 1999 work injury.

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

DATED: February 24, 2015

DIGITAL SIGNATURE:

L. Broniak

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

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

Chris Forsyth Esq.
forsythlaw@hotmail.com

Gregory K. Chambers Esq.
Dworkin, Chambers, Williams, York, Benson & Evans
jporter@dnvrlaw.com

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

Brenda Carrillo
SIF Penalty Coordinator
Revenue Assessment Officer
DOWC Special Funds Unit
Brenda.Carrillo@state.co.us

Date: 2/4/15

/s/Charleen Corliss
Court Clerk

## ISSUES

The issues presented for determination are whether the claim should be reopened and Respondents permitted to withdraw their general admission of liability based on allegations of fraud. Alternatively, Respondents seek to reopen Claimant's permanent total disability award based on an allegation that Claimant has the ability to return to employment. Respondents also seek applicable offsets and claim an overpayment.

Claimant filed a response to application for hearing alleging penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to pay permanent total disability benefits as ordered by ALJ Cannici on February 1, 2010. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to comply with Rule 5-8 regarding permanent total disability benefits alleging Respondents terminated permanent total disability benefits without a hearing. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S. for Respondents alleged failure to pay medical benefits consistent with the fee schedule in WCRP Rule 18.

The response to application for hearing alleges the defenses of WCRP Rule 7-3 (A) alleging Respondents failed to meet reopening requirements, waiver, estoppel, issue preclusion, claim preclusion, res judicata, doctrine of laches, statute of limitations, § 8-43-303, C.R.S. (2005), costs pursuant to § 8-42-101 (5), C.R.S., and attorney's fees pursuant to § 8-43-211 (2)(d),C.R.S. for endorsing issues not ripe for adjudication, C.R.S. § 8-43-203 (2), *Lewis v. Scientific Supply*, 897 P.2d 905 (Colo. App. 1995) and appeal of prehearing orders.

In response to the penalty allegations, Respondents moved to endorse the issue of 'cure' pursuant to C.R.S. § 8-43-304 (4), which was granted on February 25, 2013.

## BASIS FOR CORRECTED ORDER

Upon additional review of this order, the ALJ determined that she inadvertently cited to a former version of §8-43-304(1), C.R.S., in the Conclusions of Law portion of the order entered on January 16, 2015. Thus, pursuant to §8-43-302, C.R.S., the ALJ deems that a Corrected Order is necessary to clarify this clerical error. Despite the incorrect citation, the ALJ did consider that the maximum applicable penalty is $1,000.00 per day rather than $500.00 per day when imposing the penalty awarded in this case. The corrections are denoted in bold font type.

## FINDINGS OF FACT

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

1. The Claimant worked for the Employer as a hairstylist and manager.

2. On August 28, 2005, the Claimant completed an Employer's First Report of Injury and reported that on August 28, 2005, she injured her left arm. She reported that she was changing loads of towels, spilled water on the floor, fell and hurt her left lower arm. She indicated she had a strain and limited mobility. No one witnessed the accident.

3. The Claimant went to the Boulder Medical Center on August 28, 2005 and reported that she slipped in water and put arm out to break her fall. According to the treatment note, the Claimant had a contusion and possible fracture. She was released to return to work with restrictions.

4. The Respondents admitted liability on October 17, 2005, and the Claimant underwent medical treatment and continued to work for the Employer in a modified duty capacity until May 5, 2007, when the Claimant began experiencing pain in her thoracic spine. A separate workers' compensation claim was initiated.

5. The Claimant underwent treatment for her thoracic spine symptoms until she was placed at maximum medical improvement (MMI) on August 9, 2007.

6. By stipulation of the parties which was approved by the Judge on January 3, 2008, the 2005 claim was re-opened and the 2007 thoracic spine claim was incorporated into the 2005 left arm claim.

7. The Claimant has received a significant amount of medical treatment for her injuries, including a spinal cord stimulator.

8. On February 10, 2010, after a contested hearing, ALJ Peter J. Cannici found that Claimant was permanently and totally disabled. The Respondents did not appeal ALJ Cannici's decision.

9. Claimant has continued to receive maintenance care from her authorized treating physicians.

*Findings related to fraud allegation*

10. Kimberly Workman, the adjuster on this claim, testified that prior to July 26, 2010, Respondents had not received any information that would suggest Claimant had not suffered an injury at work on August 28, 2005, but rather suffered her injury the day before at Water World. Workman testified that, if at the time of the filing of the original General Admission of Liability, Respondents had information that Claimant had actually suffered an injury to the same body part the day before at Water World,

Respondents would have never admitted liability in this claim. Rather, Respondents would have filed a Notice of Contest.

11. On July 26, 2010, Workman received a phone call from the fraud unit with the DOWC notifying Respondents that a tipster had called stating that Claimant did not have an injury at work, but rather injured herself the day before at Water World. Workman testified that she relayed this information to the adjuster who then notified defense counsel. Specifically, the e-mail that Workman sent to the adjuster is dated July 26, 2010. The e-mail stated the following:

> Hi Cathy,
>
> I just got a call from the fraud department at the DOWC. They received a tip (we think it is from the ex-husband) stating that EE never got hurt at work. She was hurt at Water World. In attendance were her ex-husband, ex-mother-in-law, and brother. Apparently, EE is driving to California right now to take the kids to Disney Land. "Herman" (our tipster) can be reached at 303-591-5456.
>
> You may want to pass this along to defense counsel. Thanks.

12. H. Armenta was Claimant's husband from April 2001 through May 2009.

13. H. Armenta provided a statement to a private investigator on October 5, 2010. During that recorded statement, H. Armenta stated that the day before Claimant filed a Workers' Compensation claim, Claimant, Claimant's daughter, Claimant's brother, James, and H. Armenta went to Water World. Water World is a water park in the Denver metro area.

14. H. Armenta stated that at Water World, the Claimant, H. Armenta, and Claimant's brother, were in inner tubes floating in the wave pool. When the waves started to come, Claimant reached out to get hold of her brother's tube and when the wave hit, it separated her away from her brother's tube. In that process, she hurt her left arm because she was holding on to H. Armenta's tube and her brother's tube at the same time, and H. Armenta and her brother went separate ways. In this recorded statement, H. Armenta also stated that on August 28, 2005, he received a phone call from Claimant stating that Claimant was in the hospital because she had just fallen at work. When H. Armenta asked her what happened, Claimant stated that it was just from yesterday, that she was hurt at Water World and that she had just filed it as a Workers' Compensation claim. In the recorded statement, H. Armenta also stated that Claimant had decided the night of August 27, 2005 that she would report this injury to her left arm as a work-related injury the next day because it was best for the family.

15. At hearing, H. Armenta testified that on August 27, 2005, he was at Water World with Claimant, Claimant's brother, James, and her mother as well as their daughter, Alexa. H. Armenta testified that Claimant, Claimant's brother, James, and he were in the large wave pool. H. Armenta testified that when the wave hit their tubes,

Claimant was pulled in both directions. As a result, Claimant began complaining of pain in her left arm, neck, and back. H. Armenta testified that immediately following this incident, they left Water World because Claimant was in too much pain to stay there. Claimant was experiencing pain in these areas on the night of August 27, 2005, as well as the morning of August 28, 2005.

16. H. Armenta has denied that he has ever contacted the fraud unit at the Division of Workers' Compensation despite the many references to the contrary. In three separate documents, Respondent's counsel referred to H. Armenta as the reporting party. Further, the comments made by Workman to the former claims adjuster are telling. Armenta's first name was specifically mentioned. It is apparent, despite his vehement denials, that Armenta called the DOWC fraud line.

17. The allegation regarding Water World surfaced on July 26, 2010. By then, H. Armenta and Claimant had been divorced for over a year. Armenta reported to the fraud tip line that Claimant was on her way to Disneyworld with her two children. H. Armenta is their father.

18. The evidence presented suggested that the Claimant's divorce from H. Armenta was contentious. The two argued about custody of their two children, child support, and visitation schedules.

19. Martha Armenta is H. Armenta's mother. M. Armenta gave a statement to an investigator on October 5, 2010. She stated that Claimant told her that after Claimant had been drinking margaritas at a Broncos party, that Claimant actually injured herself at Water World. M. Armenta also stated that H. Armenta had told her at one time that Claimant injured herself at work.

20. M. Armenta also made inconsistent statements concerning when she learned Claimant was allegedly injured at Water World rather than at work. She also testified at hearing that Claimant told her at the Broncos party that Claimant injured herself at work then changed it and said she meant to say Water World.

21. M. Armenta's testimony is equivocal and unpersuasive.

22. H. Armenta's testimony and reports of fraud lack credibility. H. Armenta had motivation to fabricate the reports made to the DOWC. Further, his repeated denial that he contacted the DOWC fraud tip line renders his testimony wholly incredible.

23. The testimony of Claimant's family members concerning how Claimant injured herself is of little consequence and will not be recited in this order. The evidence presented by Respondents to support the fraud claim is not persuasive and lacks credibility.

*Reopening – No longer PTD*

24. In rendering his decision concerning PTD, ALJ Cannici relied on work restrictions issued by Dr. Justin Green on June 9, 2009. Dr. Green opined that

Claimant should not engage in repetitive lifting with her left upper extremity; no lifting greater than five pounds on an intermittent basis with the left upper extremity; no prolonged standing greater than 30 minutes; no working greater than 90 minutes continuous sitting without a 15-minute rest break. Dr. Green recommended no greater than 1-2 hours of work per day. Dr. Green based his restrictions on a June 2009 Functional Capacity Evaluation (FCE) and on his clinical judgment.

25. Since Claimant was determined permanently and totally disabled, the Respondents have conducted video surveillance of the Claimant. The ALJ reviewed all of the video surveillance admitted into evidence.

26. In the September 6, 2010 video, the ALJ observed the following: The Claimant was shopping at Wal-Mart. She picked up an item with her left hand. She held a greeting card in her right hand. Neither item appeared to be particularly heavy. The Claimant was in the store for approximately 45 minutes. As she was leaving, she was leaning on the grocery cart and pushing it slowly.

27. In the video taken on January 26, 2011, in the span of eight minutes, the Claimant left her house, placed her purse down in the front of a minivan, and lifted a child into the back of a minivan.

28. Five months later on May 30, 2011, the Judge observed the Claimant smoking cigarettes using her left hand. She picked up a young child who she primarily held with her right hand (and not her left arm contrary to Dr. Olsen's noted observations). The Claimant walked out of the camera view with the child and reappears within seconds. The Claimant was next observed holding a spray bottle for week killer (which appeared to be a one-gallon size) in her right hand which was attached to a hose and sprayer which the Claimant held with her left hand. She sprayed some weeds while bent at the waist. At one point she pumped the spray bottle with her left hand and then held the bottle with her left while holding the sprayer with her right arm. After spraying weeds for approximately ten minutes, the Claimant began using garden loppers to cut weeds or plants. She bent over at the waist to make the cuts and used her right hand to pick up the debris. The Claimant performed this activity for approximately six minutes before taking a break. While taking a cigarette break, the Claimant helped lower her older child out of a tree. The Claimant raised her arms over her head for a few seconds to help the child. The Claimant does not return to gardening activities in this video.

29. Later on May 30, 2011, the Claimant went for a walk with three children, two of whom she pulled in a wagon. The walk lasted approximately 24 minutes. The Claimant pulled the wagon with her right arm for the first eight minutes, she switched to her left arm for approximately ten seconds then switched right back to pulling with her right arm. The Claimant primarily pulled the wagon with her right arm and used her left arm for seconds at a time on two occasions. The Claimant occasionally raised her left hand and arm to her head to keep her hat from blowing away due to the obvious wind.

30. In the video taken on June 11, 2011, the Claimant walked a short distance with some papers in her left hand. On June 14, 2011, the Claimant walked a short distance with some papers in her left hand. She appeared to walk with a slight limp. The Claimant is next observed walking out Target carrying a bag of items with her left arm and hand.

31. On June 23, 2011, video surveillance shows the Claimant walking to a store with a wallet under her left arm. She purchased cigarettes then walked home carrying the cigarettes in her left hand. The total time of this video is seven minutes.

32. On June 24, 2011, video surveillance shows the Claimant walking to the store with two young girls (presumably her daughters). At one point, she bent down to put a cigarette out using her left arm. She bent at the waist as well as bending her legs. They enter the store and Claimant returns with a plastic bag which she initially carried on her right arm. She switched the bag to her left arm at point and also held her daughter's hand with her left hand. She walked while carrying the bag in her left hand for about five minutes before bending down again to put a cigarette out on the curb. The Claimant switched bag back to her right hand for the next five to six minutes. She carried the bag in her left hand again very briefly before entering her house.

33. On August 29, 2011, video surveillance shows the Claimant lifting her younger child into a minivan. The Claimant bends slightly at the waist into the van. Later on August 29, 2011, the Claimant crouches down for approximately two to three minutes to put new tags on a truck. She also bent down on the waist to complete the task. The Claimant also bent at the waist to pull some weeds for approximately two minutes.

34. On August 30, 2011, very little footage was obtained. The Claimant stood for a few minutes reading some papers she held with her left hand while she smoked a cigarette with her right hand.

35. On March 21, 2013, Dr. Green issued a report wherein he noted that he had reviewed surveillance video taken of the Claimant, a report from Dr. Nicholas Olsen, and a repot from Starting Point dated February 11, 12, and 13, 2013. Dr. Green also examined the Claimant on that day. Based on the information before him at that time, Dr. Green opined that Claimant's had improved. He recommended work restrictions of maximum lifting 20 pounds floor to knuckle; no greater than 10 to 15 pounds of repetitive lifting; no prolonged standing greater than 30 minutes without a 10 minute posture break; and no greater than 90 minutes of continuous sitting without a 15 minute rest break. Dr. Green recommended that Claimant work for no greater than 3 to 4 hours per day.

36. Counsel for Claimant sent a copy of the Starting Point evaluation to Dr. Phil Cambe in a letter dated February 20, 2013. In a report dated February 27, 2013, Dr. Cambe put a check by the following statement purportedly prepared by counsel for Claimant:

> I have been treating [Claimant] for her work injury for many years. I agree with the findings in the Starting Point evaluation dated February 16, 2013 and signed by Pat McKenna. [Claimant's] condition has not substantially changed. The work restrictions provided by Dr. Green on June 9, 2009 are still appropriate.

37. The Claimant underwent a Work Performance and Occupational Feasibility Evaluation at Starting Point with Pat McKenna on February 11, 12, and 13, 2013. Ms. McKenna concluded that Claimant could lift 10 pounds from floor to chin level on a very rare basis; 5 pounds from floor to overhead on an infrequent basis with her right arm; and four pounds from floor to overhead on a rare basis with her left arm.

38. Ms. McKenna also made the following observations based on the Work Performance and Occupational Feasibility Evaluation:

> Claimant could not complete one minute of the assembly test which is bilateral, lifting pegs, not dissimilar to those on a cribbage board and placing them in holes in the board in front of her.
>
> If Claimant's left hand had to be engaged at all in a task, her pain became so severe that it would have made it impossible for her to concentrate well.
>
> Claimant was only able to flex her right shoulder 66 degrees and abduct her right shoulder 106 degrees.
>
> Claimant was only able to sit for 20 minutes at a time and two hours in a eight hour day.
>
> Claimant was only able to stand one to ten minutes at a time and 30 minutes an entire day.
>
> Claimant was only able to walk for 20 minutes at a time and two hours in an eight hour day.
>
> Claimant, with her left arm, was unable to tolerate even light lifting on a repetitive basis (such activity would cause a significant increase in her pain)
>
> Claimant was very limited in reaching above her shoulder level, reaching from waist to chest level, and reaching below waist level.
>
> Claimant, with grasping activities, was limited to extremely limited.

39. Ms. McKenna stated that, based on Claimant's evaluation, Claimant would be so limited in her ability to use her left hand and arm that it would be very difficult for her to even get ready for work.

40. Ms. McKenna ultimately concluded that she agreed with Dr. Green's restrictions in his March 21, 2013 report, and opined that Claimant would not be able to sustain any job in a manner that an employer would be able or willing to tolerate.

41. Doris Shriver evaluated the Claimant on October 1, 2009. Based on the restrictions Dr. Green had imposed on June 9, 2009, and on other factors, Ms. Shriver opined that Claimant was unable to work in any capacity.

42. Ms. Shriver evaluated the Claimant again on April 29, 2013. During the hearing, Ms. Shriver testified that she had reviewed the medical records from Dr. Green, Dr. Cambe, Dr. Olsen, as well as the Starting Point evaluation dated February 16, 2013. Based on the review of these medical records, it was Ms. Shriver's opinion that she believed Claimant was doing slightly worse than how Claimant presented during the October 2009 evaluation. Ms. Shriver disagreed with Dr. Green's restrictions in his March 21, 2013 report.

43. The video surveillance taken of the Claimant did not impact Ms. Shriver's opinions. Ms. Shriver pointed out that the video surveillance merely represents a "snapshot" of Claimant's life on a particular day and should not be used as a measure of potential work performance.

44. Dr. Nicholas Olsen issued a report dated September 20, 2012, and another report dated December 11, 2012. In the September 20, 2012 report, Dr. Olsen documents reviewing video surveillance as part of his overall evaluation of Claimant. Dr. Olsen documented his observations in his report dated December 11, 2012. Dr. Olsen opined that Claimant's current permanent restrictions should be: 40 pound maximum lifting limit and a 25 pound repetitive lifting limit. No limits on her ability to work overhead. No limits in sitting, standing, or walking. Dr. Olsen also indicated that these would represent Claimant's minimal capability.

45. At hearing, Claimant testified as to her ongoing restrictions that she believes are attributable to this injury. Claimant testified that she does not have any "good" days, only "bad" days or "average" days. In the course of a week, she believes she has 2-3 average days a week, the rest being "bad." When she is having a "bad" day, she can barely stand or walk at all. Claimant does not believe she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any fine manipulation with her left upper extremity on a "bad" day. Claimant does not believe that she can reach above her shoulder when she is having a "bad" day.

46. On an “average” day, Claimant does not believe that she can stand more than 15 minutes before she begins to experience pain. Claimant does not believe she can walk for more than 45 minutes before she needs to discontinue that activity. Claimant does not think that she can lift more than 10 pounds on an “average” day. On an “average” day, Claimant still does not believe that she can lift overhead with her left arm. Claimant does not believe that she can push or pull at all with her left arm on an “average” day.

47. As part of her evaluations with Dr. Cambe, Claimant has completed Brief Pain Inventories over the period of time from August 9, 2010 through February 26, 2013. In the Brief Pain Inventory forms, Claimant was asked to rate how her pain interferes with the following activities: general activities, walking ability, normal work (includes both work outside the home and house work), and sleep. Claimant was asked to rate on a scale of 0 to 10 with 0 being no interference in that activity and 10 being complete interference in that activity. As these inventory forms reflect, Claimant has consistently indicated to Dr. Cambe that her pain has resulted in complete interference of general activities, walking abilities, normal work activities, and sleep.

48. During Claimant’s evaluation with Dr. Olsen on September 20, 2012, Claimant also provided a description of her perceived limitations. Specifically, Ms. Deane stated the following to Dr. Olsen: She is unable to carry anything using both hands and unable to use her left hand. With regards to yard work, Claimant attempted to plant flowers on Mother’s Day, but her mother had to finish the task. At a store, Claimant pushes the cart with her right arm and waist while she rests her left arm on the cart. Claimant rarely grips with her left arm. Claimant is not able to use the left hand to turn a grocery cart.

49. In addition, during Dr. Olsen’s physical examination of Claimant, Claimant was only able to demonstrate forward flexion in her left shoulder of 90 degrees and 120 degrees in her right shoulder. Claimant was unable to lift her right arm above head height and left arm above shoulder height. In her upper extremities, Claimant was only able to demonstrate 1/5 strength at wrist grip, and 2/5 at wrist flexion and extension. Dr. Olsen indicated this was for both of her upper extremities.

50. Dr. Olsen explained that on a scale of 0 to 5 with grip strength, 0 is no strength whatsoever and 5 is full strength with maximum resistance. With 1/5 grip strength, a physician can see contractibility, but there would be no range of motion initiated by the patient. With 2/5 grip strength, a patient would require some assistance to complete full range of motion. Dr. Olsen testified that he asked Claimant to squeeze his index finger with each of her hands. He could see that Claimant was trying to contract her hands but there was really no significant force.

51. Margot Burns was retained by Respondents as their vocational expert. Ms. Burns issued a report dated March 20, 2013. Based on the restrictions that Dr. Olsen had placed on Claimant in his September 20, 2012 report, Ms. Burns opined that based on these updated restrictions, Claimant would be able to return to work as a hair stylist. Additional occupational choices that Claimant would be able to perform given

Dr. Olsen's restrictions included receptionist, customer service representative, security guard, host/greeter, and movie theatre employee. As part of Ms. Burns' evaluation, labor market research was done to determine whether these positions were readily available in the Denver labor market. Based on this labor market research performed specifically for this claim, as well as labor market research that Ms. Burns continuously performs as a vocational expert, it was her opinion that positions within these occupations were readily available in the Denver labor market.

52. Ms. Burns also provided her vocational opinions based on Dr. Green's permanent restrictions identified in Dr. Green's March 21, 2013 report. Ms. Burns rendered the opinion that Claimant could perform the occupations of receptionist, greeter, or a customer service person. In some of these positions, Ms. Burns indicated that an employer may need to provide an accommodation in order to comply with Dr. Green's restrictions. However, Ms. Burns stated that it has been her experience that nearly every employer will accommodate a person if that person is still able to perform the essential functions of the job. For instance, if a person is taking tickets, that person could perform the job sitting on a stool, or standing. Consequently, as long as the restrictions do not change the scope of the job or the essential functions of the job, employers are consistently willing to accommodate those restrictions.

53. Doris Shriver also performed an evaluation of Claimant and issued an updated report dated April 29, 2013. Ms. Shriver did not meet with Claimant for this updated evaluation, but she did review the Starting Point evaluation, and had a conversation with the Claimant about the surveillance videos. Ms. Shriver testified that the Starting Point evaluation was consistent with the initial evaluation she conducted in 2009.

54. Ms. Shriver opined that Claimant is unable to work for a full eight-hour work day. She also testified that Claimant is unable to work three to four hours per day consistently. Ms. Shriver also testified that some employers may allow flex time, but no employer will consistently allow an employee to arrive late, choose a schedule, lie down or leave if the employee is unable to continue working. Ms. Shriver ultimately opined that Claimant continues to remain unemployable.

55. As noted above, Ms. Shriver disagreed with the restrictions that Dr. Green provided for Claimant in his March 21, 2013 report. However, Ms. Shriver agreed that Claimant would be employable if Dr. Olsen's restrictions in his September 20, 2012 medical report were accurate.

56. The ALJ finds that Claimant is likely present herself to treatment providers and evaluators as more disabled than she actually is; however, the video surveillance does not demonstrate that Dr. Olsen's restrictions are appropriate. The video surveillance shows short snapshots of Claimant's life, and nothing in the videos demonstrates that Claimant should have no limits on her ability to work overhead or no limits in sitting, standing, or walking. The restrictions imposed by Dr. Green on March 21, 2013 are the most appropriate. He reviewed the video surveillance as well as

additional medical reports when he provided the updated work restrictions making his opinion well-informed.

57. Based on the restrictions issued by Dr. Green on March 21, 2013, both Ms. McKenna and Ms. Shriver have opined, and the ALJ agrees, that Claimant cannot sustain employment. Ms. Burns' opinion to the contrary is not persuasive. In addition, Dr. Cambe consistently evaluates the Claimant and he has opined that Dr. Green's initial restrictions from 2009 are most appropriate. Under either set of restrictions, the ALJ finds that Respondents have failed to prove that Claimant has engaged in activities that would indicate she can return to employment.

*Penalty Claims*

58. Following ALJ Cannici's February 10, 2010 Order, Respondents filed a Final Admission of Liability on May 5, 2010.

59. In a Notice of Award dated October 1, 2011, the Social Security Administration notified Claimant that she had received an award of Social Security disability benefits. Specifically, Claimant was determined to be entitled to permanent total disability benefits beginning July 2009 and ongoing. Claimant's monthly benefit amount equaled $1,314.00. Because of the retroactive award of Social Security disability benefits, Claimant had been overpaid permanent total disability benefits in the amount of $21,789.96.

60. Respondents filed a Final Admission of Liability on April 17, 2012. In that Final Admission of Liability, Respondents stated the following:

> Per the attached Social Security disability award dated October 1, 2011, Claimant began receiving Social Security disability benefits in the amount of $1,314 per week effective July 1, 2009. Respondents shall, prospectively, take the statutorily allowed Social Security disability offset of $151.62 per week. In addition, because of Claimant's award of Social Security disability benefits is retroactive to July 1, 2009, Claimant has been overpaid $21,789.96. By agreement of Claimant through counsel, in counsel for Claimant's letter dated January 23, 2012, Claimant is agreeable to allowing Respondents to taking an additional $75.81 per week to recoup the overpayment. Consequently, the total offset that Respondents will take against Claimant's permanent total disability award is $227.43.

As a result, beginning February 6, 2012, Claimant was receiving a weekly PTD rate of $15.87. The Claimant did not object to this Final Admission of Liability.

61. At hearing, John Messner, the adjuster that filed the April 17, 2012 Final Admission of Liability, stated that he had a copy of the January 23, 2012 letter from counsel for Claimant that was referenced in the Final Admission of Liability. At hearing,

Claimant testified that she authorized the offer allowing Respondents to take the offset of $151.62 per week and the additional amount of $75.81 per week consistent with the January 23, 2012 letter from her counsel.

62. Claimant, in her Response to Application for Hearing dated May 16, 2013, identified the following as the penalty claim that she was alleging against Respondents concerning adjustment of payment of her permanent total disability. Penalties pursuant to C.R.S. Section 8-43-304 for failing to pay PTD benefits as ordered by ALJ Cannici in an Order dated February 1, 2010 (penalty dates from February 5, 2012 ongoing or August 15, 2012 ongoing) (the amount of PTD benefits were reduced in February 2012 and were stopped in August 2012 in violation of the ALJ's Order dated February 1, 2010). Penalties pursuant to C.R.S. Section 8-43-304 for failing to comply with Rule 5-8 regarding permanent total disability benefits (penalties date from August 15, 2012 ongoing – Respondents terminated PTD benefits without a hearing in August 2012 in violation of Rule 5-8).

63. The Claimant failed to prove that the reduction in PTD in February 2012 was inappropriate under the circumstances. This is especially true given that Claimant failed to notify the Insurer about the reduction until she filed a response to an application for hearing alleging penalties in February 2013. It is apparent that the Claimant expected the reduced amount and only complained about it once the Respondents alleged that she committed fraud by filing this workers' compensation claim. She also never objected to the April 17, 2012 Final Admission of Liability.

64. The Claimant testified that the Respondents ceased all PTD payments in August 2012. The payment log reflects a gap in PTD payments from August 20, 2012 through February 7, 2013. If payments are made every two weeks, payment would have been due on September 3, 2012, subjecting the Respondents to penalties for 157 days.

65. The Claimant admitted that she has been receiving PTD checks subsequent to February 2013 in the amount of $31.74 every two weeks.

66. The Respondents offered no explanation for the failure to timely issue PTD payments to the Claimant for approximately six months. In a claim file note dated February 5, 2013, a notation was made that PTD had not been paid since August and that 20 weeks was owed to the Claimant. The adjuster made an additional note about claim reserves, but did not state that the failure to confirm reserves was the reason for the failure to pay the PTD. In any event, the Respondents admitted, through that claims file notation, that they did not pay PTD for 20 weeks.

67. Claimant failed to notify the Respondents that she had not received PTD checks until she filed a response to an application for hearing on February 4, 2013. Claimant offered no explanation for the delay.

68. In a Prehearing Conference Order from PALJ McBride dated June 20, 2013, Claimant was allowed to add the issue of penalties for hearing pursuant to C.R.S.

Section 8-43-304 for failure to pay medical benefits consistent with the fee schedule in W.C.R.P. Rule 18. At the commencement of the hearing, Respondents confirmed that the penalty that Claimant was requesting was for improper fee scheduling of certain bills as opposed to non-payment of certain bills from Dr. Bennett.

69. Jody Wasserman is the billing and collection manager for Dr. Bennett. In a letter dated June 11, 2013 from Ms. Wasserman to counsel for Claimant, Ms. Wasserman attached a spreadsheet reflecting how certain bills for certain dates of service were either not paid or, in her opinion, were not paid pursuant to the fee schedule.

70. On May 3, 2010, Dr. Bennett's office billed the Insurer for a date of service of April 28, 2010. The Insurer paid only $429.29 on June 1, 2010. Ms. Wasserman initially testified that Dr. Bennett's office did not receive the rest of the payment until August 3, 2013. She later testified that the Insurer or third party administrator paid all outstanding bills by July 1, 2013.

71. It is not abundantly clear from the record that the basis for the underpayment was due improper fee scheduling. The April 28, 2010 date of service involved a right sided radiofrequency procedure, but Claimant offered no explanation concerning how that procedure should have been fee scheduled other than Ms. Wasserman's testimony that Respondents owed more than $429.29 for performing the procedure.

72. In Ms. Wasserman's letter to counsel for Claimant dated June 11, 2013, Ms. Wasserman stated that she had recently completed an audit of Claimant's claims. Ms. Wasserman testified that she did not complete the audit for determining whether the remaining bills were properly fee scheduled until sometime in June 2013. Ms. Wasserman testified that prior to performing this audit, she was unaware that Dr. Bennett's medical bills for dates of service referenced in her spreadsheet were improperly fee scheduled. Ms. Wasserman confirmed that as of July 1, 2013, Dr. Bennett's bills had been paid in full. Ms. Wasserman also confirmed that once the third party administrator was notified of the billing problems, she received 16 checks within a reasonable period of time which cleared up the outstanding accounts.

## CONCLUSIONS OF LAW

Based on the 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).

*Waiver*

4. The Claimant asserts that Respondents waived their right to seek reopening of this claim because Respondents filed two final admissions of liability admitting for permanent total disability benefits in 2012, which was after the alleged fraud first surfaced and after the Respondents had taken surveillance video of the Claimant. The ALJ disagrees that the doctrine of waiver applies under these circumstances. Under § 8-43-303(1), C.R.S., a party may file a petition to reopen on the ground of fraud at anytime within six years after the date of injury. In addition, when a claimant has been determined to permanently and totally disabled, the award may be reopened at any time to determine if the claimant has returned to employment or has participated in activities which show that the claimant has the ability to return to employment. Section 8-43-303(3), C.R.S. The ALJ concludes that filing admissions of liability concerning The filing of a final admission of liability merely for the purpose of claiming an offset does not constitute waiver.

*Reopening - Fraud*

5. 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 ….

6. In this case, the Respondent bears the burden of Claimant shoulders the burden of proving by a preponderance of the evidence the Claimant fraudulently induced the filing of an admission of liability for an injury the Respondents allege

occurred outside the course and scope of Claimant's employment with the Employer. Section 8-43-201, C.R.S. The Respondents have failed to prove that Claimant fraudulently induced the filing of a general admission of liability when she initially filed this claim in August 2005. The evidence Respondents rely upon lacks credibility and is not persuasive. The motivation of Claimant's former husband, Herman Armenta, is highly questionable. Mr. Armenta's testimony that he was not in fact the person who notified the Division of Workers' Compensation lacks credibility in light of the other evidence to the contrary. The ALJ also does not believe the testimony of Martha Armenta. She appeared confused.

*Reopening - Ability to Work*

7. Cases in which a claimant is determined to be permanently and totally disabled may be reopened to determine if a claimant has returned to employment or if the claimant has participated in activities which indicate the claimant has the ability to return to employment. If either circumstance is proven, claimant's permanent total disability award shall cease. Section 8-43-303(3), C.R.S. Respondent bears the burden of proof to establish that Claimant has engaged in activities which would indicate that she has the ability to return to employment.

8. Respondents failed to meet their burden of proof. The Starting Point evaluation, the OT Resources evaluation from 2009, Dr. Green's restrictions from 2009, and the functional capacity evaluation done by Shari Barta in 2009 are all relatively consistent with regards to Claimant's functional ability. Dr. Cambe still believes the 2009 restrictions by Dr. Green are appropriate. In March 2013, Dr. Green altered the weight restriction and the amount of time Claimant can work, but this alteration was still highly inconsistent with the work restrictions proposed by Dr. Olsen. Respondents' own vocational expert, Margot Burns, testified that an employer would have to modify a job position to fit within Dr. Green's 2013 restrictions. As found, such modification means that jobs are not available on the open labor market. Doris Shriver persuasively testified that employers would not modify a position to fit Claimant's restrictions. Dr. Olsen opined that Claimant can engage in activities that would enable Claimant to work; however, no persuasive evidence supported Dr. Olsen's opinions regarding appropriate restrictions or that Claimant can engage in such activities on a consistent basis in work environment.

9. The three-day evaluation done at Starting Point is persuasive as is the report of treating physician Dr. Cambe who adopted this report. Dr. Cambe is the only physician who is seeing Claimant on a regular basis at this point. Given that fact, his opinion that Claimant's condition has not substantially changed is highly persuasive.

*Penalties*

10. Section 8-43-304, C.R.S. **(2011)**, governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than **one thousand** dollars per day for each such offense.

First, it must be determined whether a party has violated any provision of the Workers' Compensation Act or an Order. If a violation is found, it must then be determined whether the violator acted reasonably. §8-43-304, C.R.S.; *see also Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). In this case, the Claimant seeks penalties for three reasons: Respondents' failure to pay PTD to the Claimant when owed; unilateral reduction of PTD payments; and failure to properly pay Dr. Bennett's bills consistent with the DOWC fee schedule.

11. As found above, the ALJ declines to impose penalties for the reduction in the PTD amount which occurred in January 2012. It is apparent the Claimant anticipated the reduction based on her agreement to have her payments reduced to repay an overpayment. She made no complaints about the reduction until well after it had begun. As such, the Claimant has not proven that penalties should be imposed against the Respondents for issuing a reduced PTD check starting in January 2012.

12. The Respondents admittedly failed to pay PTD to Claimant when owed over a period of 20 weeks which totaled $317.40. As such, penalties are appropriate. After considering the factors set forth in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), the ALJ imposes a penalty of $50.00 per day for a period of 157 days (September 3, 2012 through February 7, 2013) for a total penalty of $7,850.00. The Claimant offered no testimony that the failure to receive the PTD payments presented a hardship for her, and she failed to even notify the Respondents that she was not receiving the payments until her attorney filed a response to an application for hearing in February 2013. Respondents offered no credible explanation about why the payments were not made. Yet, they cured as soon as they were notified. As such, a minimal penalty is warranted.

13. Regarding Claimant's claim of penalties for Respondents' failure to pay Dr. Bennett's bill consistent with the fee schedule, the ALJ declines to impose penalties. Ms. Wasserman believed the underpayment was due to inappropriate fee scheduling, but no persuasive evidence was offered to show how the procedure should have been billed. The Claimant made no specific reference to WCRP Rule 18 and which procedure applies to this penalty claim. Although the ALJ has no reason to doubt the veracity of Ms. Wasserman's testimony, she simply did not make it clear as to why she felt that the Respondents improperly fee scheduled the April 28, 2010 procedure Claimant underwent. Thus, Claimant's claim for penalties on that basis is denied.

*Remaining Issues*

14. In light of the findings and conclusions made herein concerning the issue of waiver, Claimant's claim for attorney's fees and costs is denied. The Respondents did not file applications for hearing on issues that were not ripe. In addition, there is insufficient evidence in the record to support Claimant's claim for costs pursuant to §8-42-101(5), C.R.S. The issue of overpayment is also moot.

## ORDER

It is therefore ordered that:

1. The Respondents' petition to reopen based on fraud is denied and dismissed.

2. The Respondents' petition to reopen based on Claimant's ability to return to employment is denied and dismissed.

3. Claimant is entitled to ongoing PTD payments consistent with the April 17, 2012 Final Admission of Liability.

4. Claimant's claim for penalties concerning the reduction in PTD beginning in February 2012 is denied and dismissed.

5. Claimant's claim for penalties concerning the failure of Respondents to pay PTD for 157 days is GRANTED. Respondents shall pay penalties in the amount of $7,850.00 to Claimant. None of the penalty shall be apportioned to the Subsequent Injury Fund.

6. Claimant's claim for penalties concerning the alleged failure of Respondents to properly fee schedule the procedure Dr. Bennett performed on April 28, 2010 is denied and dismissed.

7. Claimant's claim for attorney's fees and costs is denied and dismissed.

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

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

DATED: February 4, 2015

DIGITAL SIGNATURE:

L. Broniak

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

## ISSUES

The issues presented for determination are whether this workers' compensation claim has remained open, closed, or whether it has been re-opened; whether the Claimant is entitled to additional permanent partial disability (PPD) benefits; and whether penalties should be imposed against the Claimant for his failure to comply with the June 25, 2013 and July 10, 2013 orders of PALJ Purdie.

## RESPONDENTS' MOTION TO STRIKE

The Respondents submitted a position statement which addressed both claim closure and penalties. The Claimant's position statement addressed only the issue of whether the claim was open. The Claimant then amended his position statement to address the issue of penalties which prompted the Respondents to file a motion to strike the amended position statement.

During the hearing on May 16, 2014, the ALJ determined that she would initially address the issue of whether the claim remained open or whether the Claimant has proven his claim should be re-opened if, in fact, the claim had closed. If it was determined that the claim was open and that Claimant properly obtained a Division Independent Medical Examination (DIME), the ALJ would leave the record open for the submission of additional evidence and position statements on whether the Respondents had overcome the DIME opinions regarding permanent impairment. The issue of penalties was largely dependent on the outcome of the initial order regarding whether this claim is open, and after listening to the recording of the hearing, it was not abundantly clear whether the parties should brief the penalties issue for the initial order. As such, the Respondents' Motion to Strike is DENIED. The Claimant's amended position statement is hereby accepted.

## FINDINGS OF FACT

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

1. The Claimant suffered an admitted injury to his back on April 8, 2005. His authorized treating physician determined that Claimant reached maximum medical improvement (MMI) on February 28, 2006 with 5% whole person impairment.

2. The Claimant saw Dr. John Aschberger for a Division Independent Medical Examination (DIME) on June 29, 2006. Dr. Aschberger concurred with the date of MMI and the impairment rating.

3. Claimant filed a petition to reopen on July 26, 2007. The claim was voluntarily reopened pursuant to a stipulation dated December 7, 2007. The Claimant

had additional treatment and he was once again placed at MMI as of May 17, 2007 with no additional impairment.

4. Claimant returned to Dr. Aschberger for a follow-up DIME on January 30, 2008 where he was again determined to be at MMI with no additional impairment to his lumbar spine.

5. The Respondents filed an Amended Final Admission on March 27, 2008 which admitted for the PPD, but did not admit for maintenance medical care. The date of MMI remained February 28, 2006.

6. The Claimant then attempted to re-open his claim again in March 2011. At the same time, Claimant also alleged a new injury to his lumbar spine arising on July 27, 2010 (W.C. No. 4-856-179).

7. In order to resolve the disputes relating to Claimant's March 28, 2011 petition to reopen and the new claim for benefits, the parties entered into a stipulation, approved on January 5, 2012, with the following relevant language.

> The parties stipulate that claimant filed a timely Petition to Reopen the April 8, 2005 claim under §8-43-303(1). The parties stipulate and agree that Claimant will continue to receive reasonable, necessary and related medical care to maintain maximum medical improvement for the 2005 claim by way of the authorized treating physician, Dr. Cathy Smith.
>
> "The parties stipulate and agree that the current medical evidence does not support a new injury to the lumbar spine on July 27, 2010. Claimant agrees to withdraw W.C. number 4-856-179 with a date of injury of July 27, 2010 with prejudice. The parties agree that the claim pertaining to the listed date of injury of July 27, 2010 shall only be reopened on the grounds of fraud or mutual mistake of material fact. All other issues are hereby reserved."

8. Claimant withdrew his Application for Hearing on the issue of reopening before approval of the stipulation on December 2, 2011.

9. The Respondents did not file an amended final admission at that time, and were not required to do so.

10. Dr. Smith discharged the Claimant from care on November 12, 2012 because he did not want additional injections. On November 12, 2012, Dr. Smith determined Claimant had reached MMI on February 28, 2006, and that his impairment rating remained the same at 5% percent whole person.

11. The Claimant then filed an application for hearing on July 23, 2012 seeking an increase in his permanent impairment rating. This application was not accompanied by a Petition to Reopen. As an affirmative defense, in the Response to Application for Hearing, Respondents asserted that a Petition to Reopen was required. Hearing on Claimant's July 23, 2012 Application was held on December 7, 2012 before ALJ Broniak.

12. At the December 7, 2012 hearing, the issue of whether the claim had ever been reopend arose and the ALJ heard arguments from both parties. Claimant took the position that this claim was opened or re-opened by virtue of the December 2011 stipulation which admitted for benefits that had previously been denied by the March 2008 final admission of liability. Claimant believed that the stipulation essentially reopened the claim for all issues including permanent partial disability. It was Respondents' position that the claim remained closed pursuant to the the March 27, 2008 Final Admission of Liability.

13. At hearing, the ALJ indicated that she might be unable to decide the issue of whether Claimant was entitled to additional PPD benefits without a determination of whether the claim was reopened. Claimant was unwilling to go forward with the issue of reopening at the time of hearing, but was willing to go forward on the issue of PPD benefits. Because Respondents had multiple witnesses in attendance, including an IME physician, the parties agreed to go forward on the issue of whether Claimant's low back condition had worsened sufficent to warrant an increase in permanent partial disability benefits. The ALJ agreed to go forward with a hearing on this issue and postponed ruling on whether reopening was required. Both parties submitted position statements on this issue.

14. After a lengthy discussion concerning the issues for the December 7 hearing, the parties eventually agreed that the undersigned ALJ could determine whether the Claimant was entitled to an increase in his permanent impairment rating.

15. Although the parties had agreed on the issue to being litigated and based their position statement on same, ALJ Broniak entered an order on February 8, 2013, and ultimately found she lacked jurisdiction to issue a ruling on claimant's permanent impairment. In her Findings of Fact Conclusions of Law and Order ALJ Broniak stated:

> "The Claimant apparently disagrees with the ATP's determination of permanent impairment, which requires the Claimant to follow the procedures set forth in §§ 8-42-107(8)(c) and 8-42-107.2, C.R.S. Because the Claimant has not followed the applicable procedure to challenge the ATP's determinations, the Judge lacks the authority to enter an order modifying the previously admitted PPD award."

16. Following ALJ Broniak's ruling, Claimant filed an Application for a Division IME (DIME) and a DIME was scheduled with Dr. Brian Shea for July 2, 2013.

17. Respondents sought to strike Claimant's DIME by filing a Motion to Strike with the Division of Workers' Compensation. In their Motion to Strike, Respondents

argued that the most recent final admission of liability was filed by Respondents on March 27, 2008. Because Claimant did not request a DIME within thirty days of the filing of this admission, Claimant was procedurally barred from requesting a DIME.

18. On June 25, 2013 by ALJ Purdie granted the Respondents' Motion to Strike the Application for a Division and IME and noted that Claimant failed to file a response to the Motion. PALJ Purdie ordered that the DIME shall be vacated.

19. On July 2, 2013, Claimant filed a Motion for Reconsideration Regarding Claimant's Application for a Division IME. Claimant asserted that he had filed an objection to the motion to strike and argued that he was entitled to undergo a DIME. ALJ Purdie denied the Motion for Reconsideration on July 10, 2013. She stated, "paragraph 2 of the parties' December 22, 2011 stipulation affirms that claimant was at MMI as of that date (or earlier) and was receiving maintenance medical benefits. Claimant abandoned the petition to reopen by canceling the hearing. The claim remains closed except for maintenance medical benefits."

20. Although the DIME had been vacated by ALJ Purdie, Claimant went forward with the evaluation which was scheduled for July 2, 2013. Dr. Shea issued his report on or about July 10, 2013.

21. Respondents filed an Application for Hearing on July 26, 2013 in response to the DIME report endorsing PPD benefits, overcoming of the DIME if necessary, that a petition to reopen is necessary, and penalties for claimant's failure to comply with the orders of ALJ Purdie. Claimant's response endorsed PPD benefits, issue preclusion, and "appeal of PALJ Purdie's pre-hearing Order dated July 10, 2013."

22. Respondents requested a prehearing conference in order to bifurcate the issues for hearing. On October 24, 2013 ALJ Goldstein issued a prehearing conference order granting Respondents' motion to bifurcate issues. ALJ Goldstein held: 1) Respondents' motion to bifurcate the issues of PPD and penalties from those to be adjudicated at the November 8, 2013 hearing is granted, and 2) the bifurcated issues are preserved for future determination depending on the resolution of the procedural issues. ALJ Goldstein's order allowed the parties to address procedural issues, whether the claim had been reopened and whether respondents would be required to challenge or admit to the DIME physician's rating.

23. The parties agreed that a hearing was not necessary on the first set of issues bifurcated by ALJ Goldstein and submitted a joint exhibit packet and position statements to ALJ Cain on November 25, 2013. In his December 12, 2013 order ALJ Cain found: 1) the claim for benefits was not reopened by the stipulation of the parties dated December 22, 2011; 2) the order of ALJ Broniak dated February 8, 2013 did not determine that the claim was reopened, and even if it had, ALJ Broniak's order had no preclusive or determinative effect with respect to the issues addressed in ALJ Cain's order because ALJ Broniak's order was not a final order on the merits, and 3) the claim for the April 2005 injury remains closed pursuant to the Final Admission of Liability on March 27, 2008.

24. Neither party appealed ALJ Cain's order.

25. With the procedural issues resolved by ALJ Cain's order and a determination that the claim was not reopened, according to ALJ Goldstein's prehearing conference order and the original Application and Response, the remaining issues are PPD benefits and penalties.

26. In order to set this matter for hearing on the remaining issues Respondents filed an Application for Hearing on January 2, 2014 endorsing the issue of penalties and indicating the Application for Hearing was filed in accordance with ALJ Goldstein's prehearing conference order. Claimant filed a Response to Application for Hearing and an Amended Response to Application for hearing on January 27, 2014 endorsing the issues of medical benefits, authorized provider, petition to reopen, permanent partial benefits, worsening of condition and maintenance medical care. As of the date of the hearing in this matter, the Claimant has not filed a petition to reopen the claim as required by WCRP 7-3.

27. As of the date of the hearing in this matter, there is no evidence that Claimant has filed a petition to reopen with the Division since March 2011.

28. At the May 15, 2014 hearing, argument was heard from both parties regarding whether the claim had been reopened, the conclusive effect of ALJ Cain's order, medical benefits and penalties. Exhibits were submitted by both parties and no witnesses testified.

29. Based on the evidence presented and the prior orders entered in this claim, the ALJ finds that Claimant's claim is not open, has never been re-opened since March 28, 2008, and remains closed as to all issues except for the maintenance medical care pursuant to the December 2011 stipulation of the parties. The order approving the stipulation specifically states that Claimant remains at maximum medical improvement. The only modification made to this claim's status was the Respondents' agreement to provide maintenance medical treatment.

30. Because Claimant's claim is closed, and he has not properly filed a petition to reopen, Claimant cannot prove entitlement to an increase in his PPD award. That issue has been closed based on the final admission filed on March 28, 2008.

31. The ALJ finds that Claimant did not violate PALJ Purdie's June 25, 2013 order because he filed a Motion for Reconsideration of that order which was not ripe for a decision until after the DIME appointment had occurred. Claimant acted reasonably when proceeding with the DIME appointment given the circumstances. The Claimant also did not violate the July 10, 2013 order entered by PALJ Purdie. As a practical matter, he could not have violated it by proceeding to a July 2, 2013 DIME appointment as the DIME appointment preceded the order. As such, no penalty shall be imposed against the Claimant.

## CONCLUSIONS OF LAW

1. 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).

2. The Claimant asserts that his claim was reopened by virtue of the parties' December 2011 stipulation. As found by ALJ Cain, the stipulation did not indeed reopen the claim in its entire

3. The "law of the case" doctrine is a discretionary rule, which provides that legal issues that have been litigated and decided ordinarily should not be relitigated in the same proceeding. *Jiron v. Douglas County School District RE 1*, W.C. No. 4-636-107 (ICAO November 4, 2009). Application of the rule of "law of the case" is discretionary with the ALJ. It presents considerations about the binding effect of judicial decisions similar to collateral estoppel and usually is applied to preclude relitigation of an issue already decided unless manifest injustice would result. Phillips & Phillips, *Colorado Workers' Compensation Practice and Procedure* § 13.32 (West 2010) citing *Verzuh v. Rouse*, 660 P.2d 1301 (Colo. App. 1982).

4. ALJ Cain previously determined that this claim remains closed pursuant to the Final Admission of Liability dated March 27, 2008. ALJ Cain's decision contained a comprehensive analysis of December 2011 stipulation, and its effect on this claim's status. ALJ Cain also reviewed the decision entered on February 8, 2013 by the undersigned ALJ, and determined that the decision assumed, but did not decide, that the claim was reopened for the purpose determining whether the Claimant was entitled to additional PPD. The undersigned ALJ agrees with ALJ Cain's interpretation of her decision. Here, the law of the case is that this workers' compensation claim is closed. The ALJ perceives no basis to disturb the prior rulings, in including her own, none of which determined that this claim is open or that a petition to reopen is pending.

5. After a careful and exhaustive review of all of the evidence in this case, including listening to the hearing recordings, the ALJ concludes that this claim remains closed, and no petition to reopen is pending. As such, the Claimant cannot, as a matter of law, be entitled to pursue an increase in his PPD award at this time.

6. Section 8-43-304, C.R.S. (2013), governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than one thousand dollars

per day for each such offense.

7. First, it must be determined whether a party has violated any provision of the Workers' Compensation Act or an Order. If a violation is found, it must then be determined whether the violator acted reasonably. Section 8-43-304, C.R.S.; *see also Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). As found, the Claimant did not violate the June 25, 2013 order of PALJ Purdie. Even if it could be determined that he did violate the order, he acted reasonably under the circumstances. The Claimant also did not violate the July 10, 2013 order entered by PALJ Purdie. As a practical matter, he could not have violated it by proceeding to a July 2, 2013 DIME appointment as the DIME appointment preceded the order. As such, no penalty shall be imposed against the Claimant.

## ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is closed, and has been pursuant to the March 28, 2008 final admission of liability. Thus, as a matter of law, the issue of whether Claimant should receive an increase in his PPD award cannot be determined at this time.

2. No penalties shall be imposed against the Claimant for his alleged violations of PALJ Purdie's orders.

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

DATED: February 5, 2015

/s/ Laura A. Broniak

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-692-431-04**

## ISSUE

Whether Claimant's request for a wheel-chair accessible roll-in shower, and the accompanying home bathroom modifications, are reasonable, necessary, and related to Claimant's industrial injury.

### Claimant's Work Injury

1. Claimant is a 67 year-old man who lives in Yakima, Washington. He was injured on a moving walkway at Denver International Airport on June 16, 2006, and as a consequence, was diagnosed with severe spinal stenosis at C4-5, with impingement on the spinal cord.

2. Claimant subsequently underwent an anterior cervical discectomy and fusion of C2 through C5, and on October 19, 2007, was diagnosed with quadriplegia and quadriparesis, C5-C7.

3. As a result of his admitted injury, claimant is permanently and totally disabled, and has been almost entirely confined to a wheelchair for approximately the past six years. When Claimant has attempted to walk with a walker, he has suffered numerous falls due to weakness of his legs, which have greatly aggravated an orthopedic condition discussed below.

### Claimant's Knee Injuries and Surgeries

4. Claimant has suffered from degenerative arthritis in his right knee since at least 1996. In 2010 he had total knee replacement surgery, and in 2009, 2013, and 2014 he underwent right knee repairs.

5. Claimant never sought treatment for his knee condition under his workers' compensation claim. However, Claimant's spinal injury is connected to his knee issues. His spinal injury has led to leg weakness and to Claimant's inability to control his legs. The leg weakness and lack of control in turn have resulted in Claimant falling multiple times, exacerbating his knee condition.

6. After his 2014 knee surgery, Claimant suffered a bad fall when using a walker, and as a result of that fall he tore anterior medial ligaments.

7. Dr. John S. Place, M.D., the surgeon who performed Claimant's knee surgery in 2013, wrote that Claimant "has balance issues related to his cervical spine disease . . . [and] chronic gait abnormality associated with cervical myelopathy."

8. Mr. Darren Joffs has been a physical therapist for 17 years and worked as Claimant's physical therapist following his 2013 knee surgery. He was admitted as an expert at hearing.

9. Mr. Joffs credibly testified that Claimant used the "Nautilus" leg press machine during physical therapy and was able to significantly and objectively increase his baseline leg strength, but that there was no corresponding increase in leg functionality.

10. Mr. Joffs further credibly testified that it was not often he saw someone increase their leg strength like Claimant but not show any improvement walking or standing.

11. Mr. Joffs wrote a report concerning Claimant in 2014 in which he made the following conclusions, which are found as facts here:

> a. to try and separate this patient's knee surgery needs from his cervical accident needs is futile. Any attempt to say that the issues were pre-existing and unrelated would be inaccurate.
>
> b. It is also highly likely that the change in his knee requiring the initial knee replacement was due to the manner in which he walked over time following his cervical injury….this is evidenced by the gait he used in therapy which impairments can be directly related to his initial spinal injury causing lower extremity weakness.
>
> c. Finally, the most recent repair of the knee joint in 11/2013 was again due to his inability to sustain a contraction in his legs and prevent his knees from buckling and he fell. It is impossible to separate the injury from his fall that caused the spinal issues from the sequelae that result in his current limitations.

12. Although Claimant did have a pre-existing knee condition, his work-related spinal injury resulted in leg weakness, an inability to control his legs, leg buckling and multiple falls, and ultimately in Claimant's confinement to a wheelchair.

<u>Claimant's Bathroom and Safety Concerns</u>

13. Claimant's home in Yakima has two restrooms, one in the master bedroom and one off the hallway, which he refers to as the hall or guest bathroom.

14. Claimant does not use the bathroom in the master bedroom because the space is too small for him to maneuver in and out of the shower safely.

15. When Claimant has attempted to use the master bathroom in the past, he fell. Claimant therefore only uses the hall bath, which measures six feet wide and ten feet deep. At the far end of this bathroom is the bathtub.

16. In order to bathe, Claimant wheels his wheelchair into the hall bathroom until he is one foot away from the bathtub. He is unable to rotate the wheelchair to be parallel to the bathtub because the toilet is in the way. Once perpendicular to the tub, Claimant holds onto grab bars and slowly lifts himself from his wheelchair onto a "transfer bench" that sits perpendicular on the bathtub.

17. The transfer bench is 40" long by 12" wide, and there are approximately 18-20" of the bench that hang outside of the tub. Claimant lifts his legs one at a time into the tub, then tries to secure the shower curtain in the tub.

18. Claimant uses a handheld shower wand in order to wash himself. The shower curtain is ineffective at keeping the water off of the bathroom floor because of the opening that is needed for the portion of the transfer bench that hangs out into the bathroom. Because of this opening, there are pools of free standing water on the bathroom floor after Claimant bathes.

19. The pools of free standing water on the floor present a serious slip and fall safety hazard to Claimant when he is trying to get back into his wheelchair and out of the bathroom after showering.

20. Claimant is able to use this bathroom to shower unassisted, and he has not slipped or fallen to date, but he is extremely worried that he will fall and become further debilitated.

21. The two bathrooms in Claimant's home are not large enough to fit him, his wheelchair, and another person to assist him should he ever fall or otherwise need assistance in the bathroom. This fact presents a serious safety hazard for Claimant.

22. Although Claimant is able at times to use a walker, there are times when he is weakened by other conditions, such as illness, and must use his wheelchair. Therefore, although Claimant and another person might be able to both fit in Claimant's bathrooms currently if he used a walker, it is necessary that the bathrooms be large enough to fit Claimant and another person for the times when Claimant is confined to his wheelchair.

Prescriptions and Recommendations for a Roll-in Shower or ADA Compliant Bathroom

23. Due to the risk of serious injuries in Claimant's current bathing situation, physicians and other treatment providers have prescribed or recommended that a "roll-in shower" be installed in Claimant's home.

24. A roll-in shower, as opposed to a roll-in bathtub, does not have a "lip" on the floor, and therefore, since it is flush with the floor, would allow Claimant to safely roll his wheelchair into the shower and bathe himself. He would not have to transfer out of his wheelchair onto a transfer bench and then back into his wheelchair.

25. On November 20, 2012, Dr. Bruce Kite, M.D., an occupational medicine physician, wrote a prescription for Claimant for an "ADA compliant shower."

26. On April 30, 2013, Erin See, an Advanced Registered Nurse Practitioner ("ARNP") wrote that "[Claimant's] symptoms have been constant since his date of injury . . . He needs a shower that is accessible with a wheelchair or walker as he does not have to step over anything . . . I will order an ADA bathroom with roll in shower for him."

27. On September 24, 2013, Dr. Kite wrote another prescription, this time stating "ADA bathrooms with showers and shower tub. Diagnosis: spinal cord injury."

28. On February 10, 2014, Mr. Joffs wrote "until changes are made to allow for an ADA compliant bathroom where he can easily get in and out of a tub, use the toilet, and have space for any person to assist, he will remain at a higher risk for falls and further injury."

29. On February 27, 2014, Dr. Place wrote "because of multiple spine and low extremity problems which require full time use of a wheelchair or walker I strongly advise an ADA bathroom with a roll in shower for this man."

30. On May 2, 2014, Cari J. Cowin, ARNP wrote "I am the Washington State Labor and Industries certified provider for [Claimant]. I have reviewed a recommendation dated February 10, 2014 from [Claimant's] physical therapist regarding modifications needed in his home that will allow him to safely receive adequate treatment and make his bathroom accessible using a wheelchair. I concur with the physical therapist report that indicates [Claimant] requires a wheelchair accessible, roll-in shower . . . [Claimant] is confined to a wheelchair and as part of this requires a handicap bathroom in his home to be able to take a shower and use the toilet. It is my opinion that this is industrial related and medically necessary. He would require an ADA, handicap bathroom with a roll in shower as well as grab bars installed in the shower as well as by the toilet."

31. On July 22, 2014, Dr. Daniel Kwon, M.D., wrote "I am board certified in PM&R [physical medicine and rehabilitation] and pain medicine. I have been caring for [Claimant] for about five years after his tragic accident and resultant cervical myelopathy and severe chronic pain all over his body, especially all four extremities, especially his legs. This has resulted in frequent falls that have caused multiple injuries resulting in multiple surgeries to repair these injuries. [Claimant] needs simple modifications to his bathroom to make it ADA compliant. This would be for patient safety and accommodation for his disability."

32. Claimant's request for a wheel-chair accessible roll-in shower, and the accompanying home bathroom modifications, are reasonable, necessary, and related to Claimant's 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 litigation. § 8-40-102(1), C.R.S.

2. For a claim to be compensable under the Act, a claimant has the burden of proving by a preponderance of the evidence that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. § 8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006).

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

4. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

5. The ALJ is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and weight of evidence based on an expert's knowledge, skill, experience, training and education. *See, e.g.* § 8-43-210, C.R.S.; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

6. An 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)

7. "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."

*Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004), citing *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

8. "Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S.

9. The Colorado Court of Appeals has opined on the ramifications of section 8-42-101(1)(a) by explaining that "in order for a wheelchair to provide adequate relief, it must be usable in the claimant's residence which usually requires some modification of the residence to include the installation of ramps, widening of doorways, and modification of the kitchen, bathroom, and bedroom to accommodate the wheelchair and claimant." *Cheyenne County Nursing Home v. Industrial Claim Appeals Office of State of Colo.*, 892 P.2d 443. 444 (Colo. App. 1995).

10. The Court of Appeals concluded "the employer must make such improvements or modifications to the residence of a claimant as may be necessary to allow the claimant access to, and the use of, those portions of the residence which provide for the claimant's health and medical necessities." *Id.* at 446.

11. The ALJ is persuaded that Claimant sustained multiple falls as a result of his work injury, exacerbating his pre-existing knee conditioning, and leading to his near total confinement to a wheelchair. Claimant and Mr. Joffs were both credible about their safety concerns with Claimant's current bathrooms when they testified, and the medical records clearly supported those concerns. The Claimant has established that he is entitled to medical benefits to relieve the effects of his work injury, which the ALJ finds and concludes include a wheel-chair accessible roll-in shower, and the accompanying home bathroom modifications necessary to accommodate the roll-in shower.

## ORDER

Respondents shall pay for a wheel-chair accessible roll-in shower for one of Claimant's bathrooms, and for any accompanying home bathroom modifications necessary to accommodate the roll-in shower.

DATED: February 2, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

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

## ISSUE

The issue endorsed for consideration at hearing is whether Claimant proved by a preponderance of the evidence that he is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for Respondent's failure to comply with the March 15, 2011, order of Administrative Law Judge (ALJ) Michael E. Harr.

## FINDINGS OF FACT

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

1. In August of 2006, Employer operated an oil drilling business in the State of Colorado. Claimant worked for Employer on one of its oil rigs in Colorado as a roughneck. Claimant sustained a compensable injury while working for Employer on August 31, 2006. Claimant injured his left lower leg that resulted in a below the knee amputation and lumbar injury while in the course and scope of his employment with Employer when a loader put down some drilling pipe on railroad ties and the pipes rolled off and into him.

2. At the time of Claimant's injury, Employer failed to maintain workers' compensation insurance as required under Section 8-43-408, C.R.S., of the Act. Employer thus is non-insured.

3. On May 19, 2008, Claimant proceeded to hearing before Administrative Law Judge Margot W. Jones on the issues of compensability, medical benefits, whether Employer carried workers' compensation coverage with Pinnacol Assurance, temporary total disability (TTD) benefits and penalties for failure to maintain workers' compensation insurance under Section 8-43-408, *supra*.

4. In her Final Order of July 7, 2009, Judge Jones determined that Employer is liable for all reasonably necessary medical expenses arising out of Claimant's August 31, 2006, compensable work-related injury. Judge Jones found Claimant qualified for the maximum TTD rate of $719.74 per week. Judge Jones ordered Employer to pay TTD benefits at the rate of $1079.61 per week, after adding a 50% penalty under Section 8-43-408(1), *supra*, for Employer's failure to carry workers' compensation insurance.

5. As required under Section 8-43-408(1), *supra,* ALJ Jones also ordered Employer to pay a bond in the amount of $7480.00 with the Division of Workers' Compensation, Special Funds Unit, as the trustee.

6. On July 14, 2009, Sue Sobolik, Trustee for the Division of Workers' Compensation, Special Funds Unit, wrote a letter to Employer providing notice of nonpayment of a trust deposit or failure to file a bond as ordered by Judge Jones on behalf of the Claimant. Ms. Sobolik advised Employer to make arrangements to honor said bonds within 15 days or be subject to additional penalty sanctions under Section 8-43-408(4). Employer disregarded Ms. Sobolik's letter and failed to comply with the order of Judge Jones to pay the trust deposit or file a bond.

7. On October 22, 2010, Claimant proceeded to hearing before Administrative Law Judge Michael E. Harr on the issue of penalties pursuant to Section 8-43-408(4), *supra,* for employer's failure to file a trust deposit, post a bond, or otherwise comply with the July 7, 2009, Final Order entered by Judge Jones.

8. Following hearing on October 22, 2010, ALJ Harr entered Findings of Fact, Conclusions of Law, and Order dated March 15, 2011. Judge Harr found that Employer failed to comply with the Final Order of Judge Jones and was liable to Claimant in the amount of $11,880.00 in benefits and penalties under Section 8-43-408(4), *supra.* ALJ Harr also found that Employer is liable for payment of outstanding medical bills on behalf of Claimant. On March 15, 2011, ALJ Harr specifically ordered that the "Employer shall pay Claimant adjudicated benefits and penalties in the aggregate amount of $35,640.00.

9. The record establishes that Employer failed to comply with ALJ Harr's March 15, 2011, order. Claimant seeks an award of penalties for the failure to comply with the March 15, 2011, order of ALJ Harr. It is found that the Employer's actions constitute a knowing, willful, blatant and repeated violation of the provisions of the Colorado Workers' Compensation Act. Respondent shall be liable for a penalty under Section 8-43-304, C.R.S. in the amount of $50.00 per day from April 5, 2011, (April 5, 2011, is the date ALJ Harr's March 15, 2011, order was final) to the date of the hearing in this matter on December 12, 2014, totaling 1348 days, or $67,400, for failure to comply with ALJ Harr's March 15, 2011, order.

10. On October 6, 2014, OAC provided notice to the parties of the hearing held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided to the parties of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at the December 12, 2014, hearing. Respondent was provided notice of the status conference and the hearing at: Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. The address utilized by OAC for Respondent was provided by Claimant on his application for hearing

11. On December 8, 2014, Claimant, utilizing a Certified Process Server in Florida, personally served Respondent's registered agent, Shelley Jones, at the above referenced Fort Myers, FL address. An Affidavit from the Process Server affirms that the Respondent corporation's register agent was personally served, the following pleading:

a. the Notice of Status Conference and Notice of December 12, 2014, Hearing dated October 6, 2014 in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

b. the Motion and Order to Consolidate Claims dated October 29, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341;

c. the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

d. the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton, Rueben Perez and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795, 4-740-341 & 4-734-913; and

e. the June 3, 2009, Findings of Fact, Conclusion of Law and Order of ALJ Friend in John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-740-341.

12. Respondent did not appear, in person or through counsel, at the December 10, 2014, status conference or the December 12, 2014, hearing. As of the date of this Order, Respondent has not filed a motion, or otherwise contacted the Court.

13. It is found that, consistent with OACRP 23(B)(1), the October 6, 2014, Notice of Hearing, and other relevant pleading, including the Notice of Status Conference dated October 6, 2014, the Order of Consolidation dated October 29, 2014, and Findings of Fact, Conclusion of Law and Order of ALJ Harr dated March 15, 2011 were sent to Respondent's address at 4411 Cleveland Avenue, Fort Myers, FL 33901. This is an address maintained for Respondent by OAC and an address at which Respondent or Respondent's authorized representative was likely to receive it. It is further found that, on December 8, 2012, the Notice of December 12, 2014, Hearing dated October 6, 2014, and other relevant pleading,was in fact personally served on Respondent's authorized representative at 4411 Cleveland Avenue, Fort Myers, FL 33901. Therefore, it is found that Respondent received notice of these proceedings and this order may be entered against Respondent.

## CONCLUSIONS OF LAW

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

1.A consolidated hearing was held on December 12, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341. Applications for hearing in each case were filed in which Claimant

sought penalties under Section 8-43-304, C.R.S. against Respondent for failure to comply with ALJ Harr's March 15, 2011, order. At the conclusion of the December 12, 2012, hearing, Claimant argues that he has proven by a preponderance of the evidence the Employer should pay penalties pursuant to Section 8-43-304 for failure to comply with the orders entered by Administrative Law Judge Jones on July 7, 2009, and Administrative Law Judge Michael E. Harr on March 15, 2011 and December 30, 2011.

2. It is concluded that Claimant proved by a preponderance of the evidence that he is entitled to penalties pursuant to Section 8-43-304, C.R.S. for Respondent's failure to comply with the March 15, 2011, order of ALJ Harr. The ALJ rejects Claimant's contention that he is entitled to penalties for violation of the orders of Administrative Law Judge Jones dated July 7, 2009, and Administrative Law Judge Michael E. Harr dated December 30, 2011, because Claimant did not provide notice of his intent to raise these claims.

3. 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, *supra*.

4. 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).

5. Section 8-43-304(1) states, in pertinent part that,

> Any employer or insurer, or any officer of agent of either, or any employee, or agent of either, or any employee, or any other person who violates any provision or articles 40 to 47 of this title or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a find or not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in Section 8-46-101, C.R.S.

6. Employer failed to comply with the Order of ALJ Harr dated March 15, 2011. Respondent's conduct, their blatant and repeated failure to comply with prior orders as well as the provisions of Articles 40 to 47 of this Act, constitute grounds for penalties of $50.00 per day as provided under Section 8-43-304(1) from April 5, 2011, (April 5, 2011, is the date that ALJ Harr's March 15, 2011, order became final) to the date of the hearing in this matter on December 12, 2014.

7. Accordingly, Respondent shall be liable to Claimant for 1348 days of penalties at $50.00 per day totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850, shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

8. On October 6, 2014, OAC provided notice to the parties of a hearing to be held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at hearing. Respondent did not appear at the December 10, 2014, Status Conference or the December 12, 2014, Hearing.

9. Respondent was provided notice of the Status Conference and the Hearing at Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. This is the addressed maintained by OAC for Respondent. This is the same address to which the above referenced court orders were sent: the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr; and the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr. The October 6, 2014, notice of hearing, along with relevant orders, was personally served on Respondent's registered agent on December 8, 2014, in Florida at 4411 Cleveland Avenue, Fort Myers, FL 33901.

10. Therefore, it is concluded Respondent, or it's registered agent, received notice of the December 12, 2014, hearing and, other related pleading, and ALJ Harr's March 15, 2011, order. Therefore, it is concluded that, under OACRP 23, an order may be entered against Respondent.

## ORDER

It is therefore ordered that:

1. Accordingly, Respondent shall be liable to Claimant for 1348 days of penalties under Section 8-43-304, C.R.S. for Respondent's failure to comply with the March 15, 2011, order of ALJ Harr. Penalties are assessed at $50.00 per day for 1348 days totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850,

shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

2. All benefits not paid when due are subject to 8% interest per annum.

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

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

DATED: February 6, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

## ISSUE

The issue endorsed for consideration at hearing is whether Claimant proved by a preponderance of the evidence that he is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for Respondent's failure to comply with the March 15, 2011, order of Administrative Law Judge Michael E. Harr.

## FINDINGS OF FACT

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

1. Employer operated an oil drilling business where Claimant worked as a roughneck. Claimant sustained a compensable injury to his right lower leg on April 2, 2007, when a load of steel tubing shifted, fell and struck his leg.

2. Employer was non-insured for workers' compensation injuries at the time of Claimant's injury.

3. On May 14, 2009, Claimant proceeded to hearing before Administrative Law Judge Bruce C. Friend on the issues of compensability, medical benefits, average weekly wage, penalties pursuant to Section 8-43-304, C.R.S. for failure to file an Employer's First Report of Injury, penalties pursuant to Section 8-43-203(2)(a), C.R.S. for failure to timely admit or deny liability, and penalties pursuant to Section 8-43-408, C.R.S. for failure to maintain workers' compensation insurance. Employer failed to appear for hearing.

4. On June 3, 2009, Judge Friend entered his Findings of Fact, Conclusions of Law and Order concluding Claimant's claim is compensable, awarding medical benefits, and awarding penalties against Employer. As required by Section 8-43-408(1), C.R.S., Judge Friend calculated the present value of Employer's liability under Claimant Ferrara's claim and ordered Employer to file a bond or deposit the sum of $73,000.00 with the Division of Workers' Compensation, Special Funds Unit, as trustee.

5. On June 8, 2009, Sue Sobolik, Trustee for the Division of Workers' Compensation, Special Funds Unit, wrote a letter to Employer providing notice of nonpayment of a trust deposit or failure to file a bond as ordered by Judge Friend on behalf of Claimant. Ms. Sobolik advised Employer to make arrangements to honor said bonds within 15 days or be subject to additional penalty sanctions under Section 8-43-408(4). Employer disregarded Ms. Sobolik's letter and failed to comply with the order of Judge Friend to pay the trust deposit or file a bond.

6. Claimant proceeded to hearing before Administrative Law Judge Harr on October 22, 2010. ALJ Harr ruled in his Findings of Fact, Conclusions of Law and Order on March 15, 2011, that Claimant,

> …showed it more probably true than not that Employer failed to comply with the lawful order of Judge Friend. The Order of Judge Friend required Employer to pay the trust deposit or file a bond under Claimant's claim in the amount of $73,000.00. Section 8-43-408(4) authorizes the Judge to impose an additional penalty of 50% of the trust deposit or bond, plus reasonable attorney fees, against Employer for such violation. Employer thus is liable to Claimant Ferrara for an additional penalty of $36,500.00 (50% x $73,000.00), plus reasonable attorney fees. Claimant Ferrara thus proved by a preponderance of the evidence that Employer currently is liable for adjudicated benefits and penalties in the aggregate amount of $109,500.00 ($36,500.00 + $73,000.00)

7. On March 15, 2011, ALJ Harr ordered that the "Employer shall pay Claimant Ferrara adjudicated benefits and penalties in the aggregate amount of $109,500.00.

8. Employer failed to comply with the March 15, 2011, Order of ALJ Harr and pay the amounts due under the Order as a deposit or to file a bond as required by Section 8-43-408, *supra.*

9. Claimant presented evidence at the hearing herein of a June 4 2009, Findings of Fact, Conclusions of Law and Order of ALJ Friend in WC No. 4-740-341 ordering this Respondent to pay reasonably necessary and related medical benefits totaling $44,531.95 in this claim and awarding penalties against Respondent totaling $28,100.00. Respondent did not comply with the June 4, 2009, order.

10. The record establishes that the Employer failed to comply with prior Orders, and specifically, ALJ Harr's March 15, 2011, order. Claimant seeks an award of penalties for the failure to comply with the March 15, 2011, order of ALJ Harr. It is found that the Employer's actions constitute a knowing, willful, blatant and repeated violation of the provisions of the Colorado Workers' Compensation Act. Respondent shall be liable for a penalty under Section 8-43-304, C.R.S. in the amount of $50.00 per day from April 5, 2011, (April 5, 2011, is the date ALJ Harr's March 15, 2011, order was final) to the date of the hearing in this matter on December 12, 2014, totaling 1348 days, or $67,400, for failure to comply with ALJ Harr's March 15, 2011, order.

11. On October 6, 2014, OAC provided notice to the parties of the hearing held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided to the parties of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at the December 12, 2014, hearing. Respondent was provided notice of the status conference and the hearing at: Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. The address utilized by OAC for Respondent

was provided by Claimant on his application for hearing

12. On December 8, 2014, Claimant, utilizing a Certified Process Server in Florida, personally served Respondent's registered agent, Shelley Jones, at the above referenced Fort Myers, FL address. An Affidavit from the Process Server affirms that the Respondent corporation's register agent was personally served, the following pleading:

a. the Notice of Status Conference and Notice of December 12, 2014, Hearing dated October 6, 2014 in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

b. the Motion and Order to Consolidate Claims dated October 29, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341;

c. the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

d. the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton, Rueben Perez and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795, 4-740-341 & 4-734-913; and

e. the June 3, 2009, Findings of Fact, Conclusion of Law and Order of ALJ Friend in John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-740-341.

13. Respondent did not appear, in person or through counsel, at the December 10, 2014, status conference or the December 12, 2014, hearing. As of the date of this Order, Respondent has not filed a motion, or otherwise contacted the Court.

14. It is found that, consistent with OACRP 23(B)(1), the October 6, 2014, Notice of Hearing, and other relevant pleading, including the Notice of Status Conference dated October 6, 2014, the Order of Consolidation dated October 29, 2014, and Findings of Fact, Conclusion of Law and Order of ALJ Harr dated March 15, 2011 were sent to Respondent's address at 4411 Cleveland Avenue, Fort Myers, FL 33901. This is an address maintained for Respondent by OAC and an address at which Respondent or Respondent's authorized representative was likely to receive it. It is further found that, on December 8, 2012, the Notice of December 12, 2014, Hearing dated October 6, 2014, and other relevant pleading,was in fact personally served on Respondent's authorized representative at 4411 Cleveland Avenue, Fort Myers, FL 33901. Therefore, it is found that Respondent received notice of these proceedings and this order may be entered against Respondent.

## CONCLUSIONS OF LAW

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

1. 1.A consolidated hearing was held on December 12, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341. Applications for hearing in each case were filed in which Claimant sought penalties under Section 8-43-304, C.R.S. against Respondent for failure to comply with ALJ Harr's March 15, 2011, order. At the conclusion of the December 12, 2012, hearing, Claimant argues that he has proven by a preponderance of the evidence the Employer should pay penalties pursuant to Section 8-43-304 for failure to comply with the orders entered by Administrative Law Judge Jones on July 7, 2009, and Administrative Law Judge Michael E. Harr on March 15, 2011 and December 30, 2011.

2. It is concluded that Claimant proved by a preponderance of the evidence that he is entitled to penalties pursuant to Section 8-43-304, C.R.S. for Respondent's failure to comply with the March 15, 2011, order of ALJ Harr. The ALJ rejects Claimant's contention that he is entitled to penalties for violation of the orders of Administrative Law Judge Jones dated July 7, 2009, and Administrative Law Judge Michael E. Harr dated December 30, 2011, because Claimant did not provide notice of his intent to raise these claims.

3. 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, *supra*.

4. 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).

5. Section 8-43-304(1) states, in pertinent part that,

> Any employer or insurer, or any officer of agent of either, or any employee, or agent of either, or any employee, or any other person who violates any provision or articles 40 to 47 of this title or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel or any

judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a find or not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in Section 8-46-101, C.R.S.

6. Employer failed to comply with the Order of ALJ Harr dated March 15, 2011. Respondent's conduct, their blatant and repeated failure to comply with prior orders as well as the provisions of Articles 40 to 47 of this Act, constitute grounds for penalties of $50.00 per day as provided under Section 8-43-304(1) from April 5, 2011, (April 5, 2011, is the date that ALJ Harr's March 15, 2011, order became final) to the date of the hearing in this matter on December 12, 2014.

7. Accordingly, Respondent shall be liable to Claimant for 1348 days of penalties at $50.00 per day totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850, shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

8. On October 6, 2014, OAC provided notice to the parties of a hearing to be held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at hearing. Respondent did not appear at the December 10, 2014, Status Conference or the December 12, 2014, Hearing.

9. Respondent was provided notice of the Status Conference and the Hearing at Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. This is the addressed maintained by OAC for Respondent. This is the same address to which the above referenced court orders were sent: the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr; and the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr. The October 6, 2014, notice of hearing, along with relevant orders, was personally served on Respondent's registered agent on December 8, 2014, in Florida at 4411 Cleveland Avenue, Fort Myers, FL 33901.

10. Therefore, it is concluded Respondent, or it's registered agent, received notice of the December 12, 2014, hearing and, other related pleading, and ALJ Harr's March 15, 2011, order. Therefore, it is concluded that, under OACRP 23, an order may be entered against Respondent.

## ORDER

It is therefore ordered that:

1. Respondent shall be liable to Claimant for 1348 days of penalties under Section 8-43-304 at the rate of $50.00 per day totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850, shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

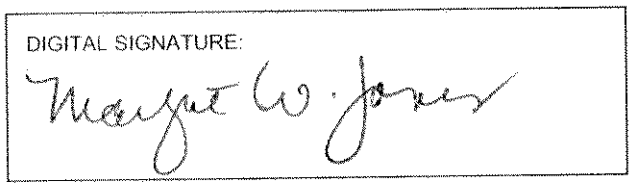
2. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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: February 6, 2015

DIGITAL SIGNATURE:



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

## ISSUES

- Do the doctrines of law of the case and/or issue preclusion prevent the respondents from litigating whether admitted for post-MMI chiropractic treatments are reasonable and necessary to relieve the effects of the injury?

- Did the claimant waive the issues of law of the case and issue preclusion by failing timely to plead them?

- Did the claimant establish by a preponderance of the evidence that ongoing chiropractic treatment constitutes reasonable and necessary post-MMI medical treatment to relieve the effects of her industrial injury?

## 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 were admitted into evidence. Claimant's Exhibit 8 was admitted into evidence with the exception of pages 252 through 261 (Dr. Kesten's Deposition) which were withdrawn. Respondents' Exhibits A through G were admitted into evidence.

2. The claimant sustained an admitted low back injury on April 21, 2008.

3. The claimant testified that she had been under the care and treatment of her primary care doctor, Jeffrey Kesten, M.D., for the residual physical problems related to her low back condition and that Dr. Kesten referred her for chiropractic treatment to Kelvin Washington, D.C., for her low back in approximately January of 2013.

4. The claimant testified that she is a dental hygienist and described the work activities that she needs to perform in order to pursue her occupation. She further testified as to the number of jobs that she has had in the same or similar employment since the on the job injury and opined that without the ongoing chiropractic treatments it would be difficult for her to continue to perform her occupation.

5. On June 26, 2012 Dr. Kesten issued a report stating that the claimant had been seen on May 10, 2012 and placed at maximum medical improvement (MMI) with a 9% whole person impairment rating. However, the claimant returned to Dr. Kesten on June 26 because the prior range of motion measurements were considered to be invalid. On June 26 the claimant advised Dr. Kesten that on scale of 0 to 10 with 0 representing no pain and 10 representing the worst pain imaginable her lumbosacral pain was a 9 (9/10). On this examination the claimant reported she was using Topracin

(a topical cream) and a mechanical lumbar traction unit. The claimant also reported she was "attending chiropractic" with Doug Gibson, D.C., and receiving massage through Dr. Gibson's office. Dr. Kesten noted that the claimant had, in addition to physical therapy, previously undergone 2 prior courses of chiropractic treatment with Dr. Gibson. Dr. Kesten's diagnoses included the following: (1) Lumbar, sacral and left inguinal pain; (2) Lumbosacral strain; (3) L1-2 degenerative disk disease; (4) Minimal L1-2 disk osteophyte complex; (5) Severe L1-2 spondylosis (6) L2-3 degenerative disk disease; (7) Moderate L4-5 central and left lateralizing disk protrusion; (8) L4-5 degenerative disk disease; (9) Possible Left L5 radiculitis secondary to diagnosis # 7; (10) L4-5 annular tear; (11) Mild L5-S1 facet arthropathy; (12) Right sacroiliac (SI) joint dysfunction with associated pelvic obliquity. On June 26 Dr. Kesten assessed a 16% whole person impairment based on a specific disorder of the lumbar spine and reduced range of motion of the lumbar spine. He stated that the claimant was "released to full-time employment without restrictions and [was] encouraged to perform her prescribed independent home exercise program daily."

6. On August 9, 2012 the insurer filed a Final Admission of Liability (FAL). The FAL admitted for permanent partial disability benefits based on Dr. Kesten's 16% whole person impairment rating. The FAL further admitted for medical benefits after maximum medical improvement (MMI) including "Topracin (homeopathic) cream topically, mechanical lumbar traction unit as long as it affords her benefit, continue attending chiropractic and massage therapy."

7. After the claimant was placed at MMI Dr. Kesten continued to prescribe Topracin, traction, massage therapy and chiropractic treatment with Dr. Gibson. On November 8, 2012 the claimant reported to Dr. Kesten that the chiropractic treatments afforded her "appreciable benefit." On that date Dr. Kesten prescribed an additional "6-session course of maintenance chiropractic per Doug Gibson, DC whereby she attends monthly." On January 16, 2013 Dr. Kesten wrote a prescription for chiropractic treatment to be provided by Kelvin Washington, D.C. The prescription described this chiropractic treatment as "maintenance care" and was for 2 months with 6 sessions per month.

8. Dr. Washington commenced treating the claimant on January 16, 2013. The claimant reported lower back pain since the date of the injury that was worsening with time. She estimated her pain as 10/10 with 10 being the worst pain she could feel. Dr. Washington prepared a treatment plan in which he stated that the claimant's condition involved "soft tissue" including fascia, ligaments and muscles. He stated his treatment would include "three stages of care." The first stage, lasting 4 to 12 weeks, would be the "symptomatic relief stage." The second stage would be would be the "repair stage" and the third stage would be the "regenerative stage." Dr. Washington wrote that if the claimant kept her appointments he expected she would increase her lumbar range of motion by 75%, decrease discomfort by 75%, be able to drive with little pain, stabilize her lumbar region and both hips, improve function of the lumbar region and improve posture.

9. Dr. Kesten has continued to prescribe chiropractic treatment as a form of maintenance treatment. On July 16, 2013 Dr. Kesten noted the claimant was enrolled in an "18-session course of maintenance chiropractic" with Dr. Washington. The claimant reported "benefit" from this course of treatment although she stated her pain was 7/10 and her problems become worse "when she is at work, stands up, stands for a prolonged time and bends." On August 12, 2013 the claimant reported to Dr. Kesten that she was benefiting from chiropractic treatment and the Dr. Washington needed "a script for 9 more visits." On August 12, 2013 Dr. Kesten wrote a prescription for 8 more visits with Dr. Washington. On December 12, 2013 the claimant reported she had not been attending chiropractic treatment with Dr. Washington because the insurer denied authorization for these treatments. Dr. Kesten noted he had spoken with Dr. Washington who stated the claimant needed maintenance care every other week and that the claimant was performing home exercise and has a gym membership with logs showing consistent visits. The claimant rated her lumbosacral pain at 6-7/10. Dr. Kesten requested the insurer to authorize "6 additional sessions (32 sessions total)" of chiropractic treatment with Dr. Washington. On March 27, 2014 the claimant reported to Dr. Kesten that her lower back is frequently tight, stiff, aching agonizing, annoying, miserable, sore, smarting, tingling and that her pain had recently ranged in the range of 5-7/10. Dr. Kesten requested authorization for 4 additional chiropractic sessions.

10. The ALJ has reviewed Dr. Washington's numerous treatment notes from January 16, 2013 through November 26, 2014. These notes reflect that beginning in March 2013 the claimant typically rated her back pain as 6/10 or 7/10 with occasional minor fluctuations up or down. With minor variations the claimant typically reported that her pain was aggravated by the weather, work, standing, sitting and doing "nothing in particular." The claimant typically reported that her symptoms improved with acupuncture, "adjustments," stretching and massage. Throughout this period of time Dr. Washington applied chiropractic manipulations. Dr. Washington's notes frequently state that at the end of treatment the claimant reported she was feeling "better" or that she felt she had increased range of motion. Dr. Washington often concluded his notes by stating that the claimant's prognosis was "fair" because she was "responding well" or with "mixed results" to "conservative chiropractic therapy."

11. On August 11, 2014 Richard K. Mobus, D.C., submitted a report of a records review that he conducted regarding the claimant's chiropractic treatment. Dr. Mobus is a chiropractor, is Level 1 certified, participated In writing the Level 1 accreditation course and has participated on Division of Workers' Compensation low back treatment committees. Dr. Mobus noted that the claimant began treatment with Dr. Washington on January 16, 2013, but Dr. Washington's notes do not include a date of injury. Dr. Mobus further noted that Dr. Washington's notes refer to the claimant as having suffered a herniated disc after a sneeze, and that Dr. Washington also diagnosed lumbosacral neuritis, radiculitis unspecified, lumbar region subluxation, stiffness of the pelvic and thigh joints, degeneration of the lumbar or lumbosacral disc and muscle spasm.

12. On October 17, 2013 Dr. Washington stated the claimant was in the "strengthening stage" of treatment which he expected to last 4 to 12 weeks.

Nevertheless, on October 30, 2013 the claimant advised Dr. Washington that her pain was at 7/10 and that her back was tight, stiff, aching, agonizing, annoying and constant." On December 12, 2013 Dr. Washington wrote the claimant had returned to the "symptomatic stage" of treatment which he expected to last 4 to 12 weeks. On January 18, 2014 Dr. Washington wrote the claimant remained in the symptomatic stage and that he recommended 8 additional visits.

13. In his report Dr. Mobus opined it is "unclear" how the claimant could have continued to suffer from a lumbar radiculopathy five years after the date of injury. Dr. Mobus opined that ongoing care in workers' compensation cases is "justified by functional gains, not by ongoing pain that suggests treatment has been ineffective." Dr. Mobus noted that when the claimant first appeared for treatment with Dr. Washington her pain level was 10/10. On her second visit of February 6, 2013 the reported pain had improved to 7/10. After her sixth visit on March 1, 2013 her low back pain "remained at 7/10." On April 5, 2013, the tenth visit, the pain level was "still 7/10." Dr. Mobus opined this constituted a "reasonable trial" of chiropractic treatment. He further opined that although Dr. Washington reported that the claimant's function improved, there is "no evidence through the course of 71 treatments of chiropractic care from January 15, 2013 to June 25, 2014, of overall progress or of functional gains."

14. Dr. Mobus testified as follows. He reviewed Dr. Washington's chiropractic records from January 2013 through June 25, 2014. During that time Dr. Washington treated the claimant 71 times. Dr. Mobus opined Dr. Washington's records fail to document any functional improvement and contain no objective evidence of improvement in the claimant's condition. Dr. Mobus opined that continued chiropractic treatment is not reasonable because ongoing treatment is predicated on functional improvement, not ongoing symptoms. He further opined that continued chiropractic treatment is not necessary because if treatment is effective it is not extensive.

15. Dr. Mobus testified that under WCRP 17 Exhibit 1, the Medical Treatment Guidelines (MTG) for Low Back Pain (found in his written report) 6 treatments constitutes a reasonable trial to establish clinical benefit from chiropractic care. Dr. Mobus testified that under the MTG chiropractic care should be discontinued if the patient is not showing functional gains. In this case Dr. Mobus opined the claimant's first 6 to 10 visits with Dr. Washington complied with the MTG, but after that they did not.

16. Dr. Mobus testified that if a patient has reached maximum medical improvement (MMI) he is uncertain of whether the MTG limit the authorized treating physician's discretion to prescribe additional chiropractic treatment. Dr. Mobus conceded that the claimant testified that the chiropractic treatment with Dr. Washington provided her functional gains but reiterated that Dr. Washington's records did not document any functional gains.

17. The provisions of the Low Back Pain MTG cited by Dr. Mobus in his written report state that "manipulation" is defined "as the therapeutic application of manually guided forces by an operator to improve physiologic function and/or support

homeostasis that has been altered by the injury…and has associated clinical significance." The MTG provide that the time to produce effect from manipulation is "4 to 6 treatments" and the optimum duration is "8 weeks." The MTG further provide that the "maximum duration" of manipulation is 8 weeks and at 8 weeks the "patient should be re-evaluated." The MTG provide that care "beyond 8 weeks may be indicated for certain chronic pain patients in whom manipulation is helpful in improving function, decreasing pain, and improving quality of life." In these cases "treatment may be continued at one treatment every other week until the patient has reached MMI and maintenance treatments have been determined." Extension of manipulation beyond "maximum" may be "necessary in cases of re-injury, interrupted continuity of care, exacerbation of symptoms, and in those patients with co-morbidities." Care beyond maximum should be "re-evaluated and documented on a monthly basis."

18. Lloyd J. Thurston. D.O., conducted an independent medical examination of the claimant at the respondents' request. He prepared a written report dated September 2, 2014, reviewed medical records and performed a physical examination. Dr. Thurston is board certified in family practice and is level II accredited. The ALJ has reviewed Dr. Thurston's testimony and has reviewed his report of September 2, 2014.

19. Dr. Thurston opined that the claimant reached MMI in April 2010 and needed 6 months of maintenance treatment after that date. He opined that the chiropractic treatment the claimant has received since that time is "palliative care" that affects her symptoms but does not improve her underling condition. Dr. Thurston stated he found no evidence of "functional gains" from the chiropractic treatment. Dr. Thurston opined it is not reasonable to continue providing chiropractic care in this case. He explained that further chiropractic treatment to make the claimant "feel better" is not warranted and that the claimant should be "responsible" for her own care through exercise. Dr. Thurston opined that a home exercise program is warranted. He explained that active therapy is better for the claimant than "passive" chiropractic therapy which provides no long term benefit. He opined that "pain avoidance" is not going to help the claimant and that she is not going to hurt herself with activity.

20. A preponderance of the credible and persuasive evidence establishes that the chiropractic treatment being provided by Dr. Washington no longer constitutes reasonable and necessary maintenance treatment.

21. The ALJ credits the opinion of Dr. Thurston that the care being provided by Dr. Washington is essentially "palliative" in nature and that such "passive" treatment is no longer reasonable and necessary. Dr. Thurston credibly opined that the best type of treatment for the claimant is activity and that such activity will not injure her.

22. The ALJ finds that Dr. Kesten has been prescribing chiropractic treatment as "maintenance care." However, Dr. Washington's treatment plans indicate that the objectives of his treatment are to improve the claimant's condition by reducing pain and increasing function. However, a preponderance of the evidence establishes that after a lengthy course of chiropractic treatment the claimant's pain level has remained essentially unchanged and remains at the usual level of 6-7/10. The ALJ infers from

this evidence that the chiropractic treatment is providing no long term pain relief and very little short term relief. Moreover, Dr. Mobus and Dr. Thurston credibly opined that Dr. Washington's notes fail to document any functional gains from the chiropractic treatment. Rather, the claimant has advised Dr. Washington that her symptoms reappear with work, standing, sitting, changes in the weather and even when doing nothing at all. The credible and persuasive evidence establishes that the claimant's function has not been significantly improved for more than very brief periods of time between chiropractic visits. All of this evidence corroborates Dr. Thurston's opinion that further chiropractic treatment is not warranted because it is not providing any sustained benefit to the claimant and because it is not the best course of treatment to maintain her condition and relieve her symptoms.

23. Evidence and inferences inconsistent with these findings are not credible and persuasive.

## CONCLUSIONS OF LAW

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

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

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

### LAW OF THE CASE AND ISSUE PRECLUSION

At the hearing the claimant asserted that because the respondents admitted liability for continuing medical treatment after MMI, including ongoing chiropractic care, the doctrines of law of the case and issue preclusion prevent the respondents from litigating whether subsequent care is reasonable and necessary. The ALJ understands from the claimant's position statement that she has now abandoned these arguments

and concedes that law of the case and issue preclusion do not prevent the respondents from disputing the reasonableness and necessity for ongoing care. (See Claimant's proposed Finding of Fact 3 and proposed Conclusions of Law pp. 5 and 6).

In any event, the ALJ concludes that the filing of an FAL admitting for a specific ongoing medical benefit, like chiropractic care, does not constitute an admission that the respondents are automatically liable to pay for all subsequent care of that type regardless of the reasonableness, necessity and cause of the need for care. Rather, where the respondents admit liability for ongoing medical benefits after MMI they retain the right to litigate whether specific care sought in the future is reasonable, necessary and related to the industrial injury. *See Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003); *Ford v. Regional Transportation District*, WC 4-309-217 (ICAO February 12, 2009).

REASONABLENESS AND NECESSITY FOR ONGOING CHIROPRACTIC CARE

The claimant contends the evidence establishes that she needs ongoing chiropractic care as a form of post-MMI medical treatment to relieve her ongoing symptoms and maintain function so that she can perform her job as a dental hygienist. The respondents contend the evidence establishes that such care is not reasonable and necessary.

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

Except in certain circumstances not present here, 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, supra*. The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As determined in Findings of Fact 20 through 22, a preponderance of the credible and persuasive evidence establishes that ongoing chiropractic treatment is not reasonable and necessary to relieve the effects of the claimant's injury or prevent deterioration of her condition. Dr. Thurston credibly opined that at this point the chiropractic treatment provided by Dr. Washington is "palliative" in nature and that this type of passive treatment is no longer warranted for the claimant's condition. Rather,

the most appropriate treatment to relieve and maintain the claimant's condition is exercise. Dr. Thurston's opinion in this regard is supported by evidence that the claimant's pain has remained more or less constant despite numerous and frequent chiropractic treatments and there is no documentation that such treatment have altered her function for any significant length of time. Indeed, Dr. Washington's treatment plans were aimed at reducing pain and improving function, but the credible and persuasive evidence establishes that this has not occurred and the claimant's condition has remained static and she is not receiving any substantial relief of her symptoms despite an extensive course of chiropractic treatment.

## ORDER

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

1. The respondents are no longer required to pay for chiropractic treatment as a form of post-MMI medical benefit.

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: February 24, 2015

DIGITAL SIGNATURE:

David P. Cain

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

## ISSUE

The issue raised for consideration is whether Claimant may proceed to hearing on the issue of permanent total disability benefits (PTD)

## PARTIES' STIPULATION OF FACT

The parties appeared at hearing through counsel, called no witnesses, offered no documentary evidence, and requested ruling on the issue raised above based on the parties' stipulated facts.

1. On June 30, 2009, the claimant was involved in a work related motor vehicle accident involving a collision with a freight train

2. The claimant's authorized treating physician is Richard Book, M.D. Dr. Book is a family medicine physician practicing in La Junta, Colorado. Dr. Book is not a Level II accredited physician.

3. Richard Book, M.D. determined that the claimant reached maximum medical improvement as of November 6, 2013, but did not provide an impairment rating.

4. The respondents continue to pay temporary total disability benefits pursuant to the General Admission of Liability filed on July 13, 2011. A final admission has not been filed.

5. On July 11, 2014, the claimant filed an Application for Hearing on the issue of permanent total disability benefits.

6. The claimant underwent an appointment with Dr. Miguel Castrejon on October 16, 2014, for the purpose of an impairment rating. Dr. Castrejon is Level II accredited and was agreed upon by both parties.

## CONCLUSIONS OF LAW

Having considered the stipulated facts of the parties, the following Conclusions of Law are entered.

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. Except as noted below 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 8-43-2

2. Claimant filed an Application for Hearing endorsing the issue of permanent total disability benefits. In order to be awarded permanent total disability benefits, the employee must be "unable to earn any wages in the same or other employment". Section 8-40-201(16.5)(a) (C.R.S. 2014). Respondents contend that the determination whether the claimant is permanently and totally disabled is not ripe until the claimant has reached maximum medical improvement (MMI) and the permanent effects of the injury are ascertainable. *Golden Animal Hospital v. Horton*, 897 P.2d 833, 838 (Colo. 1995). The statute's reference in Section 8-43-211(2)(b), C.R.S. to an issue that is "ripe for adjudication" means an issue that is "real, immediate, and fit for adjudication." *Franz v. Industrial Claim Appeals Office,* 250 P.3d 1284 (Colo. App. 2010); *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006); *Chavez v. Cargill, Inc.* W.C. No. 4-421-748 (November 1, 2002). An issue is "fit for adjudication" if there is no "legal impediment" to its immediate resolution. *Maestas v. Wal Mart Stores, Inc.,* WC 4-717-132 (ICAO January 22, 2009).

3. Respondents contend that the determination of MMI and impairment rating by a Level II accredited physician needs to be made before PTD can be adjudicated. Claimant contends that the determination of MMI by a level II accredited physician is not a prerequisite to Claimant's right to proceed to hearing on the issue of PTD.

4. In this case, it is concluded, contrary to the finding of the Summary Order, there is no legal impediment to adjudication of the issue of permanent total disability benefits.

5. A claimant has reached MMI "when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expect to improve the condition." Section 8-40-201(11.5) C.R.S. (2014). Respondents rely on the provision of the statute contained in Section 8-42-107(8)(b)(II) and (III) C.R.S. to argue that the issue of PTD raised by Claimant is not ripe for adjudication. These sections provide that, once an authorized treating physician places a claimant at MMI, "if either party dispute a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2". Section 8-42-107(8)(b)(II) C.R.S. (2014). A treating physician's determination regarding maximum medical improvement cannot be challenged absent a Division Independent Medical Examination. *Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). Section 8-42-107(8)(b)(III), C.R.S. provides that, "The findings regarding maximum medical improvement and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the findings of the independent medical examiner has been filed with the division."

6. In this case, the ALJ finds and concludes that the issue of PTD is ripe for determination on grounds that are not related to Respondents failure to timely refer Claimant for impairment rating. Under the 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). The claimant's commutable labor market or other similar concepts that depend upon the existence of employment that is reasonably available to the claimant under his or her particular circumstances must be considered. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

7. A person's ability to earn wages is not determined by any single criterion. The extent and degree of permanent disability is assessed on the basis of interdependent factors which affect the worker's capacity to be gainfully employed. *Professional Fire Protection v. Long*, 867 P.2d 175 (Colo. App. 1993). PTD benefits are established by Section 8-42-111, C.R.S., which contains no requirement that the parties use the Division IME process that is required for the impairment rating benefits. The ICAO in the case entitled, *Dighero v. Jefferson County*, W.C. No. 4-250-485 (Industrial Claim Appeals Office, May 30, 1997), seems to indicate that the Division IME provisions in Section 8-42-107(8)(c), C.R.S., do not apply to permanent total disability determinations.

8. Therefore, it is found and concluded that the provisions of Sections 8-42-107(8) and 8-42-107.2(2)(b), C.R.S. do not apply to a claim for PTD so as to bar the claim from going forward at hearing before exhausting the DIME process. Claimant's claim of PTD is ripe for adjudication and may proceed at hearing.

## ORDER

It is therefore ordered that:

1. The issue of PTD is ripe for determination at hearing because there are no legal impediments to the Claimant's ability to proceed to hearing on the issue.

2. 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: _February 17, 2015_____

DIGITAL SIGNATURE:

Margot W. Jones

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

## PROCEDURAL HISTORY/PRELIMINARY MATTERS

There are prior rulings related to this matter to consider. On November 1, 2012, ALJ Friend entered an Order Re: Respondents' Unopposed Motion for Corrected Order, determining that Claimant's average weekly wage is $1,092.88, with a corresponding TTD benefit rate of $782.59. In addition, on September 4, 2013, ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order that Respondents had failed to overcome the Division Independent Medical Examination of Brian Beatty, D.O.; that, therefore, the Claimant's left upper extremity condition is proximately related to the admitted right upper extremity injury of February 21, 2011; that Claimant was not at maximum medical improvement; that Respondents shall pay Claimant medical benefits at the hands of previously authorized physicians. Respondents timely filed a Petition to review ALJ Felter's order to the Industrial Claim Appeals Office. On March 4, 2014, the Industrial Claim Appeals Office dismissed the Respondents' petition to review ALJ Felter's order without prejudice for lack of a final order.

## STIPULATIONS

The doctors at Concentra, including Dr. Ogden, and Dr. Ogden's valid referral, Dr. Motz, are authorized treating physicians in this case. Dr. Lichtenberg is not an authorized treating physician in this case.

## ISSUES

In light of the foregoing stipulations, the following remained at issue for the hearing:

1. Whether the Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits for his right shoulder condition.

2. Whether the Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits for his left shoulder condition.

3. Whether the Claimant proved that he is entitled to temporary disability benefits from July 23, 2012 ongoing.

4. If the Claimant is entitled to temporary disability benefits, whether the Respondents proved they are entitled to offsets.

## FINDINGS OF FACT

1. The Claimant was born on June 29, 1951. He was 63 years old at time of the October 1, 2014 hearing (Claimant's Exhibit 3). It is undisputed that he was performing his usual job duties on February 21, 2011 when he suffered an admitted work injury.

2. The Claimant testified at the hearing on October 1, 2014. The ALJ notes that the Claimant appeared to have difficulty raising his right hand to take his oath and he was grimacing while his hand was slightly raised to take the oath. The Claimant testified that he was hired by Employer on October 1, 2004 as a stage hand. His duties were warehouse work and he worked 7 days a week, about 60-65 hours per week. At the time of his February 21, 2011 work injury, the Claimant's title was dock master and he was in charge of getting items into trucks so that Employer can install the materials for tradeshows. It is a labor-intensive, highly physical job and there is little to no sitting around. The Claimant testified that he frequently lifted heavy items overhead, including carpet which could weigh up to 200 lbs. He also loaded stacks of tables and chair carts which could get very heavy. The materials to be loaded on the trucks were stored on racks from 5 feet tall up to 25/30 feet tall. Ladders and forklifts are used to get to the high racks. In referencing a physical work description for the Employer (Claimant's Exhibit 12), the Claimant testified that he performed most of the work listed on the sheet, all of which is physically challenging and generally requires lifting items. The Claimant did not have a second job outside of his primary employment with Employer. Outside of work, his activities included riding his Harley Davidson motorcycle and playing Santa at Christmas. The Claimant recalled working on Presidents' Day on February 21, 2011 and he heard a snap. His arm started to turn black and he was in pain and he reported the injury right away and was sent for medical treatment at Concentra. The Claimant's testimony as stated in this paragraph was credible and persuasive and found as fact.

3. The Claimant treated with his authorized treating physicians at Concentra, including Dr. Paul Ogden. Dr. Ogden referred the Claimant to Dr. Cary Motz for an orthopedic surgery evaluation. On March 28, 2011, Dr. Cary Motz performed a repair of the right proximal biceps rupture, a repair of the right supraspinatus, and an arthroscopic subacromial decompression (Claimant's Exhibit 18).

4. The Claimant testified that after his first surgery, he used a sling to immobilize his right arm and he participated in physical therapy. He testified that for a lot of the exercises in physical therapy, he had to use both arms. The Claimant testified that he was not permitted to work until his rehabilitation was complete so he was out of work from March of 2011 until September 2011. He returned to work, but in September 2011 he was having right shoulder pain again. He testified that the condition of his right arm was such that it hurt the whole time he was working through December of 2011. The Claimant's testimony as set forth in this paragraph is supported by the medical records and was credible and persuasive and is found as fact.

5. After surgery, the Claimant participated in 57 physical therapy sessions occurring over a period of approximately six (6) months, during which he used both upper extremities during many of the physical therapy exercises (Claimant's Exhibit 11).

6. The Respondents admitted liability for the right upper extremity injury and paid temporary total disability benefits between March 28, 2011 and September 5, 2011 (Claimant's Exhibit 4).

7. On or about September 6, 2011, the Claimant returned to full duty performing his regular duties, and he continued to work full time until about December 16, 2011.

8. By September 26, 2011, the Claimant sought medical care for continued problems with his right shoulder. In a report of that date, Dr. Ogden noted that "Patient relates worsening of pain… the patient has had physical therapy and does not feel better. The pain is located on the anterior aspect of the right shoulder.…Since returning to work, he tires easily. He has had to increase his pain medications." Dr. Ogden decided to hold off on performing an impairment rating and referred him back to Dr. Motz to consider other interventions (Claimant's Exhibit 11). Reports from Concentra doctors dated October 18, October 31, November 10, and November 23, 2011 record continuing pain in the right shoulder (Claimant's Exhibit 11).

9. An MRI of the right shoulder on November 2, 2011 revealed a re-tear of the Claimant's supraspinatus (Claimant's Exhibit 6, p. 6).

10. On December 19, 2011, Dr. Motz performed a second surgery on the Claimant's right shoulder. The post-operative diagnosis was right shoulder recurrent 2-cm supraspinatus tear, and the operation was an arthroscopic revision of the rotator cuff repair and removal of retained sutures (See Claimant's Exhibit 6, p. 6)

11. The Claimant testified that he underwent a second right shoulder surgery in December 2011 and was advised that he would be off work until he passed a physical assessment test. It was estimated that he would be able to take the assessment test in July of 2012. The Claimant testified that in between the return to work and his second right shoulder surgery, the condition of his left shoulder was starting to hurt and give him problems. After the second surgery, when he had his 65 physical therapy visits (Claimant's Exhibit 23, Report of Thomas Ryan PT dated July 16, 2012), the left shoulder was hurting from the elbow to the neck and certain movements made it worse. The Claimant testified that over this time period his level of pain for the left upper extremity changed from about a 2 to days where it was more of a 7 or 8 out of 10. The Claimant testified that he told Dr. Ogden about the problems he was having with his left upper extremity. The Claimant agrees that Dr. Ogden's report of February 27, 2012 in Claimant's Exhibit 11 is an accurate history of present illness, although the Claimant later testified on cross-examination that he recalled that he told Dr. Ogden before this date that his left shoulder was having pain. The Claimant's testimony as set forth above was credible and is found as fact.

12. In a report dated February 13, 2012, Thomas Ryan, PT reported that the Claimant's left shoulder was hurting him more than the right (Claimant's Exhibit 23). In a report dated February 27, 2012, the Claimant's primary treating physician, Paul Ogden, M.D. wrote that "left shoulder has gradually worsened with pain. He thinks it started around May of 2011. He wasn't working at the time, but was in therapy. It smoldered with pain, the [pain] was much worse after going back to work in September. Now pain with abduction and flexion, and IR. Weakness also" (Claimant's Exhibit 11).

13. While he was in physical therapy after the second surgery, the Claimant testified that he did not receive a modified job offer with Employer nor has he returned to work for the Employer after the conclusion of his physical therapy sessions. He did undergo a physical assessment test after the second surgery but the Claimant testified that he could only pick up 45 lbs. and so he could not do his former job without restrictions. At that time, the Claimant testified that with respect to his left arm he was also very limited and couldn't do half of what he used to be able to do and he could not do his job nor could he do all of the normal day-to-day activities at home such as moving laundry upstairs and putting away dishes. The Claimant testified that he gave his full effort using both arms for a physical assessment performed with his physical therapist Mr. Ryan on July 16, 2012.

14. In a report dated March 7, 2012, Dr. Ogden referred the Claimant to Dr. Motz for surgical consultation for the left shoulder (Claimant's Exhibit 6, Report of Dr. Beatty dated December 5, 2012, p. 7). By report dated May 2, 2012, Dr. Ogden noted that Dr. Motz feels that the condition is causally related as Claimant has favored the right shoulder during recovery from two surgeries and other than PT has not had a particular injury" (Exhibit 6, Report of Dr. Beatty dated December 5, 2012, p. 9).

15. Respondents denied liability for a left shoulder surgery.

16. On July 23, 2012, Dr. Ogden noted that Claimant's return to full duties has been somewhat limited by his left shoulder condition as well, that he is currently not working due to no available light duty, and that he that he had a 12% impairment of the RUE which converts to a 7% whole person impairment (Claimant's Exhibit 11).

17. On April 26, 2012, Dr, Motz opined that "The patient returns for evaluation of left shoulder pain which developed as a result of overusing following right shoulder surgery approximately 1 year ago. The discomfort is currently moderate to severe in intensity and has been progressively worsening" (Claimant's Exhibit 10).

18. On May 18, 2012, Dr. Ron Carbaugh, providing psychological evaluation, reported that testing revealed open and honest responses with no major distortions, that there did not appear to be any magnification of symptoms, and that the Claimant was the type that would minimize physical and psychological discomfort (Claimant's Exhibit 6, Report of Dr. Beatty dated December 5, 2012, p. 9).

19. In a record review report dated May 23, 2012, John Douthit, M.D. opined that as to causality, just because the symptoms in the left shoulder began concurrently with the right shoulder condition, it does not follow in itself that the left shoulder conditions are related. Dr. Douthit found it more medically probable that the Claimant has a "chronic tendinopathy of his left shoulder related to his aging with symptoms naturally occurring." Dr. Douthit opined that the development of symptoms in the left shoulder was coincidental (Respondents' Exhibit C).

20. On July 23, 2012, Dr. Ogden determined the Claimant was at MMI and rated the Claimant with a 12% upper extremity impairment. Dr. Ogden assigned a permanent lifting restriction of no lifting over 45 pounds, no pushing over 75 pounds, and no pulling over 55 pounds (Claimant's Exhibit 11; Respondents' Exhibit B, pp. 23-24).

21. The restrictions imposed by Dr. Ogden will not allow Claimant to return to work at his regular job which requires lifting at least 50 pounds overhead, and pushing and pulling carts, crates and objects weighing hundreds of pounds or more (Claimant's Exhibit 12). The Employer will not allow Claimant to return to work until he passes a Physical Assessment Test and is able to return back to work 100% without restrictions (See Exhibit 12).

22. The Respondents filed a Final Admission of Liability admitting for a 12% scheduled impairment and noting two periods of TTD paid to the Claimant. The Claimant received temporary total disability benefits from 3/28/2011 to 9/5/2011 and then again from 12/19/2011 to 7/22/2012 (Claimant's Exhibit 4).

23. On November 1, 2012, ALJ Friend entered an Order Re: Respondents' Unopposed Motion for Corrected Order, determining that Claimant's average weekly wage is $1,092.88, with a corresponding TTD benefit rate of $782.59.

24. On December 5, 2012, Dr. Brian Beatty performed a Division Independent Medical Examination. In his report, Dr. Beatty opined that the Claimant was not at MMI from the effects of the February 21, 2011 injury. Dr. 3Beatty diagnosed right rotator cuff tear with repair and left rotator cuff tear; opined that the Claimant was not at maximum medical improvement even though he had exhausted all treatment avenues for the right shoulder; opined that he needs surgical repair of the left shoulder as recommended by Dr. Motz and appropriate physical therapy. Dr. Beatty gave the Claimant a 14% RUE rating which converted to an 8% whole person rating. Dr. Beatty opined that "I believe his current left shoulder symptoms are related to his work due to the fact that he works at a very heavy labor intensive job requiring a lot of upper body use. Based on the history he gave to me and Dr. Ogden his left shoulder symptoms worsened considerably after returning from his right shoulder surgery."

25. On December 13, 2012, Dr. Allison Fall performed an independent medical examination of the Claimant and reviewed his medical records. Dr. Fall opined that "the left shoulder chronic degenerative findings are not work related. Medical

records are not supportive that he developed symptoms when he returned to work or even initially after the injury when he was more limited with his right shoulder. The first reported documentation of the left shoulder symptoms were in 02/12. He was not working at that time. He was able to use his right shoulder for activities of daily living. I am not aware that he was performing any heavy manual labor at home." Dr. Fall agreed in this regard with Dr. Douthit (Claimant's Exhibit 7; Respondents' Exhibit A, p. 17).

26. Disputing the DIME, the Respondents litigated the issue of "not at MMI." On September 4, 2013, ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order that Respondents had failed to overcome the Division Independent Medical Examination of Brian Beatty, D.O.; that, therefore, the Claimant's left upper extremity condition is proximately related to the admitted right upper extremity injury of February 21, 2011; that Claimant was not at maximum medical improvement; that Respondents shall pay Claimant medical benefits at the hands of previously authorized physicians, subject to the Division of Workers' Compensation Medical Fee Schedule; and that W.C. No. 4-916-403-01 was denied and dismissed as moot. Respondents timely filed a Petition to review ALJ Felter's order to the Industrial Claim Appeals Office. On March 4, 2014, the Industrial Claim Appeals Office dismissed the Respondents' petition to review ALJ Felter's order without prejudice for lack of a final order. ALJ Felter's order is not final for purposes of review or law of the case.

27. On June 19, 2014, Dr. Fall performed a follow-up independent medical examination of Claimant and reviewed his medical records. Dr. Fall noted that his pain behaviors had increased, and his limitations secondary to pain had increased, but otherwise he was in the same situation as he was at her previous evaluation. Regarding the left shoulder, she stated that findings were consistent with degenerative changes and he had undergone appropriate treatment for it. "Given the outcome of the right shoulder and the significant pain behaviors and psychological issues likely playing a role, it is unlikely there would be any functional benefit to be gained from a left shoulder arthroscopy." She has opined that the Claimant should be able to return to his regular job, and that he is magnifying his symptoms. She has further opined that any inability to work is due to the Claimant's RUE injury or a non-work-related LUE condition. She opined that Claimant would be at MMI for his left shoulder condition regardless of whether it was work-related and that the cause for the need of any additional treatment for the left shoulder would be age related (Claimant's Exhibit 17; Respondents' Exhibit A).

28. In his IME report dated July 8, 2014 (Exhibit 16), Alan Lichtenberg, M.D. opined that claim-related diagnoses included right shoulder rotator cuff tear, status post surgical repair x 2, permanent aggravation of left shoulder degenerative joint disease due to overuse syndrome/repetitive motion/cumulative trauma, and adjustment disorder with depression/anxiety/insomnia; with a reasonable degree of medical probability, that the accident of February 2, 2011 was the proximate cause of the claim-related diagnoses; that a treatment plan would include right shoulder re-evaluation by an orthopedic specialist, left shoulder surgery and appropriate postoperative care, and, for both shoulders, psychological pain evaluation and treatment for severe adjustment

disorder with depression and anxiety; that the Claimant is not at MMI with respect to his left shoulder injury; that Dr. Fall missed the proper diagnosis of the Claimant's left shoulder condition by dismissing the notion of an overuse syndrome as not real; that at this time the Claimant is unable to work because "both shoulders have contributed to his inability to work at his regular job"; and that he has not been able to work at all since July 23, 2012 (when TTD ended by Final Admission) "due to inability to use his arms and shoulders, with associated psychological factors and high levels of chronic pain" (Claimant's Exhibit 16).

29. On September 17, 2014, Glenn Petersen, PA, a Concentra physician assistant, opined that the Claimant was restricted to "No lifting over 0 lbs." PA Petersen also restricted Claimant from driving and any work above waist level. He referred Claimant to an orthopedist and he projected a date of MMI of January 17, 2015 (Claimant's Exhibit 23).

30. Dr. Ogden testified as an expert in the areas of family medicine, preventative medicine and occupational medicine. Dr. Ogden is not board certified in occupational medicine but has been practicing occupational medicine since August of 2010 and has seen thousands of occupational medicine patients and is also currently an area medical director for Concentra. Dr. Ogden is Level II accredited (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 2-9). Dr. Ogden treated the Claimant, seeing him multiple times with respect to an admitted right upper extremity injury dated February 21, 2011 (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 10-11). Dr. Ogden testified that it was his understanding that the Claimant worked at a physically demanding job that would fall within the "heavy" or "very heavy" classification of DOT jobs (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 13-14). Dr. Ogden testified that he commenced treating the Claimant just before the Claimant's first surgery date on March 28, 2011. It is Dr. Ogden's understanding that the first surgery was an attempt to repair the proximal right bicep, supraspinatus and a subacromial decompression (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 15). Dr. Ogden testified that after the first surgery, the Claimant was off work for approximately six months due to work restrictions (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 16-17). During the time the Claimant was off work after the first surgery, the Claimant participated in physical therapy visits with Concentra physical therapists and he was in an arm sling to immobilize his right upper extremity (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 18-19). At some point after this, the Claimant was authorized to return to work full duty. Dr. Ogden reviewed medical records indicating that on October 31st, November 10th and November 23rd the Claimant was full duty (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 23-24). The Claimant had a second surgery on December 19, 2011 which was a repeat repair of the supraspinatus muscle of the right upper extremity (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 21). There had been an MRI of the right upper extremity on November 2, 2011 which Dr. Ogden initially opined showed a new injury, a tear in the supraspinatus muscle (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 21-22). However, Dr. Ogden later conceded that he did not know when the tear that showed up on the November 2, 2011 MRI occurred, since there hadn't been a prior MRI (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 24-25). Dr. Ogden reviewed a medical report of his from February 27, 2012 and agreed there was a lifting restriction with respect to

the Claimant's left arm. Dr. Ogden testified that he recalled that restriction was due to the Claimant reporting that his left shoulder was bothering him (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p.32). Based on that medical note, Dr. Ogden indicated that the Claimant thought the pain in the left shoulder started around May, it was low grade and lingering at first, but not severe, then the Claimant told him it was much worse after going back to work in September (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 34). Dr. Ogden ordered an MRI after obtaining approval from an adjuster to determine causality for the left shoulder (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 36-37). Dr. Ogden testified that the March 1, 2012 left shoulder MRI showed advanced acromioclavicular joint arthrosis, or essentially that the joint was deteriorated (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 37). Dr. Ogden testified that he made a referral for the Claimant for a surgical consult with Dr. Motz for the left shoulder (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 38). Dr. Ogden testified that he spoke with Dr. Motz after this evaluation and noted that it was his understanding that Dr. Motz found the left shoulder injury casually related because the Claimant favored his right shoulder during recovery from 2 surgeries, but that other than PT, the Claimant had not had a particular injury (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 39-40). On cross-examination, Dr. Ogden testified that from September 1, 2011 through December 19, 2011 when the Claimant was working, he did not indicate any left shoulder symptomatology on pain diagrams (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 52). In discussing the March 1, 2012 MRI, Dr. Ogden noted that advanced acromioclavicular joint arthrosis is a degenerative condition but that not all of the findings on the MRI were merely consistent with the aging process. He stated that it usually takes more than just aging for the findings on the Claimant's MRI (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 55). Although, Dr. Ogden conceded that there was no support in the therapy records that the Claimant developed left shoulder problems in May of 2011 either because of right shoulder immobility or therapy he was doing (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 61).

31. Dr. Ogden's testimony was completed by deposition on May 13, 2013. On questioning about whether or not the Claimant's left shoulder condition could be related to overuse while his right shoulder was immobilized, Dr. Ogden testified that he did not think that was likely as he didn't think there would have been enough use of the left shoulder to account for the problems that he was having with his left shoulder at that point (Depo. Tr. 05/13/13 Dr. Paul Ogden, pp. 6-7). He did believe that it is probable that the Claimant had a left shoulder rotator cuff tear to due years of work using his shoulders and working overhead (Depo. Tr. 05/13/13 Dr. Paul Ogden, p. 7). He clarified a little later in the testimony that he did not find that the Claimant had an aggravation of the wear-and-tear process on the left arm by virtue of his having had a right shoulder injury (Depo. Tr. 05/13/13 Dr. Paul Ogden, pp. 10-11). Dr. Ogden later testified on cross-examination that it was his opinion that the Claimant's work caused his pathology, but that the pathology didn't become symptomatic until three months after he had stopped working (Depo. Tr. 05/13/13 Dr. Paul Ogden, p. 15).

32. Dr. Cary Motz testified by deposition on March 22, 2013. He is board certified in orthopedic surgery with a subspecialty in sports medicine and a Level II accreditation (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 3). Dr. Motz testified that he first

treated the Claimant for a right shoulder injury that the Claimant sustained when he was lifting carpet (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 4). He performed a right shoulder rotator cuff repair with a subacromial decompression and an open biceps tenodesis on March 28, 2011 (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 4). The Claimant was not complaining of left shoulder issues in this time frame (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 4). Dr. Motz testified that the Claimant continued to follow up with him through August 19, 2011 and the Claimant still made no complaints to Dr. Motz about left shoulder problems through that time (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 6). Dr. Motz testified that he saw the Claimant on October 4, 2011 and November 15, 2011 and Dr. Motz's PA saw the Claimant on December 6, 2011 and there is no documentation of left shoulder pain (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 7-8). Dr. Motz testified that he performed a second surgery on the Claimant's right shoulder on December 19, 2011 (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 8). The Claimant continued to see Dr. Motz for follow up after the second surgery and the first note that Dr. Motz has in his records of the Claimant complaining of left shoulder pain is from February 23, 2012. The note indicates that the Claimant reports that the left shoulder pain had started in June of 2011, but Dr. Motz agreed that the medical records don't support that the pain had been ongoing since June of 2011 (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 9). Dr. Motz reviewed over a dozen pain diagrams completed by the Claimant from March 3, 2011 through January 3, 2012 and saw no evidence of pain complaints for the left shoulder in any of them (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 12-15). Dr. Motz testified that, in spite of the lack of documentation in the medical records, he did have a recollection that when he and the Claimant were discussing the second right shoulder surgery that the Claimant had told Dr. Motz about left shoulder pain and that he had some concern about what this might entail for his left shoulder (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 16-17). Dr. Motz testified that just because the Claimant had left shoulder pain that it does not necessarily mean it is related to the right shoulder injury, and Dr. Motz agreed with Dr. Douthit's opinion that it is more reasonable and medically probable that the Claimant has a chronic tendinopathy of his left shoulder related to the natural aging process (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 20-21). In reviewing the Claimant's March 1, 2012 left shoulder MRI, Dr. Motz testified that there is no evidence that the left shoulder findings are related to the right shoulder, but rather that the left shoulder pathology was pre-existing but asymptomatic before February of 2012 (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 21-22). Dr. Motz later testified that although his previous opinion was that the left shoulder was related to the right shoulder, he is now opining that there is no necessary connection between the right shoulder injury and the left shoulder condition. However, Dr. Motz further testified that the Claimant's left shoulder has become symptomatic due to overuse of his left shoulder because of an extended period of time that he was without full use of his right shoulder (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 25). Dr. Motz does believe that the need for the second right rotator cuff surgery was due to work activities after the first surgery, that the repair from the first surgery had not healed fully, and the Claimant was further injured, requiring the second surgery (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 30-33). Then, notwithstanding his opinion that the March 1, 2012 pathology is not necessarily consistent with the Claimant's history of heavy work, Dr. Motz testified that he felt that the left shoulder symptomotology was related to an overuse of his left arm on account of the two

surgeries on the right shoulder (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 33). So, it is not just a coincidence, as Dr. Douthit suggested, that the Claimant's left shoulder symptoms started in February of 2012, rather is it likely that a patient with degenerative pathology in the opposite shoulder, because of overuse, developed pain in that shoulder that could eventually require surgical intervention (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 34). The testimony of Dr. Motz is credible and persuasive among the various physician opinions.

33. Mr. Thomas J. Ryan provided deposition testimony on April 10, 2013. He has been a physical therapist for 11 years and has worked out of the Stapleton Concentra office for 6 ½ years. He provided physical therapy to the Claimant (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 4). Mr. Ryan examined two sets of physical therapy records (contained within Claimant's Exhibit 20), the first beginning on April 22, 2011 and the second beginning on January 2012 (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 7). Mr. Ryan testified that there was nothing in the physical therapy charts from 2011 that the Claimant complained of left shoulder symptoms (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 8). In examining the 2012 records, Mr. Ryan testified that the first time the Claimant advised Mr. Ryan that his left shoulder was bothering him was February 13, 2012 (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 9-10). On February 17, 2012, Mr. Ryan testified that the records show that the modalities and therapies performed on the Claimant included: cold pack with electrical sim, manual therapy, bony prominence clearing, passive range of motion, soft tissue mobilization, TheraBand exercises, corner stretching, scapular stabilization exercises in prone, and pulleys. The pulley therapy involved use of the left upper extremity but the therapy note does not indicate that the Claimant complained that the modality caused any symptoms in his left shoulder (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 14-15). Mr. Ryan similarly testified that there was no note that the Claimant had complaints of left shoulder symptoms at the February 20, 2012 therapy session (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 16-17). Mr. Ryan testified that on February 22, 2012 the Claimant complained of left shoulder symptoms (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 18). Mr. Ryan testified that on February 24, 2012, the Claimant reported to Mr. Ryan that his left shoulder is hurting more and more, and he's having more problems with the left (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 20). Per the therapy records, Mr. Ryan didn't document that the Claimant complained of left shoulder pain on February 24, 2012 or February 27, 2012 (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 20-22) but on February 29, 2012, Mr. Ryan testified that he did document that the Claimant "appears concerned about the worsening of his left shoulder (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 22-23). On March 2, 2012, the Claimant was again complaining of left shoulder symptoms (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 24). On March 5, 2012, the Claimant again complained of left shoulder symptoms and Mr. Ryan testified that the note indicates that the Claimant "rolled onto his left shoulder the night before" (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 25-26).

34. Dr. Alan Lichtenberg testified by deposition on August 20, 2014. Deposition Exhibits A and B and Deposition Exhibits 1, 2 and 3 were introduced during the deposition, Dr. Lichtenberg testified about them and these exhibits are admitted into evidence and included in the record for this matter. Dr. Lichtenberg authored a written report dated July 8, 2014 (found at Claimant's Exhibit 16). As part of Dr. Lichtenberg's

examination of the Claimant, Dr. Lichtenberg had the Claimant complete the Clinical Evaluation Questionnaire prior to the appointment for the Examination. The completed questionnaire was designated Deposition Exhibit C. The Claimant noted that the immediate effects after the accident included "pain in right arm" and gradual or delayed effects included "pain in left arm and neck." In his work history, the Claimant indicated the last day he worked was December 17, 2011. Under future plans, the Claimant wrote he wanted to "get fixed and go back to work" (Lichtenberg Deposition Exhibit C). Dr. Lichtenberg then testified about the particulars of his physical examination of the Claimant (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, pp. 25-27). Based on the review of medical records that Dr. Lichtenberg deemed relevant and the physical examination, Dr. Lichtenberg diagnosed the Claimant with "permanent aggravation of the left shoulder/degenerative joint disease due to overuse syndrome, repetitive motion, cumulative trauma and adjustment disorder with depression/anxiety/insomnia" (Claimant's Exhibit 16; Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 28). Dr. Lichtenberg testified that based on the March 2012 MRI, the Claimant had degenerative joint disease and it was Dr. Lichtenberg's opinion that the preexisting condition was permanently aggravated due to overuse syndrome, repetitive motion and cumulative trauma (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 28). Dr. Lichtenberg later testified that he essentially equates "overuse syndrome" with "cumulative trauma" (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 30). Dr. Lichtenberg testified, in accordance with his written report that Dr. Douthit's opinion is completely wrong and should be ignored (Claimant's Exhibit 16, p. 8; Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 43). Dr. Lichtenberg also testified that he opines that Dr. Fall "missed the proper diagnosis" and as a result her medical report should be discarded. Specifically, Dr. Lichtenberg testified that Dr. Fall did not diagnose permanent aggravation of preexisting left shoulder degenerative joint disease and that Dr. Fall believes all of the left shoulder finding relate only to aging (Claimant's Exhibit 16, p. 8; Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 46). As for the type of surgery that the Claimant requires for his left upper extremity, Dr. Lichtenberg would defer to Dr. Motz, the orthopedic surgeon (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 64). Dr. Lichtenberg testified that it is his opinion that Dr. Mot's care with respect to the Claimant's right shoulder was reasonable and necessary (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 65). Dr. Lichtenberg testified that he saw no evidence of symptom magnification when he examined the Claimant (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 66) rather he opined that the Claimant's complaints have been fairly consistent and it is expected that his symptoms would increase with time and that is, in part, why Dr. Lichtenberg recommended psychological evaluation and treatment (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, pp. 66-67). Dr. Lichtenberg testified that he does not believe the Claimant was able to return to his regular job as a laborer at any time since he last worked for the Employer (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 68).

35. Dr. Allison M. Fall testified by deposition on August 21, 2014 as an expert in the areas of physical medicine and rehabilitation and as to Level II accreditation matters (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 4-5). Dr. Fall has evaluated the Claimant on two separate occasions for IMEs and has reviewed the Claimant's medical

records (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 7). Dr. Fall first saw the Claimant on December 13, 2012 and last saw him on June 19, 2014. She also reviewed medical records from Dr. Motz and from physical therapy at Concentra (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 7-8). Dr. Fall testified that she does not believe the proposed surgery for the left shoulder is reasonably necessary based on pathology in a March 1, 2012 MRI. She further testified that in looking at the entire context of the Claimant's treatment, he had no benefit from two surgical procedures to his right upper extremity and the risks of the left shoulder surgery outweigh the likelihood that the Claimant will get any benefit from a left shoulder arthroscopy (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 9-10). Dr. Fall also testified that based on her review of the medical evidence, she does not see any support that the Claimant's right shoulder problems caused by his February 2011 work injury worsened as a natural progression so that by June of 2014 his ability to lift and his range of motion (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 10-11). Dr. Fall opines that the Claimant does not require any further medical treatment because of the right shoulder injury he sustained in February 2011 because there is no physiologic explanation for his pain complaints (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 11). Dr. Fall testified that in her review of medical records in this case and based on her medical research, she does not find any support that the Claimant's left upper extremity pathology in the March 2012 MRI was a direct and proximate result of his inability to use his right upper extremity resulting in overuse or repetitive motion by the left upper extremity (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 12). Dr. Fall also testified that it is her opinion that the Claimant did not require any restrictions or limitations from working because of his left upper extremity in July 2012 (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 15). Dr. Fall testified that when she saw the Claimant in December of 2012 he could use his right shoulder and arm and when she saw him in June of 2014 he could use his right shoulder and arm (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 18). Dr. Fall further testified that the fact that the Claimant worked for two months and his FCE establish that the Claimant could use his right shoulder and arm (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 19). Dr. Fall also testified that while the Claimant may have advised his physical therapist and Dr. Ogden at a later date, in 2012, that he had been having left shoulder complaints back in 2011, the review of the medical records shows no contemporaneous complaints of left shoulder pain in May 2011 and then getting worse in September 2011 when he returned to work (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 22-23). Dr. Fall opined that the pathology seen on the March of 2012 MRI showed degenerative changes but the MRI does not establish when this pathology occurred and she believes this is the result of a progressive disease process (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 24). Dr. Fall further testified that, regardless of whether the pathology on the MRI is work related, she does not believe this requires operative intervention (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 25). Rather, Dr. Fall finds that due to the fact that on July 8, 2014, the Claimant had "normal and equal bilateral sensation, reflexes, pulses and strength was 4 out of 5 bilaterally," that no further healthcare treatment is indicated and there is no medical basis for surgery per his physical exam (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 28-30). Dr. Fall also disagrees with Dr. Lichtenberg's diagnosis of "overuse syndrome/repetitive motion/cumulative trauma" because this is not a specific diagnosis per Level II training and the AMA Guides (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 34). Dr. Fall also disagrees with Dr. Lichtenberg's treatment recommendation for

reevaluation of the right shoulder by an orthopedic surgeon. She feels that the recommendation does not correlate with the patient and there would be nothing new to offer (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 36). Dr. Fall also disagrees with Dr. Lichtenberg's recommendation for a psychological pain evaluation and treatment as related to his February 21, 2011 work injury because he does not have a work-related diagnosis of a mental disorder. Specifically, Dr. Fall commented that Dr. Carbaugh's working diagnosis of "probable personality traits or coping style affecting rehabilitation" would not be a work-related condition as it relates to the Claimant's personality (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 38). Dr. Fall notes that in discussing depression or stressors as a mental disorder for the Claimant, Dr. Lichtenberg relates things unrelated to his shoulder such as financial issues, bankruptcy, divorce, etc., which are not work-related (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 39). Dr. Fall also takes issue with Dr. Lichtenberg's use of the AMA Guides, 6th addition as opposed to the 3rd Edition in his discussion that the Claimant suffers from "central sensitization" since Colorado, by statute, requires use of the 3rd Edition. Moreover, Dr. Fall does not find that the Claimant suffers from a chronic paid disorder in any event (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 40-42). With regard to the "overuse injury," Dr. Fall again reiterated that her review of the medical records and patient statements shows that there was no repetitious activity noted to cause such an overuse injury therefore, there is no aggravation of the underlying degenerative changes due to the overuse, but rather just a naturally occurring degenerative process (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 43).

36. Dr. Fall continued her testimony by deposition on September 18, 2014. Dr. Fall agreed that the Claimant passed an FCE which permitted the Claimant to return to work full duty at his regular job from September 9, 2011 and December 16, 2011, after his first right shoulder surgery on March 28, 2011(Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 55-57). Dr. Fall also agreed that the portion of the March 28, 2011 surgery to repair the torn biceps was reasonable and necessary to cure and relieve the Claimant from the February 21, 2011 work-related injury. However, she believes that the portion of the surgery to fix the rotator cuff tear was related to a degenerative condition (Depo. Tr. 09/18//2014 Dr. Allison Fall, p 59-60). Dr. Fall also agreed that, following the March 28, 2011 surgery, the Claimant was in a sling for about three weeks and had limited use of the right arm and this is appropriate post-surgery treatment (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 61-62). Dr. Fall also agreed that the Claimant had 56-57 physical therapy visits after the surgery which was about twice a week over a six-month period (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 62). Dr. Fall also testified that after the initial exercises in physical therapy, the Claimant would have been using both arms as they moved into more strengthening-type exercises such as pull downs (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 63). Dr. Fall testified that the Claimant told her that when he went back to work for just over three months, he tried to do his job as best as he could, but he was experiencing worsening pain in his right arm (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 64-65). In reviewing Dr. Motz's operative report from the December 19, 2011 surgery, Dr. Fall opined that the Claimant experienced a second small tear because "it was a failure of the prior repair" (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 66-67). However, Dr. Fall testified that she couldn't say that this was due to the fact the

Claimant went back to work, because sometimes rotator cuff surgical repairs just fail, there are just a certain percentage of them that Dr. Fall believes will simply fail (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 67-68). When questioned about the Claimant's recovery after the second surgery, Dr. Fall agreed that the Claimant had 65 additional physical therapy visits, for 121 total physical therapy visits after both right shoulder surgeries (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 69). Nevertheless, Dr. Fall maintains that neither 3 months of working full duty in between surgeries nor the physical therapy had anything to do with the Claimant's left shoulder symptoms. Dr. Fall bases this primarily on the fact that there is no documentation of the Claimant complaining of left shoulder problems until after the second surgery (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 70-71). Dr. Fall also testified that she believes the Claimant is magnifying his symptoms of left shoulder pain based on her physical examinations of the Claimant although she agrees that the Claimant's treating physicians have not ever opined that the Claimant is symptom-magnifying (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 72). She believes this because of pain behaviors and the way the Claimant handled maneuvers on examination and that he was much worse at her second examination as opposed to the first without having any additional trauma between the two visits (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 92). In any event, Dr. Fall states that the fact that the Claimant's left shoulder symptoms began to be reported after his two right shoulder surgeries would be merely coincidental and there is no relationship to the right shoulder surgeries (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 73). Later Dr. Fall further clarified that it was her opinion that the pathology in the Claimant's left shoulder was likely there for years, he just started complaining of symptoms in his left shoulder. Yet this didn't have anything to do with the right shoulder injury or the things the Claimant was doing at work (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 90).

37. The Claimant testified that about 3 years ago, he worked for another decorator company for about 3 days doing temporary forklift work. He only worked the 3 days because they only needed a forklift driver for 3 days. The Claimant testified that this work was within his restrictions and didn't make his right shoulder or his left shoulder worse. The Claimant also testified that he has not ridden his Harley Davidson motorcycle since about halfway through his physical therapy. He testified that the vibration from the Harley goes up his arms into his shoulders. The Claimant testified that although it does not appear in the medical records or his pain diagrams, his left shoulder symptoms got worse when he went back to work in 2011. As far as specific events occurring during work, the Claimant testified that the only specific "ouch" event was when his right shoulder bicep tendon popped, and that was the only "outstanding event."

38. No evidence was provided that Employer ever offered the Claimant a job, or that any provider ever released the Claimant to his regular job, at any time since July 23, 2012. The Claimant has not undergone a Physical Assessment Test, nor has he gone back to work for Employer at any time since he was found at MMI by Dr. Ogden for his right shoulder injury, July 23, 2012. The Claimant has not received any

unemployment compensation or social security benefits, or any wages except for the temporary forklift job.

## 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).

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).

### *Medical Benefits – Reasonable and Necessary, Related and Authorized*

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; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). 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. 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). 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).

A claimant may also establish a causal relationship through the "quasi-course of employment doctrine" such as where a claimant is injured while seeking authorized medical treatment, physical therapy or medical evaluation for a work injury even though this is outside employment-related activities where the employer has a quasi-contract obligation to provide treatment for a compensable injury and the claimant has a corresponding obligations to submit to the treatment or evaluation. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993).

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).

Under the Workers' Compensation Act, treatment is compensable where it is provided by an authorized treating physician. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008). 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 v. Industrial Claims Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claims 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 authorized

treating physician refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claims Appeals Office*, 70 3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an authorized treating physician has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claims Appeals Office*, 902 P.2d 854 (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). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

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).

The Claimant initially injured his right shoulder in an admitted work-related injury. The Claimant underwent his first surgery on March 28, 2011 to repair a right proximal biceps rupture and a repair of the right supraspinatus and an arthroscopic subacromial decompression. After the first surgery, the Claimant used a sling to immobilize his right arm and he attended approximately 57 physical therapy sessions over a period of almost 6 months. After this, the Claimant returned to work full duty on September 6, 2011. He was able to perform his regular work duties. However in October, November and December of 2011, the medical records document a return of the pain in the Claimant's right upper extremity. An MRI of the right shoulder revealed a re-tear of the Claimant's supraspinatus. On December 19, 2011, Dr. Motz performed a second surgery on the right shoulder. After the second surgery, the Claimant was off work again and he again engaged in physical therapy, approximately 65 visits. After completing his course of physical therapy, the Claimant had a functional capabilities assessment and he was unable to lift more than 45 lbs. with his right upper extremity. The Claimant's surgeon persuasively opined that the need for the second right shoulder surgery was due to the Claimant's work activities after his first surgery, essentially that the Claimant

had not fully healed and was further injured. This opinion is supported by the opinions of Dr. Ogden and Dr. Lichtenberg. The DIME physician opined that the Claimant has exhausted treatment options for his right shoulder, although he noted that the Claimant may benefit from maintenance care including cortisone injections.

After the second surgery, the medical records begin to document, in February of 2012, that the Claimant had complaints of left shoulder pain. When the Claimant first began to complain of left shoulder symptoms has been the subject of considerable debate in this case as has whether or not the Claimant is entitled to medical benefits related to the left shoulder condition.

Dr. Fall and Dr. Douthit argue, on the one hand, that the medical records only begin to document left shoulder complaints in February of 2012 and therefore, the Claimant's left shoulder pain did not start until February of 2012. Dr. Fall also believes that the Claimant is magnifying his symptoms and may not be experiencing the level of left shoulder pain that the Claimant now reports. Dr. Douthit and Dr. Fall both further opine that the objective pathology in the Claimant's left shoulder MRI was unrelated to the original right shoulder injury and was more probably due solely to an age-related degenerative and progressive disease process. Dr. Fall further opined that even if the left shoulder condition were to be found related, the condition does not require operative intervention based on the results of her physical examination of the Claimant and the failure of the surgeries on the right shoulder.

In the other camp are Doctor Ogden, Dr. Motz, Dr. Beatty and Dr. Lichtenberg. Dr. Ogden reviewed medical records and conceded that the records, including pain diagrams completed by the Claimant, do not documentation of left shoulder complaints until February of 2012. However, Dr. Ogden opined that, upon review of his February 27, 2012 medical report, he imposed a lifting restriction for the Claimant's left arm and at that visit Dr. Ogden noted that the Claimant had told him that the pain started around May of 2011, then got worse when he went back to work in September of 2011. Dr. Ogden believed the Claimant's statements about when the pain began, ordered an MRI and referred the Claimant to Dr. Motz for a consultation about the left shoulder. Commenting on the left shoulder pathology he saw on the Claimant's March 1, 2012 MRI, Dr. Ogden opined that not all of the findings on the MRI were merely consistent with the aging process and that it usually takes more than just aging for the type of findings he noted on the Claimant's MRI. Dr. Ogden believes that the Claimant's work caused the pathology, but that the pathology did not become symptomatic until 3 months after he had stopped working following the first right shoulder surgery. Dr. Motz is the Claimant's treating orthopedic surgeon. Dr. Motz testified that although there is a lack of documentation in the medical records of the Claimant's left shoulder complaints until February 2012, Dr. Motz specifically recalled that during the time frame when he and the Claimant were discussing proceeding with the second right shoulder surgery, that the Claimant had told Dr. Motz of left shoulder pain and questioned what the second right shoulder surgery might mean for the left shoulder. As the second right shoulder surgery took place on December 19, 2011, this would put the Claimant's complaints about left shoulder pain back into 2011, likely in late November or early

December. Dr. Motz' testimony in this regard is credible and persuasive. Dr. Motz opined that that the Claimant's left shoulder symptomotology was related to an overuse of his left arm on account of the two surgeries on the right shoulder and that it is likely that a patient with degenerative pathology in the opposite shoulder, because of overuse, developed pain in the other shoulder eventually requiring surgical intervention. Dr. Beatty, the DIME physician, and Dr. Lichtenberg agreed with Dr. Motz and opined that the Claimant suffers from a permanent aggravation of preexisting left shoulder degenerative disease. Dr. Lichtenberg specifically agreed with Dr. Ogden that the pathology on the March 1, 2012 left shoulder MRI is not related solely to the aging process.

Ultimately, in weighing the conflicting evidence in this case, it is found the Claimant established by a preponderance of the evidence that the maintenance medical treatment recommended by the DIME physician Dr. Beatty is reasonably necessary to prevent further deterioration of the Claimant's right shoulder, but the Claimant is at MMI for the right shoulder condition, so no further right shoulder evaluation is necessary and the Claimant requires only such maintenance care as the Claimant's authorized treating physicians recommend to prevent deterioration of the condition.

As for the left shoulder condition, the Claimant proved by a preponderance of the evidence that he is entitled to medical benefits. In weighing the conflicting medical opinions, it is found that the Claimant's left shoulder preexisting degenerative disease was permanently aggravated or accelerated by either or both his return to work after his first surgery and/or overuse of his left upper extremity at his work duties and/or during his extensive courses of physical therapy following each of the right shoulder surgeries. The Claimant's left shoulder condition requires active medical treatment as recommended by Drs. Ogden and Motz, up to, and including surgical intervention. The Claimant has proven that his left shoulder condition is related to his February 21, 2011 work injury and he has established that the recommended medical benefits are reasonably necessary to cure and relieve the effects of the injury.

***Temporary Disability Benefits***

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *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 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 existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Through testimony and the exhibits, it was established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. The Respondents admitted liability for the right upper extremity injury and paid temporary total disability benefits between March 28, 2011 and September 5, 2011. The Claimant then returned to work and earned full wages until he was taken off work again in December 2011 when he had his second right upper extremity surgery. The Claimant received temporary total disability benefits again from December 19, 2011 to July 22, 2012 when the Claimant was off work again for the surgery and subsequent physical therapy. On July 23, 2012, Dr. Ogden found the Claimant at MMI for the right upper extremity condition and provided an impairment rating. Although, it has been found pursuant to this order that the Claimant was not at MMI at that point as his left shoulder condition was active then and that condition requires medical treatment and would have prevented the Claimant from performing his job duties. After this time, the Claimant did not receive temporary disability benefits, nor did he receive unemployment compensation or social security benefits. The only wages that the Claimant received was payment for the three days of forklift work that the Claimant performed on a temporary basis. This temporary 3-day work was within the Claimant's restrictions at the time and does not provide evidence that the Claimant was released to or capable of regular employment. On September 17, 2014, Concentra physician assistant Glenn Petersen noted that the Claimant was restricted from lifting anything and from driving and any work above waist level. There is no evidence that the Claimant was released to regular duty work or that Employer provided an offer of modified work at any time after July 23, 2012.

Therefore, the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 23, 2012 ongoing until the occurrence of one of the events set forth in C.R.S. 8-42-105 (d). The Respondents are entitled to an offset for any amounts paid to the Claimant for his temporary 3-day work providing forklift services.

## ORDER

IT IS THEREFORE ORDERED THAT:

1. The Claimant's current right shoulder condition was caused, aggravated or accelerated by the work injury he suffered on February 21, 2011. Per Dr. Beatty, the Claimant requires and has proven he is entitled to maintenance care for the right shoulder condition.

2. The Claimant's preexisting left shoulder condition was aggravated or accelerated by the work injury he suffered on February 21, 2011 and the Claimant has proven that he is entitled to medical benefits reasonably necessary to cure and relieve the Claimant from the effects of his work injury and subsequent quasi-course of employment injury.

3. The Respondents shall be liable for all authorized, reasonably necessary and related treatment rendered by the Concentra doctors, including Dr. Ogden or provided pursuant to appropriate referral, to cure and relieve the Claimant of the effects of his left shoulder condition. This liability shall include, but is not limited to the surgical proposal of Dr. Motz for the Claimant's left shoulder condition. Insurer shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

4. The Claimant is entitled to temporary disability benefits, and Respondents shall, therefore, pay Claimant temporary disability benefits in accordance with the November 1, 2012 Corrected Order of ALJ Friend, determining that the Claimant's average weekly wage is $1,092.88, with a corresponding TTD benefit rate of $782.59. Temporary total disability benefits shall be paid from July 23, 2012 ongoing pursuant to statute.

5. Respondents shall pay statutory interest at the rate of 8% per annum on all amounts due and not paid when due; and

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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: February 18, 2015

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

## ISSUE

Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to a Social Security offset pursuant to §8-42-103(1)(c)(I), C.R.S. after February 1, 2013.

## FINDINGS OF FACT

1. Claimant was born on February 10, 1947. He was 67 years old at the time of the hearing in this matter.

2. On November 29, 2010 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. He was in the process of changing a forklift battery when he injured his back.

3. On March 11, 2012 Claimant received a Notice of Award from the Social Security Administration (SSA). The SSA determined that Claimant had become disabled on March 29, 2011. He was thus entitled to monthly disability benefits of $1,840.00 beginning on September 1, 2011.

4. Following a Division Independent Medical Examination (DIME) Respondents issued an amended General Admission of Liability (GAL). In the amended GAL Respondents took an SSDI offset of $252.52 for periods of Temporary Total Disability (TTD) after February 1, 2013. The offset was taken pursuant to the March 11, 2012 SSA determination.

5. On February 1, 2013 Claimant received a letter from the SSA. The letter specified that Claimant was no longer entitled to SSDI benefits because he had reached full retirement age. Instead, Claimant would receive Social Security Retirement (SSR) benefits in the amount of $1,871.00 beginning March 13, 2013. The basis for the SSA's decision was that Claimant was born on February 10, 1947 and had reached 66 years of age.

6. However, a printout of information from the SSA website reveals that Claimant received SSDI benefits in the monthly amount of $1,871.00 through December 11, 2013. Beginning on January 8, 2014 Claimant received SSR benefits in the monthly amount of $1,899.00. The document provided a complete payment history of dates and amounts.

7. Respondents have demonstrated that it is more probably true than not that Claimant continued to receive SSDI benefits from the SSA in the monthly amount of $1,871.00 from September 1, 2011 through December 11, 2013. Although the SSA notified Claimant in a February 1, 2013 letter that his SSDI benefits would be converted

to SSR benefits effective March 13, 2013 because he had reached the full retirement age of 66, it appears that the conversion did not occur until January 2014. The actual payment history, including dates and amounts, reflects that Claimant's SSDI benefits were not actually converted to SSR benefits until January 8, 2014. As revealed in the SSA's February 1, 2013 letter Claimant's benefits should have converted to SSR when he reached 66 years of age in February 2013. Because the conversion did not actually occur, Claimant continued to receive SSDI benefits. Because Claimant continued to receive SSDI benefits after February 1, 2013, Respondents are entitled to take a Social Security offset through December 2013 pursuant to §8-42-103(1)(c)(I), C.R.S.

## CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-103(1)(c)(I), C.R.S. provides, in relevant part, that TTD benefits "shall be reduced, but not below zero, by an amount practically equal to one-half" of SSDI benefits. The overpayment statute in §8-42-107.5, C.R.S. also refers to the SSDI offset. The overall purpose of §8-42-107.5, C.R.S. is to prevent "double recovery" of SSDI and Workers' Compensation benefits for the same disability. *U.S. West Communications, Inc. v. Industrial Claim Appeals Office,* 978 P.2d 154, 156 (Colo. App. 1999). SSDI payments must be accounted for when determining whether a claimant has received funds reaching the statutory cap. Thus, the actual temporary or partial disability benefits paid out should include a proportionate amount of SSDI

benefits for the duration of the payments. *See Flores v. Oregon Steel Mills, Inc.,* W.C. No. 4-608-694 (ICAP, Dec. 14, 2009).

5. As found, Respondents have demonstrated by a preponderance of the evidence that Claimant continued to receive SSDI benefits from the SSA in the monthly amount of $1,871.00 from September 1, 2011 through December 11, 2013. Although the SSA notified Claimant in a February 1, 2013 letter that his SSDI benefits would be converted to SSR benefits effective March 13, 2013 because he had reached the full retirement age of 66, it appears that the conversion did not occur until January 2014. The actual payment history, including dates and amounts, reflects that Claimant's SSDI benefits were not actually converted to SSR benefits until January 8, 2014. As revealed in the SSA's February 1, 2013 letter Claimant's benefits should have converted to SSR when he reached 66 years of age in February 2013. Because the conversion did not actually occur, Claimant continued to receive SSDI benefits. Because Claimant continued to receive SSDI benefits after February 1, 2013, Respondents are entitled to take a Social Security offset through December 2013 pursuant to §8-42-103(1)(c)(I), C.R.S.

## ORDER

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

Respondents' entitlement to an offset for SSDI benefits continued through December 2013 and terminated effective January 1, 2014..

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

DATED: February 24, 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

- Whether claimant has proven by a preponderance of the evidence that his claim for compensation should be reopened based on a worsening of his condition?

- Whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $833.86?

- Whether respondent has proven by a preponderance of the evidence that claimant's claim for reopening is precluded by issue preclusion or res judicata?

## FINDINGS OF FACT

1. Claimant was employed with Employer on June 2, 2011. Claimant was required to drive his Ford truck to the hot plant in Delta and wait in line to have the bed of his truck loaded with hot asphalt. While having his truck loaded with asphalt, claimant pulled up and the operator began dumping the asphalt onto the hood of Claimant's truck. Claimant testified that the front windshield caved in and the asphalt came into the truck.

2. Following the accident, claimant was taken to the emergency room ("ER") at Montrose Memorial Hospital by his supervisor. Claimant was diagnosed with burns to his right thigh and right hand and provided burn cream and vicodin and discharged from the ER. Claimant came under the care of Dr. Mosley for his physical injuries. Dr. Mosely provided claimant with treatment through June 29, 2011 at which point he placed claimant at MMI. Dr. Mosely, however, recommended a psychological evaluation.

3. Claimant was evaluated by Dr. Bowen for his psychological issues on July 8, 2011. Dr. Bowen obtained a history and performed a psychiatric evaluation. Dr. Bowen recommended 12 to 15 sessions of treatment.

4. Claimant subsequently transferred his psychiatric care to Dr. Holland, in Delta, Colorado. Dr. Holland diagnosed post traumatic stress disorder ("PTSD") and recommended continued treatment. Claimant continued to treat with Dr. Holland through November 18, 2011. Claimant returned to Dr. Holland for additional psychiatric care on December 14, 2012. Dr. Holland noted that claimant demonstrated moderate depression with irritability, fatigue, loss of interest and pleasure, guilt, and social withdrawal. Dr. Holland noted that the past season claimant did as little asphalt as possible and dreaded days he had to haul asphalt. Dr. Holland noted claimant had

significant depression had developed since the last meeting one year ago. Dr. Holland recommended ongoing psychiatric treatment.

5. Claimant returned to Dr. Holland on January 18, 2013. Dr. Holland again noted depressive behavior and noted claimant couldn't stand performing asphalt work now. Claimant testified he eventually changed jobs with employer so that his exposure to asphalt work would be minimized.

6. Respondents had previously filed a final admission of liability ("FAL") on June 30, 2011 that denied liability for medical treatment after MMI. Claimant did not object to the FAL and his case was closed as a matter of law. This case proceeded to hearing before the undersigned ALJ on a prior occasion and resulted in an award of post-MMI medical treatment for claimant's psychological condition. The Order also denied claimant's petition to reopen his claim based on a worsened condition.

7. Claimant sought treatment with Dr. Holland on August 2, 2013 and received cognitive behavioral treatment for anxiety. Claimant returned to Dr. Holland on August 30, 2013 again for additional treatment for anxiety. Dr. Holland eventually referred claimant to Dr. Price on January 10, 2014 after claimant requested an impairment rating. Dr. Holland noted in her referral that she was not "set up" to perform an impairment rating.

8. Dr. Price evaluated claimant on May 1, 2014. Dr. Price diagnosed claimant with a history of PTSD, a history of insomnia and a history of nightmares. Dr. Price recommended claimant continue seeing Dr. Holland and recommended his primary care physician consider placing him on prazosin for his nightmares. Dr. Price also recommended claimant consider seeing a psychiatrist.

9. Claimant returned to Dr. Price on June 23, 2014. Claimant reported he had tried the prazosin, but the medications made him sick to his stomach and he stopped the medication. Dr. Price performed an impairment rating and provided claimant with a 7% whole person impairment rating for this psychiatric condition.

10. Claimant was referred for an independent medical examination ("IME") with Dr. Kleinman on two occasions. Claimant's initial IME with Dr. Kleinman took place on March 7, 2013 and determined, following an examination and review of claimant's medical records, that claimant suffered a physically and psychologically traumatic injury at work and that claimant was still presenting with PTSD symptoms. Dr. Kleinman noted that claimant's symptoms increase during each "asphalt season". Dr. Kleinman recommended claimant have psychotherapy as a maintenance benefit related to his work injury.

11. Dr. Kleinman performed a second IME on October 21, 2014. Dr. Kleinman reviewed claimant's updated medical records and again performed an examination in connection with his IME. Dr. Kleinman noted that claimant reported he

was still suffering from depression, anxiety and PTSD. Dr. Kleinman noted that claimant reported that while he was not as social as he was before the injury, he was leaving the house for social occasions. Claimant reported he was less irritable since being on valproic acid, but continued to be somewhat irritable. Claimant reported having nightmares about twice a week and reported his frequency of nightmares had decreased since being on prazosin. Dr. Kleinman reported that when questioned regarding additional treatment, claimant indicated he would like to see a psychiatrist who would do psychotherapy and would like marital counseling. Dr. Kleinman indicated in his report that claimant was presenting now much as he did in 2013. Dr. Kleinman reviewed the reports from Dr. Holland and noted claimant had some progress with his treatment. Dr. Kleinsman opined that the reports did not indicate a worsening of his condition. The ALJ finds the report of Dr. Kleinsman to be credible and persuasive.

12. Dr. Kleinsman testified at hearing consistent with his report. Dr. Kleinsman noted that after his initial evaluation of claimant, claimant had gotten married and had adapted well. Dr. Kleinsman noted that claimant continued to complain of symptoms, but could talk about the incident without arousal and that this was "a plus" with regard to his condition. Dr. Kleinsman opined that claimant's physiologic response had gotten less and less and it was not interfering with claimant's activities of daily living. Dr. Kleinsman opined that claimant's psychological condition had improved since 2013. The ALJ finds the testimony of Dr. Kleinsman to be credible and persuasive.

13. The ALJ has carefully reviewed the medical records entered into evidence at hearing in this matter and determines that claimant has failed to establish that it is more probable than not that he has sustained a change of condition after being placed at MMI that would justify a reopening of his claim. The ALJ notes that claimant received psychological treatment through Dr. Holland and appears to have improved following this treatment. The ALJ credits the reports and testimony of Dr. Kleinman regarding claimant's condition and finds that claimant has not proven a worsened condition causally related to his work injury.

14. Claimant also argues at hearing that his AWW should be increased to $833.86 based on his earnings through August 31, 2011. Claimant argued that this would properly take into consideration the overtime claimant would work during the summer months. The ALJ is not persuaded that claimant's AWW should be increased in this case by earnings claimant secured after his date of injury.

15. The ALJ notes that the Colorado Workers' Compensation Act was amended in 2010 to include language that establishes that when calculating an AWW, the calculation should include the injured workers earnings at the time of the injury. The ALJ recognizes that the court continues to have discretion to use an alternative method for calculating an appropriate AWW, but declines to use that discretion in this case. The ALJ therefore determines that claimant has failed to establish that his AWW should be modified to include earnings after his injury.

16. Because the ALJ denies claimant's petition to reopen and denies claimant's request to increase his AWW, the ALJ need not consider the affirmative defenses raised by respondents at hearing.

## 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. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that his condition has worsened since being placed at MMI. As found, the existence of an impairment rating provided to claimant at claimant's request does not automatically establish the basis for reopening. As found, the ALJ determines that

claimant's psychological condition was not worsened to justify a reopening of his workers' compensation claim.

5. As found, the ALJ relies on the opinions expressed by Dr. Kleinsman, along with the other medical records submitted in this case, and determines that claimant has failed to prove by a preponderance of the evidence that his case should be reopened based on a change of condition.

6. 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).

7. Claimant argues at hearing that his AWW should be increased based on his earnings through August 31, 2011. However, Section 8-42-102(5) provides that the intent of the phrase "at the time of the injury" in subsection (2) of the statute governing the calculation of an injured workers' AWW, "the wage on the date of the accident shall be used." As found, claimant has failed to demonstrate by a preponderance of the evidence that the claimant's AWW should be modified to include his earnings after his date of injury.

## ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

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

DATED: February 4, 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

The issues for determination at the hearing were:

1. Whether the Respondents have overcome by clear and convincing evidence the DIME opinion of Dr. Dwight R. Leggett regarding the Claimant's status related to maximum medical improvement ("MMI").

2. Whether the Claimant proved, by a preponderance of the evidence, that she is entitled to medical treatment recommended by the DIME examiner that is reasonably necessary to cure and relieve the effects of the Claimant's June 7, 2011 industrial injury.

## FINDINGS OF FACT

1. The Claimant was born January 8, 1975. She has had no prior injuries pertinent to this claim.

2. The Claimant worked for the Employer as a materials handler/packager. She worked for them for approximately one and one-half years prior to the injury.

3. On or about June 7, 2011, the Claimant suffered an admitted work injury when she lost control of a box she was lifting. The Claimant testified the box shifted. She first developed symptoms in her right fingers, in her nailbed which progressed to her right shoulder. The shoulder pain worsened after she later pulled on a heavy drawer on June 17, 2011.

4. The Claimant was examined and treated at Centura Centers for Occupational Medicine ("CCOM") by Dr. Mary Dickson, M.D. She was diagnosed with a right shoulder strain. An MRI of the right shoulder indicated supraspinatus tendinosis, mild joint arthrosis and synovitis (Respondents' Exhibit A, p. 1).

5. The Claimant began a course of physical therapy and was given work restrictions. Her right shoulder pain continued and she was referred for both an orthopedic evaluation and biofeedback training. On September 19, 2011 she was given a psychological evaluation by Dale P. Mann, PsyD. He administered the Pain Patient Profile, the Brief Battery for Health Improvement-2, the Beck Depression Inventory-2 and the Beck Anxiety Inventory. Dr. Mann opined that the testing indicated moderate to severe psychological stress, extreme functional distress, severe anxiety and moderate to severe depression. It was recommended that she be placed in a comprehensive pain rehabilitation program (Respondents' Exhibit A, pp. 1-2; Respondents' Exhibit C, pp. 1-2).

6. The Claimant's physical condition deteriorated to the point that she underwent a bursa injection and an arthroscopy. The latter revealed a partial rotator cuff tear and torn joint disc. As a result, she underwent a rotator cuff debridement, acromioplasty and distal clavicular resection (Respondents' Exhibit A, p. 2).

7. An October 1, 2012 MRI showed disc protrusions. The Claimant underwent physical therapy for a time. She also received a pain management referral. Prior to beginning the pain management program, she underwent a second arthroscopy with revision, subacromial decompression and distal clavicle resection on March 14, 2013. She then began her physical therapy once again (Respondents' Exhibit A, p. 3).

8. The Claimant's remaining course of physical treatment included trigger point injections, pool therapy, pain medications and chiropractic treatment. During this time the Claimant was also sent back to Dr. Mann due to her ongoing pain disorder for treatment that included cognitive behavioral therapy, mood stabilization, biofeedback, relaxation training, and additional pain management (Respondents' Exhibit A, p. 3).

9. On June 13, 2013, Dr. Mary Dickson referred the Claimant back to Dr. Mann to evaluate the Claimant's current level of psychological functioning. The Claimant reported that she currently experiences constant headaches, neck and right shoulder pain which ranges from a level of 3-9. Her sleep is very poor and she reports feeling quite depressed, irritated and angry. She also has nightmares most nights about her accident and she thinks about it quite often during the day. The Claimant reported no outlets for expressing her stress at this time and significant problems with memory and concentration. She also reported fear of being along and she gets upset when her husband leaves the house. The Claimant reported no past injuries, surgeries or major medical problems, diseases or psychiatric treatment or counseling prior to her work injury. The Claimant reported no family history of psychiatric problems. At this evaluation, the Claimant was administered the Pain Patient Profile, the Brief Battery for Health Improvement-2, the Posttraumatic Stress Diagnostic Scale, the Beck Depression Inventory-II and the Beck Anxiety Inventory. Dr. Mann's diagnosed the Claimant with Pain Disorder with psychological factors and a general medical condition; Dythmyic Disorder, Psychosocial stressors involving being unable to work and GAF of 50. Dr. Mann noted that the results of his evaluation "included an extensive clinical interview, a review of the patient's history and psychological testing." He concluded that his evaluation "revealed an individual who is currently experiencing severe anxiety, severe depression, high somatic distress, and extremely high functional distress." He recommended participation in a follow up program to include psychological intervention, biofeedback treatment and participation in the chronic pain coping group. The patient and her husband both agreed to Dr. Mann's plan (Respondents' Exhibit C, pp. 3-6).

10. On December 12, 2013 she was seen by Dr. Daniel Olson at CCOM, who had provided little or none of her ongoing care, for a "Maximum Medical Improvement ["MMI"] and Impairment Report." Dr. Olson testified that her ATP was no longer practicing at CCOM and he was on duty the day that the Claimant's impairment rating appointment was scheduled. He placed her at MMI as of that date and gave her a 16% whole person impairment rating for her upper extremity involvement, which he

diagnosed in part as a "failed shoulder" (Respondents' Exhibit A, pp. 3-4; Respondents' Exhibit B).

11. Regarding her "psychological status," Dr. Olson stated that he did not know the Claimant well enough to assign her an impairment rating. He did nevertheless opine that, "it is apparent from the first visit that she has some underlying psychological overlay that is more than likely pre-existing. In addition, many of the symptoms that the psych check list has are probably limited by her physical condition and not her psych status. Language difficulties also make assessing her phsych status difficult." The only mental impairment rating he did provide was 3% for "ongoing medication." He also provided permanent sedentary restrictions and two years' worth of ongoing pain management with Dr. Jenks and counseling with Dr. Mann (Respondents' Exhibit B).

12. A DIME was performed by Dwight R. Leggett, II, M.D. on April 29, 2014. After reciting her medical history as partially indicated above, Dr. Leggett related that the Claimant had ongoing pain from the right shoulder into the right neck area and over the top of her head. The Claimant stated to him that the pain was "intense, sharp and constant" and was made worse with activity and with "sitting, standing, or laying down." Claimant indicated she was unable to perform tasks with her right arm and felt she had extreme instability and weakness. Dr. Leggett "maintained" the 16% whole person impairment rating which had been provided by Dr. Olson for her right shoulder injury and range of motion deficits.

13. In his DIME report, Dr. Leggett also addressed the "psychological component" of the Claimant's injury. Dr. Leggett indicated Claimant was experiencing sadness, depression, was constantly "mad" and felt antisocial. She reported ongoing anxiety. He stated he believed she was not at MMI psychologically and that her antidepressant and/or related treatments had not been "maximized," including alternative antidepressant medications or related treatments. He recommended that she have a psychiatric referral to coordinate the pain management and counseling sessions with Dr. Mann and Amy Alsum. Dr. Leggett opined that, "with proper treatment of the psychological component of her injury, this will likely [sic] her tolerance of shoulder pain as her perception of the shoulder injury is distorted by her ongoing depression and anxiety" (Respondents' Exhibit A).

14. In the absence of further active treatment, Dr. Leggett provided the Claimant an additional 16% whole person rating for the psychological component which he combined for a total whole person impairment of 29% (Respondents' Exhibit A).

15. On or about September 28, 2014, Dr. David Zierk, Psy. D. evaluated the Claimant. Dr. Zierk's psychological assessment involved a clinical interview and a number of psychosocial tests, including, Clinical Assessment of Depression (CAD), Health Index Questionnaire (HIQ), Millon Behavioral Medicine Diagnostic (MBMD), the Brief Battery for Health Improvement-2 (BBHI-2), and the MMPI-2 RF. Based on his interview and testing, Dr. Zierk stated that the Claimant was struggling with moderately severe depression, generalized anxiety and generalized emotional distress. He diagnosed her with mood and pain disorders along with dependent personality traits,

occupational insecurity and limited social support (9/28/14 Report of Dr. Zierk, admitted post-hearing pursuant to Motion).

16. Respondents applied for this hearing to challenge the results of the DIME and Dr. Leggett's deposition was taken in preparation for the hearing. None of his findings from the DIME were changed or, effectively, challenged in the deposition. He did state that he "honestly" did not think the Claimant was magnifying her symptoms (Depo. Tr. Dr. Leggett, p. 41) and that what he perceived as her dependence on her husband was not something he was "critical" of (Depo. Tr. Dr. Leggett, p. 51). Dr. Leggett reiterated that he did not believe the Claimant was at MMI for the psychological component as she had not maximized potential treatment (Depo. Tr. Dr. Leggett, p. 31). Dr. Leggett specifically testified that the Claimant could benefit from a regime of antidepressant medications and that only a couple had been tried on the Claimant so far and he did not feel that this was a sufficient medical trial to determine if the Claimant could benefit from certain dosages and frequencies of medications (Depo. Tr. Dr. Leggett, p. 33). Dr. Leggett testified that he would defer to Dr. Mann to refer a psychiatrist for the Claimant for medication trials and to coordinate with the psychological treatment with Dr. Mann and Amy Alsum (Depo. Tr. Dr. Leggett, pp. 34-35).

17. Dr. Olson also testified by deposition. He testified that he did not believe the Claimant was "faking" her pain presentation (Depo. Tr. Dr. Olson, p. 20). In referring back to his impairment rating report, he testified that he "did not have the time or information there to assess her pre-injury status. I think the psychologist, they do spend more time with them. They can assess that better than I can. I certainly left it open that if there needed to be a psychiatric impairment, that that should be evaluated as well" (Depo. Tr. Dr. Olson, p. 14). Dr. Olson also testified that he would defer to Dr. Mann on psychological issues (Depo. Tr. Dr. Olson, p. 15). He testified that the reason he felt the Claimant did not need additional psychiatric care was that he believed that one of the notes from Amy Alsum said that the treatment was wrapping up (Depo. Tr. Dr. Olson, p. 16). He testified that he felt the Claimant was at MMI but that she would require maintenance visits with Dr. Mann for the next 2 years (Depo. Tr. Dr. Olson, p. 17.

18. At the hearing, the Claimant testified that she experiences sadness and depression and wakes up screaming from the pain and from bad dreams. She testified she still has dreams of the initial injury with the box and dropping it and now wishes she would have just let go. She experiences continued depression, memory issues, photosensitivity, dizziness and nausea. She testified that she is in more pain now than she was before her two surgeries. She testified that she believes that biofeedback sessions that she had with Amy Alsum helped her condition. The Claimant testified that she is sad because she is hoping to be healed but it feels hopeless and she doesn't know if she will be healed. The Claimant testified that she has never experienced mental illness before her injury nor was she ever treated for mental illness or depression. Before her injury, the Claimant testified that she played tennis and hung out with a bunch of people and went to church. Now, she does not like to be around a lot of people so she doesn't go to church or play tennis anymore. She testified that she wants the phychological referral recommended by the DIME physician.

19. The Claimant's husband also testified at the hearing. He married the Claimant on October 22, 2008. He takes the Claimant to all of her appointments because she doesn't want to go anywhere without him. He met his wife, who is Filipino in the Phillipines. She was on a tennis court playing tennis when he met her but now she no longer plays tennis. The Claimant's husband testified that the Claimant was different when he met her, she was wonderful and he was looking forward to a wonderful marriage. He testified that now he feels he is as much a caregiver as a husband. He testified that now she is closed in and afraid.

20. The Claimant and her husband testified persuasively at the hearing. The Claimant requested the psychiatric referral mentioned above and her husband testified as to the significant mental changes she had experienced since the admitted injury.

21. Excerpts of written materials from Level II Curriculum training were entered into evidence at Respondents' Exhibit E and both Dr. Leggett and Dr. Olson commented on it during their depositions. The information provides instruction for the performance of a psychiatric examination for the purpose of Workers' Compensation. There is a detailed description listing the sections of the examination which are to include: description of causal work event, history of immediate or ensuing physical injury, history of immediate emotional impact and ensuing psychiatric disorder, review of the worker's basic psychological development (composition of nuclear family including birthplace, earlier relationships with family members, performance in school including highest level of education, social adjustment growing up), experience with use of alcohol and or drugs, history of emotional, physical or sexual abuse, detailed history of past psychiatric treatment, detailed occupational history, family psychiatric history, legal history, current adjustment consisting of detailed description of a typical day's activities, description of sleet, other activities of daily living, detailed description of current enjoyable activities, mental status evaluation (Respondents' Exhibit E, pp. 2-3). The materials also note that as to determination of MMI, "workers who have not received medically necessary and appropriate treatment are <u>not</u> at psychiatric MMI. For example, the examiner must assess whether maximal does of medications and psychiatric therapy have been utilized to abate symptoms before the worker is considered at psychiatric MMI" (Respondents' Exhibit E, p. 4).

## 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).

***Burden of Proof for Challenging an Opinion on MMI Rendered by a DIME Physician***

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

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." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A 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. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's

opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his 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 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

Here, the Respondents have failed to meet their burden of proof to show that it is highly probable that the opinion of Dr. Leggett on the determination of the Claimant's MMI status was clearly incorrect. Dr. Olson disagrees with Dr. Leggett's opinion that the Claimant is not at MMI. Dr. Leggett found that the Claimant is not at MMI because the Claimant was experiencing sadness, depression, was constantly "mad" and felt antisocial. She reported ongoing anxiety. He stated he believed she was not at MMI psychologically and that her antidepressant and/or related treatments had not been "maximized," including alternative antidepressant medications or related treatments. He recommended that she have a psychiatric referral to coordinate the pain management and counseling sessions with Dr. Mann and Amy Alsum. Dr. Leggett opined that, "with proper treatment of the psychological component of her injury, this will likely [sic] her tolerance of shoulder pain as her perception of the shoulder injury is distorted by her ongoing depression and anxiety." The Claimant herself testified that she was interested in pursuing the psychiatric referral of the MMI physician. Dr. Mann's DIME report was detailed, thorough and complied with the Level II Curriculum with respect to the psychiatric component of his opinion.

For his part, Dr. Olson testified that he did not believe the Claimant was "faking" her pain presentation. In referring back to his impairment rating report, he testified that he simply "did not have the time or information there to assess her pre-injury status" but he also testified that "he certainly left it open that if there needed to be a psychiatric impairment." Dr. Olson also testified that he would defer to Dr. Mann on psychological issues. He testified that the reason he felt the Claimant did not need additional psychiatric care was that he believed that one of the notes from Amy Alsum said that the treatment was wrapping up. He testified that he felt the Claimant was at MMI but that she would require maintenance visits with Dr. Mann for the next 2 years. Dr. Olson did not address the DIME physician, Dr. Leggett's recommendation for a psychiatric

referral and trials of different types, doses and frequencies of medications to alleviate the Claimant's psychiatric symptoms.

The conflict between the conclusion of Dr. Olson that the Claimant is at MMI for her psychiatric condition amounts to a difference of opinion with Dr. Leggett, which is not sufficient to overcome the DIME physician's opinion. Moreover, neither Dr. Olson, nor Dr. Mann, nor any other physician has disagreed with Dr. Leggett's reasonable recommendation that the Claimant obtain a psychiatric referral and for coordination between a psychiatric and the psychological treatment that the Claimant is receiving from Dr. Mann and Amy Alsum. Thus, Dr. Mitchell's determination that the Claimant is not at MMI has not been overcome by clear and convincing evidence. Therefore, Respondents' application to overcome the DIME opinion is denied and dismissed.

***Medical Benefits–Authorized, Reasonably Necessary and Causally Related***

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

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 weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). 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).

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).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

The Claimant continues to suffer from a debilitating psychiatric condition attendant to her June 7, 2011 work injury. At the hearing, the Claimant testified that she experiences sadness and depression and wakes up screaming from the pain and from bad dreams. She testified she still has dreams of the initial injury with the box and dropping it and now wishes she would have just let go. She experiences continued depression, memory issues, photosensitivity, dizziness and nausea. She testified that she is in more pain now than she was before her two surgeries. She testified that she believes that the biofeedback sessions that she had with Amy Alsum helped her condition. The Claimant testified that she is sad because she is hoping to be healed but it feels hopeless and she doesn't know if she will be healed. The Claimant testified that she has never experienced mental illness before her injury nor was she ever treated for mental illness or depression. Before her injury, the Claimant testified that she played tennis and hung out with a bunch of people and went to church. Now, she does not like to be around a lot of people so she doesn't go to church or play tennis anymore. She testified that she wants the psychiatric referral recommended by the DIME physician.

Dr. Leggett specifically testified that the Claimant could benefit from a regime of antidepressant medications and that only a couple had been tried on the Claimant so far and he did not feel that this was a sufficient medical trial to determine if the Claimant could benefit from certain dosages and frequencies of medications. Dr. Leggett testified that he would defer to Dr. Mann to refer a psychiatrist for the Claimant for medication trials and to coordinate with the psychological treatment with Dr. Mann and Amy Alsum.

There was no persuasive testimony to contradict the recommendation of Dr. Leggett and the recommendation is reasonably necessary to cure and relieve the Claimant of the effects of her admitted work injury. In addition, the 2 years of continued psychological treatment with Dr. Mann and Amy Alsum recommended by Dr. Olson is likewise reasonably necessary to cure and relieve the Claimant of the effects of her admitted work injury.

Thus, the Claimant has proven by a preponderance of the evidence that the psychological and psychiatric treatment recommended by Dr. Leggett and Dr. Olson is reasonably necessary to cure and relieve the Claimant of the effects of her June 7, 2011 work injury.

## ORDER

It is therefore ordered that:

1. The Respondents have failed to meet the burden of proving, by clear and convincing evidence that the DIME physician is in error as to his determination that the Claimant is not at MMI.

2. The Respondents' application to overcome the DIME opinion is denied and dismissed.

3. The Respondents shall provide medical treatment to the Claimant consisting of the psychiatric referral and treatment recommendations by Dr. Leggett and the continued psychological treatment recommended by Dr. Olson.

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

DATED: February 9, 2015

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

## ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that they should be permitted to withdraw their December 23, 2012 General Admission of Liability (GAL) because Claimant did not suffer an occupational disease in the form of Carpal Tunnel Syndrome (CTS) during the course and scope of her employment with Employer.

2. Alternatively, whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Shimon Y. Blau, M.D. that she did not suffer CTS during the course and scope of her employment with Employer.

3. Whether Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered CRPS and was entitled to a 5% whole person impairment rating.

4. Whether Claimant is entitled to a 2% whole person mental impairment rating for depression as a result of chronic pain.

## FINDINGS OF FACT

1. Claimant began working for Employer in March 2010 as a Markdown Associate. She worked 3-4 days per week for 5-8 hours each day for a total of approximately 20-25 hours per week. Claimant also received two 15 minute breaks and one 30 minute lunch break. Her duties involved scanning clothing and other merchandise using a scan gun. When using the scan gun on an item Claimant pulled a trigger with her right index finger. The gun then printed a bar code ticket that Claimant affixed to the scanned item. While performing her job duties Claimant began to experience tingling in her forearms, wrists and hands.

2. In 2011 Claimant was promoted to the position of Stock Room Lead for Employer. She worked an average of 37.5 hours per week. Claimant received two 15 minute breaks and one 30 minute lunch break. For the first 30-45 minutes of each day Claimant unloaded boxes from a truck by sliding them down a conveyor belt to the stock room floor. Claimant and her employees would then open the boxes, remove plastic from the clothing items, place them on hangers and hard-tag the merchandise. Claimant explained that the hard tags consisted of two pieces. One piece was circular, about two inches in diameter, and contained a pin that would be inserted into the other part of the tag. The tags were used as a theft deterrent. Claimant noted that her job duties as a Stock Room Lead caused her hands to become tingling and painful.

3. Based on her upper extremity symptoms Claimant filed a claim for Workers' Compensation and visited Guy Cook, D.O. for an examination. He took her off of work and ordered an EMG/NCS. The EMG revealed CTS. Claimant was then referred to Randy Bussey, M.D. for a surgical consultation. On February 23, 2012 Respondents filed a General Admission of Liability (GAL) acknowledging that Claimant's job duties for Employer caused her to develop CTS. On March 13, 2012 Dr. Bussey performed an open single incision decompression of the median nerve of Claimant's left upper extremity.

4. On July 10, 2013 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian also testified at the hearing in this matter. Dr. Cebrian testified that he relied on the *Division of Workers' Compensation Medical Treatment Guidelines (Guidelines)* in performing his causation analysis. He explained that in order to perform a medical causation assessment for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis. The next step is to evaluate causation of the diagnosis, including defining the job duties, and identifying whether any of the duties meet the delineated risk factors in the *Guidelines*. Dr. Cebrian further explained that, if the job duties do not meet the primary or secondary risk factors, then the condition is not work-related. If one or more primary risk factors are present, then the next step is to determine whether the primary risk factor is physiologically related to the diagnosis. If secondary risk factors are present then a third step in the causation analysis is required.

5. Dr. Cebrian noted that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5 of the *Guidelines*. He discussed each of the risk factors enumerated in the *Guidelines*. Dr. Cebrian remarked that Claimant's job duties as a Markdown Associate involved scanning clothing and other merchandise. The scan gun weighed approximately one pound. Scanning involved pulling a trigger with her right index finger. Claimant told Dr. Cebrian that scanning accounted for approximately 80% of her work day. Dr. Cebrian determined that the preceding job duties did not meet the primary or secondary risk factors as outlined in the *Guidelines*. The *Guidelines* specify activities including computer work, using handheld vibratory power tools, working in cold environments, a combination of force and repetition (e.g. six hours of graded and 50% of individual maximum force with task cycles of 30 seconds or less), use of handheld tools weighing two pounds or greater and awkward posture and duration. Dr. Cebrian remarked that repetition alone is not a risk factor for CTS and there must be a proven combination of repetition, force and cycle time in order to meet the causational requirements. He summarized that, even if Claimant used the scan gun continuously during her shift she would not meet the requirement of performing the repetitive task for an average of six hours per shift. Notably, Claimant's most severe CTS symptoms involved her left wrist area but she used her right hand to operate the scan gun.

6. Dr. Cebrian explained that Claimant's job duties as a Stock Room Lead involved working an average of 7.5 hours per day with two 15 minute breaks and one 30 minute break. Claimant thus actually worked for an average of 6.5 hours per day. She attributed her CTS symptoms to hard-tagging items. However, Dr. Cebrian detailed that

hard-tagging was only a small portion of Claimant's task cycle. Claimant typically reached into a box, pulled out an item of clothing, removed any packaging material, identified the area in which to sort the item and hang the clothing. Claimant would then attach a hard-tag to the item. She was not required to hard-tag home merchandise that was removed from boxes. Claimant also noted that approximately 80% of her day involved hard-tagging. If Claimant worked 6.5 hours each day and spent 80% of her time hard-tagging items, she only spent 5.2 hours per day performing the activity and thus did not meet the six hour threshold delineated for cumulative trauma conditions in the *Guidelines.* Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Stock Room Lead failed to meet the causation requirements for CTS outlined in the *Guidelines.*

7. Following her CTS surgery Claimant developed chronic pain in her upper body. She was referred to Authorized Treating Physician (ATP) Gregory Reichhardt, M.D. for medical treatment. On September 14, 2012 she visited Dr. Reichhardt for an evaluation of her chronic pain. He referred Claimant for diagnostic testing regarding possible Chronic Regional Pain Syndrome (CRPS).

8. On September 24, 2012 Claimant underwent a Functional Infrared Thermogram performed by Timothy Conwell, D.C. The thermogram met the criteria for bilateral CRPS Type II with associated median nerve root involvement. On December 18, 2012 Claimant underwent an Autonomic Testing Battery performed by J. Tashof Bernton, M.D. The testing revealed a high probability for CRPS Type II.

9. Dr. Reichhardt referred Claimant to Daniel Bruns, Psy.D. for chronic pain management. Dr. Bruns began treating Claimant for depression beginning August 16, 2012.

10. Dr. Reichardt determined that Claimant reached Maximum Medical Improvement (MMI) on March 14, 2014 and assigned a 14% whole person impairment rating. The rating consisted of 5% for CRPS and 2% for depression. The rating also included a 12% right upper extremity impairment for CTS that converted to a 7% whole person rating.

11. Respondents challenged Dr. Reichardt's 14% whole person impairment rating and sought a DIME. On July 14, 2014 Claimant underwent a DIME with Dr. Blau. Dr. Blau reviewed Claimant's medical records, conducted a physical examination, made diagnoses and performed a causation analysis of Claimant's injuries. Dr. Blau determined that Claimant suffered from bilateral CTS and left upper extremity CRPS. He agreed with Dr. Cebrian that Claimant's bilateral CTS did not meet the *Guidelines* for a work-related injury. However, Dr. Blau explained that Claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under her Workers' Compensation claim. Based on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* he assigned Claimant a 5% whole person impairment because of her left upper extremity CRPS. Dr. Blau did not assign Claimant any impairment rating for depression. He agreed with Dr. Reichhardt that Claimant reached MMI on March 14, 2014.

12. Respondents have proven that it is more probably true than not that they should be permitted to withdraw their December 23, 2012 GAL because Claimant did not suffer an occupational disease in the form of CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Markdown Associate and a Stock Room Lead while working for Employer caused her to develop CTS in her left upper extremity. However, relying on the *Guidelines,* Dr. Cebrian noted that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5. He discussed each of the risk factors enumerated in the *Guidelines*. Relying on the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Markdown Associate or Stock Room Lead failed to meet the causational requirements for CTS outlined in the *Guidelines.* DIME. He persuasively explained that Claimant did not suffer CTS as a result of her work activities for Employer. DIME Dr. Blau agreed with Dr. Cebrian that Claimant's bilateral CTS did not meet the *Guidelines* for a work-related injury. Accordingly, Respondents have demonstrated that the hazards of Claimant's employment did not cause, intensify, or, to a reasonable degree, aggravate her left upper extremity condition. Respondents are thus permitted to withdraw their December 23, 2012 GAL. Because Respondents are permitted to withdraw their GAL it is unnecessary to address Claimant's challenge to Dr. Blau's determination that her work activities did not cause her CTS.

13. Respondents have failed to produce clear and convincing evidence to overcome the opinion of DIME Dr. Blau that Claimant suffered CRPS as a result of her CTS surgery. Based on Claimant's upper extremity symptoms that she attributed to her work activities for Employer, she filed a claim for Workers' Compensation and visited Dr. Cook for an examination. He took her off of work and ordered an EMG/NCS. The EMG revealed CTS. Claimant was then referred to Dr. Bussey for a surgical consultation. On February 23, 2012 Respondents field a GAL acknowledging that Claimant's job duties for Employer caused her to develop CTS. On March 13, 2012 Dr. Bussey performed an open single incision decompression of the median nerve of Claimant's left upper extremity. Following her CTS surgery Claimant developed chronic pain in her upper body. After diagnostic testing consisting of a Functional Infrared Thermogram and an Autonomic Testing Battery she was diagnosed with CRPS Type II. Dr. Blau agreed that Claimant suffered from left upper extremity CRPS. He explained that Claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under her Workers' Compensation claim. Based on the *AMA Guides* he assigned Claimant a 5% whole person impairment rating for her left upper extremity CRPS. Nevertheless, Respondents assert that Dr. Blau's determination was erroneous because Claimant's underlying CTS was not caused by her work activities for Employer. Because the CTS was a non-work-related injury, Respondents assert that subsequent surgery for the condition cannot be work-related. However, Respondents contention fails based on the quasi-course of employment doctrine.

14. Claimant developed CRPS while undergoing authorized medical treatment for an industrial injury. Even though the condition occurred outside the ordinary time and place limitations of normal employment, CRPS developed because of Claimant's surgery. Employer was thus required to provide reasonable and necessary medical

treatment and Claimant was required to submit to it or risk suspension or termination of benefits. Surgical treatment by Dr. Bussey to relieve the effects of her admitted industrial injury thus became an implied part of the employment contract. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Blau's 5% whole person impairment determination for CRPS was incorrect.

15. Finally, Dr. Reichhardt assigned Claimant a 2% whole person mental impairment for depression because of chronic pain. Dr. Blau did not address the 2% whole person mental impairment rating. In fact, Respondents Application for a DIME did not include any request to review Claimant's 2% whole person impairment for depression assigned by Dr. Reichhardt. Because Dr. Blau was not asked to address Claimant's 2% whole person mental impairment rating, his failure to consider the rating was not clearly erroneous. Dr. Reichardt's assignment of a 2% whole person mental impairment rating does not constitute unmistakable evidence free from serious or substantial doubt that Dr. Blau's failure to assign a rating for depression was incorrect.

## 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).

*Withdrawing the FAL*

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

5. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2013), C.R.S. On February 23, 2012 Respondents admitted that Claimant sustained the occupational disease of CTS while working for Employer. Accordingly, Respondents have the burden of proving by a preponderance of the evidence that Claimant did not sustain CTS to withdraw the GAL.

6. 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.

7. 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.*

8. 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.

9. "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.

10. As found, Respondents have proven by a preponderance of the evidence that they should be permitted to withdraw their December 23, 2012 GAL because Claimant did not suffer an occupational disease in the form of CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Markdown Associate and a Stock Room Lead while working for Employer caused her to develop CTS in her left upper extremity. However, relying on the *Guidelines,* Dr. Cebrian noted that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5. He discussed each of the risk factors enumerated in the *Guidelines*. Relying on the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Markdown Associate or Stock Room Lead failed to meet the causational requirements for CTS outlined in the *Guidelines.* DIME. He persuasively explained that Claimant did not suffer CTS as a result of her work activities for Employer. DIME Dr. Blau agreed with Dr. Cebrian that Claimant's bilateral CTS did not meet the *Guidelines* for a work-related injury. Accordingly, Respondents have demonstrated that the hazards of Claimant's employment did not cause, intensify, or, to a reasonable degree, aggravate her left upper extremity condition. Respondents are thus permitted to withdraw their December 23, 2012 GAL. Because Respondents are permitted to withdraw their GAL it is unnecessary to address Claimant's challenge to Dr. Blau's determination that her work activities did not cause her CTS.

*Overcoming the DIME*

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

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

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

14. Under the quasi-course of employment doctrine, injuries incurred while undergoing authorized medical treatment for an industrial injury are considered compensable even though they occur outside the ordinary time and place limitations of "normal employment." *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993). The rationale for the doctrine is that, because the employer is required to provide reasonable and necessary medical treatment and the claimant is required to submit to it or risk suspension or termination of benefits, treatment by the physician becomes an implied part of the employment contract. *See Employers Fire Insurance Co. v. Lumbermen's Mutual Casualty Co.,* 964 P.2d 591 (Colo. App. 1998)*; Shreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. App. 1993).

. 15. As found, Respondents have failed to produce clear and convincing evidence to overcome the opinion of DIME Dr. Blau that Claimant suffered CRPS as a result of her CTS surgery. Based on Claimant's upper extremity symptoms that she attributed to her work activities for Employer, she filed a claim for Workers' Compensation and visited Dr. Cook for an examination. He took her off of work and ordered an EMG/NCS. The EMG revealed CTS. Claimant was then referred to Dr. Bussey for a surgical consultation. On February 23, 2012 Respondents field a GAL acknowledging that Claimant's job duties for Employer caused her to develop CTS. On March 13, 2012 Dr. Bussey performed an open single incision decompression of the median nerve of Claimant's left upper extremity. Following her CTS surgery Claimant developed chronic pain in her upper body. After diagnostic testing consisting of a Functional Infrared Thermogram and an Autonomic Testing Battery she was diagnosed with CRPS Type II. Dr. Blau agreed that Claimant suffered from left upper extremity CRPS. He explained that Claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under her Workers' Compensation claim. Based on the *AMA Guides* he assigned Claimant a 5% whole person impairment rating for her left upper extremity CRPS. Nevertheless, Respondents assert that Dr. Blau's determination was erroneous because Claimant's underlying CTS was not caused by her work activities for Employer. Because the CTS was a non-work-related injury, Respondents assert that subsequent surgery for the condition cannot be work-related. However, Respondents contention fails based on the quasi-course of employment doctrine.

16. As found, Claimant developed CRPS while undergoing authorized medical treatment for an industrial injury. Even though the condition occurred outside the ordinary time and place limitations of normal employment, CRPS developed because of Claimant's surgery. Employer was thus required to provide reasonable and necessary medical treatment and Claimant was required to submit to it or risk suspension or termination of benefits. Surgical treatment by Dr. Bussey to relieve the effects of her admitted industrial injury thus became an implied part of the employment contract. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Blau's 5% whole person impairment determination for CRPS was incorrect.

17. As found, finally, Dr. Reichhardt assigned Claimant a 2% whole person mental impairment for depression because of chronic pain. Dr. Blau did not address the 2% whole person mental impairment rating. In fact, Respondents Application for a DIME did not include any request to review Claimant's 2% whole person impairment for depression assigned by Dr. Reichhardt. Because Dr. Blau was not asked to address Claimant's 2% whole person mental impairment rating, his failure to consider the rating was not clearly erroneous. Dr. Reichardt's assignment of a 2% whole person mental impairment rating does not constitute unmistakable evidence free from serious or substantial doubt that Dr. Blau's failure to assign a rating for depression was incorrect.

## ORDER

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

1. Respondents are permitted to withdraw their December 23, 2012 GAL because Claimant did not suffer an occupational disease in the form of CTS during the course and scope of her employment with Employer. It is thus unnecessary to address Claimant's challenge to DIME Dr. Blau's determination that her work activities did not cause her CTS.

2. Respondents have failed to produce clear and convincing evidence to overcome the opinion of Dr. Blau that Claimant suffered CRPS as a result of her CTS surgery. Claimant is thus entitled to a 5% whole person impairment rating for CRPS.

3. Claimant is not entitled to a 2% whole person mental impairment rating for depression as a result of chronic pain.

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

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

DATED: February 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-879-404-03**

## ISSUE

The sole issue presented for adjudication at the hearing was:

1. Whether Respondent has proven it is entitled to a fifty percent (50%) reduction in compensation because Claimant's injury was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

## FINDINGS OF FACT

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

1. The Claimant was hired by Employer in April 2001 to work at the Employer's bakery plant (Respondent's Exhibit D). The Claimant began working on the freezer bread molder in the bakery plant on May 27, 2007. The Claimant signed a bid for the position with her seniority date in May 2007 and won the bid on May 22, 2007. The essential duties for the Freezer Bread Molder position that the Claimant signed up for in May 2007 included: responsible for daily set up of all machinery, responsible for all changeovers to various products in a timely manner, maintaining an efficient line, responsible for inventories of raw material whenever needed, responsible for all paperwork that is needed on the job, responsible for keeping a clean and safe working area (each area has designated clean ups), knowledge of all lock out-tag out procedures. At the time, the Claimant won the bid, a listed foreperson for the position was Jacob Vigil and a supervisor was Joseph McCaffery (Respondent's Exhibit I; 08/27/14 Hearing Tr. pp. 34-35).

2. While working on the freezer bread molder on February 13, 2012, the Claimant sustained an admitted work-related injury. The injury occurred when Claimant was setting up the freezer bread molder for production. The Claimant was attempting to place a piece of cardboard on top of the lower conveyor belt to catch flour and dough that would fall from the top conveyor belt during production. This was typically done by some of the workers to aid in clean up at the end of the shift. When the Claimant attempted to put the cardboard on the lower conveyor belt on February 13, 2012, the top conveyor belt was in the down position and running. While the Claimant was placing the cardboard on the lower conveyor belt, the cardboard got caught in the rollers of the upper conveyer belt and pulled the Claimants' left hand into the top conveyer belt and her arm became trapped in the roller of the upper conveyor belt that was running. The Claimant specifically testified that she was placing cardboard and the lower conveyer was off, although the top conveyer was on, when the cardboard pulled her left arm into the top conveyor belt and roller. She testified that she held her left arm with her other arm to keep it from being pulled all the way into the machine. She told another co-worker to turn off the machine, but the co-worker turned off the magnets instead. Then the Claimant testified that she remembered another switch that was above her and she

turned it off (9/19/2114 Hearing Tr. p. 12). The Claimant suffered a severe injury that included broken bones in her left arm that required surgery.

3. Joseph McCaffery testified that he has been the Production Manager at the King Soopers Bakery for approximately the last seven years 08/27/14 Hearing Tr. p. 71). Mr. McCaffrey was working as supervisor on duty the day of the Claimant's February 13, 2012 injury and he testified that the Claimant violated Employer's safety rules 41, 15 and 2 (08/27/14 Hearing Tr. p. 76-77). He testified that King Soopers does not have a specific rule, company policy or operational policy for employees placing cardboard on the lower conveyor belt that is done to facilitate the ease of cleaning up at a later time by an employee (08/27/14 Hearing Tr. pp. 77-79 and p. 83). However, Mr. McCaffery stated that employees are to turn off the upper conveyer belt before placing the cardboard on the lower conveyer belt because there is a specific policy about moving machinery (08/27/14 Hearing Tr. p. 84). He further testified that he has not witnessed anyone not turning off the upper conveyer belt before placing the cardboard on the lower conveyer belt (08/27/14 Hearing Tr. pp. 80-81).

4. Mr. McCaffery completed a hand-written first report of injury on February 13, 2012. He wrote that the Claimant was "setting up her work area. She was placing sheets of cardboard under a running conveyor (caught (L) arm above)." Mr. McCaffery noted on the first report of injury that the injury occurred because of a safety violation as he checked this box. Mr. McCaffery testified that it was his understanding that the Claimant was placing a piece of cardboard on top of the lower conveyer belt while the upper conveyer belt was running and that this was a safety rule violation. (Respondent's Exhibit A; 08/27/14 Hearing Tr., p. 63). A typed first report of injury was found at Claimant's Exhibits, p. 3, but Mr. McCaffery did not type it and it is unclear where the typed first report of injury came from or who created it. It does indicate that Mr. McCaffery did complete it and it is dated February 13, 2012. In the typed version of Employer's First Report of Injury, the box about whether the injury occurred because of a safety rule violation was left unchecked (Claimant's Exhibits, p. 3).

5. Mr. McCaffery also completed an employee incident root cause analysis report. On the form as the reasons/at risk acts that caused to injury, Mr. McCaffery checked "inattention" and "inattention to hazard." Mr. McCaffery also noted there was "no at risk condition" that caused the injury. Mr. McCaffery noted on this form that this incident was not Claimant's 1st unsafe action and listed an amputation of finger from 2005. Mr. McCaffery also noted that the store management's actions to prevent reoccurrence were corrective discipline of associate involved (Claimant's Exhibits, p. 4; Respondent's Exhibit E).

6. Ms. Katherine Saunders testified during the first day of hearing that she is currently the General Manager for King Soopers Bakery plant and was the Operations Manager/Safety Manager at the time of the Claimant's injury. She had held the position of Operations Manager/Safety Manager for 14 years (08/27/14 Hearing Tr. pp. 22-23). Ms. Saunders testified that the Employer takes safety very seriously in this plant and that safety violations are written up and kept in a log book (08/27/14 Hearing Tr. p. 32). Copies of written warnings for safety violations were admitted into evidence at

Respondents' Exhibit V, pp. 153-224. Most of these write ups related to Lockout / Tag Out procedures or placing hands in moving machinery. Many were for cleaning or trying to unplug product out of machinery that was not turned off.

7. There was considerable testimony and a number of exhibits entered into evidence about the Lockout / Tagout Procedures of the Employer, including a Lockout / Tagout Training Power Point (Claimant's Exhibits, pp. 15-41; Respondent's Exhibit J), and a Lockout / Tagout procedure form for the Employer's bakery for the bread molder/sheeter equipment (Respondent's Exhibit K, p. 69). The Power Point presentation notes that,

> LOTO procedures are for YOUR safety. These procedures apply when it becomes necessary to place any part of your body into an area on a machine or in equipment where the cycling of that machine/equipment could cause injury. These procedures are designed to prevent those accidents and injuries caused by the unexpected start up of a piece of equipment/machinery during <u>cleaning, servicing or maintenance</u>.
>
> (Claimant's Exhibits, p. 16; Respondent's Exhibit J, p. 44)

8. There was some dispute during the course of the proceedings as to the Claimant's ability to understand, speak and read English. The Claimant testified that she speaks and understands just a little bit of English and reads and writes in English not too much. (09/10/14 Hearing Tr. pp. 10-11). However, there was evidence presented at the hearings to the contrary that the Claimant has greater ability to understand, speak and read English that she testified. When the Claimant applied for employment with Employer, she completed a job application in English. The Claimant also completed a job interview before she was hired. The Claimant testified that she completed the interview in Spanish. However, Kathy Saunders, who has worked for Employer for 38 years, credibly testified that interviews are only done in English and not offered in Spanish (Respondent's Exhibit D; 09/10/14 Hearing Tr. pp. 66–67). Ms. Saunders also testified that she has known the Claimant for 13 years. Ms. Saunders does not speak or understand Spanish yet testified she communicates with the Claimant and has never had any difficulty communicating with the Claimant. The Claimant speaks with Ms. Saunders in English and has never spoken with Ms. Saunders in Spanish (08/27/14 Hearing Tr. pp. 24–25). Mr. McCaffery testified that he has known the Claimant for 9 years. Mr. McCaffery testified that he does not speak or understand Spanish but he is able to communicate with the Claimant easily. Mr. McCaffery testified that the Claimant only speaks to him in English and does not communicate with him in Spanish. Mr. McCaffery testified that he has never had difficulty understanding the Claimant. (08/27/14 Hearing Tr. pp. 74–75). Mr. Vigil, the Claimant's co-worker and former foreman, testified that he worked on the freezer line with the Claimant for 4 years. Mr. Vigil does not speak or understand Spanish. Mr. Vigil testified that he always communicates with the Claimant in English. Mr. Vigil testified that he would ask the Claimant to perform various tasks, clean this, and clean that in English, and the Claimant would always understand him and do the work. Mr. Vigil also testified that the Claimant does not speak in "broken English" in his opinion (09/10/14 Hearing Tr. pp.

34–36; p. 49). When the Claimant met with Ms. Saunders, Mr. McCaffery, and Mr. Vigil on April 9, 2012 to discuss her injury and explain what happened, she did this without an interpreter present despite Ms. Saunders, Mr. McCaffery, and Mr. Vigil not speaking or understanding Spanish. Ms. Saunders testified that an interpreter was not present when the Claimant showed them how the injury occurred and explained what had happened (08/27/14 Hearing Tr. p. 49). Based on the totality of the testimony and the evidence, it is found as fact that, although English is clearly not the Claimant's first language, she has sufficient skills understanding, reading and speaking English that language is not a barrier that would likely have prevented the Claimant from understanding training and safety information that the Claimant received from the Employer.

9. The Claimant knew Employer's safety rules based on over 10 years of training. When Claimant was hired, she was given a copy of the February 1996 Main Bakery Plant Safety Manual on April 16, 2001 and signed acknowledging receipt and that she was responsible for the policies and procedures. On April 17, 2001, Claimant underwent orientation and training with Employer. The Claimant's orientation checklist notes the following in regards to safety: "5. Has read and understands the Safety Rules. … 16. Familiarization with general work area and job duties (Special attention given to safety procedures related to the job or area)." The Claimant signed the orientation checklist on April 30, 2001 (Respondent's Exhibit L pp. 71-73).

10. Employees also receive 30 days of training on the job that includes lock out/tag out training. This is repeated with new positions. The Claimant would have received this 30 days of training in 2001 and again in May 2007 with the new position on the freezer bread line (08/27/14 Hearing Tr. p. 30).

11. After her orientation and initial training, the Claimant underwent annual safety training. Ms. Saunders testified regarding the training process. Ms. Saunders has worked for Employer for 38 years with 14 of those years as the safety manager. Ms. Sanders' job duties as safety manager included overseeing all of the safety training, documentation, and record keeping, including the lock out/tag out training and enforcement of safety rules. Ms. Saunders testified that the lock out/tag out annual training includes a power point presentation that is reviewed every year with the employees (08/27/14 Hearing Tr. pp. 22-23 and p. 28).

12. The Claimant received multiple trainings on safety rules and lock-out/tag-out procedures. On January 29, 2004, the Claimant was trained on the lock out/tag out scope, application, exceptions, and procedures. Claimant also completed a lock out/tag out quiz and a lock out/tag out review on January 29, 2004 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit M pp. 73-77). On February 16, 2005, the Claimant was trained again on the lock out/tag out scope, application, exceptions, and procedures. The Claimant also completed a lock out/tag out quiz on February 16, 2005 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit M pp. 78-83). She was trained on the lock out/tag out scope, application, exceptions, and procedures on April 30, 2006. The Claimant also completed a lock out/tag out quiz and a lock out/tag

out review on April 30, 2006 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit M pp. 89-93). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2006 including rules number 2, 15 (formerly number 14), and 45 (Respondent's Exhibit O pp. 85-87). On February 13, 2007, Claimant was trained again on lock out/tag out procedures and policies. Claimant also completed a lock out/tag out quiz on February 13, 2007 and acknowledged that she had read and understood the training handbook on lock out/tag out. (Resp. Ex. P p. 98-101). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2007 including rules number 2, 15, and 46 (formerly number 45) (Respondent's Exhibit P pp. 94-97). The Claimant was trained again on the lock out/tag out procedures on February 12, 2009. Claimant also completed a lock out/tag out quiz and a lock out/tag out review on February 12, 2009 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit Q pp. 105-09). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2009 including rules number 2, 15, and 46 (Respondent's Exhibit Q pp. 102-05). The Claimant was trained again on the lock out/tag out procedures on February 10, 2010. The Claimant also completed a lock out/tag out quiz and general safety rules quiz on February 10, 2010, which included acknowledgements for understanding these rules and training (Respondent's Exhibit R pp. 114-15). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2010 including rules number 2, 15, and 46 (Respondent's Exhibit R pp. 110-13). On February 1, 2011, the Claimant was trained again on the lock out/tag out procedures. The Claimant also completed a lock out/tag out quiz and general safety rules quiz on February 1, 2011 acknowledging that she had read and understood the training and procedures (Respondent's Exhibit S pp. 119-20). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2011 including rules number 2, 15, and 41 (formerly number 45 and 46) (Respondent's Exhibit S pp. 116-18). The Claimant was trained as recently as January 26, 2012 (two weeks prior to the work injury) on the lock out/tag out procedures. The Claimant also completed a lock out/tag out quiz on January 26, 2012 (Respondent's Exhibit T pp. 121-25). Additionally, employees are required once a year to demonstrate proper lock out/tag out procedures to a supervisor. Claimant demonstrated the proper procedures on February 16, 2011 on the KRD & Pan Mat. This is a part of the same machine that the February 13, 2012 injury occurred on (Respondent's Exhibit K; 08/27/14 Hearing Tr. pp. 30–31).

13. Ms. Saunders also testified that when the employees are trained on the safety rules, they are given a copy to read but that the safety rules are also read aloud by the supervisors at the training and there is a discussion of the rules. The training is done in a meeting of 10 to 20 employees for 8 to 10 hours. The employees are asked whether they understand and if they have any questions. Mr. McCaffery also testified that the training is conducted in this manner, rules are read aloud, and employees are encouraged to ask questions if they do not understand (08/27/14 Hearing Tr. pp. 27–29 and pp. 72–73).

14. In addition, employees have weekly and/or bi-weekly safety awareness huddles to discuss various safety concerns around the plant. The huddles are done in the conference room, one crew at a time, and with a supervisor. Topics for the safety

huddles include safety rules, lock out/ tag out, emergency procedures, accidents, food safety, and personal protective equipment. The Claimant attended 22 safety huddles in 2011 and 5 safety huddles in 2012 prior to the accident. On February 9, 2012, 4 days before the injury, the Claimant attended a safety huddle addressing lock out/tag out procedures on the freezer line (Claimant's Exhibit 7; Respondent's Exhibit U; and 08/27/14 Hearing Tr. pp. 29-30 and pp. 73–74).

15. The Claimant was previously written up for an injury on August 25, 2005. The Claimant received a written behavior notice and a 1-day suspension for violation of safety rule #14. With respect to that injury, the notice indicates that the Claimant stuck her hand in equipment while it was running and it resulted in injury to her index finger (Respondents' Exhibit G). Ms. Saunders also provided testimony in reference to safety rules promulgated by Employer in effect at the time of the Claimant's previous 2005 injury. In reference to Exhibit N, pp. 80-82, Ms. Saunders testified regarding the three rules that she believes the Claimant violated in 2005 when she injured her index finger were,

> Safety rule #2: No employee shall engage in any act which endangers himself or another. Employees working in a manner that might cause injury to them or others will be advised of the danger and appropriate disciplinary action taken where warranted. Repeated violation of safety policies or rules will result in possible suspension or termination.
>
> Safety rule # 14: Always turn off equipment before placing hands into it. Reaching into moving machinery will cause serious injury and is strictly forbidden. Cleaning and repairing equipment requires following specific Lock-Out Tag-Out procedure which must be followed.
>
> Safety rule #45: Any employee that puts their hands in running equipment will be suspended and or terminated for this safety violation.
>
> (Respondent's Exhibit N, 08/27/14 Hearing Tr. pp. 39-42).

16. Ms. Saunders testified that she was not present when the Claimant's current February 13, 2012 injury happened (08/27/14 Hearing Tr. p. 63). She testified that completed an accident investigation in April 2012 in which she accompanied the Claimant to the accident site. There the Claimant explained how the accident occurred. Mrs. Saunders acknowledged that the description of the accident as reported on the Associate Work-Related Injury Illness Report (Claimant Exhibit 1) is correct. In her written behavior notice to the Claimant, which is stated to be a "5-day 'final' warning for safety violation," the Claimant is put on notice that any further safety violations will result in her termination. Ms. Saunders noted that,

> [the Claimant] was placing a piece of cardboard on the belt – without the top conveyor being locked out – (it was running). [The Claimant] states the cardboard pulled her left hand in the rollers – causing a very serious

accident. The top conveyor should have been shut off and locked out before doing this.

(Respondent's Exhibit F, p. 23).

18. For this violation, Ms. Saunders determined that Claimant's actions on February 13, 2012 violated safety rules number 2, 15, and 41. Safety rule number 2 pertains to not engaging in actions that endanger an employee, number 15 (formerly number 14) is for placing hands in equipment without turning it off and doing lock out/tag out, and number 41 (formerly number 45) is for placing hands into running equipment (Respondent's Exhibit F; 08/27/14 Hearing Tr. p. 26).

19. On cross-examination, Ms. Saunders testified that she was aware of the customary practice of employees placing a sheet of cardboard on the lower conveyer belt to facilitate in clean up at the end of their shift. However, Ms. Saunders testified that it was not common to put the cardboard on the lower conveyer belt with a moving upper conveyer belt. Ms. Saunders testified that if the upper conveyer belt is moving, then the act of placing the cardboard on the lower conveyer belt would be a violation of the safety rules (08/27/14 Hearing Tr. pp. 56-57).

20. Mr. Bobby Alexander also testified on the first day of hearing. He that he has worked for King Soopers for fourteen (14) years and is familiar with the freezer line. He stated that Joe McCaffery has been his supervisor for the last six years (08/27/14 Hearing Tr. pp. 96-97). He has worked off and on at the freezer line for awhile. Mr. Alexander testified that it is customary practice for employees to place cardboard on the lower conveyor belt to expedite cleanup. Mr. Alexander testified that in his observation, not all employees turned off the upper conveyor belt when they are placing cardboard on the lower conveyor belt. He specifically stated, "there's times it's on, there's times it's off" (08/27/14 Hearing Tr. pp. 97-98). He agreed that although some employees turn the upper conveyor belt off to place the cardboard or pan underneath, other employees will leave the upper conveyor belt on while putting the cardboard in (08/27/14 Hearing Tr. p. 98).

21. The Claimant testified on the second day of hearing on September 19, 2014. The Claimant testified consistently with how she described the way the accident occurred to her supervisors when she was placing cardboard on the lower conveyor belt, which was turned off, and the corner of the cardboard got caught in the rollers of the upper conveyor belt and yanked her left hand and arm into the upper rollers of the conveyor belt (09/19/2014 Hearing Tr. p. 12).

22. The Claimant testified that the reason that the production line employees place the cardboard on the lower conveyor belt is so that they can catch the powder. The employees are responsible for clean up at the end of the day and the Employer wants them to do this quickly because they don't want the employees to do overtime (09/19/2014 Hearing Tr. p. 19). She testified that when she got to work on the day of her accident, the upper conveyor belt was already on and the Employer didn't let the employees turn off the conveyor belt because it would stop production. She said that

this is customary to begin her shift with the upper conveyor belt running and that the foreman who gets there first has to turn it on (09/19/2014 Hearing Tr. pp. 20-21). She stated that her co-workers would do the same and place cardboard on the bottom conveyor belt without turning off the upper conveyor belt. She further testified that none of her supervisors or foreman had trained her to turn off the upper conveyor belt before placing the cardboard on the lower conveyor belt (09/19/2014 Hearing Tr. p. 21 and p. 22). The Claimant testified that neither Mr. McCaffrey nor her foreman Hassan has ever told her to turn the top conveyor belt off before putting the cardboard underneath it on the bottom conveyor belt (09/19/2014 Hearing Tr. p. 23). Because the lower conveyor belt was turned off when she placed the cardboard on it, the Claimant understood that she was not violating safety rule #15 about putting hands into running equipment (09/19/2014 Hearing Tr. p. 23). When asked what her understanding of lockout tag out, she stated that this was to be done when you need to perform maintenance, cleaning, or have to service the machine (09/19/2014 Hearing Tr. p. 24). The Claimant testified that they do not let the employees do a log-out/tag-out when they are setting up their machines, only when they are cleaning them at the end of the day (09/19/2014 Hearing Tr. pp. 24-25).

23. Mr. Jacob Vigil testified on the second day of hearing in this matter. Mr. Vigil testified that he has worked at the Bakery plant for King Soopers for 21 years. He is currently a production foreman and was the lead foreman on the freezer line at the time of the Claimant's injury (09/19/2014 Hearing Tr. pp. 33-34). Mr. Vigil stated that employees do place cardboard on the lower conveyor belt and that he has done it as well (09/19/2014 Hearing Tr. pp. 34-36). Mr. Vigil is familiar with the machine that the Claimant was working on the day of her February 13, 2012 injury (09/19/2014 Hearing Tr. p. 36). Mr. Vigil is also familiar with the practice of placing a piece of cardboard on the lower conveyor belt (09/19/2014 Hearing Tr. p. 37). However, he specifically testified that he has never placed cardboard on the lower conveyor belt while the upper conveyor belt was running (09/19/2014 Hearing Tr. p. 37). Mr. Vigil testified that employees were allowed to turn off the top conveyor belt that it didn't hurt anything and that is what the employees are trained to do. He specifically stated that he has never been told that he could not turn off the top conveyor belt (09/19/2014 Hearing Tr. p. 37).

24. Mr. Amado Santana testified on the second day of the hearing. Mr. Santana testified that he worked for King Soopers in October 1999 until somewhere in October 2006 as a maintenance mechanic at the bakery department at King Soopers. He later agreed that he left King Soopers in 2005. He testified that it was a common practice for employees to place cardboard or pans on the top of lower conveyer belt without turning off the upper conveyor belt and he saw several employees, not just the Claimant, who would do this (09/19/2014 Hearing Tr. p. 74). Mr. Santana testified that sometimes the top conveyor belt would be on when they placed the cardboard and pans and sometimes it would be off (09/19/2014 Hearing Tr. pp. 75-76). He further testified that the lock out tag out was used at the end of the day when cleaning.

## 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. § 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 that Claimant's injury was caused by a willful violation of a safety rule. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) 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. § 8-43-201 (2008) C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The 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).

### *Safety Rule Violation*

C.R.S. § 8-42-112(1)(b), provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee.

The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, it is clear that there was no specific rule about how to place cardboard under a conveyor belt to catch dough and make for easier clean up. It is equally clear that the placement of cardboard on the lower conveyor belt was a relatively standard practice by the production line employees in this department. While there was no specific rule related to the placement of cardboard, Employer urges that the activity is encompassed by three other safety rules which the Claimant violated. Namely, the Employer argues that the Claimant violated the following:

> Safety rule #2: No employee shall engage in any act which endangers himself or another. Employees working in a manner that might cause injury to them or others will be advised of the danger and appropriate disciplinary action taken where warranted. Repeated violation of safety policies or rules will result in possible suspension or termination.
>
> Safety rule #15 (formerly #14): Always turn off equipment before placing hands into it. Reaching into moving machinery will cause serious injury and is strictly forbidden. Cleaning and repairing equipment requires following specific Lock-Out Tag-Out procedure which must be followed.
>
> Safety rule #45: Any employee that puts their hands in running equipment will be suspended and or terminated for this safety violation.

The question of whether a claimant knew of a safety rule is a factual determination for the ALJ. *Gutierrez v. Seven Hills Trucking, Inc.,* W.C. 4-561-352 (ICAO April 29, 2004). Here, although there was no specific rule about placing pans or cardboard beneath a conveyor belt to assist with clean up later, the activity of placing the cardboard does come within other specific safety rules. In order to have a specific, unambiguous and definite safety rule, it is not necessary that every single possible activity employees can engage in be covered by a separate rule. If this were the case, it would be nearly impossible for an employer to have an understandable, manageable list of safety rules. Rather, if conduct falls within a rule, that is sufficient. Here it is not necessary to have a rule about putting a piece of cardboard down where there is more than one specific rule about putting hands in equipment. The rule is simple and that is that employees are forbidden to reach into moving machinery. The Claimant argues that the bottom conveyor belt was off and so she was not reaching into moving machinery. However, the Claimant was reaching in between a lower conveyor belt that was turned off and an upper belt that was turned on. When the upper belt was on, it was down and closer to the lower belt than when it was turned off. A reasonable person would

understand that the safety rules prohibited the placing of hands into or near the moving upper conveyor belt, even if the lower conveyor belt was off. It is the moving belt that was a danger and this is the reason for the rule. The rule is reasonable since it was designed to prevent hands and body parts from being injured in moving equipment, the exact injury that the Claimant suffered.

Through the promulgation of specific rules which were reinforced with trainings, the Employer "brought home" the safety rules at issue in this case. It was specifically found that the Claimant's understanding of written and spoken English was sufficient that she understood the safety rule that an employee is to always turn off equipment before placing hands into it. Reaching into moving machinery will cause serious injury and is strictly forbidden.

Even if, as Claimant and other witnesses testified, other employees were placing cardboard on the lower conveyor belt with the top conveyor belt running, the Claimant's actions still violated safety rules. Just because other employees are doing something wrong does not make it acceptable. Mr. McCaffery, Ms. Saunders and Mr. Vigil testified that the employee are required to turn off the upper conveyor belt before placing anything on the lower conveyor belt. If they would have been aware of employees doing otherwise, they would stop and discipline employees they notice violating the rules.

The Employer had established safety rules to protect the employees. The Claimant was aware of the safety rules through annual training, safety huddles, her prior injury, and her prior write-up. Despite her knowledge of the rules, Claimant chose to place the cardboard on the lower conveyor belt while the top conveyor belt was running and not locked out/tagged out. This resulted in her injury. This is a safety rule violation and warrants a reduction in benefits if it is found that the Claimant acted willfully and with deliberate intent.

The question of whether the Respondent proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). intention. Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Here, the Claimant argues that she did not place her left arm deliberately into the machinery. Rather, she argues that as she placed a piece of cardboard on a lower conveyor belt, the cardboard was pulled into the machinery and her arm was pulled in with it. Essentially, Claimant argues that her conduct was negligent or careless but it

was not willful and that she did not, in fact, put her left hand in moving machinery. However, the conduct in question is not intentionally putting her arm into the moving upper conveyor belt. Instead, the issue is whether the conduct of placing the cardboard on the lower belt in close proximity to the upper conveyor belt violates the rule of keeping hands out of moving machinery. A reasonably prudent person would find that the safety rules, as promulgated and explained repeatedly by the Employer, are intended to include a situation such as the one here, where an employee is placing the piece of cardboard on the lower belt while the upper belt is moving. The upper belt is the danger or hazard and it is reasonably predictable that the act of placing the cardboard in relatively close proximity to the moving upper conveyor belt would cause exactly the type of injury that occurred to the Claimant. The employees can simply turn off the moving machinery, place cardboard where it will catch falling product to assist with clean up later, and then turn the upper belt back on. There was no compelling or persuasive testimony that this practice was prohibited. In fact, several credible witnesses testified that employees are trained to turn off moving machinery to accomplish this sort of task and then turn it back on. The ALJ finds that although the Claimant did not have the intent of sticking her hands into the upper conveyor belt in this case, she did intend to put her hand into moving machinery by the act of placing the cardboard on the lower belt while the upper belt was moving.

Therefore, the Respondent has demonstrated the existence of specific safety rules covering the conduct in question in this case, long-standing education and enforcement of the rules, effective communication of the rules to the Claimant and the Claimant's willful failure to adopt a reasonable rule adopted by the Employer for her safety. As such, Respondent is entitled to a reduction in benefits pursuant to §8-42-112(1).

## ORDER

It is therefore ordered that:

1. Respondent has established that Claimant's injury resulted from her willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondent is entitled to a reduction in benefits pursuant to §8-42-112(1).

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 Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to

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

DATED: February 9, 2015

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

## ISSUES

I. PPD Conversion: Whether claimant established by a preponderance of the evidence that his scheduled ratings on W.C. Nos. 4-898-537 and 4-897-278 should be converted to whole person impairment ratings.

II. MMI: Whether claimant has produced clear and convincing evidence to overcome the Division IME's opinion that he reached MMI on October 3, 2013 for his industrial injuries in W.C. Nos. 4-898-537 and 4-897-278.

III. Medical Benefits: Whether respondents are liable for a left total knee replacement surgery on W.C. No. 4-898-537 and a right total knee replacement surgery on W.C. No. 4-891-278.

## PROCEDURAL BACKGROUND/HISTORY

1. W.C. No. 4-891-278 concerns the admitted right knee injury of May 9, 2012.

2. W.C. No. 4-898-537 concerns an admitted left knee injury sustained September 5, 2012.

3. Claimant attained MMI for both injuries on October 3, 2013 according to authorized treating physicians. Dr. George Johnson, an authorized treated physician, determined impairment for both injuries. Respondents filed Final Admissions of Liability in each claim on November 13, 2013 consistent with Dr. Johnson's reports.

4. Claimant objected to both Final Admissions. He requested a Division IME on the claims.

5. The claims were consolidated for the purposes of completion of a global the Division IME by unopposed motion and the subsequent order of Prehearing Administrative Law Judge Carolyn Sue Purdie on January 15, 2014. .

6. Dr. Shank performed the global Division IME on March 6, 2014. Dr. Shank agreed claimant reached MMI on October 3, 2013 for both injuries. Dr. Shank determined claimant had a 24% scheduled rating of the left lower extremity for the May 9, 2012 injury. Regarding the right knee, Dr. Shank determined claimant sustained a 34% scheduled rating.

7. Respondents filed Final Admissions of Liability on both claims consistent with the Division IME's report.

8. Claimant applied for hearing on both claims. Issues for determination included claimant's attempt to overcome the Division IME opinions on impairment, causation and MMI, as well as permanent total disability. A prehearing was held before Prehearing ALJ Thomas O. McBride on August 4, 2014 to streamline the issues for hearing and to consolidate the two claims for the purposes of hearing. Judge McBride granted the motion to consolidate the claims for purposes of hearing. He also granted claimant's unopposed motion to hold the issue of PTD in abeyance pending the outcome of any scheduled hearing to determine the aforementioned issues.

9. Claimant asserted he "is attempting to show he is not at MMI because he has a present need for bilateral total knee replacements." *See* August 5, 2014 Prehearing Conference Order, ¶ 2.

## FINDINGS OF FACT

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

1. Claimant is a 52-year-old man who worked as a truck driver and trash collector for Employer, a refuse collection company.

2. Claimant injured his right knee on May 9, 2012. That injury was assigned W.C. No. 4-891-278. Claimant described injuring his right knee while attempting to stop his garbage truck from rolling down a hill. Claimant slipped and fell, hitting his right knee on the metal step of the truck.

3. Claimant injured his left knee on September 5, 2012. On that date, Claimant reported his left knee popped as he exited his garbage truck. Claimant's left knee injury was assigned W.C. No. 4-898-537.

4. The insurer admitted liability for both injuries.

5. Prior to both injuries, the medical records demonstrate Claimant had difficulty with both knees. An MRI of the right knee was recommended shortly before the May 9, 2012 injury occurred. As early as 2003, the records demonstrate Claimant had left knee problems that caused swelling in the knee and pain when he walked. Claimant was prescribed Vicodin for his pain complaints.

6. The medical records demonstrate Claimant sought treatment for his bilateral knees on September 1, 2011. Claimant related his bilateral knee complaints to an April 16, 2009 motor vehicle accident. The symptoms were constant and described as sharp, shooting and tingling. The problems were "worsening" according to claimant. Pain was at a 7/10 level and it interfered with his social activities all of the time. Claimant walked with a cane on September 1, 2011. Treatment of the knees had been delayed because

of Claimant's incarceration. The pain made it difficult for Claimant to find work. X-rays of the knees and other load bearing joints in his body showed extensive degenerative arthritis in both knees. Claimant was encouraged to make an appointment with an orthopedist.

7. On April 26, 2012, claimant treated with a physician's assistant, PA Heard. The PA noted Claimant was taking Percocet and ibuprofen for his knee pain at that time. The PA ordered a right knee MRI. This appointment took place less than two weeks prior to the right knee injury at work.

8. Before the MRI could be performed on the right knee, Claimant sustained the injury to his right knee on May 9, 2012. Claimant struck the front part of his right knee on his work truck's metal step as he attempted to stop the vehicle from rolling off.

9. PA Mullen examined Claimant on May 24, 2012 after striking his knee on the metal step. PA Mullen took a history of a prior injury to the right knee from playing basketball. Prior medical records indicate Claimant also injured his right knee in a 2009 MVA, a 2010 MVA and walking up stairs in 2011. Claimant told PA Mullen he had been under the care of PA Huard at Peak Vista for "ongoing chronic right knee pain." Claimant admitted he already had a right knee MRI scheduled prior to his latest right knee injury. PA Mullen left undetermined what part of claimant's right knee complaints were related to the May 9, 2012 work injury.

10. The MRI taken of the right knee showed a complex medial meniscus tear and mild medial compartment osteoarthritis. The medial compartment of the right knee had joint space narrowing and chondromalacia. There was no evidence of any bony contusion on the MRI. PA Mullen told Claimant to continue his Percocet and ibuprofen, the same medications he took prior to the right knee injury on May 9, 2012.

11. On June 7, 2012, PA Huard examined Claimant and diagnosed a medial meniscus tear after falling at work and preexisting right knee pain. Following the May 9, 2012 work injury, Dr. Matthews performed a right knee arthroscopy to debride the meniscus.

12. Respondents' IME, Dr. Roth, asked Claimant for a history of knee complaints before his injuries during his examination. Claimant reported to Dr. Roth he had no history of any knee problems prior to his May 9, 2012 work injury. Claimant did not recall treatment in 2003, 2011 and 2012 for his right knee injury. Dr. Roth attempted to spark his memory by mentioning a basketball injury. Claimant asserted the basketball injury primarily affected his ankle, not his knee. Claimant denied any problems with his knees prior to the accident at work on May 9, 2012.

13. Dr. Roth testified credibly and persuasively that Claimant's symptoms prior to his right knee injury on May 9, 2012 were entirely consistent with what was seen on the MRI. Claimant's complaints were sufficient to cause his providers to prescribe narcotic pain medication prior to May 9, 2012. An MRI was ordered before the May 9, 2012

injury. Further, a “complex posterior horn medial meniscus tear” is more likely than not pre-existing degenerative anatomy according to Dr. Roth. Current evidence-based epidemiology reviewed by Dr. Roth demonstrate this type of tear is evidence of ordinary degenerative change that more likely than not predated the May 9, 2012 injury.

14. Dr. Roth’s opinion that the right knee meniscus tear is degenerative in nature is supported by other facts reviewed in the medical records. The mechanism of injury on May 9, 2012 is not likely to have caused a meniscus tear. There was no twisting or torqueing of the knee one would expect to cause a meniscus tear. As described by Claimant, he sustained a contusion to the right knee. Dr. Roth reviewed the MRI findings for both knees. Despite completely different mechanisms of injury, claimant had the “exact same anatomy” in his right and left knees. The identical pathology in the knees despite two different mechanisms of injuries indicates the changes are degenerative in nature according to Dr. Roth.

15. Claimant’s left knee injury on September 5, 2012 shares a similar complicated history. Nonetheless, liability was admitted on the left knee.

16. On August 27, 2012, Claimant indicated to his physical therapist he had pain in his left knee secondary to compensating for the right knee. Claimant returned to work. At the end of his shift, he had swelling in the left knee. On September 5, 2012, Claimant stated his right knee is not getting any better. He has a follow up MRI on the right knee scheduled for the following week. Also, he had left knee swelling secondary to compensation.

17. There was no mention of any injury to the left knee in this September 5, 2012 PT report.

18. Claimant told Dr. Roth he injured his left knee on September 5, 2012 while getting out of his truck. He had some irritation from overuse, but the left knee “snapped” when he stepped down from his truck. Dr. Roth notes the left knee complaints were present before September 5, 2012.

19. The MRI on December 3, 2012 for the left knee showed medial meniscus changes, similar to those found on the right knee. Claimant had “complex tearing” of the medial meniscus. There was subarticular reactive marrow change and mild to moderate cartilage loss in the medial compartment.

20. The medical records indicate claimant’s pain in his right knee did not improve after the medial meniscus surgery on June 27, 2012.

21. The evidence demonstrates Claimant already had chronic worsening right knee pain prior to the May 9, 2012 injury. Dr. Roth asked the key question – if he already had pain in the right knee that required the use of Percocet and caused an MRI to be ordered, what was causing this chronic pain in the knee. The only abnormality on the MRI was the complex medial meniscus tear. The tear is consistent the pain complaints of Claimant before and after the May 9, 2012 injury. The mechanism of injury for the right knee on May 9, 2012 is not consistent with a meniscus tear – it is

consistent with a contusion. Treatment and evaluation after May 9, 2012 revealed the medial compartment meniscus abnormality. According to Dr. Roth, this is the only abnormality in the right knee. "Thus, this being the only abnormality, it is the only explanation for his symptoms and dysfunction prior to 5/09/12."

22. Another MRI was taken of the right knee on September 17, 2012. Claimant's history of the injury changed to a "twisting" injury with previous surgery, despite the records showing it was an injury consistent with a contusion. It is unknown where the "twisting" aspect of the right knee injury description came from. Claimant did not describe a twisting injury to providers before this time. With Dr. Roth, Claimant did not describe a twisting injury. Claimant described a contusion-type injury. But now, in the MRI description for the right knee, the mechanism of injury is described as a twisting event. A second surgery was suggested to treat Claimant.

23. Dr. Erickson reviewed the surgery request. He notes the need for medical records prior to the May 9, 2012 injury date. Dr. Erickson thought the subchondral edema seen in the September 17, 2012 MRI of the right knee was consistent with a re-tear of the meniscus.

24. Dr. Roth disagrees with Dr. Erickson's assessment. But he was aided with the medical records Dr. Erickson suggested should be reviewed and that were not available to him when he reviewed the request for surgery. Those records demonstrate Claimant had substantial knee pain prior to May 9, 2012 that continued after that date. The knee pain did not ebb with surgery on June 27, 2012. Physical therapy did not improve the condition. The records do not establish the pain worsened at any time. Dr. Roth opined it is an erroneous assumption to assess claimant's pain as a "reflection of an abnormality or event that occurred subsequent to the June 27, 2012 surgery. It is not reasonable to assume that persistent pain after medial meniscectomy is not the same pain that existed prior to the meniscectomy, as a partial meniscectomy is no guarantee of pain relief." Dr. Roth's opinion is credible and persuasive.

25. Dr. Roth opined it is "a weak assumption that the edema or subchondral bone changes are a reflection of recent trauma as these are the exact abnormalities expected with degeneration. Yes, [claimant] describes returning to his usual job duties, which may have included jumping, but there is no point in time that [claimant] identifies an acute injury or sudden change in his post 6/27/12 subjective status. He simply had pain all along, the pain did not improve."

26. Dr. Matthews performed the second surgery on the right knee on November 12, 2012. The meniscus was trimmed again.

27. Dr. Matthews performed arthroscopic surgery on the left knee on January 9, 2013. Like the right knee, Claimant had a complex posterior horn medial meniscus tear. Dr. Matthews states the rest of the medial compartment is normal for age. Claimant reported intense pain following the surgery.

28. Claimant was sent to Dr. David Walden for a second opinion after he failed to

experience improvement in his left knee condition. Dr. Walden evaluated claimant on April 9, 2013. He noted there was confusion regarding "when the patient injured his left knee." Claimant reported in September of 2012, he jumped from a truck, felt a pop in his left knee and the knee swelled. Dr. Walden was unable to determine what was related to an injury and what was consistent with degeneration in the knee. Pain medications, other than Percocet, were not helpful according to claimant when he spoke with Dr. Dixon on May 10, 2013. Dr. Dixon expressed her medical opinion that use of narcotics is not indicated.

29. Dr. Walden reviewed a repeat MRI of the left knee. Claimant wanted to pursue surgery on the knee because repeat surgery helped a small bit on the right knee. Dr. Walden performed the second surgery to claimant's left knee on June 17, 2013.

30. Dr. George Johnson examined claimant on June 4, 2013 and June 25, 2013. Claimant told Dr. Johnson his pain was 9/10. Dr. Johnson was concerned about the long-term use of opiates and addiction. Dr. Johnson refused to prescribe Percocet, because there appeared to be drug-seeking behavior.

31. On July 18, 2013, Dr. Walden noted Claimant had no improvement following the second surgery to the left knee. Dr. Walden determined "the majority of the patient's symptoms are likely coming from the arthritic changes in the knee."

32. On August 14, 2013, Dr. Johnson reevaluated claimant. Dr. Johnson continued to express his concern with the use of opioids for Claimant's condition. Claimant's subjective symptoms did not match the objective findings according to Dr. Johnson. Claimant walked normally without the cane he uses (claimant used a cane prior to May 9, 2012). Dr. Johnson indicated claimant did not appear to be in severe pain and thought claimant was exaggerating his pain complaints.

33. On August 29, 2013, Dr. Walden believed claimant reached MMI for the left knee. Dr. Walden restated his belief that while a TKR may be indicated in the future for the left knee but whether or not it is work related is difficult to determine.

34. On September 6, 2013, Dr. Johnson evaluated claimant for his right knee. Claimant was able to walk normally without his cane. Claimant's right knee was wrapped in an Ace bandage, but there was no swelling. The knee was non-tender to palpation. The knee was stable. Dr. Johnson questioned whether Claimant gave his full effort in the range of motion measurement. Dr. Johnson noted he was not successful in his attempts to wean Claimant from the Vicodin he used daily. Dr. Johnson stated Claimant's "subjective complaints of pain are not supported by the objective findings."

35. On September 12, 2013, Dr. Walden opined claimant's right knee had undergone two meniscectomies. Claimant had right knee osteoarthritis. Dr. Walden believed Claimant was continuing to experience pain due "presumably" to his osteoarthritis. Dr. Walden stated claimant may be a candidate for a right knee TKR, as

well. He thought causation of any need for a TKR on the right side would still need to be determined.

36. On October 3, 2013, Dr. Johnson placed claimant at MMI for both injuries. For the right knee, Dr. Johnson noted Claimant stated his right knee pain was severe and unrelenting. Claimant was using Vicodin two times a day. This is less medication than he used prior to the May 9, 2012 right knee injury. Claimant had 8/10 pain on average. Claimant was conversant and in no acute distress. He was able to walk normally without a cane. The right knee was wrapped, but not swollen. The knee was stable. Dr. Johnson opined the "subjective complaints of pain are not supported by the objective findings." Claimant was placed at MMI and Dr. Johnson noted a rating would be provided.

37. Likewise, with the left knee, Dr. Johnson also placed claimant at MMI for the September 5, 2012 left knee injury on October 3, 2013. Dr. Johnson recorded Dr. Walden's belief claimant would need a TKR on the left knee in the future, but "he does not believe that this is a time for that." The pain in the left knee was worse than the right. Claimant had 9/10 pain on average. Claimant's symptoms did not match the objective findings in the examination, according to Dr. Johnson. Claimant did not appear to be in severe pain. Dr. Johnson believed claimant was exaggerating his symptoms.

38. Dr. Johnson provided impairment ratings for both injuries on October 7, 2013. Claimant's right knee was rated at 23% of the lower extremity, which converts to a 9% W.P. impairment. Claimant's left knee was rated at 27% of the left lower extremity, which converts to an 11% W.P. impairment.

39. There were no functional impairments identified in the record that demonstrate Claimant had impairment outside the schedule as the result of either injury; Claimant's functional impairment, as it existed, was confined to the right and left lower extremities.

40. Dr. Johnson noted maintenance care was necessary to help with the medications he used (Mobic and Tramadol) for pain control.

41. Dr. Johnson indicated Claimant did not have problems with his knees prior to the work injuries. This is incorrect, as demonstrated by the record, as Claimant clearly had problems with both knees prior to the work injuries and was scheduled for an MRI of the right knee prior to the May 9, 2012 injury.

42. Respondents filed final admissions consistent with the reports of Dr. Johnson. Claimant objected and a Division IME, Dr. Shank, performed an examination of both claims, consolidated for the purposes of the Division IME.

43. Dr. Shank, the Division IME, agreed claimant was at MMI for both injuries on October 3, 2013. He placed Claimant at MMI with the understanding TKR surgery may be performed in the future. Dr. Shank found Claimant had right knee impairment of 24% of the right lower extremity. For the left knee, Dr. Shank found claimant had 34% of the

left lower extremity. Nothing in Dr. Shank's Division IME report suggests claimant has impairment related to the injuries that is outside the schedule of disabilities.

44. Respondents filed final admissions consistent with Dr. Shank's Division IME report and admitted for the scheduled ratings. Claimant applied for hearing to overcome the Division IME on MMI and asked for medical benefits in the form of bilateral total knee replacement surgery. Claimant also applied for hearing to convert the scheduled ratings to whole person awards. Claimant's PTD request was held in abeyance and the claims were consolidated for the purposes of hearing.

45. Claimant obtained two IME reports after the final admissions were filed. The first was from Dr. Simpson. Dr. Simpson did not agree that total knee replacement surgery was warranted. Claimant's pain complaints were "definitely out of proportion to the objective physical findings that have been noted on multiple MRI's and arthroscopic findings." Dr. Simpson was concerned the pain complaints were excessive, given that Claimant had "no appreciable bone on bone arthrosis and no MRI evidence of avascular necrosis." Dr. Simpson thought claimant might have a neuropathic pain syndrome. He was concerned a TKR might not improve his non-objective pain complaints and suggested other treatment. Dr. Simpson cautioned Claimant against aggressive additional surgeries unless there was confidence his pain would lessen. Dr. Simpson expressed concern about the reliability of claimant's pain complaints. He had suggestions for additional conservative treatment and testing, but would not recommend a total knee replacement.

46. After Dr. Simpson completed his IME for claimant, Dr. James Duffy was asked to perform an IME for Claimant. Dr. Duffy issued a two-page report. He determined claimant had osteoarthritis of the left knee. He concluded claimant "did not have a history of knee problems or visits for knee complaints of the left knee prior to this [September 5, 2012] work-related injury." Based on this history, Dr. Duffy concluded total knee replacement surgery of the left knee should be considered as part of the September 5, 2012 work injury. Dr. Duffy is willing to perform (and be paid for) knee replacement surgery on his left knee.

47. Dr. Duffy's report is not persuasive. He summarily declares there is no history of left knee complaints prior to September 5, 2012, but fails to list or document what history or records he relies on for this opinion. He fails to address the MMI determination by the Division IME and why it might be incorrect. He fails to address the concerns from Dr. Simpson – claimant's prior IME – that a total knee replacement may not be beneficial to claimant given his out of proportion subjective complaints. He fails to explain why Dr. Shank, the Division, and the treating physicians were incorrect when they declared claimant reached MMI for his work injuries.

48. Read in the most favorable light to claimant, Dr. Duffy's report could be read to indicate that Claimant was never at MMI for the left knee injury because total knee replacement surgery was contemplated but not performed prior to MMI. That interpretation leaves the MMI determination for the right knee injury W.C. No. 4-891-278 (May 9, 2012 DOI) intact and without any factual objection. Claimant failed to prove by

clear and convincing evidence the Division IME is incorrect when he placed claimant at MMI for this right knee injury. Additionally, Claimant failed to prove a right-sided total knee replacement surgery is reasonably necessary or related to his May 9, 2012 work injury.

49. As for the left knee, W.C. No. 4-898-537 (September 5, 2012), there is much doubt as to whether any other treatment is causally related to the work injury. In fact, the Division IME expressed doubt whether there was a work related injury to the left knee at all.

50. Following the IME report from Dr. Duffy, Claimant took the evidentiary deposition of Dr. Shank, the Division IME. Dr. Shank expressed early on in his deposition he did not "see that he had a new injury to the left knee." Dr. Shank Deposition ("Shank Depo") at p. 5. "I don't see it clearly documented that he had an injury to the left knee. …It was more of a compensation-type thing." BN 345, Shank Depo at pp. 5-6. Dr. Shank could not support Claimant's contention that left knee replacement surgery resulted from a work related injury, because it was "tough" for him to say Claimant had a work-related left knee injury requiring treatment. Shank Depo pp. 7-8. He agreed with Dr. Simpson that claimant's "global" pain complaints demonstrate it is probably wiser to rule out other disorders before attempting a total knee replacement. But he does not believe Claimant has a pain disorder; Dr. Shank believes Claimant has "knee arthritis." Shank Depo pp. 14-15.

51. Dr. Shank's statement that Claimant sustained a "compensatory-type" problem in his left knee rather than an accident connected to a specific time and place creates a contradiction. Claimant did not report a compensatory-type of injury to his left knee. Claimant attributed his left knee problems to a specific event occurring on September 5, 2012. Dr. Shank believed there needed to be a specific "injury" to the left knee for knee replacement surgery to be considered attributable to a work injury. Shank Depo pp. 7-8.

52. Claimant alleges he never reached MMI because Dr. Duffy is willing to perform a total left knee replacement surgery. Dr. Duffy attributes the total left knee replacement surgery to the September 5, 2012 work injury because Claimant "did not have a history of knee problems or visits for knee complaints of the left knee prior to his work-related injury." That opinion is contrary to the evidence presented at hearing showing claimant had preexisting problems with the left knee. Dr. Duffy's opinion is not persuasive.

53. Respondents' IME, Dr. Roth, was presented with all of the medical evidence available, which including records prior to either injury. He was asked to perform a causation evaluation and determine whether Claimant was at MMI for his work injuries. Dr. Roth testified at hearing.

54. Since Dr. Duffy wanted to perform a left total knee replacement. Dr. Roth addressed whether such a surgery is causally related to work-related activities. Dr. Roth opined and credibly testified total knee replacement surgery is not related to any work

related activity. Dr. Roth testified credibly and persuasively claimant is at MMI for his work injuries.

55. Significantly, Dr. Roth found identical pathology in both knees, which is evidence claimant's degeneration, is unrelated to work activities. The mechanisms of injury, described by Claimant, are completely different yet MRI findings were identical. "That the MRI of the right and left knees are so similar is medically probably an indication of underlying pre-existing endogenous arthrosis/degeneration." The persistence of Claimant's symptoms indicated the pain in the knees reflects arthritis according to Dr. Roth.

56. Claimant's pain never improved with any of the care provided to him. Claimant has pain because of the underlying arthritis, not the surgeries, according to the testimony of Dr. Roth. The MRI demonstrated preexisting degenerative changes according to Dr. Roth. Dr. Roth performed a medical literature search and found minor to moderate injuries like contusions and sprains do not accelerate osteoarthritis. Meniscus tears may be part and parcel of osteoarthritis in the knees.

57. Dr. Roth also noted the location of Claimant's tears is more suggestive of osteoarthritis, not trauma. Medical literature demonstrates isolated medial compartment tears are associated with osteoarthritis, not injuries. Injuries are more likely to show up as damage in all compartments of the knees.

58. The evidence demonstrates Claimant's medial meniscus tear is more likely associated with his preexisting osteoarthritis, not an injury. Claimant's MRI findings are more likely than not degenerative in nature and pre-existing. They do not reflect acute or recent trauma according to current medical literature reviewed by Dr. Roth.

59. Dr. Roth concluded Claimant's current need for evaluation and treatment of his knees is a reflection of the ongoing nature and the progression of the preexisting osteoarthritis that started years before this claim. Tr at 19, lns. 8-18. The osteoarthritis was active and being evaluated when the claims began.

60. Claimant is now at MMI, according to Dr. Roth, who agreed with Dr. Shank, the Division IME. Tr at 20-22. Claimant's condition is stable and has plateaued. Further treatment is not like to improve Claimant's condition. While there may be some future treatment suggested, there are considerable issues whether the treatment would be work-related. Tr at 20-21.

61. Dr. Roth reviewed Dr. Shank's deposition. He understood there had been a recommendation by Dr. Duffy and a request by Claimant to have the left knee TKR covered under the claim. Dr. Roth noted Dr. Shank in his deposition does not find clear evidence of an injury to the left knee. Tr at 21-22. Dr. Shank stated he could not opine that a TKR for the left knee should be covered under worker's compensation. Dr. Shank thought a global review of the claims by an expert looking at causation might be helpful. Dr. Roth performed that review and concluded claimant remains at MMI and the TKR surgery suggested for the left knee is not work-related. Tr 22-23.

62. Dr. Roth agrees with Dr. Shank there is not clear evidence of an injury to the left knee on September 5, 2012. Tr at 23, lns 8-13. Dr. Roth notes Claimant described a very clear, serious, and emergent event when his knee snaps backwards and he has acute pain with dramatic swelling on September 5, 2012. But, Claimant continued working that day. He does not mention this injury to his physical therapist, whom his sees on September 5, 2012. Tr at 23-24. Claimant instead describes pain in his left knee due to over-compensation for the right knee that started prior to September 5, 2012. Tr at 24-25. Claimant had similar issues in 2011, according to Dr. Roth.

63. The onset of Claimant's right knee problems is similar to the left. Claimant had problems before May 9, 2012. He was in active treatment and was scheduled to have an MRI. The MRI was ordered on April 25, 2012. Tr at 26-27. The pain was significant enough prior to May 9, 2012 to require narcotics. Tr at 27-28.

64. The total knee replacement suggested by Dr. Duffy is, according to the credible and persuasive testimony of Dr. Roth, only reasonable or necessary to treat the underlying arthritis, not the work injury. It is a reflection of a preexisting condition that will continue to progress. It was documented prior to the work injuries and it is progressing. He may need a joint replacement because he has global pain in the knees, not a work injury. Tr at 37-39.

65. Dr. Roth agreed with Claimant's first IME, Dr. Simpson, when he stated Claimant has pain that is out of proportion to objective findings. Tr at 39, lns 9-18. Claimant has consistently had pain that is out of proportion when compared to his objective findings. Tr at 39-40. Dr. Johnson agreed with this assessment. Dr. Johnson also found drug-seeking behavior, which Dr. Roth documented on page 20 (BN 73) of his report. Tr. 40, lns 9-18.

66. Dr. Roth credibly and persuasively opined claimant is now as he would have been whether or not these injuries occurred. "His pain, his need for treatment, whether or not that treatment works, is not a reflection of an injury sustained on September 5, 2012." Tr at 48-49. While the injuries may have caused pain complaints, Claimant eventually reverted back to baseline. Treatment initially directed at the complaints caused by the injury eventually transitioned to treatment of claimant's underlying degenerative arthritis.

67. The ALJ is not persuaded that Dr. Shank expressed ambiguity regarding Claimant's MMI status. To the contrary, during his deposition testimony, Dr. Shank was clear when he testified as follows:

> Well, I think if – if we're proceeding with a total knee, he is not at MMI. You know, it – upon review of the medical records, I think their goal was to get him better with a knee scope and place him at MMI. So, if he – if the treatment plan involves a knee replacement, he is not at maximum medical improvement. If workers' comp is not going to approve the knee replacement or state that it is work-

related, then he is probably at maximum medical improvement, or was so on the October date that we dictated in the chart.

68. There was no outstanding recommendation for a right total knee arthroplasty at the time of the DIME. Consequently, the ALJ finds that Claimant was unambiguously placed at MMI by Dr. Shank during the DIME performed March 6, 2014.

69. The persuasive evidence demonstrates Claimant attained MMI on October 3, 2013; he failed to present sufficient evidence to prove he is not at MMI for either injury. Likewise, Claimant failed to prove total knee replacement surgery for either knee is reasonable, necessary or related to the respective knee injuries. Further, Claimant failed to prove conversion of his scheduled ratings to whole person awards is warranted.

## 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 any litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of rights of respondents. §8-43-201, C.R.S. (2005). A preponderance of the evidence is that which leaves the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. 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).

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S. As found, Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case. Furthermore, the ALJ concludes that Dr. Fall's testimony to be contradicted by the more persuasive opinions of Drs. Larimore and Jones.

*Overcoming the DIME*

D. Claimant bears the burden of proof to overcome the MMI opinions of Dr. Shank by clear and convincing evidence. *Lambert & Sons, Inc. v. Indus. Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). "Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc., v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Whether the DIME physician properly applied the AMA Guides in determining MMI, and whether the rating was overcome by clear and convincing evidence are issues of fact for the ALJ's determination. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995.).

E. A party meets the burden of overcoming the DIME conclusion on MMI only if the party demonstrates that the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). The instant case involves complex questions concerning medico-legal causation. Clamant has received extensive treatment, including surgical intervention and has been evaluated by multiple providers who have expressed various opinions regarding his appropriateness for additional surgery. Nonetheless, the evidentiary record supports the conclusion that following his treatment, Claimant was placed at MMI and provided a rating for both injuries. Knee replacement surgery was reviewed, but not recommended, before his treating provider declared Claimant at MMI. The evidentiary record also supports the conclusion that after Claimant was placed at MMI, the determination of MMI was challenged through the DIME process. The DIME considered MMI and the causal relationship of a total left knee replacement to the September 5, 2012 injury and could not support relating any need for a total knee replacement to that injury. The DIME considered the opinion of Dr. Duffy and did not change his opinion. To the extent that Dr. Duffy's opinions concerning MMI diverge from those expressed by Dr. Shank, the ALJ concludes those discrepancies constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Claimant has failed to prove that it is highly probable that Dr. Shank was highly probably incorrect when he placed Claimant at MMI for both knee injuries involved in these consolidated cases.

F. Claimant's request for medical benefits in the form of a total knee arthroplasty for either the right or left knee is denied and dismissed. 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).

G. 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). 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). Based upon the evidence presented, the ALJ credits the opinions of Dr. Roth to conclude that Claimant's immediate need for a left total knee replacement, as well as any future right knee replacement procedure is, more probably than not, related to an underlying progressive degenerative osteoarthritis of his knees.

H. 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. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part 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*. Here, conversion of Claimant's scheduled lower extremity impairment to impairment of the whole person is not warranted. The persuasive evidence demonstrates that Claimant's complaints and treatment were associated with and directed to his knees. Claimant did not testify and the medical records do not support that Claimant's knee injuries have resulted in any decreased capacity to meet his personal, social or occupational demands. Consequently, the ALJ concludes that Claimant has not sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which would warrant conversion.

## ORDER

It is therefore ordered that:

1. Claimant's request to set aside the Division IME's opinion that MMI was attained on October 3, 2013 in W.C. Nos. 4-898-537 and 4-897-278 is denied and dismissed.

2. Claimant's request for medical benefits in the form of total knee replacement surgery on the left knee under W.C. No. 4-898-537 is denied and dismissed.

3. Claimant's request for medical benefits in the form of total knee replacement surgery on the right knee under W.C. No. 4-891-278 is denied and dismissed.

4. Claimant's request for conversion of his scheduled rating to a whole person award on W.C. No. 4-898-537 is denied and dismissed.

5. Claimant's request for conversion of his scheduled ratings to a whole person award is denied and dismissed.

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

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

DATED: February 17, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-893-705-01**

## ISSUES

The issues to be determined by this decision are:

A. Reopening the claim;
B. Medical Benefits.

## STIPULATION

The parties stipulated that if the case is reopened, Dr. Orgel is an authorized provider.

## FINDINGS OF FACT

1. Claimant's date of birth is January 18, 1965. He began working as a transportation maintenance worker for Employer on November 1, 2008. Claimant's job duties include all aspects of highway and vehicle maintenance including heavy equipment operation, blacktop and asphalt overlays, pothole repair, guard rail repair and snow removal. Claimant's job duties include driving snowplows, gravel trucks, dump trucks, and tandem dump trucks.

2. On July 16, 2012, Claimant sustained an admitted industrial injury while stepping down from a loader.

3. On July 17, 2012 Claimant was initially seen by Amber Payne, PA, at Concentra. Ms. Payne reported that, "he states that there was no accident. He reports, no twisting, I didn't get off the loader wrong. I stepped and felt a sharp pain." Claimant denied previous knee pain and injuries. Ms. Payne informed Claimant that walking does not correlate to a work-related injury and she urged Claimant to follow up with his primary care physician and have x-rays done. Claimant did see a Kaiser doctor on July 18, 2012.

4. On July 24, 2012 Claimant saw Dr. David Orgel at Concentra. He reported to Dr. Orgel that when he was coming down off the loader, his left foot was on the bottom rung of the ladder and his right foot was planted as he twisted left to step down off the ladder and that as he twisted left with his right foot planted, he developed pain in the right knee. The ALJ finds that Claimant's report of how the injury occurred is not consistent with what he told Ms. Payne the day before;

although this finding is not relevant to compensability because that issue has already been determined, it does relate to Claimant' credibility. Dr. Orgel reported that he discussed the situation with the employer, stating that he felt that the claim should be evaluated as a work-related condition. Dr. Orgel referred Claimant for an MRI and authorized a return to work for July 24, 2012 with restrictions of no lifting over 10 lbs. and no squatting and/or kneeling. As a result, the claim was admitted and payment of temporary total disability benefits began on July 17, 2012.

5. On July 30, 2012, Claimant underwent a right knee MRI. He was diagnosed with a complex tear of the medial meniscus, moderate degenerative changes of the patellofemoral compartment, mild to moderate degenerative changes within the medial compartment and mild to moderate thinning of the cartilage overlying the medial femoral condyle.

6. On August 2, 2012, Dr. Orgel referred Claimant to an orthopedist. On August 3, 2012, Claimant saw Dr. William Ciccone who reported that Claimant had right knee pain with a severity level of 10. Claimant reported that he had physical therapy which helped minimally and that his pain was persistent with walking. Dr. Ciccone reported that Claimant had persistent right-side medial joint line pain consistent with a meniscal tearing and that he had been unresponsive with conservative treatment, including physical therapy. Dr. Ciccone discussed the meniscal tearing with Claimant as well as the fact that there were some degenerative changes within the right knee.

7. On August 20, 2012, Dr. Ciccone performed surgery to repair the medial meniscal tear. His post operative diagnosis included right knee meniscal tear, Grade 3, chondromalacia patellae and Grade 3 chondromalacia of the medial femoral condyle. Dr. Ciccone performed a right knee arthroscopy with partial medial meniscectomy with chondroplasty of the medial femoral condyle. Dr. Ciccone documented that while probing with a scope he found no further flaps of the meniscus, however, he did find articular cartilage flaps along the medial femoral condyle with Grade 3 chondromalacia. He performed a chondroplasty in this area utilizing a shaver.

8. In a September 19, 2012 post operative report, Dr. Ciccone reports that Claimant is doing well. Claimant reported to Dr. Ciccone that he was feeling much improved and happy with his result.

9. On October 4, 2012, Claimant saw Dr. Orgel and reported noted improvement but continued pain. Claimant expressed his desire to return to work without restrictions. Dr. Orgel reported that he discussed this with the physical therapist

who agreed that Claimant was able to return to work full duty. Dr. Orgel reported normal gait and good range-of-motion. His assessment was that Claimant was improved and could return to work full duty.

10. Claimant's final post operative visit with Dr. Ciccone occurred on October 24, 2012. Claimant reported that he was back to work full duty with some occasional pain along the joint line which is much resolved, and that he feels improved. Dr. Orgel determined MMI and assigned a 14% scheduled rating, which included a 9% for loss of range-of-motion and 5% for a partial meniscectomy. Dr. Orgel discharged Claimant with the impairment and determined that no follow-up or maintenance was required.

11. Respondents filed a Final Admission of Liability on November 2, 2012 consistent with Dr. Orgel's October 24, 2012 report.

12. On December 17, 2012, Claimant returned to Dr. Orgel with complaints that his right knee is more painful than at discharge in October 2012 and the pain is with activity. Dr. Orgel placed Claimant on work restrictions and referred him for a repeat MRI.

13. Claimant had a repeat MRI on December 24, 2012. The radiologist, Dr. Tanya Tivorsak, reported that no displaced medial meniscal tear was present but that Claimant had a subchondral fracture and Grade 4 full-thickness chondral loss. Areas of high-grade partial thickness, chondral loss was reported in the medial femoral condyle, as well as postsurgical changes of partial medial meniscectomy and degeneration of the medial and lateral meniscus. Dr. Tivorsak also noted scarring of the anterior cruciate ligament (ACL) from an old injury related to the right knee.

14. On January 2, 2013, Claimant was seen by Dr. Sarah Harvey at Concentra on as a follow-up of the repeat MRI. Dr. Harvey reported, "Dr. Orgel has informed the insurance company that the finding in the MRI is not work-related. Patient is so informed."

15. On January 7, 2013, Claimant was seen by Dr. Robert Rhodes at Kaiser and reported that he has been weight bearing without pain and ready to return to work. Dr. Rhodes noted that Claimant was upset, angry, and worried that he would be fired from his job because he did not have much FMLA time remaining. It was recommended that Claimant be seen by an orthopedist for evaluation prior to being given a full duty work release.

16. Claimant had bilateral knee x-rays at Kaiser on January 10, 2013, which showed mild degenerative changes to both knees, right greater than left. The left knee x-ray showed patellar spurring, small ossicles projected adjacent to the left proximal tibia, which may represent interarticular loose bodies. The radiologist determined there was no fracture.

17. Claimant was seen by Dr. David Gladu, an orthopedist at Kaiser, on January 10, 2013. He reported to Dr. Gladu that he was "really minimally symptomatic, once or twice a week that he has some aching in his knee and takes some over-the-counter ibuprofen for this with very good relief." After a review of the x-rays, Dr. Gladu reported that Claimant did not have a true subchondral fracture but noted that Claimant has degenerative changes in the right knee with a loss of nearly 50% of the joint space and a subchondral lesion in the medial femoral condyle which correlates well with what was in the MRI report. He encouraged a weight management program for Claimant and advised that Claimant not return to any high-impact exercise so that the arthritis does not progress rapidly. Dr. Gladu gave Claimant a full-duty work release. Dr. Gladu reported that Claimant's symptoms fit with changes sometimes seen in osteoarthritis. There is nothing in Dr. Gladu's report indicating that he thought Claimant's arthritic change was due to his work injury or his injury-related surgery.

18. Claimant returned to Kaiser on April 4, 2013 with complaints of right knee pain. He stated that he minimized his pain at the January 2013 appointments because he wanted to return to work. The ALJ gives this record very little weight due to credibility issues with Claimant. On May 10, 2013, Claimant was seen at Kaiser and received a right knee injection.

19. On May 10, 2013, Claimant was seen at Kaiser and received a right knee injection.

20. Kaiser records indicate that Claimant is obese and could benefit from a weight management program or surgery. Claimant expressed an interest in weight management particularly because he believed it may help his knee condition.

21. On September 20, 2013, Claimant saw Dr. Orgel with complaints of right knee pain and his desire to have maintenance treatment under the work-related injury claim. After review of the Kaiser records, Dr. Orgel reported that Claimant had a permanent aggravation of his underlying arthritis and that his claim should be reopened.

22. Claimant testified that he continued to work full duty and that his co-workers often helped him with job duties due to his knee pain. The ALJ is not persuaded by

this testimony regarding assistance from co-workers. Other than Claimant's testimony, there was no other evidence or testimony presented that Claimant's co-workers assisted him with his job duties.

23. Claimant returned to Concentra on July 16, 2014 with complaints of right knee pain. He saw Nurse Practitioner, Keith Meier who recommended that the work-related injury claim from July 2012 be reopened.

24. On July 17, 2014, Dr. Orgel signed a State of Colorado Medical Certification Form (Employee's Health Condition) on behalf of Claimant.

25. Claimant's last day of employment with Employer was July 16, 2014.

26. Claimant testified that prior to his last day of employment, he had been getting good quarterly evaluations by Employer. However, sometime prior to July 16, 2014, Claimant lost his Colorado Commercial Driver's License (CDL) due to being charged with a DUI.

27. Having a CDL is a requirement of Claimant's job and at the point he lost the license he was no longer able to perform all of the duties associated with his position. At hearing, Claimant denied that he was facing a disciplinary hearing due to the loss of his CDL. The ALJ finds that Claimant is not credible in his testimony regarding such and no other evidence was presented to support Claimant's testimony.

28. In the first half of July 2014, Claimant testified that he rode his bike to work for national bike day. Claimant testified that on July 16, 2014, he told a co-worker "I can't take another step."

29. The ALJ finds the timing of pain that was so severe that Claimant could not take another step is suspicious when considered with the timing of Claimant losing his CDL and his inability to perform all of his work duties due to losing the license.

30. The ALJ finds that Claimant was able to work following MMI doing physically difficult work until July 16, 2014, with the exception of work restrictions by Dr. Orgel in December 2012. The ALJ finds that Claimant's symptoms seemed to wax and wane depending on who he was talking to about his right knee. For instance, when Claimant saw both Drs. Rhodes and Dr. Gladu in January 2013, he was minimally symptomatic and ready to return to work. However, in the month before, in December, 2012, Claimant was complaining of right knee issues and pain to Dr. Orgel.

31. Despite Claimant's assertion at hearing of right knee pain that continued to get worse post-MMI, Claimant did not seek regular treatment for his knee. Claimant testified that he did not seek treatment due to not having the time off to do so, finances, and not wanting to lose his job. However, even after his last day of employment with Employer on July 16, 2014, Claimant did not seek regular treatment for his right knee except for prescription medications.

32. From July 16, 2014 through the end of October 2014, Claimant was on temporary disability. Claimant could have sought medical treatment under the temporary disability coverage and did not do so.

33. At hearing, Claimant testified that he told Dr. Gladu in January 2013 that he was minimally symptomatic, when in reality, he was having more pain than he represented. The fact that Claimant was not truthful regarding his knee condition in the past presents a problem for his credibility at hearing.

34. On January 16, 2014, Claimant saw Dr. Joel Gonzales, an orthopedic surgeon, due to Respondents' request for an Independent Medical Examination (IME). Dr. Gonzales agreed that the December 24, 2012 MRI did not show an acute fracture of the medial aspect of the knee after personally reviewing the images. He felt that Claimant had Grade 4 degenerative changes on the medial compartment of the knee. Claimant reported that he continues to work full duty and does heavy work with increased pain, which is mainly activity related. Dr. Gonzales reported that Claimant has a significant amount of arthritis but continues to perform a very demanding job without restrictions. He opined that Claimant's BMI is 44, which equates to severe obesity. His treatment recommendations include weight loss, activity modifications, anti-inflammatories and possibly cortisone injections or visco supplementation injections. He went on to report:

> …
>
> "I do not believe that these should be related to the claimant's July 16, 2012, claim. I believe that the patient sustained a meniscus tear on July 16, 2012, and that it was treated appropriately with surgery and the patient improved after the surgery and was returned to work full-duty.
>
> I do not believe the claimant's condition has worsened since he was put at MMI on October 2012.
>
> …

> It is my medical opinion that the current symptoms Mr. Young is experiencing are consistent with the natural history of the progression of degenerative joint disease."

35. Dr. David Orgel testified by evidentiary deposition on November 18, 2014. Dr. Orgel is Board Certified in Internal and Occupational Medicine and is Level II certified as well. Dr. Orgel's opinion was that Claimant sustained a permanent aggravation of his underlying arthritic condition. It is Dr. Orgel's opinion that when Dr. Ciccone repaired Claimant's meniscus, he also performed a chondroplasty to smooth out the medial femoral condyle. The chondroplasty of the medial femoral condyle was to treat Claimant's degenerative condition. Had Dr. Ciccone not gone in to treat the meniscus injury, he would not have treated the medial femoral condyle. He believed that it was the chondroplasty that accelerated Claimant's underlying arthritic condition because it thinned the cartilage. However, Dr. Orgel also testified, in the context of whether Claimant's situation would be improved by weight loss, that weight accelerates arthritic changes.

36. Dr. Orgel finished his testimony by indicating that but for the meniscal injury and surgery, Claimant's knee would not be in the position it currently is based only on the natural progression of the degenerative changes.

37. Dr. Joel Gonzales testified by evidentiary deposition on December 4, 2014. Dr. Gonzales is Board Certified by the American Board of Orthopedic Surgery and also Board Certified for Sports Medicine. When he saw Claimant in January 2014, Claimant was not limping or using an assistance device, he had good range-of-motion with no swelling in the right knee and there was nothing very remarkable on exam. Dr. Gonzales agrees that Claimant did not have a subchondral fracture. However, his opinion is that Claimant had preexisting arthritis in his knee, and then had an acute injury which was the tearing of the meniscus that was treated appropriately by Dr. Ciccone. He testified that Claimant returned to baseline, his injury was taken care of and Claimant's continuing symptoms were due to arthritis in his knee.

38. Dr. Gonzales agrees with Dr. Orgel, that if Claimant had not had the meniscus injury and arthroscopic repair, the chondroplasty would not have taken place. Dr. Gonzales testified that the Grade 3 chondromalacia was preexisting. He discussed that there were some flaps of cartilage and Dr. Gonzales cannot say one way or another whether the injury made those flaps worse. Dr. Gonzales also testified that the flaps may have been created when Claimant twisted his knee, and in that case, the condition that prompted the chondroplasty could be related to the acute work injury. The ALJ finds there is not sufficient medical

evidence or testimony to show that the flaps were created when Claimant injured his right knee at Employer or that the flaps are related to the acute work injury.

39. Dr. Gonzales does not agree with Dr. Orgel's opinion that the chondroplasty accelerated Claimant's degenerative arthritis. Dr. Gonzales testified that he has done probably close to 1000 chondroplasties, if not more. It is not typical that this procedure would accelerate a patient's arthritis. The fact that Claimant has Grade 3 chondromalacia at the time of the surgery means that there had been significant degeneration of the cartilage in the compartment of the knee. Grade 4 is when there is no cartilage left and it is just raw bone and Grade 3 is just when there is a little bit left. It would not be unusual for Claimant's chondromalacia to progress from Grade 3 at the time of Dr. Ciccone's surgery to Grade 4, which was demonstrated on the December 24, 2014 MRI. The ALJ finds this testimony persuasive.

40. Dr. Gonzales testified that Claimant's current symptoms are consistent with arthritis, which he had before, and even if he Claimant was asymptomatic prior to the work-related injury, Claimant would have had the symptoms either way given the condition of his right knee. Dr. Gonzales testified that Claimant's weight is a factor which contributes to his current symptoms.

41. The ALJ finds that Claimant weighed approximately 320 lbs. at the time of the work-related injury. All doctors who expressed opinions regarding Claimant's weight agree that Claimant is obese and that being obese contributes to knee problems.

42. Weighing the evidence against Claimant's burden of proof in this case, the ALJ is more persuaded by the testimony and medical records of Dr. Gonzales and medical records from Dr. Gladu than the testimony and medical records from Dr. Orgel. The ALJ finds that Claimant is not credible or persuasive due to his admitted dishonesty and inconsistent reporting of symptoms showing a willingness and ability to be dishonest for advantage and/or benefit.

43. Medical records document the following: On October 24, 2012, when Claimant was placed at MMI, he reported some occasional pain as high as 3/10, with some locking and crepitation in the knee. On December 17, 2012, Claimant reported to Dr. Orgel that he had episodes of locking and knee pain with activity and the exam showed mild effusion. By January, 2013, he reported to Dr. Rhodes that he was weight bearing on the knee and ready to return to work; his right knee exam was normal. Also in January 2013, Claimant gave a similar account to Dr. Gladu, Dr. Gladu noted no obvious effusion. One year later, in January 2014, Dr. Gonzales documented no effusion in the right knee or

increased warmth. The chronology suggests that Claimant's right knee condition was similar in January 2013 to what it was at MM in October 2012, and even improved by January 2014. The timing of pain so severe in July 2014 that Claimant could not take another step correlates with pending employment issues due to Claimant's loss of his CDL and potential disciplinary proceedings rather than a worsened or changed condition in the right knee.

44. Claimant has failed to show by a preponderance of the evidence that his right knee complaints are causally connected to the admitted industrial injury or that his condition has changed or worsened.

45. Thus, the ALJ finds that Claimant's work-related injury was treated and Claimant stabilized and returned to baseline. The ALJ finds that it is more probably true than not that any continued right knee pain is due to Claimant's preexisting degenerative condition/osteoarthritis and the natural progression of the degenerative changes as well as Claimant's weight. Additionally, Claimant's preexisting condition was not aggravated or accelerated by the industrial injury or treatment thereof.

## CONCLUSIONS OF LAW

Based on the Findings of Fact enunciated above, the undersigned ALJ makes the following Conclusions of Law:

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 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*, 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.

b. 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).

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

d. 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); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). 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. Clam Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009).

e. The burden to prove that a claim should be reopened rests with the claimant to demonstrate that reopening is warranted by a preponderance of evidence. *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323 (Colo. 2004). Pursuant to Section 8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985).

f. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). Resolution of that issue is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). Claimant has failed to show by a preponderance of the evidence that his preexisting condition was aggravated or accelerated by the industrial injury.

g. Claimant has failed to demonstrate by a preponderance of the evidence that it is more probably true than not that his injury-related condition has worsened or changed since being placed at MMI on October 24, 2012. The opinions of Dr. Gonzales are more compelling than those of Dr. Orgel. Here, it is undisputed, that Claimant's injury-related condition was a meniscal tear. Drs. Gonzales and Orgel agree that the claim-related meniscus remains intact, has not worsened

and is not a basis for reopening this claim. What is at issue here, is whether a surgical procedure, specifically a chondroplasty, performed by Dr. Ciccone to repair an underlying, not related chronic condition, to repair for cartilage of the medial femoral condyle accelerated Claimant's arthritic condition. Dr. Gonzales' opinion that Claimant's current condition is due to a natural progression of the claimant's underlying arthritic condition is more persuasive. The fact that Claimant had a Grade 3 chondromalacia when Dr. Ciccone performed surgery on August 20, 2014, is persuasive in the undersigned ALJ's determination that Claimant had a severe underlying arthritic condition preexistent to Claimant's work-related meniscal tear, and the preexisting condition progressed naturally to a Grade 4 chondromalacia.

h. When Dr. Orgel first saw Claimant after the December 24, 2012 MRI, he opined that Claimant's condition was unrelated and that his claim should not be reopened, notwithstanding the fact that it was reported that Claimant's chondromalacia had advanced to Grade 4.

i. Dr. Gladu, the Kaiser orthopedist, saw Claimant on January 10, 2013 and reported that Claimant did not have a true subchondral fracture and that what was seen on x-ray was a change in Claimant's osteoarthritis. He reported that Claimant's symptoms fit the condition of what is seen with osteoarthritis. There is nothing in Dr. Gladu's report indicating that he thought Claimant's arthritic change was due to his work injury or his injury-related surgery.

## ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen Claim is denied and dismissed.

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.

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**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-907-349-03**

## IINITIAL MATTERS

At the beginning of hearing the ALJ determined that Respondents had not copied Claimant's counsel on their Response to Application for Hearing. As a result Claimant was not informed that Respondents would call Dr Brian Lambden as a live witness. To avoid any prejudice to Claimant, the ALJ granted Claimant up to January 15, 2015 to submit additional evidence based on testimony taken at hearing from Dr. Lambden. Claimant submitted no additional evidence.

The ALJ admitted into evidence Claimant's hearing exhibits 1-17 and 19, over Respondents standing objection based on the parol evidence rule. The ALJ overruled Respondents' objection because Claimant's exhibits were used to establish a mutual mistake of material fact and not to alter the terms of the unambiguous contract. To the extent Respondents continue to raise that same objection, it is overruled for the same reason.

## STIPULATION

The parties stipulated that the settlement documents in this case were based on the Division-approved form promulgated under the Rules. The parties also stipulated that Respondents' Exhibit B (also Claimant's Exhibit 17) is a true and accurate copy of the settlement documents, signed by Claimant while represented by previous counsel.

## ISSUES

- Whether Claimant established by a preponderance of the evidence that he is entitled to a reopening of the settlement agreement based on a mutual mistake of material fact?
- Whether Claimant established by a preponderance of the evidence that his post settlement medical treatment was provided by an authorized provider?
- Whether Claimant established by a preponderance of the evidence that his post settlement medical treatment was reasonably necessary?
- Whether Claimant established by a preponderance of the evidence his average weekly wage?
- Whether Claimant established by a preponderance of the evidence his entitlement to temporary total disability benefits?

## FINDINGS OF FACT

### General

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

1. Claimant is a 60 year old driver who began working for Employer on April 29, 2012, delivering butane gas.

2. On December 29, 2012 Claimant slipped on ice and fell backward while delivering a load of butane gas to a location in Sinclair, Wyoming.

3. As a result of Claimant's December 29, 2012 injury, Claimant filed a workers' claim for compensation and Employer filed a first report of injury. Respondents then filed two general admissions of liability, the first on January 24, 2013 and the second on February 6, 2013. Respondents admitted to an average weekly wage of $1162.38 and to temporary partial disability benefits at a varying rate.

4. Claimant received treatment and evaluation for his work injury including approximately three weeks of physical therapy which increased his pain. Claimant obtained an MRI scan of his right shoulder which showed irreparable rotator cuff pathology. Claimant was referred to Dr. John Papilion who performed a reverse total shoulder arthroplasty on February 20, 2013. Post surgery Claimant's shoulder dislocated on one or more occasions requiring him to seek emergency medical attention. Dr. Papilion preformed a revision arthroplasty on May 1, 2013 using a larger ball and thicker plate to prevent further injury. The plate was secured onto Claimant's scapula with a number of screws.

**Settlement**

5. Following his May 1, 2013 surgery, Claimant continued to experience severe pain and instability in his shoulder joint and blade. Claimant testified he had terrible right-sided pain between the middle and top of his shoulder blade, his shoulder did not improve after the second surgery, and he continued to have pain and feelings of instability in his right shoulder. Claimant credibly testified he thought his continuing symptoms were part of the healing process and that the pain would resolve over time.

6. On July 30 2013, Dr. Lambden performed a Respondents' IME. In his report he stated he anticipated Claimant reaching MMI within two to three months.

7. Respondents offered Claimant $35,000 to settle his claims. Respondents' counsel stated in Respondents' position statement that, "*A $35,000 settlement for an injury contemplates a potential impairment rating and waiver of potential medical benefits.*" Respondents were represented by the same counsel during the settlement negotiations. The ALJ finds that this amount is consistent with Dr. Lambden's report and further supports a finding that at the time of settlement Respondents believed and understood that Claimant was recovering from his revision surgery and would soon reach MMI.

8. The ALJ infers from Claimant's testimony, Respondents' counsel's representation, and from Dr. Lambden's report of anticipated MMI that the parties mutually understood Claimant to be recovering from his revision surgery with the expectation that he would soon reach MMI.

9. Claimant and Respondents entered into a settlement before Claimant was actually placed at MMI. However, the record is void of any credible evidence that any parties' expectation that Claimant would soon be at MMI ever changed. The ALJ thus finds that when the parties entered into the settlement, they mutually understood that Claimant was recovering from a revision arthroplasty and approaching MMI.

10. Claimant was represented by counsel when he entered into the settlement. The settlement details were provided on the Division of Workers' Compensation mandated form and were approved by an Order dated September 12, 2013. Claimant understood that once the case settled that his claim was closed.

**Post Settlement**

11. Post settlement, Claimant continued to have right shoulder pain and instability and eventually sought treatment in mid-October 2013 at a Kaiser facility through his private health insurance. Claimant was referred to Dr. Michael Gallagher, an orthopedic specialist. Dr. Gallagher obtained an x-ray on October 15, 2013 which revealed a fracture in Claimant's right scapula.

12. Claimant credibly testified that the October 15 x-ray was the first indication he had of a fracture in his right scapula. He testified further that if he had been aware of the fracture in his scapula, he would not have settled his worker's compensation case.

13. Because no evidence of the fractured scapula existed prior to October 15, the ALJ finds that Respondents could not have known at the time of settlement that Claimant had a fractured right scapula.

14. After the shoulder fracture was diagnosed, Dr. Gallagher recommended surgical repair which was performed November 20, 2013. The surgery was unsuccessful and the fracture remained unhealed.

15. When Claimant sought to reopen his claim, Insurer sent him back to Dr. Papilion who referred Claimant to Dr. Hatzidakis, another shoulder surgical specialist, for evaluation and treatment. Dr. Hatzidakis did a follow-up surgery in September 2014 and at the time of the hearing Claimant was scheduled for another surgery with Dr. Hatzidakis on January 16, 2015.

**Expert Testimony**

16. Dr. Gallagher is board certified in orthopedic surgery with a specialty in fracture management. Dr. Gallagher opined that Claimant's fracture was the result of a screw used in the surgical repair of this right shoulder creating a stress fracture. Dr. Gallagher opined:

> Claimant's scapular fracture was likely due to a stress riser created by one of the screws from his right shoulder reverse arthroplasty.

> The tip of at least one of the screws was seen on radiographs taken on 10/15/2013, to be in the scapular spine fracture, suggesting it played a role. . . . Claimant denied further trauma to the shoulder subsequent to his shoulder surgeries.

Dr. Gallagher further testified that the tip of a screw was right in the fracture site.

17. Dr. Gallagher testified the larger ball and socket put in during the revision surgery also may have played a role by creating greater tension. Dr. Gallagher testified the best method to see an early stress fracture is a bone scan or MRI [which were not performed] rather than plain x-ray, and that the location of the scapular fracture would not typically have been seen on the MRI taken on June 1, 2013.

18. According to Dr. Gallagher, the first objective evidence of an actual fracture became available on October 15, 2013. Prior to then, there was no way for anyone to know that the scapula fracture existed. While Dr. Gallagher acknowledged he could not state the exact date when the stress fracture began, he stated that a stress fracture is something that develops over time and, more likely than not, in this case it took several months to develop. The natural course of a stress fracture is that it begins so small that it is invisible, and then develops over time into a true or open fracture.

19. Both Dr. Gallagher and Dr. Papilion agreed that the stress fracture is related to the workers' compensation case. The doctors disagreed, however, about what caused the stress fracture: Dr. Papilion believed that the fracture occurred when Claimant's shoulder dislocated; Dr. Gallagher believed the stress fracture was likely due to the reverse shoulder arthroplasty, although he acknowledged that Dr. Papilion's theory could be true and reasonable. Both doctors agreed that the scapular fracture was not caused in the initial fall in December of 2012, and that the stress fracture developed *before* the settlement was finalized.

20. Dr. Papilion specifically opined "the scapular fracture likely occurred at the dislocation of his total shoulder prosthesis and was not visualized at revision surgery." Dr. Papilion explained that one would not normally be able to be visualize the scapular spine during a revision surgery. Dr. Papilion also opined that "the treatment for this fracture and subsequent arthroplasty is related to [Claimant's] worker's compensation claim."

21. Dr. Lambden performed two Respondents' IMEs on Claimant, one before the settlement and one after the fracture was discovered. Dr. Lambden is a physical medicine and rehabilitation specialist. He is not an orthopedist or an orthopedic surgeon. Dr. Lambden opined there were four possible causes of the fracture. He believed (1) a small stress fracture might have existed undetected after the dislocation following Claimant's first shoulder surgery, or (2) the fracture occurred in the response to the screw penetration after the revision procedure following the dislocation. Dr. Lambden explained the fracture identified on October 15, 2013 may have been caused by the screw because the screw passes through the fracture. Dr. Lambden also opined (3) the fracture could have

occurred after the revision surgery due to a trauma, or (4) the fracture could have been due to progression of a post-revision trauma.

22. Dr. Lambden admitted that the scapular fracture could have occurred as early as August 2013. Specifically, Dr. Lambden testified that "in my mind there is a stress fracture, and then there was an obvious acceleration of the stress fracture to create an actual [open] fracture evident on plain x-rays." Dr. Lambden also acknowledged the likely culprit was a screw that created a stress point or stress riser: "I think we can say that the screw, more likely than not, was the cause." Dr. Lambden agreed that there is no report of trauma in the initial Kaiser medical record in October of 2013 and that Claimant reported no new injury in that record. While Dr. Papilion's records contain a hand written notation that Claimant fell on May 13, 2014, Claimant credibly testified that he did not suffer any such fall and that he contacted Dr. Papilion's office to correct the record. Dr. Lambden acknowledged there were no other medical records documenting any kind of fall by Claimant at any time other than at the initial fall.

23. Claimant credibly testified that following the work-related fall in December 2012, he did not have any other falls or injuries to his right shoulder and he never reported any falls to any doctors. After the settlement, Claimant did not have any falls or injuries to his right shoulder and did not report any falls or injuries to his right shoulder. The ALJ finds it more likely than not that trauma did not cause or exacerbate his scapula fracture, thus eliminating Dr. Lambden's causation options (3) and (4).

24. Dr. Lambden stated that an individual with Claimant's shoulder range of motion could not do a semi-truck driving job. Dr. Lambden also agreed that the surgeries by Dr. Gallagher and Dr. Hatzidakis to address the scapula fracture and the non-union have been reasonable and appropriate to treat Claimant's condition. The ALJ finds this opinion to be credible and persuasive.

25. Dr. Lambden stated that as of the date of the hearing, Claimant would not be considered at MMI from his recovery from his September 2014 surgery with Dr. Hatzidakis. The ALJ finds this opinion to be credible and persuasive.

26. Doctors Gallagher and Papilion both opined the fracture identified on Claimant's October 15, 2013 x-ray was related to Claimant's original work injury in December 2012.

27. In large part, Dr. Gallagher and Dr. Lambden agree on the source of the fracture: a screw created a stress riser that created a stress fracture that developed into an actual [open] fracture over time. That actual fracture was not discovered until October 15, 2013. Nevertheless, it was the type of fracture that develops over time, absent trauma. Dr. Gallagher opined that this type of fracture would take months to develop. Dr. Lambden opined that the fracture could have existed as early as August of 2013, more than a month prior to the settlement. Ultimately, the ALJ finds the opinions of the orthopedic specialist, Dr. Gallagher, to be more credible and persuasive. To the extent Dr. Lambden's opinions are consistent with the opinions of Dr. Gallagher, they are also

accepted. To the extent Dr. Lambden's opinions differ from Dr. Gallagher's opinions, the ALJ rejects them as less persuasive.

28. At the time of the settlement, Claimant had an existing, undiagnosed, and undiscovered fracture in his scapula consistent with the medical opinions of Dr. Gallagher. Neither party sought or paid consideration for the unknown fracture for the precise reason that no one knew of its existence. Thus the ALJ finds that the parties entered into the settlement without being fully informed concerning the "extent, severity and likely duration" of Claimant's shoulder injury.

29. Additionally, Claimant attended school only through the eighth grade. The ALJ observed Claimant often had difficulty understanding even his own attorney's questions. The ALJ also observed Claimant express that he often had difficulty understanding things generally.

30. At the hearing, after Claimant rested, Respondents moved for a directed verdict arguing a lack of evidence that Respondents settled Claimant's case on a mutual mistake of material fact and a lack of evidence that Claimant's shoulder was fractured on the day of settlement, or that any party had knowledge of a fracture that existed in Claimant's shoulder on the day of settlement. The ALJ reserved ruling and now denies that motion.

31. Based on the above findings, the ALJ finds that the parties were mutually mistaken at the time of the settlement because they believed Claimant's continued pain was attributable to his recovery from the revision arthroplasty and that he was approaching MMI. While in actuality at the time of settlement Claimant had an undisclosed and undiagnosed scapula fracture stemming from his work injury and surgeries, which was unknown to any party at the time of the settlement.

32. The ALJ further finds that the scapula fracture was material because it required numerous surgeries to attempt to repair, it prevented Claimant from being able to return to work, and at the time of the hearing the status of Claimant's fracture remained uncertain.

33. As mandated by the Act and the Director, paragraph 4 of the settlement agreement provides for reopening based on mutual mistake of material fact. Section 8-43-204(1) is an explicit legislative directive to favor a just result over Respondents' interest in finality under the facts in this case.

34. Based on the factual findings above, the ALJ finds that Claimant has satisfied his burden of establishing that the settlement agreement was reached based upon a mutual mistake of material fact as provided for by C.R.S. section 8-43-204(1).

## REMAINING ISSUES

35. Dr. Papilion, an authorized treating physician in the claim, referred Claimant to Dr. Hatzidakis for treatment. Dr. Hatzidakis is thus an authorized provider.

36. The credible testimony of doctors Gallagher, Papilion, and Lambden supports a finding that all of the medical treatment received by Claimant for his right shoulder on and after October 15, 2013 has been reasonable, necessary, and related to his worker's compensation injury or the surgeries he received for that injury.

37. Claimant was off of work as a result of the work injury and was receiving TTD benefits at the time of the settlement. Since his first surgery Claimant has been unable to perform his regular job duties with Employer. He also has continued to be on restrictions since the settlement date.

38. Dr. Lambden's testimony supports a finding that Claimant remains unable to perform his regular duties as a semi-truck driver for Employer. He remains on restrictions that prevent him from performing his regular job. Claimant has not worked in any other capacity since the settlement.

39. Respondents admitted to an average weekly wage of $1162.38. However, the evidence Claimant presented at hearing shows it to be more likely that Claimant's gross earnings from his work for the employer in the 11.86 weeks leading up to the injury totaled $14,010.09. This results in an average weekly wage of $1181.29. Thus, Claimant has established his entitlement to an average weekly wage of $1181.29 for the entire claim.

40. Claimant has been receiving a Social Security Disability benefit in the monthly amount of $1,387.60 awarded back to the date of the initial injury plus the five month waiting period. Claimant also received $35,000 in compensation pursuant to the settlement agreement.

41. Respondents are entitled to a credit for a proper Social Security offset and the amount paid at the time of settlement.

## CONCLUSIONS OF LAW

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

### General

The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof.

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. § 8-43-210, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of this issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). It is the ALJ's prerogative to weigh the evidence, and that the ALJ might have reached a contrary conclusion is immaterial on review. *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

**Mutual Mistake of Material Fact**

By legislative mandate, every workers' compensation settlement is subject to reopening on the grounds of mutual mistake of material fact. C.R.S. section 8-43-204(1) provides:

> An injured employee may settle all or part of any claim for compensation, benefits, penalties, or interest. If such settlement provides by its terms that the employee's claim or award shall not be reopened, such settlement shall not be subject to being reopened under any provisions of articles 40 to 47 of this title other than on the ground of fraud or mutual mistake of material fact.

Paragraph 4 of the settlement document at issue incorporates the required language from the statute: "The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact."

The reopening provisions of the Act are based on a strong legislative policy favoring a just result over litigants' interest in achieving a final resolution of their dispute. *Padilla v. ICAO*, 696 P.2d 273, 278 (Colo. 1985); *Travelers Insurance Co. v. industrial Commission*, 646 P.2d 389 (Colo. App. 1981). Contrary to Respondents' arguments, section 8-43-204(1) is the General Assembly's explicit resolution of the tension between respondents' interests in finality, and claimants' interests in reopening where settlements are founded on mutual mistakes of fact. *See Cary v. Chevron, U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993).

The claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000). The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R–1*, 924 P. 2d 1177 (Colo. App. 1996). The question of whether the claimant has proven a mutual mistake of material fact is one of fact to be decided by the ALJ. *Maryland Casualty Co. v. Buckeye Gas Products Co., Inc.*, 797 P.2d 11 (Colo. 1990).

A mistake may be found where parties settle a claim without being fully informed concerning the "extent, severity and likely duration" of the injury. *Gleason v. Guzman*, 623 P.2d 378 (1981). In this regard, the mistake must pertain to a past or present fact not an opinion or prophecy about the future. *Guzman*, 623 P.2d 378 (1981) (a "mutual mistake of material fact" is one which relates to the "nature" of a known injury rather than a prediction about the future course and effects of the injury). Further, a mutual mistake is one which is reciprocal and

common to both parties to an agreement. *Maryland Casualty Co. v. Buckeye Gas Products Co.*, 797 P.2d 11 (Colo. 1990); *Cary v. Chevron U.S.A., Inc.*, 867 P. 2d 117 (Colo. App. 1993).

Claimant has met his burden of establishing the grounds for reopening based on mutual mistake of a material fact. The only plausible inference from the evidence is that the mistake was mutual. Both parties entered into the settlement with the understanding that Claimant was recovering from his revision arthroplasty and soon would reach MMI. Both testifying doctors agreed that the first objective evidence of the scapula fracture was discovered on October 15, 2013, approximately a month *after* approval of the settlement. Claimant testified he would not have settled his claim if he had known of the fracture. Further, neither party sought or paid consideration for the unknown fracture for the precise reason that no one knew of its existence. Respondents' offer of $35,000 does not reasonably reflect the value of a claim which would involve numerous surgeries and a lengthy if not permanent period of disability. The settlement was based upon a mistake concerning the existence of the scapula fracture which existed at the time of settlement which constitutes a past or present fact and not an opinion or prophecy about the future. In addition, the evidence compels the conclusion that the mistake was material. The undisclosed and undiagnosed fracture has resulted in three additional surgeries, an unresolved medical condition, and Claimant's inability to work as a result of the fracture and the surgeries.

In *Gleason v. Guzman*, *supra*, the court indicated that, for a "general release" to be effective against unknown injuries, "It must appear from the circumstances surrounding the transaction that such was [the releasor's] clear intention." The court went on to state that a party could not be found to have intended to release "future unknown injuries or the later consequences of known or unknown injuries where there is evidence that he was not fully aware of the basic character of the primary injury for which the release was sought and executed." *Gleason v. Guzman*, 623 P.2d at 387. Here, the ALJ concludes that Claimant could not have intended to release Respondents because the evidence shows that Claimant could not have been aware of the scapula fracture -- the basic character of the primary injury -- until October 15, 2013 when the fracture was discovered by x-ray.

Moreover, paragraph (4) of the settlement agreement explicitly states, as it must, that the settlement is subject to section 8-43-204(1). Thus, the parties recognized that Claimant retained the right to reopen based upon mutual mistake of material fact, and, contrary to Respondents' arguments, the settlement agreement cannot be construed to abrogate the claimant's statutory right. *See Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985) ("under the Act claims resolved by settlement agreements remain subject to the reopening provisions of the statute in the same manner as claims resolved by the granting of an award, and that parties may not by private agreement modify this strong legislative policy").

**Parol Evidence**

Paragraph 4 of the settlement agreement is clear and unambiguous. Claimant did not seek to admit any evidence regarding the interpretation of that unambiguous language. Instead, as the ALJ ruled, Claimant presented evidence to establish a mutual mistake of material fact. The parol evidence rule has no application in this situation. *See Boyer v. Karakehian*, 915 P.2d 1295, 1299 (Colo. 1996), *as modified on denial of reh'g* (May 20, 1996).

**Remaining Issues**

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).

Based on the ALJ's findings of fact, Claimant has established his entitlement to TTD benefits from the date after the settlement (September 13, 2013) forward and continuing. Subject to a credit for the amount paid at the time of settlement and a proper Social Security offset, Respondents shall pay TTD benefits from September 13, 2013 and continuing.

The ALJ must determine an employee's average weekly wage (AWW) by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

The ALJ concludes Claimant's average weekly wage is $1181.29 with a corresponding TTD rate of $787.53. This average weekly wage and corresponding TTD rate applies back to the date the claim was opened. Respondents shall pay back due benefits with interest using this TTD rate. TTD benefits shall continue until terminated by law or order pursuant to sections 8-42-105 and 8-42-103, C.R.S.

Dr. Hatzidakis is an authorized treating provider based on a referral for treatment by Dr. Papilion. Respondents are liable for all medical treatment provided by Dr. Papilion, Dr. Hatzidakis, and their referrals, as all of their treatment has been reasonable, necessary, and related to the work injury. *See* section 8-43-404(9), C.R.S.

While Respondents noticed for hearing the issue of attorney fees, they did not pursue the claim at hearing and have not addressed it in their position statement. Respondents' claim for attorney fees is deemed abandoned and as such is denied and dismissed.

## ORDER

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

1. Claim 4-907-349 is reopened.
2. Claimant's average weekly wage is $1181.29 with a corresponding TTD rate of $787.53. Respondents shall pay past due benefits back to the initial entitlement to TTD in the claim and interest using this TTD rate.
3. Claimant is entitled to TTD beginning September 13, 2013 and continuing, subject to a credit for the amount paid at the time of settlement and a proper Social Security offset.
4. Dr. Papilion and Dr. Hatzidakis is an authorized treating physician, and so are his referrals.
5. Respondents are liable for all medical treatment provided to Claimant by Dr. Papilion, Dr. Hatzidakis, and their referrals.
6. Respondents' request for attorney fees is DENIED and DISMISSED;
7. Respondent shall pay interest at the statutory rate of 8% on all benefits not paid when due.
8. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 12, 2015

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-909-364-06**

## ISSUES

- Whether Respondents have overcome the DIME's opinion on MMI by clear and convincing evidence?
    - Whether Respondents have overcome the DIME's opinion that Claimant's right shoulder complaints are related to her industrial injury of November 28, 2012?
    - If so, whether Respondents have overcome the DIME's opinion that Claimant's depression is attributable to her shoulder complaints?
- If not, whether Clamant is entitled to TTD from February 28, 2014, ongoing, payable at the rate of $848.82 per week?

## FINDINGS OF FACT

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

At the opening of the hearing, Respondents entered the deposition transcript of Claimant's Authorized Treating Physician (ATP), Dr. John Raschbacher into evidence. Based upon the evidence in the record, the Judge enters the following findings of fact:

1. Claimant was employed for nineteen years by the City of Littleton as a firefighter on the date of her injury. On November 28, 2012, Claimant was reloading fire hoses overhead and suffered a compensable injury. She eventually underwent surgery on June 24, 2013, for cervical disc problems.

2. Claimant was treated by ATP Dr. Raschbacher and released by him at MMI on February 28, 2014. Dr. Raschbacher rendered an opinion that Claimant had suffered a 22% whole person impairment. Claimant has not worked and has been under restrictions and treatment since being placed at MMI on February 28, 2014. Respondents issued a Final Admission of Liability ("FA") on March 28, 2014, to which a timely objection was filed.

3. The parties have agreed to a temporary total disability benefit rate of $848.82, based on admissions showing an average weekly wage of $1,590.47.

4. Prior to the November 28, 2012 injury, Claimant had a previous right shoulder injury, specifically a right labral tear and bone spur in 2006. Dr. Steven Horan treated Claimant in 2007 by debriding the labral tear and completing an arthroplasty for impingement.

5. On December 12, 2012 Claimant sought medical treatment for her November 28, 2012 injury. PA Karen Matusik at Arbor Occupational Medicine evaluated her. The history from the initial intake indicates that Claimant reported an exacerbation of her pre-existing neck pain with complaints of pain down the right side and pain over the right cervical paraspinal muscles and facets.

6. Claimant returned to Arbor on December 28, 2012, and was diagnosed with cervical sprain/strain, and was referred for chiropractic treatment and a surgical consultation.

7. Claimant reported right shoulder and extremity pain; however, Dr. Raschbacher decided Claimant's right shoulder complaints were due to her cervical injury. Dr. Raschbacher did not veer from that decision as the case evolved over time.

8. Claimant underwent x-rays and a cervical MRI. On January 8, 2013, Claimant saw Dr. Sean Markey, who, upon review of Claimant's imaging and history, found significant degenerative findings and foraminal stenosis at C4-C5 and C6-C-7. Ultimately, Dr. Markey recommended a three level spinal fusion from C-4 to C-7.

9. On January 15, 2013, Claimant returned Dr. John Raschbacher and requested a second opinion from an orthopedic spinal surgeon to explore the possibility of a disc arthroplasty. Dr. Raschbacher referred Claimant to Dr. Michael Janssen.

10. On January 24, 2013, Dr. Janssen evaluated Claimant, and found that Claimant's work related injury required surgery.

11. On June 24, 2013, Claimant underwent surgery for her neck. The surgery was complex, but consisted primarily of a one level fusion at C6-7 and total disc arthroplasties following decompressions and reconstructions at the two adjacent levels.

12. After surgery, Claimant began a course of physical therapy (PT) with Performax Physical Therapy. Claimant testified that she performed many shoulder exercises during PT and that she was unable to extend her arm above her head. Claimant's testimony about shoulder pain and complaints during PT are supported by numerous PT records admitted into evidence.

13. Four months after surgery, Claimant reported to Dr. Raschbacher that her physical therapist told her she may have some impingement in her right shoulder. At the time, Dr. Raschbacher again noted that she was not doing strenuous, repetitive, overhead activities, and that Claimant did not present with any risk factors for impingement syndrome. Dr. Raschbacher found that Claimant had tenderness at her right AC joint, but concluded the symptoms in the shoulder were not related to her November 28, 2012, injury.

14. On November 26, 2013, Claimant returned to Dr. Raschbacher with continued complaints of right shoulder pain. Dr. Raschbacher acknowledged a note from the physical therapist's office regarding right shoulder involvement, and that Claimant stated she could not progress very well with neck rehabilitation because her

right shoulder was bothersome. Dr. Raschbacher discussed with Claimant that her right shoulder was not a body part under treatment in this claim. However, Dr. Raschbacher's note reflected Claimant had a positive impingement sign and decreased and painful internal rotation.

15. Dr. Raschbacher's November 26, 2013 note contains the following remark,

> We discussed the fact that the right shoulder is not a body part under treatment in this claim and no liability has been accepted by the carrier for the right shoulder. Additionally, the neck is what has been treated and one would not like to presume that cervical spine surgery was done when in fact the shoulder should have been addressed. This is unlikely as she clearly has cervical pathology. She has improved after the surgery, but has pain at the front and the top of the right shoulder which is aggravated with activity.

Despite the fact that Dr. Raschbacher knew of Claimant's prior labral injury, was aware that Claimant had consistently reported the onset of should symptoms during physical therapy and acknowledged Claimant's shoulder complaints, he remained committed to his original impression that only Claimant's neck was involved. Confronted with substantial information that Claimant's shoulder could be involved, he viewed the situation as either neck or shoulder, and since the neck had been treated, was not open to any other possible injury. The ALJ finds that Dr. Raschbacher's failure to consider whether Claimant's shoulder injury was related to her claim because he had previously identified a neck injury limits the persuasiveness of his opinions.

16. On December 17, 2013, Claimant had a recheck visit with Dr. Raschbacher who noted, "It appears her right shoulder, at least by description, is interfering with rehabilitation of the neck. . . . She is stuck in rehabilitation, with respect to the shoulder. She states that the shoulder happened in physical therapy. She was doing physical therapy at Performax and states that this is where the right shoulder became a problem."

17. On January 2, 2014, Claimant reported to Dr. Raschbacher who noted that he had reviewed the records and that there had initially been "some right shoulder symptomology," but he attributed it to her neck injury, without explanation. "She states that she hurt the right shoulder doing shoulder shrugs and similar exercises in physical therapy. It is still sore and she is still not able to progress well for rehabilitating the neck with the limitations at the upper right extremity."

18. On January 17, 2014, Claimant returned to Dr. Raschbacher noting that her right shoulder was interfering with the rehabilitation of her neck. Dr. Raschbacher explained his opinion that it was unlikely that Claimant could have suffered any intrinsic anatomic pathology in her shoulder from the physical therapy, including shoulder shrugs. Despite his belief that there was no pathology, he ordered an MRI to support

his contention, rather than for the purposes of diagnosis or treatment. He also noted that the MRI might be denied because Claimant's shoulder had never been part of the accepted claim. Insurer denied the MRI as unrelated.

19. On February 10, 2014, Claimant returned to Dr. Raschbacher continuing to state that whatever happened to her shoulder happened in physical therapy.

20. Dr. Raschbacher placed Claimant at MMI on February 28, 2014 with a 22% whole person impairment.

21. Claimant testified that she was suffering from these same shoulder complaints when Dr. Raschbacher found her at MMI.

22. Claimant timely objected to the Final Admission and obtained a DIME with Dr. Edwin Healy.

23. At hearing, Dr. Swarsen offered expert testimony that DIME Dr. Healey performed his DIME examination consistently with the directives of the DOWC, the AMA *Guides* and its medical records. He also testified that DIME Dr. Healey's MMI opinion is supported by the totality of the evidence, specifically the documentation found in those records addressing treatment post-MMI.

24. Dr. Healy was "specifically requested by [Claimant's] attorney to evaluate specific body parts and conditions including chronic pain, neck pain, right should pain, right trapezius and scapular pain, cervical pain and neurological radiating pain and to determine if any additional diagnostic testing was necessary and to recommend medical maintenance treatment if required." The chief complaint listed for the DIME was "chronic right shoulder pain."

25. During his examination of Claimant, Dr. Healy found diffuse tenderness over her right shoulder, particularly over the right bicipital tendon and subacromial bursa and mildly over the acromioclavicular joint. He noted decreased range of motion in her right shoulder and crepitus and popping with adduction of the right shoulder.

26. Based on his review of the medical records, his history from Claimant and his examination, Dr. Healy concluded that Claimant was not at MMI for her November 28, 2012 injury. His report included the following diagnoses: (1) right shoulder pain occurring during rehabilitation of her cervical spine, with ongoing chronic pain, stiffness and crepitus of her right shoulder; (2) Prior history of right shoulder injury in 2006, requiring arthroscopy, subacromial decompression, labral tear repair and impairment rating; (3) Intermittent dysphagia and hoarseness after intubation for cervical surgery; and (4) Adult adjustment disorder with depression and anxiety due to chronic pain and disability.

27. During her DIME, Claimant reported that she had similar shoulder problems associated with her 2006 work related injury. She stated that when she was injured on November 28, 2012, she had been lifting hoses overhead when she had the onset of neck and right upper extremity pain and weakness. Claimant reported she was

not certain if she injured her shoulder at that time but noticed her shoulder pain was particularly aggravated by various activities she did in physical therapy. She reported that her symptoms of pain and stiffness progressed over time. The ALJ credits Claimant's statements made during her DIME as credible, consistent with her earlier reports, and consistent with the medical records in evidence. The ALJ particularly credits Claimant's testimony relating her current symptoms with her earlier labral tear as she had personal experience of that injury.

28. Dr. Healy opined that Claimant's prior right labral tear was aggravated by extensive physical therapy treatment she underwent. His opinion was based on claimant's report and the medical records which indicate that her right shoulder symptomology began in physical therapy. Dr. Healy recommended Claimant undergo an MRI of her right shoulder and see an orthopedic spinal surgeon for evaluation and treatment of her right shoulder pain and disability as a result of her rehabilitation for her November 28, 2012 work injury. Dr. Healy opined that treatment of Claimant's right shoulder would also improve her function and help her depression.

29. Dr. Healy opined that Claimant's adult adjustment disorder was caused by her chronic pain, inability to sleep, and other psychosocial factors relating to the loss of her career. He recommended Claimant undergo psychological evaluation and some psychological counseling to help her cope with her depression and anxiety. Dr. Healy postulated that treatment of Claimant's shoulder should result in significant improvement of her depression.

30. Dr. Healy determined that Claimant continued to experience difficulty swallowing, and recommended Claimant see an ENT physician for evaluation of her swallowing problem to determine whether anything else could be done to treat it.

31. Dr. Healy provided a provisional impairment rating which included a combined specific impairment of her cervical spine plus a loss of cervical range of motion, for a combined 19% whole person impairment of her cervical spine; a whole person impairment for loss of range of motion for her right shoulder of 4%; a mental impairment rating of 3% whole person. Dr. Healy assigned Claimant a combined 24% whole person impairment, noting that she had not yet reached MMI for her shoulder, or her depression, and that she might require an impairment rating for her dysphagia.

32. The ALJ finds Dr. Healy's opinions and conclusions, especially his opinion that Claimant's shoulder injury was related to the treatment of her November 28, 2012 injury to be persuasive, credible, and well supported by a great weight of the evidence.

33. Prior to hearing, Claimant underwent the MRI recommended by Dr. Healey. On October 31, 2013 Dr. Horan, who previously treated Claimant's right shoulder in 2006, reviewed the MRI and found "a little tendinitis in the rotator cuff and maybe *a little irritation of the anterior labrum*, but these are minor." (emphasis supplied). While Dr. Horan's findings do not provide strong support for Dr. Healy's relatedness opinion, they do note irritation of the labrum.

34. Claimant returned to Dr. Horan on December 12, 2014 and received an injection of Kenalog into her right shoulder joint. Claimant received a second injection at a later date. Claimant testified that the injections provided her with pain relief and greater mobility. The ALJ finds that Claimant's improvement with injections supports Dr. Healy's opinion that her shoulder was not at MMI.

35. Prior to hearing, the parties deposed Dr. Raschbacher who described the difference between his speculation about Dr. Healy's opinion concerning aggravation of a labral tear and the actual MRI finding which showed mild tendonitis with chondromalacia of the humeral head. On cross-examination and in contrast to Dr. Horan's note mentioning irritation of the anterior labrum, Dr. Raschbacher stated that the MRI did not show labral pathology. Dr. Raschbacher opined Claimant's diagnosed right shoulder tendonitis was not related to her work injury of November 2012 or the physical therapy after her surgery.

36. Dr. Raschbacher testified by deposition that chondromalacia, defined by Meriam-Webster's Medical Desk Dictionary, revised edition, as "abnormal softness of cartilage" is "essentially an arthritis" which commonly becomes symptomatic idiopathically, and was not caused by any specific action of the Claimant. However, Dr. Raschbacher did not explain why the idiopathic onset of chondromalacia was more likely to have occurred than the aggravation of a prior shoulder condition, especially in light of Claimant's continued and specific complaints of pain with activity and the onset of such pain occurring during physical therapy which involved shoulder exercises.

37. In addition, the record supports an inference that Dr. Raschbacher was not familiar with the exercises Claimant was required to do during physical therapy. For example, when asked the basis for his opinion that physical therapy had not caused significant intrinsic anatomic pathology, he responded, "I imagine that it would be based primarily on some knowledge of what people do for rehabilitation…" This response is both speculative and not tied to Claimant's case. Dr. Raschbacher further testified that he was unsure who had ordered the physical therapy. When asked if he was aware of what physical therapy Claimant was undergoing, he responded, "Well, the basic therapy would be as stated in the therapy goals – decreased pain, increased motion, increased strength." Again, his answer was not specific as to Claimant's therapy, and did not indicate that Dr. Raschbacher was at all familiar with Claimant's actual exercises and therapy.

38. In Dr. Raschbacher's opinion, the MRI ordered by Dr. Healey does not support his diagnosis and conclusion that Claimant's right shoulder pain was related to her work-related injury or therapy. Both Dr. Horan, who interpreted the MRI, and Dr. Raschbacher who explained Dr. Horan's findings contradict Dr. Healey's DIME opinion.

39. Because the ALJ has found Dr. Healy's opinions to be supported by the greater weight of evidence, and that Dr. Raschbacher's opinions were less persuasive and motivated by his desire to not expand Claimant's claim, the ALJ further finds that Dr. Raschbacher's and Dr. Horan's opinions constitute only a disagreement of opinion and do not rise to the level of clear and convincing evidence of an error in Dr. Healy's

conclusions and opinions. The ALJ finds Claimant's shoulder injury is related to her industrial injury of November 28, 2012

40. Dr. Healy only partially related Claimant's depression to her continuing right shoulder pain, also attributing it to Claimant's inability to sleep, and other psychosocial factors relating to the loss of her job. Therefore, his opinion concerning the causal relatedness of the depression to the work-injury of November 28, 2012, is not rebutted by the opinions of Dr. Horan and Dr. Raschbacher.

41. Subsequent to the DIME opinion of Dr. Healey, Claimant was referred to Dr. Jeffrey Cutler for evaluation and treatment of her swallowing difficulties. Dr. Cutler performed a pharyngoscopy and diagnosed Claimant with both dysphagia and globus. Dr. Culter then referred Claimant for a barium swallow, speech therapy, and a follow up appointment after speech therapy.

42. At the hearing, Claimant testified about her complaints of right shoulder pain and how it began during physical therapy. She testified credibly that although she raised the issue on numerous occasions with Dr. Raschbacher, he was not open to the idea that her right shoulder complaints could possibly be related to her work injury or her rehabilitative therapy. Claimant also testified about her depression and difficulty swallowing, her treatments post DIME, and the relief they had provided.

43. None of the physical therapy notes admitted into evidence indicate what exercises or therapy Claimant performed during her PT appointments.

44. Clamant is entitled to TTD from February 28, 2014, ongoing, payable at the rate of $848.82 per week.

## CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. 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. A Workers'' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

Section 8-42-107(8), C.R.S., provides that the determination of MMI and impairment by a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Because both determinations inherently require the DIME to assess whether a claimant's medical condition is related to an industrial injury, the DIME's opinion on causation is binding unless overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office*, 55 F.3d 186 (Colo. App. 2002). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The ALJ has found that the opinions of Dr. Horan and Dr. Raschbacher are less persuasive than those of Dr. Healy. The mere difference of opinion between the physicians fails to constitute error. The difference between their opinions does constitute clear and convincing evidence that Claimant's right shoulder complaints are not causally related to this claim or the treatment which Claimant received in recovering from her cervical surgery.

Because the ALJ finds and concludes that Claimant's shoulder injury is related to her claim, Respondents' argument that her depression is caused by her unrelated shoulder claim fails. Additionally, as found, Dr. Healy only partially related Claimant's depression to her continuing right shoulder pain, also attributing it to Claimant's inability to sleep, and other psychosocial factors relating to the loss of her job. Therefore, his opinion concerning the causal relatedness of the depression to the work-injury of November 28, 2012, is not rebutted by the opinions of Dr. Horan and Dr. Raschbacher.

DIME physician Dr. Healey's opinion states that Claimant's difficulty swallowing is causally related to her industrial injury. No persuasive evidence was offered to overcome this opinion.

To obtain TTD benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. §8-42-1 03(1)(a), C.R.S. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, which she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements:

(1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when she has a complete inability to work or there are restrictions that impair her ability to effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A respondent's liability for TTD benefits ceases on the date when the claimant has attained MMI. §8-42-1 05(3)(a), C.R.S.

In this case, Respondents have not overcome the DIME opinion concerning the causal relatedness of Claimant's right shoulder pain, depression, and difficulties swallowing. Claimant has not been placed at and is entitled to TTD benefits from February 28, 2014, ongoing, payable at the rate of $848.82 per week.

## ORDER

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

1. Respondents have failed to overcome by clear and convincing evidence the DIME's opinion that Claimant is not at MMI.

2. Claimant is not at MMI and continues under disability. She is entitled to TTD benefits commencing February 28, 2014, ongoing, at the rate of $848.82 per week, ongoing, until terminated by statute.

3. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All other issues are reserved.

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

DATED: February 2, 2015

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-912-371-01**

## ISSUE

1. Whether Claimant has proven by a preponderance of the evidence that he is permanently totally disabled?

## FINDINGS OF FACT

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

1. The Claimant has an 11th grade formal education, but has obtained his G.E.D.

2. Prior to working for Respondent-Employer, the Claimant's work experience included work as a manager at an Elk's lodge, where he placed orders for the lodge, scheduled the bartending staff, ran the cash register, worked as a bartender, and cooked occasionally. He also had his own body shop, where he did auto body work and administrative work, such as estimates, final billing and deposits. The Claimant also has experience as an estimator at an auto body shop, where he would look at vehicles and estimate the damages and costs to repair.

3. The Claimant sustained an admitted workers' compensation injury on February 25, 2013 when he fell off a ladder while he was employed as an HVAC technician for the Respondent-Employer. The Claimant's job duties required him to climb ladders, run wire and pipe, and put in switches.

4. The Claimant began treating with Concentra, the authorized treating provider, on February 26, 2013 and was diagnosed with multiple rib fractures, pneumothorax, and chest wall/back contusion (Respondents' Exhibit D, pgs. 166 & 157).

5. Dr. Robert Nystrom, of Concentra, referred the Claimant to Dr. Kathy McCranie for a physiatric evaluation and pain management.

6. As part of his treatment, the Claimant received physical therapy, injections, and a psychological evaluation. The physical therapy reports indicate the Claimant was able to lift 45 lbs. from July 23, 2013 through September 18, 2013 (Respondent's Exhibit I, pgs. 214-235).

7. The Claimant explained he was able to perform in physical therapy because he was taking "lots of Percocet" which allowed him to do more than normal.

8. On January 10, 2014 the Claimant was referred to Dr. Albert Hattem, a delayed recovery specialist at Concentra (Respondents' Exhibit D, pgs. 103-106). Dr. Hattem examined the Claimant on February 17, 2014 and agreed with Dr. McCranie that the Claimant was approaching maximum medical improvement (MMI). The Claimant was to follow-up with Dr. McCranie for an impairment rating. Dr. Hattem did not believe that a Functional Capacity Evaluation (FCE) was needed (Respondents' Exhibit E, pg. 173).

9. Dr. McCranie placed the Claimant at MMI on March 3, 2014 and provided him with a 5% whole person rating for his thoracic spine. It was noted that his rib fractures had healed and the pneumothorax had resolved. She noted that the Claimant indicated his goal was to retire and not return to work. Dr. McCranie further noted that the Claimant was lifting up to 45 lbs. in physical therapy and did not believe that an FCE was necessary. Dr. McCranie referred the Claimant to Dr. Hattem for final discharge and to assign any permanent work restrictions (See Respondents' Exhibit C, pgs. 038-041).

10. On March 24, 2014, the Claimant returned to Dr. Hattem for a final evaluation. Dr. Hattem noted that the Claimant continued to complain of mid back pain, and that the Claimant wanted him to document that he had left hip discomfort, as well as, bilateral ulnar digit numbness. The Claimant also reported to Dr. Hattem that he was unable to lift more than 30 lbs. without experiencing mid back pain. Dr. Hattem agreed with Dr. McCranie's impairment rating and provided the Claimant with permanent work restrictions of 30 lbs. lifting limit (Respondents' Exhibit E, pgs. 169-173).

11. The Claimant attended a Division Independent Medical Examination (Division IME) on July 17, 2014 with Dr. Linda Mitchell. Dr. Mitchell was asked to evaluate the Claimant's multiple rib fractures, collapsed lung, left hip, left shoulder, and middle back (Respondents' Exhibit B, pg. 013). Dr. Mitchell noted the Claimant's current complaints as back pain, hip pain, numbness and tingling in his arms, mid back pain that radiated up to his neck and gave him headaches and radiated down the back of his legs to his knees (Respondents' Exhibit B, pg. 019).

12. Dr. Mitchell agreed that the Claimant reached MMI on March 3, 2014. She opined that the Claimant's hip pain, low back pain, upper extremity numbness, tingling and weakness, and lower extremity tingling were not attributable to the work injury. Dr. Mitchell provided the Claimant with an 8% whole person impairment rating for his thoracic spine and opined that the Claimant was capable of working a medium category job (25 lbs. of force frequently and 50 lbs. of force occasionally for lifting, carrying, pushing, or pulling), but that he should avoid frequent bending or twisting of the thoracic region (Respondents' Exhibit B, pgs. 012-022).

13. Dr. McCranie, accepted by the ALJ as an expert in physiatry, physical medicine and rehabilitation, and pain medicine who is Level II Accredited, testified that the Claimant was referred to her from Concentra for pain medication management and to start him in a rehabilitation program when appropriate. She stated that she agrees

with the Division IME that the Claimant's hip issues, cervical issues, upper extremity symptoms and lower extremity symptoms were not related or attributable to the Claimant's work injury. Dr. McCranie testified that she only attributed the rib fractures, pneumothorax, and thoracic strain to the work injury. As the rib fractures and pneumothorax had fully resolved (the Claimant confirmed this resolution), she provided the Claimant with an impairment rating for his thoracic spine.

14. Dr. McCranie also testified that, contrary to the Claimant's contention, he was not on Percocet the entire time he was in physical therapy. She stated that the Claimant had discontinued Percocet five days prior to August 30, 2013, well before the physical therapy report of September 11, 2013 which showed the Claimant lifting up to 45 lbs. She further testified that she did not believe an FCE was necessary in the Claimant's case because she found they were only helpful for patients who are trying to prove they can go back to work. In the Claimant's case, he specifically told her he had no intention of going back to work, therefore she didn't believe an FCE was necessary and did not think it would show his true functional potential.

15. The Respondents filed a Final Admission of Liability based on Dr. Mitchell's report on August 8, 2014 (Respondents' Exhibit L).

16. The Claimant's counsel represented to this ALJ that the Claimant did not challenge the PPD, MMI and causation opinions of the Division IME. Therefore, the Division IME's opinions on these issues are binding.

17. The Claimant, of his own volition, had an FCE done during the first week of November 2014. The FCE results showed the Claimant had a 10 lb. infrequent lifting limit, could sit and stand 10-15 minutes at a time, and could walk 5-15 minutes at a time.

18. Additionally, the Claimant testified that he could not sit, stand or lay for long periods of time. He stated when sitting he tries to make it to a half an hour, but said he moves around a lot, and can't stay in one position. The Claimant testified that if he stands too long his hip bothers him and his back burns. He stated his injury has affected his ability to do his job because he can't squat, bend over, or lift the weight he was required to lift. He testified he was in pain every day and could not sleep at night, generally only getting 1-3 hours of sleep. He stated he was generally very uncomfortable and hurt, with some days being worse than others. He said when the pain was at its worst he experienced a burning, aching, and pinching sensation. The Claimant stated his pain was an average of 8 out of 10, almost every day and he had 6-7 "bad days" per week. He testified since his injury he avoids cleaning and stairs, and only goes shopping when he has to. The Claimant stated that his neighbor, his son and his daughter-in-law help him with the things he can't do.

19. The Claimant further testified that he lives in Thornton, has a working car and can drive, occasionally goes shopping, can carry light bags, and is capable of getting gas for his vehicle.

20. Louis C. Phillips was accepted as an expert in vocational rehabilitation counseling. Mr. Phillips completed a vocational evaluation on the Claimant's behalf on November 18, 2014. Mr. Phillips obtained an educational history and work history from the Claimant similar to the Claimant's testimony. Mr. Phillips testified that he identified a number of skills that the Claimant has acquired from his past employment that could transfer from one job to another. He relied primarily on the FCE results in his evaluation, because he stated the FCE was one of the best ways to determine what a person could do and contained built in tests to determine if the individual is putting forth full effort. He found the FCE results were consistent with the Claimant's report of his abilities. He also reviewed the medical records.

21. Mr. Phillips testified that the FCE placed the Claimant in the sub-sedentary category of work, which is less than the lowest level of work. This could indicate that the individual could not work at all. In his opinion, the Claimant should be considered permanently totally disabled, because based on the Claimant as a whole, he cannot return to work. The factors he considered were Claimant's age, his self-reported limitations, tested work tolerances through the FCE which show limitations on sitting, standing and walking, the Claimant's inability to return to any prior work. In his opinion, the Claimant was not able to utilize any transferable skill he has obtained and due to his physical condition was unlikely to be hired by anyone.

22. However, Mr. Phillips conceded that if the Claimant was able to work at a minimum of sedentary level he could be employable, if no other factors were considered. He acknowledged that the Claimant had previous sedentary work experience as an estimator. He also agreed that if Dr. Hattem's 30 lb. permanent lifting restriction was accurate that the Claimant would be able to work.

23. Katie G. Montoya was accepted as an expert in vocational rehabilitation and consulting. Ms. Montoya completed a vocational evaluation of the Claimant on behalf of Respondents on December 16, 2014. Ms. Montoya relied on the physical restrictions provided by the Claimant's treating providers, Dr. Hattem and Dr. McCranie, and the physical restrictions provided by the Division IME, Dr. Mitchell. She testified that none of these doctors placed sitting, standing or laying restrictions on Claimant. Ms. Montoya also did a transferable skills analysis and, similar to Mr. Phillips, found the Claimant had multiple transferable skills, including estimator skills, management, computer skills, and customer service. She agreed with Mr. Phillips that if any of the restrictions provided by the treating doctors were correct the Claimant would be employable. She based her opinion on the fact that even considering Dr. Hattem's 30 lb. permanent restrictions, which was the lowest the Claimant was provided from his treating providers or the Division IME, would put him in a light to medium work classification and approximately 90% of jobs were classified as medium or under. She testified that even unskilled workers could find activities they could perform in these work categories.

24. Ms. Montoya also agreed that even if the Claimant had sedentary work restrictions that he could return to work as he had experience as an estimator so could

return to some aspects of that work, and his customer service and other skills he has obtained through his previous employment would allow for sedentary work activities. She further testified that the Denver metro area's unemployment rate was low and she found several positions during a labor market sampling which would fall within a sedentary work classification that were consistent with the Claimant's background. She testified that the vocational opinions have been consistent that if the Claimant was found to have permanent restrictions of sedentary work or greater he would be employable.

25. The ALJ finds that the results of the Claimant's FCE are significantly at odds with the opinions of both Drs. McCranie and Hattem, the Claimant's treating physicians, and the Division IME. The physical therapy reports support that the Claimant can lift more than 10 lbs. Additionally, this ALJ observed the Claimant in the courtroom throughout the course of the hearing and found that, while he may appear to be in some discomfort, the Claimant can sit in excess of that noted in the FCE. Therefore, the ALJ is not persuaded by the Claimant's FCE results and does not find the FCE reliable.

26. The ALJ does not find Mr. Phillips' opinion that the Claimant is permanently totally disabled persuasive or credible. Mr. Phillips testified that he relied primarily on the FCE in formulating his opinion. As the ALJ find the results of the FCE do not accurately depict the Claimant's physical capabilities, Mr. Phillips' reliance on the FCE in his determination that the Claimant is unemployable is neither persuasive nor credible based on the finding that the FCE does not accurately reflect the Claimant's physical abilities and is therefore not reliable.

27. Both Mr. Phillips and Ms. Montoya opined that the Claimant had numerous transferable skills from his employment background. Additionally, Mr. Phillips and Ms. Montoya agreed that if any of the permanent work restrictions provided by the Claimant's treating providers, Drs. McCranie and Hattem, or the Division IME were correct then the Claimant would be employable. Furthermore, the testimony of the vocational rehabilitation experts indicate that even if the Claimant had sedentary restrictions he would be employable. The ALJ finds the opinions of Drs. McCranie and Hattem, who were the Claimant's treating physicians for almost a year, regarding the Claimant's permanent restrictions to be more persuasive and accurate than the FCE. Drs. McCranie and Hattem's permanent restrictions place the Claimant's physical capabilities into the sedentary work category, and may very well put the Claimant into the light work category and possibly even into the lower medium category.

28. The Claimant is 58 years old, has experience in management of an Elk's lodge, auto body work, and owned his own auto body business, which included estimating damages and costs. The ALJ credits the testimony of Ms. Montoya that a number of the Claimant's transferable skills fall within the sedentary and light work categories. In fact, both vocational experts agree that there would be positions available for the Claimant within the sedentary category. Additionally, the ALJ finds the Claimant lives in Thornton, Colorado which is within the Denver metro area, which has a relatively low unemployment rate, as testified to by both Mr. Phillips and Ms. Montoya. The ALJ

further finds that there is an availability of work that the Claimant could perform within the commutable labor market.

29. The Claimant has failed to prove by a preponderance of the evidence that he is unable to earn wages in his same or other employment.

## 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).

### *Permanent Total Disability*

Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an "employee is unable to earn any wage in the same or other employment." When the statute was amended in 1991, it established a strict definition of permanent total disability. The intention of the amendments was to create a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently and totally disabled. *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo. App. 1997). A claimant must also establish that the industrial injury was a significant causative factor by showing a direct causal relationship between the industrial injury and the permanent

total disability. *Joslins Dry Goods Co. v. Indus. Claim App. Off.*, 21 P.3d 866 (Colo. App. 2001)*; Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App.1986).

It is the claimant's burden of proof to establish that he is permanently totally disabled by a preponderance of the evidence. The question of whether claimant has the ability to earn any wages is one of fact for resolution by the administrative law judge. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 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. It is not necessary that the claimant be able to return to previous employment. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for the purpose of the statute. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). Although, if the evidence establishes that a claimant is not physically able to sustain post-injury employment, or that such employment is unlikely to become available to a claimant in the future in light of particular circumstances, an ALJ is not required to find a claimant is capable of earning wages. *Joslins,* supra; *Holly Nursing Care Center v. Industrial Claim Appeals Office, 992 P.2d 701, (Colo. App. 1999).*

The determination of whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant. In determining whether a claimant is permanently totally disabled, the ALJ may consider various "human factors" such as mental capabilities, physical ability, education, vocational training, overall physical condition, former employment, and availability of work a claimant can perform within a commutable labor market. The overall objective is to determine whether employment exists that is reasonably available to a claimant under her particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999).

In the present case, the Claimant is 58 years old, has numerous skills from his experience in management of an Elk's lodge, auto body work, his own auto body business, which included estimating damages and costs. The ALJ credits the persuasive testimony of Ms. Montoya that a number of the Claimant's transferable skills fall within the sedentary and light work categories. In fact, both vocational experts agree that there would be positions available for the Claimant within the sedentary category. Additionally, the Claimant lives in Thornton, Colorado which is within the Denver metro area, which has a relatively low unemployment rate, as testified to by both Mr. Phillips and Ms. Montoya. Therefore, the evidence proves there is an availability of work that the Claimant could perform within the commutable labor market.

Moreover, the medical restrictions from the treating doctors and Division IME all place claimant in at least the light to medium category of work. Dr. Hattem indicated that the Claimant could lift up to 30 pounds, Dr. McCranie provided a 45 pound restriction and the Division IME had that lifting up to 50 pounds may be permissible.

The FCE that the Claimant had performed lacks credibility and does not accurately describe the Claimant's physical abilities. The Claimant has the ability to perform even sedentary work based on his transferrable skills and this ALJ finds the Claimant has the physical ability to perform medium duty work based on the opinions from the medical doctors on this case. As a result, the Claimant has failed to prove that he is permanently and totally disabled.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

1. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

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: February 23, 2015

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

## ISSUE

Whether Claimant's 8% scheduled impairment rating for his left shoulder injury incurred on February 28, 2013 should be compensated as a whole person pursuant to § 8-42-107(8)(d), C.R.S., or remain a scheduled rating.

## STIPULATIONS

1. The parties stipulated that there is no permanent impairment for the left elbow in relation to this claim.

2. The parties stipulated that the upper extremity 8%, or 5% whole person rating, given by Dr. Shih for Claimant's left shoulder injury is not challenged. However, the parties disagree over whether this injury should be compensated as a whole person.

## FINDINGS OF FACT

1. Claimant is a 58 year-old man who has been a tractor trailer driver for UPS for approximately 27 years. Most of his job involves breaking down freight. Additionally, he drives, loads and unloads the truck, and attaches and detaches the trailer.

2. On February 28, 2013, Claimant was at work and was having difficulty with a frozen fifth wheel hitch. He was pulling it toward himself with his left, dominant side, when he felt a pop and deep pain in his left shoulder blade.

3. Claimant reported his injury to Employer, and on March 1, 2013 he underwent initial treatment with authorized treatment provider Dr. Jonathan Bloch, D.O., at Concentra Medical Center.

4. On March 11, 2013, Claimant underwent a left shoulder MRI, which found a partial thickness tear of the anterior joint of the left shoulder, mild tendinosis and a type II acromion.

5. On March 21, 2013, Claimant saw Dr. Mark S. Failinger, M.D., a board certified orthopedic surgeon, for evaluation. After seeing Dr. Failinger, Claimant underwent a regimen of conservative therapy and steroid injections.

6. During a follow-up visit on August 1, 2013, Claimant indicated significant improvement as the result of a July 11, 2013 injection. Dr. Failinger wrote that the injection was "in some ways, miraculous for him." Dr. Failinger also noted that

Claimant's range of motion was improved, and that treatment at that time was largely just for pain.

7. Claimant's injections gave him some relief; however, he continued to be symptomatic and therefore, on October 22, 2013, Claimant underwent surgery with Dr. Failinger. Dr. Failinger performed a left shoulder examination under anesthesia, an arthroscopic debridement and subacromial decompression of the left shoulder, and left shoulder manipulation under anesthesia. Dr. Failinger stated that Claimant had "left shoulder glenoid degenerative joint disease with grade 4 chondromalacia in the superior and posterior head."

8. Claimant saw Dr. Bloch on February 17, 2014, after which Dr. Bloch wrote "history of present illness: pain is with overactivity, a tolerable dull ache located at left shoulder. Patient has had physical therapy and feels better. Patient has been taking their [sic] medications and has noted improvement."

9. Claimant pointed to his entire shoulder to over his back when he was telling Dr. Bloch where his pain was located.

10. On March 10, 2014, Dr. Bloch released Claimant to full work duty with no restrictions.

11. On April 9, 2014, Dr. Bloch placed Claimant at MMI, with an impairment rating of 8% on Claimant's left shoulder, which he converted to a 5% whole person impairment.

12. In April of 2014 Claimant went back to work at UPS, where he still works.

13. On July 8, 2014, Claimant saw Dr. Eric Ridings, M.D., for an Independent Medical Exam. Dr. Ridings opined that, as a result of the February 28, 2013 work injury, Claimant sustained a partial-thickness rotator cuff tear and an aggravation of significant preexisting left shoulder adhesive capsulitis.

14. Dr. Ridings agreed with the MMI date of April 9, 2014.

15. On July 15, 2014, Claimant underwent a DIME with Dr. Franklin Shih, M.D. Dr. Shih found that the Claimant was at MMI on April 9, 2014 and accorded him an 8% upper extremity rating which he converted to a 5% whole person.

16. Dr. Shih performed a physical examination and found, among other things, that Claimant had suffered loss of range of motion with diffuse discomfort around the shoulder girdle anteriorly over the rotator cuff and along the bicep tendon.

17. On July 24, 2014, Respondents filed an Amended Final Admission of Liability ("FAL") admitting for an 8% scheduled impairment rating of the upper extremity.

18. Claimant timely filed an Application for Hearing seeking to have his impairment compensated as a whole person.

19. At hearing, Claimant credibly testified, and it is found as fact, that the work injury of February 28, 2013 has caused him the following ongoing and current difficulties:

a. He is left hand dominant. Prior to his injury, Claimant used his left shoulder to carry things; he currently cannot carry objects on his left shoulder.

b. He sleeps on his side, and because of pain from his injury, he wakes up to roll over on average two times per night.

c. Claimant has difficulty using his left shoulder to lift objects above his head.

d. Claimant has to pull a garage-type door up and down as part of his job and he is unable to do that in the same way in which he was able to prior to his injury. Now, to open the door he has to use a 16 inch long strap that he holds onto to pull the door up. He ties a rope onto the door to close it. He cannot use his left shoulder to pull the door down like he used to.

e. Part of Claimant's job involves stacking pallets, which requires him to reach over his head, which causes pain.

f. Claimant has difficulties steering and viewing vehicles when he is driving the UPS tractor trailer. UPS drivers abide by the "Smith System" when driving, in which they scan their mirrors every five to eight seconds. Claimant's tractor trailer has four mirrors that he scans. He begins driving at 4:00 A.M., and by 10:00 or 11:00 A.M. he has to move his entire upper body instead of just his head in order to scan the mirrors due to his left shoulder pain.

20. Using a pain diagram, Claimant indicated that he experienced numbness, burning, and aching in his posterior left shoulder, and numbness, burning, the feeling of pins and needles, and aching in the anterior of his left shoulder.

21. Dr. Ronald J. Swarsen, M.D. is Level II accredited and was admitted as an expert in occupational medicine at hearing. Dr. Swarsen had not performed a physical examination of Claimant but did review his medical records. Dr. Swarsen testified on behalf of Claimant.

22. Using an anatomical diagram, Dr. Swarsen credibly testified, and it is found as fact, that all of Claimant's pathology and treatment in connection with his work

injury was to the left shoulder, and not to the left arm. He further credibly testified, and it is found as fact, that the situs of Claimant's functional impairment was at his shoulder.

23. Dr. Swarsen testified, and it is found as fact, that the areas impacting Claimant's function were part of the shoulder girdle, which is located above the glenohumeral head of the left arm.

24. Dr. Swarsen opined to a reasonable degree of medical certainty that Claimant's impairment should be converted to a whole person.

25. Dr. Ridings is Level II accredited, and was admitted as an expert in physical medicine and rehabilitation at hearing. He testified on behalf of Respondents.

26. Dr. Ridings testified that loss of ability to sleep is not ratable as a permanent impairment under the AMA Guides.

27. Dr. Ridings also testified that reaching overhead and the ability to carry objects on the shoulder are activities which primarily involve the arm. He testified that the July 11, 2013 steroid injection that Claimant received was diagnostic in nature, and that Claimant's subsequent temporary relief and improvement indicated his symptomatology was derived from anatomical areas proximal to the function of the arm.

28. Dr. Ridings testified that the shoulder serves to support the functions of the arm and operates as part of the upper extremity. He further testified that Claimant had significant degenerative arthritis of the left shoulder contributing to his ongoing symptoms which would not be expected to have resulted from the work-related mechanism of injury involved in this claim. Dr. Ridings was ultimately of the opinion that Claimant's permanent functional impairment pertained only to limited range of motion of the shoulder, which primarily impacts the use of Claimant's arm.

29. Dr. Ridings also testified that there was strong indication that situs of injury was Claimant's shoulder joint.

30. Dr. Ridings testified that Claimant's injury, according to the AMA Guides, was to his upper extremity, and that no permanent impairment was warranted because the situs of injury was at the joint. He testified that his opinions were to a reasonable degree of medical certainty.

31. On cross-examination, Dr. Ridings testified that the pathology was to Claimant's left shoulder, all of his treatments were to his left shoulder, and that Claimant's functional loss was to his left shoulder.

32. However, while Dr. Ridings was ultimately of the opinion that Claimant's permanent functional impairment pertained only to limited range of motion of his

shoulder, he opined that that impairment primarily impacted the use of Claimant's arm, which is on the schedule of permanent impairment.

## CONCLUSIONS OF LAW

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

1. 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).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275; 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

3. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

4. Pain and discomfort which limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *See Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996).

5. Here, the issue to be determined is whether Claimant's injury resulted in a "loss of an arm at the shoulder" or whether Claimant has proven that the situs of his functional impairment extends beyond the "arm at the shoulder."

6. Claimant has met his burden of proof that the situs of his functional impairment extends beyond the arm at the shoulder. Claimant credibly testified that there are many things he cannot do because of pain in his left shoulder that he used to be able to do, such as carrying things on top of his left shoulder, using his left shoulder

to help him lift objects over his head, using his left shoulder to pull a garage-type door, and having to turn his entire body to scan his mirror while driving. These difficulties are all due to pain in Claimant's shoulder, not in his arm. Both Respondents' and Claimant's medical experts testified that Claimant's pathology was to his left shoulder, his treatments were to his left shoulder, and that Claimant's functional loss was to his left shoulder. There was no testimony or evidence that Claimant's pathology or treatments were to his left arm.

7. The ALJ does not find persuasive Dr. Ridings' opinion that Claimant's permanent functional impairment primarily impacted the use of his arm, thus making his injury scheduled. The persuasive and credible evidence pointed to the fact that Claimant's permanent functional impairment was to his shoulder. The fact that the shoulder joint affects arm mobility, or that the arm and shoulder's functions may be to some degree intertwined, does not mean Claimant sustained only a "loss of arm at the shoulder." Claimant has ongoing functional impairment of his left shoulder which causes the problems stated in paragraph 6 above, all involving his shoulder much more than his arm, which the ALJ concludes makes Claimant's injury beyond his "arm at the shoulder." Accordingly, Claimant's impairment is not on the schedule of permanent impairment and he is entitled to a rating for the whole person at 5% based on the impairment rating assessed by Dr. Shih.

## ORDER

1. Claimant has sustained a functional impairment of 5% of the whole person for his left shoulder injury incurred on February 28, 2013. Medical impairment benefits shall be calculated under § 8-42-107(8)(d), C.R.S., based upon a 5% whole person rating.

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

DATED: February 19, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within

twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

## ISSUES

The issues to be determined herein are:

1. Compensability;

2. Medical benefits; and,

3. A contest to the denial of authorization for surgery.

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

## FINDINGS OF FACT

1. The claimant testified that while working his regular job he began to notice a problem with pain in his arm. The pain was keeping the claimant up at night.

2. The claimant saw a Nurse Practitioner who recommended the claimant see Dr. Idler, a hand specialist.

3. The claimant was seen by Dr. Idler who referred the claimant to Dr. Leppard for an EMG diagnostic study. The claimant was assessed with a severe left carpal tunnel syndrome.

4. Once the claimant had been diagnosed he believed that the condition must be work related because he did not think he engaged in any specific activities outside of work.

5. The claimant testified that he does a lot of lifting, moving, and holding with his left arm when engaged in his work activities. The claimant works 40-hours per week.

6. The claimant was seen by the respondent-employer's workers' compensation doctor and a work-site evaluation was conducted by a Ms. Porter.

7. The claimant took the results to the doctor.

8. The claim was ultimately denied by the respondent-insurer.

9. The claimant is a 54-year old man who began working for the respondent-employer in 2012.

10. The claimant's duties involve working with extruded aluminum products. The claimant's is in the position of Head Stretcher. He is involved in the stretching and cutting of the extruded aluminum to ensure it meets required specifications. Once the product is cut it is moved to a table. The claimant uses his right arm to engage and disengage the product from the stretching machine; his left arm is used to maneuver the product.

11. The claimant does play golf on a regular basis. He regularly plays a round of golf on Fridays. When golfing the claimant does use his left wrist. He did not think that golf was the cause of his condition and therefore did not report that activity to the doctors.

12. Once the claimant's ENG results were in Dr. Jones had concerns that the results of the EMG did not correspond to the claimant's symptoms.

13. The claimant indicated that his duties do not require him to bend his wrist up and down. Additionally, his elbow is not bent a lot.

14. Dr. Jonathan Sollender conducted an independent medical evaluation og the claimant and issued a report dated June 26, 2013. Dr. Sollender reviewed the medical records as well as the results of the work place evaluation and examined the claimant.

15. Dr. Sollender also spoke directly with Ms. Porter the author of the work place evaluation.

16. Dr. Sollender opined that the work place evaluation was flawed in several respects and did not accurately assess the conditions under which the claimant was working.

17. Dr. Sollender opined that the cliamant's work conditions did not meet the Medical Treatment Guidelines for Cumulative Trauma to establish causality.

18. Dr. Sollender opined that the claimant's left arm condition was not caused by hie employment duties.

19. The ALJ finds that Dr. Sollender's opinions are credible and persuasive and entitled to great weight.

20. There is no medical evidence definitively opining that the claimant's condition is work related.

21. The ALJ finds that the claimant has failed to establish that it is more likely than not that his condition arose 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). 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). 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).

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. An "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.

7. Under this statute the claimant bears the burden to prove that the disease was "directly and proximately caused" by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. The ALJ concludes that Dr. Sollender's opinions are credible and entitled to great weight.

9. As found above, the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury or occupational disease arising out of and in the course of his employment on or about April 15, 2013.

## 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: February 11, 2015

/s/ original signed by:

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

## ISSUES

- Whether Claimant's right shoulder injury resulted in functional impairment beyond that found in the schedule of impairments under § 8-42-107(2)(a), C.R.S., or whether Claimant's impairment is limited to his right upper extremity.

- Whether Respondent has overcome the DIME opinion by clear and convincing evidence.

## STIPULATION

At hearing the parties stipulated that Respondent will pay $899.62 for temporary disability benefits for the period between July 18, 2013 and July 28, 2013, inclusive. The stipulation resolves the issue of temporary disability benefits that Claimant endorsed for hearing.

## FINDINGS OF FACT

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

1. Claimant is 49 years old and his date of birth is May 31, 1965. He has worked for Employer for approximately eighteen years. He works full-time in maintenance at a vehicle repair facility.

2. Claimant sustained an admitted compensable injury to his right shoulder on April 18, 2013. He initially received medical treatment at Concentra with Dr. Kirk Holmboe.

3. After being seen at Concentra, Claimant was referred for an MRI which took place on May 6, 2013. The MRI found that the Claimant had numerous problems impacting his right shoulder, i.e., tendinopathy of the supraspinatus, infraspinatus and subscapularis tendons, a large full-thickness tear of the distal fibers of the supraspinatus and infraspinatus tendons (rotator cuff tear), high grade partial-thickness articular surface tear of the distal fibers of the subscapularis tendon, tendinopathy and partial tearing of the long head of the biceps tendon, mild concave under surface type II acromion with mild anterior down sloping.

4. Claimant was eventually referred to Dr. Michael Hewitt, an orthopedist, who first evaluated Claimant on May 20, 2013. On June 4, 2013, Claimant underwent the following surgical procedures with Dr. Hewitt: right shoulder arthroscopic rotator cuff

repair, arthroscopic subacromial decompression, distal clavicle co-planing, superior labral debridement, and right shoulder manipulation. Dr. Hewitt discharged Claimant with instructions to return in a week for a wound check and begin formal physical therapy.

5. After the surgery, Claimant's medical treatment was managed by Dr. Holmboe and Claimant participated in physical therapy. Claimant also saw Dr. Hewitt on occasion.

6. On November 14, 2013, Claimant returned to Concentra and saw Dr. Steve Danahey. Prior to November 14, 2013, Dr. Danahey had not treated Claimant. Dr. Danahey determined that Claimant reached maximum medical improvement ("MMI") on November 14, 2013. He noted that Claimant had mild motion limitations with respect to the right shoulder and rated 2% for flexion, 1% for extension, 0% for adduction, and 1% for abduction. Internal rotation was measured and rated at 1% and external rotation was measured and rated at 0%. Dr. Danahey determined a 5% upper extremity impairment rating, and he noted that if applicable, it may be converted to a 3% whole person impairment from Table 3.

7. Dr. Danahey noted that Claimant was comfortable working on his exercises at home and had already returned to his regular duty job without any problems. He documented that Claimant reported that overhead repetitive motion bothers him and reaching behind him is problematic. Dr. Danahey noted that Claimant was aware that he may have orthopedic follow-up with Dr. Hewitt on a maintenance basis up to two times within the next year.

8. On December 4, 2013, Respondents filed a Final Admission of Liability consistent with Dr. Danahey's report. Claimant subsequently applied for a Division Independent Medical Examination ("DIME").

9. The DIME occurred on February 27, 2014, which Dr. Ronald J. Swarsen performed. He agreed with the authorized treating physician that Claimant reached MMI on November 14, 2013 with respect to his right shoulder. Dr. Swarsen's report demonstrates his proper use of the AMA *Guides* and appropriate methods of measuring range of motion. He concluded Claimant had range of motion deficits in his right shoulder in flexion, extension, abduction, adduction, and internal/external rotation that resulted in a 12% upper extremity impairment rating which he converted to a 7% whole person rating. He noted that apportionment was not applicable.

10. Dr. Swarsen's report reflects that Claimant reported that he can lift his arm, but has trouble with overhead work and a lot of difficulty with internal rotation and reaching behind his back. Claimant reported off and on pain at night when he sleeps on the shoulder and he awakens with marked stiffness; he stated that his pain was usually around 4/10 (with 1 being almost not noticeable) and Claimant stated that at its worst, his pain is an 8/10. Claimant expressed concern that his main treating physician, Dr. Holmboe was not the physician who did his impairment rating.

11. In his report, Dr. Swarsen opined that the differences between his ratings and Dr. Danahey's ratings were due to discontinuation of formal physical therapy rehabilitation or the possible development of adhesive capsulitis. He recommended a more directed maintenance program.

12. Claimant returned to Dr. Danahey on June 3, 2014 for a maintenance evaluation at Dr. Danahey's suggestion. Claimant reported that he is doing very well and that everything is good and work is not aggravating his shoulder. Claimant did note that he has trouble shooting 3-pointers in basketball and had trouble reaching back.

13. Following Dr. Swarsen's DIME and report, Respondent requested an Independent Medical Examination ("IME") and it was performed by Dr. John S. Hughes. He examined Claimant on July 16, 2014 and agreed that Claimant reached maximum medical improvement on November 14, 2013. He noted that Claimant had Type II diabetes. He noted crepitation in both shoulders. He determined that Claimant had range of motion deficits in internal and external rotation, flexions and extension, and abduction and adduction. These deficits amounted to a 7% impairment of the right upper extremity. Dr. Hughes characterized Dr. Swarsen's 12% impairment rating as an "outlier."

14. Dr. Hughes also noted that Claimant had full strength to manual testing in both arms. He noted that other upper extremity joint examinations were normal. Claimant had a slight decrease in left lateral flexion and rotation of the head and neck but no symptoms and no palpable right-sided trapezius hypertonicity. Claimant told Dr. Hughes that he had no symptoms of pain but had difficulty with activities that required internal rotation of the right arm at the shoulder. Claimant had no restrictions on any occupational activities.

15. At hearing, Dr. Hughes testified as an expert in occupational medicine who is fully Level-II accredited. He testified about the location of the pathology in Claimant's shoulder and generally described the procedures that were performed. He explained that Claimant might have adhesive capsulitis and that people with diabetes are more likely to have this problem.

16. Dr. Hughes testified that the April 18, 2013 injury did not cause functional impairment above Claimant' arm. Rather, that injury has caused small limitations on right arm range of motion, but did not functionally impair any structures above the arm.

17. Dr. Hughes discussed that Claimant has undergone considerable physical therapy and has had a good post-surgical recovery from the industrial injury.

18. The record contains documentation from twenty-four physical therapy sessions, beginning in June 2013 and ending in September 2013, although it appears that Claimant may have had additional physical therapy sessions after October 8, 2013. During Claimant's twenty-four physical therapy sessions, he frequently reported pain in his right shoulder when sleeping and with internal rotation activities.

19. Claimant's right shoulder concerns seemed to improve with regular physical therapy, but he still had some limitations on internal rotation when he returned to Dr. Holmboe on October 8, 2013.

20. At hearing Claimant testified that he has functional loss in the area of his right shoulder and that he suffers both pain and dysfunction when performing various activities at work, including overhead work when he is changing valets or repairing hoses. He also testified that he has problems sleeping on his right side. He stated that when he sleeps on his right side he wakes up with pain in the area between his shoulder joint and the base of his neck. He is also limited in carrying objects on his right shoulder; and avoids using his right shoulder, relying extensively on his left shoulder to perform this activity.

21. Although Claimant's testimony may seem contradictory in reference to statements made to Dr. Hewitt on August 26, 2013 and October 7, 2013, and his statement to Dr. Hughes on July 16, 2014, and finally his statement to Dr. Danahey on June 3, 2014, all regarding shoulder pain or the lack thereof and sleep issues; the ALJ finds that Claimant's testimony is not inconsistent with the medical records and on and off complaints regarding his right shoulder. Hi testimony is not in conflict with his statements to Dr. Swarsen on February 27, 2014.

22. On February 27, 2014 Claimant reported to Dr. Swarsen that he can lift his arm, but has trouble with overhead work and a lot of difficulty with internal rotation and reaching behind his back for dressing and for hygiene. He reported that he cannot shoot overhead in basketball the way he used to. Claimant also reported that he has off and on pain at night when he sleeps on his right shoulder and then awakens with marked stiffness. Finally, Claimant reported to Dr. Swarsen that he returned to full duty work and was doing well with it but does have some trouble with sustained resisted activity with the right upper extremity and overhead work, but is accommodating himself reasonably well. The ALJ reconciles the differing statements by recognizing and finding that Claimant has had off and on pain with sleeping at night and that his pain waxes and wanes with certain activities, including work activities and whether he is doing his regular job duties.

23. At hearing, Dr. Swarsen testified as an expert in occupational medicine who is fully Level-II accredited. He testified that Claimant's injury was to his right shoulder and that the Claimant's functional impairment was to that shoulder. He also testified that the Claimant's arm is not his shoulder and that the Claimant's right shoulder is functionally impaired. Thus, a whole person rating is warranted.

24. In response to Dr. Hughes' testimony that Claimant was not entitled to a whole person impairment because his functional impairment did not include loss to the neck or thoracic spine, Dr. Swarsen agreed that there was no loss to the neck or thoracic spine. However, Dr. Swarsen opined that there was loss to the shoulder girdle which is not the same as a loss to the arm. Thus, a whole person rating is appropriate.

25. Dr. Swarsen described the shoulder as the scaffolding upon which the arm operates and that the arm cannot function without the shoulder girdle. Further, he testified that the Claimant's functional impairment was to his right shoulder and that there was no evidence in the record of injury to the Claimant's right arm. The Judge finds this testimony persuasive.

26. Dr. Swarsen's opinion was that Claimant's testimony concerning the Claimant's functional loss was consistent with the nature of the Claimant's right shoulder pathology and surgical intervention. He agreed with Dr. Hughes concerning the anatomical location of the Claimant's problems. Dr. Hughes noted in his report that he agrees with the opinion that Claimant has impaired ranges of motion of his right shoulder.

27. Both Dr. Swarsen and Dr. Hughes agreed that there were no tonicity problems in the area of the Claimant's trapezius. Dr. Swarsen testified that this was not inconsistent with the fact that the Claimant suffers functional loss when attempting to use his right shoulder girdle for lifting and carrying objects or sleeping on his right side.

28. Dr. Hughes' disagreement with Dr. Swarsen's findings and ratings does not constitute clear and convincing evidence that Dr. Swarsen is incorrect. The opinions and conclusions of Dr. Hughes regarding the situs of functional impairment and impairment rating are a difference of medical opinion only and are insufficient to overcome Dr. Swarsen's opinion and rating.

29. The ALJ finds that the report and testimony of Dr. Swarsen is more persuasive than the report and testimony of Dr. Hughes and that Dr. Swarsen obtained a valid impairment rating on February 27, 2014. The Judge is not convinced that Dr. Swarsen's impairment rating is an "outlier" or that his impairment rating is in error compared to the ratings of Dr. Hughes and Dr. Danahey. Both Drs. Hughes and Swarsen testified that with impairment ratings for range of motion deficits there are reasonable degrees of variance. Dr. Swarsen testified that things can be different on different days.

30. Based on the credible and persuasive testimony and report of Dr. Swarsen, and the credible testimony of Claimant, the ALJ finds that Claimant's right shoulder injury resulted in functional impairment beyond that found in the schedule of impairments under § 8-42-107(2)(a), C.R.S. Thus, Claimant's impairment is not limited to his right upper extremity. The situs of Claimant's functional impairment extends beyond the "arm at the shoulder."

31. Respondents have failed to overcome the DIME opinion regarding a whole person rating by clear and convincing evidence to show that it is highly probable that Dr. Swarsen is incorrect.

32. Claimant has suffered a 12% upper extremity impairment rating which is appropriately converted to a 7% whole person rating as a result of the April 18, 2013 industrial accident and resulting right shoulder injury.

33. At hearing, Claimant withdrew the issue of medical maintenance benefits.

## 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 worker's 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,* 592 P.2d 792, 800 (Colo. 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. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. Section 8-42-101(3.7) mandates that physicians rating injured workers' impairments follow the AMA *Guides*.

5. A DIME physician's findings concerning a claimant's whole person impairment rating are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. 2006; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002). Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert,* 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988). A party meets this burden only by demonstrating that the evidence contradicting the DIME is "unmistakable and free from

serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

7. 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 Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000). To overcome Dr. Swarsen's DIME opinion, Respondent was required to present clear and convincing evidence, i.e. evidence which is unmistakable and free from serious or substantial doubt. *De Leo v. Koltnow,* 613 P.2d 318 (Colo. 1980). Respondent has not met this burden through Dr. Hughes' testimony. Dr. Hughes did not demonstrate that Dr. Swarsen erred in his application of the AMA *Guides* and rating. Whether the physician properly applied the AMA *Guides* is a question of fact for the ALJ. *Metro Moving and Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, Dr. Swarsen's report demonstrates his proper use of the AMA *Guides* and appropriate methods of measuring range of motion. He concluded Claimant had range of motion deficits in his right shoulder in flexion, extension, abduction, adduction, and internal/external rotation.

8. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

9. The fact that the AMA *Guides* do not provide for a method to rate a particular condition as a whole person is not dispositive of whether the Claimant suffered compensable functional impairment not enumerated on the schedule of disabilities. Thus, the ALJ may find functional impairment not listed on the scheduled of disabilities. See *Cordova v. Industrial Claims Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

10. Where the Claimant suffers an injury not enumerated in section 8-42-107(2), C.R.S., the Claimant is entitled to whole person impairment benefits under section 8-42-107(8), C.R.S. In the context of section 8-42-107(1), C.R.S. the term "injury" refers to

the manifestation in a part or parts of the body which have been functionally impaired or disabled as a result of the industrial accident or injury. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *Martinez v. Albertsons*, W.C. # 4-692-947 (ICAO 6/30/08). The determination of the situs of the functional impairment is one of fact and is distinct from the Claimant's medical impairment rating. As a matter of law, upper extremity impairment ratings contained in the AMA *Guides* may, or may not, be consistent with the scheduled injury ratings contained in section 8-42-107(2), C.R.S. *See Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996).

11. Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Functional impairment need not take any particular form. Accordingly, discomfort which interferes with the Claimant's ability to use a portion of the body may be considered "impairment". *Mader v, Popejoy Construction Co., Inc.* W.C. No. 4-198-489 (ICAO 8/9/96). 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).

12. Here, Claimant has functional loss to his right shoulder, and the use of Claimant's right shoulder is impaired. Claimant suffers both pain and dysfunction when performing various activities at work, including overhead work when he is changing valets or repairing hoses. Claimant has problems sleeping on his right side. When he sleeps on his right side he wakes up with pain in the area between his shoulder joint and the base of his neck. He is also limited in carrying objects on his right shoulder; and avoids using his right shoulder, relying extensively on his left shoulder to perform this activity. Claimant's shoulder joint itself is impaired because it does not function as it did before his injury. The mere fact that the shoulder joint affects arm mobility does not mean Claimant sustained only a "loss of arm at the shoulder." The situs of Claimant's functional impairment extends beyond the "arm at the shoulder."

13. Accordingly, Claimant's impairment is not on the schedule of permanent impairment and he is entitled to a rating for the whole person at 7% based on impairment rating assessed by Dr. Swarsen.

## ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME physician's opinions by clear and convincing evidence.

2. The Respondents shall pay permanent partial disability benefits to the Claimant based upon a whole person impairment rating of 7%.

3. The Respondent (self-insured) shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

DATED: February 12, 2015

/s/ Sara L. Oliver

SARA L. OLIVER
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-921-057-03**

## ISSUES

The issues to be determined are as follows:

1. Whether the Claimant has proven that his request for cervical injections and a cervical/upper extremity EMG recommended by Dr. Bhavesh Patel is reasonable, necessary and related to his work-related injury of June 8, 2013[1];

2. Whether the Claimant has proven that his request for injections and discectomy at the L5-S1 level of his lumbar spine recommended by Dr. Michael Karnasiewicz is reasonable, necessary and related to his work injury of June 8, 2013.

3. Whether the Claimant has proven that he is entitled to temporary total disability benefits from December 19, 2013 ongoing.

## PROCEDURAL MATTERS

Following the hearing, the ALJ permitted the parties to complete the testimony of Dr. Karnasiewicz by telephone. That deposition was completed and the transcript has been submitted. In addition respondents were given the opportunity to depose Dr. Paz and Dr. Walker as part of their case in chief. In lieu of completing those depositions the parties agreed to submit a supplemental report authored by Dr. Paz that addresses the reasonableness, relatedness, and necessity of the lumbar surgery recommended by Dr. Karnasiewicz. That report was submitted to the ALJ and entered into evidence.

## FINDINGS OF FACT

1. The Claimant is 23-year-old male who was hired by Employer in March 2013 to repair and maintain pools and spas.

2. On June 8, 2013, the Claimant was hanging over a pool while unscrewing and opening steel jet covers. He was in the process of removing a metal plate from the

[1] The Claimant's Case Information sheet noted that "Pursuant to ALJ Felter's Order dated May 7, 2014, the issues to be heard at this hearing are (1) the authorization of the recommendations of the Connecticut authorized treating provider (ATP), Bhavesh Patel, M.D. for a lumbar fusion, (2) a cervical EMG, (3) a cervical traction unit, and (4) physical therapy for Claimant's whole body. However, these issues were not all pursued at hearing (except the Claimant mentioning the EMG for his upper extremity and cervical), and, in the Claimant's post hearing brief, the Claimant did not seek redress on the remaining issues, but rather only the 3 issues listed above.

jet with the use of a screw driver and when he lifted himself out of the pool, he experienced pain in his left mid back just to the left of his spine (Claimant's Exhibit 1, p. 3, ¶3, excerpt from Order of ALJ Felter dated December 3, 2013).

3. The Respondents initially admitted for injuries including the thoracic and cervical spine, but contested injury to the lumbar spine which included a herniated disc (Claimant's Exhibit 1, p. 3,¶ 4, excerpt from Order of ALJ Felter dated December 3, 2013). ALJ Felter determined that the weight of the medical evidence established that the Claimant's lumbar spine condition was causally related to the admitted injury of June 8, 2013 (Claimant's Exhibit 1, p. 6, ¶¶ 18-19 and p. 10, excerpt from Order of ALJ Felter dated December 3, 2013). ALJ Felter ordered that, "Respondents shall pay the costs of medical care and treatment for the Claimant's thoracic and low back injuries of June 8, 2013, subject to the Division of Workers Compensation Medical Fee Schedule (Claimant's Exhibit 1, p. 12, ¶A, excerpt from Order of ALJ Felter dated December 3, 2013).

4. The Claimant originally received medical care from Dr. Sander Orent and Dr. Sharon Walker at Arbor Medical Clinic. The initial history provided by the Claimant on June 11, 2013 was "back pain" (Claimant's Exhibit 10, p. 72; Respondents' Exhibit E, p. 17). On June 12, 2013, Dr. Sander Orent assessed the Claimant with "thoracic strain, in an otherwise healthy young man" (Claimant's Exhibit 10, p. 78; Respondents' Exhibit E, p. 18). On June 18, 2013, the Claimant was still complaining of a good deal of pain. Dr. Orent noted that, on review of imaging studies, "there is evidence of an old T7 compression fracture, although there is no history thereof, so it may be a lot more acute than what we realize based on the imaging finding itself." As for the Claimant's symptoms, Dr. Orent noted "some numbness at the ends of his hands. It is worse with certain positions. He is complaining of some discomfort in the neck as well. The primary pain, though, is right over the T7 area in the central portion of the spine." Dr. Orent further noted that the Claimant was taking enough narcotics for the pain that he should not be driving or working, even at sedentary activities in the work place (Claimant's Exhibit 10, p. 83; Respondents' Exhibit E, p. 19). On June 28, 2013, the Claimant came to Dr. Orent's clinic to report that he was going to be moving to Connecticut. As Dr. Orent was out, the Claimant was seen by P. A. Clint Dillard. The Claimant continued to report pain in the thoracic region and reported lumbar pain. P.A. Dillard noted that there were no radicular symptoms. P.A. Dillard felt the Claimant had a "myofascial spasm" and questioned the need for a lumbar spine MRI as P.A. Dillard did not see any indications on physical exam on that date.

5. The Claimant moved to Connecticut on July 12, 2013 and transferred his care briefly to Concentra Medical Center where he was seen by Dr. Victor Cohen, and Dr. Victor Wasilauskas. On July 16, 2013, the Claimant told Dr. Cohen, "I was hanging over the edge pulling steal jet covers off when I pulled myself out I pulled my back out – I have pain up and down my back, but mid and upper back is unbarable [sic]." Dr. Cohen assessed thoracic strain, trapezius strain and lumbar strain. On July 29, 2013, the Claimant saw Dr. Wasilauskas and reported "pain located on neck and middle back" and "no radicular pain noted." Dr. Wasilauskas referred the Claimant for a neurosurgical

consultation for his neck and thoracic spine conditions. On August 26, 2013, Dr. Wasilauskas noted that the Claimant was still reporting thoracic pain and low back pain but no radicular symptoms were noted. Dr. Wasilauskas also noted that the Claimant had been seen by Dr. Karnasiewicz and he did not feel that the Claimant needed surgery but would benefit from physical therapy (Claimant's Exhibits 15 and 16; Respondents' Exhibit F).

6. The Claimant saw Dr. Karnasiewicz on August 8, 2013. Dr. Karnasiewicz noted that the Claimant reported that he currently has "bilateral upper extremity pain right greater than left that he describes as 'pressure.' He states this is into the bilateral upper trapezius, lateral and posterior arm throughout into the lateral hand and lateral third through fifth digits. He admits to paresthesias right greater than left into the posterior arm and hand. He denies any frank weakness into the upper extremities bilaterally. He also admits to right mid back flank pain. He states that he also has lower back pain and bilateral lower extremity pain throughout the buttock, posterior and anterior thigh. He admits to paresthesias into the dorsal feet bilaterally. He also admits to weakness into the lower extremities bilaterally stating that his knees give out on him on occasion. He states that the severity of his pain is 7/10 and is alleviated with physical therapy and lying supine. Dr. Karnasiewicz assessed the Claimant with a "diffuse spinal injury" and noted "at the present time surgery is not recommended." Dr. Karnasiewicz recommended continued physical therapy and medication refill (Claimant's Exhibit 3; Respondents' Exhibit H).

7. The Claimant flew back out to Colorado for an IME with Dr. Paz which took place on September 10, 2013. Dr. Paz prepared a report dated October 7, 2013, in which he determined that the Claimant reached MMI with respect to his June 8, 2013 event and determined that the Claimant's current symptoms were not related to the work injury, stating, "[the Claimant's] differential diagnosis includes myofascial pain in the thoracic and lower chest wall. However, the natural history of a myofascial strain of the thoracic region would be to improve and resolve of 4-6 weeks. The history, in this particular case, is inconsistent with the natural history of myofascial pain of the thoracic region and chest wall. The "spread" of symptoms from the thoracic region to the cervical and lumbar region is inconsistent with myofascial strain" (Respondents' Exhibit I). In a prior Order on compensability issues and causal relatedness, ALJ Felter found this IME opinion of Dr. Paz "lacking in credibility and outweighed by the totality of the medical opinions of each of the Claimant's authorized treating physicians" (Claimant's Exhibit 1, p. 6, ¶ 19, excerpt from Order of ALJ Felter dated December 3, 2013).

8. Subsequently, the Claimant's care was then transferred to Dr. Bhavesh Patel at US MedGroup who took over as the Claimant's primary care provider in Connecticut. On September 12, 2013, Dr. Patel noted that upon examination and after review of an MRI scan of the Claimant's lumbar spine performed on 08/29/2013, there was evidence of a small left L5-S1 disk herniation encroaching the left S1 nerve root. And a small disc bulge at the L4-L5 level. Dr. Patel also noted that the Claimant's thoracic spine MRI done on 06/19/2013 revealed evidence of a right sided C4-C5 disk protrusion with mild indentation of the retro aspect of the cord. Dr. Patel assessed

cervicalgia associated with motion, rule out left C6 radiculopathy, mild stenosis, mechanical back pain and left L5-S1 radiculitis secondary to a small herniated disc. Dr. Patel recommended "a left L5-S1 transforaminal epidural steroid injection to help his back and left radicular leg pain which favors the L5-S1 distribution (Claimant's Exhibit 4, Respondents' Exhibit G).

9. The Claimant saw Dr. Patel again on October 10, 2013 continuing to complaint of "pain to the lower back and left leg and also, pain in his neck and left arm." The Claimant was recommended for lumbar injections and further workup including an EMG of his left upper extremity, but Dr. Patel notes that "this was denied through Workers' Compensation." Dr. Patel continued to opine that the Claimant would benefit from a lumbar epidural injection to help with his left leg pain and he further recommended continued light duty work and physical therapy and medication distribution (Claimant's Exhibit 4, Respondents' Exhibit G).

10. Per a Physician Work Activity Status Report by Dr. Cohen dated December 19, 2013, the Claimant's work status is "no activity" (Claimant's Exhibit 6, p. 61). Also note that, in a letter dated June 13, 2014, the Claimant requested that Dr. Patel clarify his opinion that Claimant's working restrictions was "no activity." The letter was answered by Dr. Barinder Mahal on June 18, 2014, indicating that "Patient with symptomatic cervical & lumbar radiculopathy with restrictions lifting, pushing, pulling, standing, & sitting. His restrictions should remain "No Activity"(Claimant's Exhibit 6, p. 62). The Claimant has not returned to any type of employment. It is noted that ALJ Felter previously found that the Claimant had voluntarily left modified employment with Employer to return to Connecticut to be with family and that he was responsible for termination due to his decision to abandon medically approved modified work provided by the Employer (Claimant's Exhibit 1, pp. 6-8, Order of ALJ Felter dated December 3, 2013). However, the "no activity" work status occurs on December 19, 2013 after ALJ Felter's Order as does the further clarification on June 18, 2014.

11. As of January 2, 2014, Dr. Patel notes that the Claimant's range of motion in his cervical spine and lumbar spine is restricted bilaterally and straight leg raising causes localized low back pain and left leg pain (Claimant's Exhibit 4, Respondents' Exhibit G).

12. On January 16, 2014, due to the continued pain symptoms and continuing restrictions on range of motion, Dr. Patel referred the Claimant back to see Dr. Karnasiewicz, the neurosurgeon, for re-evaluation of the lower back and leg pain (Claimant's Exhibit 4, Respondents' Exhibit G).

13. The Claimant continued to see Dr. Patel for pain management, and as of May 1, 2014, Dr. Patel recommended a cervical injection for his neck and right arm pain and an injection to help his lumbar pain, pending surgery. The Claimant was continuing to take Percocet and was started on Neurontin (Claimant's Exhibit 4, p. 52).

14. After the Claimant's condition did not improve with physical therapy and treatment by Dr. Patel, he returned to Dr. Karnasiewicz on February 11, 2014 for re-evaluation. At this visit, Dr. Karnasiewicz reviewed the lumbar MRI scan noting it showed a herniated disc that was abutting the left S1 nerve root and a concomitant annular tear. At that point in time, since the Claimant had not received any type of improvement in spite of considerable conservative care including over 40 sessions of therapy, a microdiskectomy was recommended. Complications of the surgery were discussed, and the Claimant wished to proceed with surgery (Claimant's Exhibit 3, pp. 19-20).

15. Respondents denied the surgery and sent the Claimant for a medical examination with Dr. Michael Rauzzino in Colorado. Dr. Rauzzino, in his May 17, 2013 written report stated that he agrees with Dr. Paz's earlier opinion that was rejected in the December 3, 2013 Order by ALJ Felter, that there was no compensable workers' compensation injury and that the problems with the Claimant's lumbar spine were more likely related to previous activities. Dr. Rauzzino opined that the Claimant sustained no structural injury to his spine on June 8, 2013, but only myofascial strain. He further stated that he did not believe the Claimant needed any sort of surgery and does not have a true S1 radiculopathy. This was in spite of the fact that Claimant had pain radiating down his left leg, has breakaway weakness in the muscles of his left leg, and very noticeable atrophy in his left leg. The atrophy was visibly noticeable and was observed by this Court. Dr. Rauzzino believes the Claimant is at MMI and his case should be closed with no impairment. Dr. Rauzzino also found that the Claimant had positive Waddell's signs and also based his report on video surveillance footage which showed the Claimant doing tricks on his bicycle approximately two (2) to three (3) years prior to Claimant's injury on the job (Respondents' Exhibit P). The video, taken significantly prior to the incident does not show the Claimant suffering a spinal injury nor does it negate the fact that two (2) years later, the Claimant sustained an admitted work injury and by his December 3, 2013 Order, ALJ Felter determined that the claim was compensable and the Respondents were responsible for medical care for the Claimant's cervical, thoracic and lumbar spine conditions.

16. Dr. Rauzzino also testified by deposition on June 30, 2014. Dr. Rauzzino is board certified in neurosurgery with an active clinical practice taking care of patients with both brain and spinal disorders (Depo. Tr. Dr. Rauzzino, pp. 5-6). Dr. Rauzzino characterizes the Claimant's lumbar MRI as showing "a fairly small disc protrusion at L5-S1, which contacted, but didn't put the specific amount of pressure on the S1 nerve root (Depo. Tr. Dr. Rauzzino, p. 7). Dr. Rauzzino testified that he did not believe that these structural abnormalities came from the Claimant's described mechanism of injury on June 8, 2013 since his initial complaints were not directed to the lumbar spine but to his neck and upper back (Depo. Tr. Dr. Rauzzino, p. 8). Dr. Rauzzino testified that the initial treating physicians ordered neck and thoracic MRIs initially but did not image his lumbar spine at that time since they did not feel that his symptoms at that time were consistent with a lumbar injury (Depo. Tr. Dr. Rauzzino, p. 9). Then, the pattern of his symptoms changes and he complained of pain radiating down his leg and there were x-rays taken in August of 2013 (Depo. Tr. Dr. Rauzzino, p. 9). Dr. Rauzzino testified that if

the Claimant had suffered a structural injury to his low back on June 8, 2013 then the symptoms would have shown up within a few days, 4-5 at the most, not 4 weeks later (Depo. Tr. Dr. Rauzzino,pp. 13). Dr. Rauzzino testified that the surgery that is being proposed is designed to treat a lumbar disc herniation, putting pressure on a nerve and radicular pain that goes down the leg in the distribution of the nerve which is being affected by the disc. He does not believe the Claimant should have this surgery because he thinks the Claimant is "a bad surgical candidate, in the sense that I don't know that surgery is likely to make him getter. If he has a very clear presentation that makes sense and has very significant radiographic findings, then one might consider to operate on him." However Dr. Rauzzino did not see clear-cut evidence of the specific nerve being bothered when he examined the Claimant (Depo. Tr. Dr. Rauzzino, p. 14). Dr. Rauzzino opines that the Claimant's responses to pain were exaggerated and out of proportion and not consistent with a specific nerve and a specific distribution (Depo. Tr. Dr. Rauzzino, p. 15). In general, Dr. Rauzzino testified that he agreed with the opinion of Dr. Paz but felt that his own opinion was a little more detailed in terms of causation (Depo. Tr. Dr. Rauzzino, pp. 32-34). On cross-examination, Dr. Rauzzino testified that it was his opinion that the Claimant had degenerative changes due to injuries before his June 8, 2013 work injury. However, he agreed that there were no medical records that supported prior injuries, except to the extent that Dr. Rauzzino noted radiographic evidence of chronic injury to his spine (Depo. Tr. Dr. Rauzzino, pp. 48-50).

17. In addition to IME's that the Respondent has requested the Claimant undergo, Respondents have requested peer reviews from several physicians for review of the requests of Dr. Patel and Dr. Karnasiewicz.

- On February 12, 2014, Dr. Anjmum Sharma reviewed the Claimant's medical presentation and found that the recommended treatment for disc and nerve pathology was not necessary nor related to the injuries the Claimant suffered on June 8, 2013. Specifically, Dr. Sharma felt that the Claimant's mechanism of injury was not significant enough to result in the injury that he is reporting of chronic, unmitigating cervical, thoracic and lumbar pain. Dr. Sharma opined the Claimant is at MMI and required no further treatment based, in part, on video surveillance that he reviewed showing the Claimant walking, talking on a cell phone and getting into a car and closing the door and raising the hood of the car (Respondents' Exhibit B, pp. 2-5).

- On September 23, 2013, Dr. Deborah Saint-Phard reviewed and found the requests for additional physical, therapy epidural steroid injections and EMG requested on September 8, 2013, to be not related to the injuries the Claimant may have suffered on June 8, 2013 (Respondents' Exhibit B, p. 6).

- On December 11, 2013, Dr. Fillmore also opined that the request for an upper extremity EMG should be denied based on Dr. Paz' IME and the other medical records that Dr. Fillmore may have reviewed (Respondents'

Exhibit B, p. 7).

- Dr. James Ogsbury, neurosurgeon, reviewed the case as of January 9, 2014. He noted that while requests were forthcoming to treat low back problems, the requests should be denied until medical necessity is fully explored in spite of his recognition that the hearing officer found the low back condition a compensable work-related injury. He also noted all cervical treatment is denied as not work-related (Respondents' Exhibit B, p. 9).

18. The Claimant testified at the hearing. He testified that prior to June 8, 2013 he worked Monday – Saturday performing heavy lifting, including huge bags on his shoulders while he worked for Employer and he never had any problems before. He identified himself as the person riding a bike and performing tricks, riding up and down stairs, in a DVD entered into evidence at Exhibit Q. He testified that he did not fall very often because he stayed close to the ground. He testified that after the video was prepared, he worked at an asphalt company working 70+ hours per week and then 50+ hours per week at Employer and there were never physical problems or limitations. He testified that prior to the injury he never had the pain and now he has it all the time. The Claimant testified that his low back pain and leg pain is ongoing. The pain from his upper left buttocks travels down the back of his butt, down the quad, down past the knee and sometimes down the calf and occasionally reaches his foot. It is constant and he never has relief. Sitting and putting pressure on his low back makes it worse. The Claimant exhibited his right leg and left leg for observation in the court. His right leg appeared to have regular muscle definition. His left leg showed visible atrophy and little muscle definition. The circumference of his calf was smaller on the left than the right. He testified that his doctor has recommended surgery for his lumbar spine because of a disk sitting on a nerve root. The Claimant also testified that he would like to proceed with cervical injections because his hands and fingers go numb and hurt. He also testified that his doctors have recommended an EMG for his upper extremities/cervical. He would like to pursue the lumbar surgery recommended by his doctors. The Claimant's testimony regarding his symptoms and his ability to work without restrictions or limitations prior to his June 8, 2013 injury was credible and persuasive and is found as fact.

19. Dr. Karnasiewicz testified at the hearing and continued his testimony in a deposition of July 28, 2014. Dr. Karnasiewicz is a neurosurgeon in Connecticut who not only treats patients, but performs medical examinations for the Workers' Compensation Board in Connecticut. He is appointed by judges to render opinions in cases when there is a question on compensability and the reasonableness and necessity of surgical intervention. Here, Dr. Karnasiewicz testified that the first time he saw the Claimant, he noted diffuse spinal complaints but did not have the benefit of lumbar imaging and he did not recommend surgery. When the Claimant was referred back a second time, Dr. Karnasiewicz testified that the pain complaints, which were more specific and with radiation down the left leg, along with the MRI of the lumbar spine, changed his recommendation. With the clinical presentation, visible leg atrophy, and the MRI, which

clearly showed that the disc was herniated and had been abutting the nerve root, this pathology was a reasonable explanation for the Claimant's lower back pain and left leg pain. Dr. Karnasiewicz opined that his explanation for why the Claimant's complaints changed from his first visit to his second was that the tear in the annulus had progressed. While the herniation in the MRI is small, it is in the location to compress and abut the nerve root. Considering the Claimant's clinical findings, complaints of pain which are consistent with a herniated disc, along with a MRI which shows the herniated disc itself, Dr. Karnasiewicz opined that the surgery would more likely than not improve the Claimant's condition. Dr. Karnasiewicz has no other medical treatment to offer Claimant other than surgical intervention. He opined that it is reasonable and that there is no other option that will relieve the Claimant's symptoms and those symptoms will not abate on their own. Dr. Karnasiewicz also testified that the mechanism of injury described by the Claimant is consistent with the symptoms the Claimant is experiencing. He disagrees with the opinion of Dr. Rauzzino on the issue of radiculopathy noting the Claimant has signs and symptoms of left L5-S1 radiculopathy and he also notes that he did not find evidence of positive Waddell's signs in his examinations of the Claimant.

20. At the completion of his testimony by deposition on July 28, 2014, Dr. Karnasiewicz testified that he felt strongly enough that the Claimant's symptoms were coming from the pathology on the lumbar MRI that he is willing to operate (Depo. Tr. Dr. Karnasiewicz, p. 4). He did not find it probable that the Claimant's symptoms were coming from somewhere else (Depo. Tr. Dr. Karnasiewicz, p. 4). He testified that "there is hard neurological evidence of compression of the S1 nerve root. Atrophy, which is consistent with longstanding compression, doesn't happen in a matter of weeks. It takes several months, sometimes a year for that to happen (Depo. Tr. Dr. Karnasiewicz, p. 21). Since there is radiographic findings and clinical signs that are consistent with S1 radiculopathy, Dr. Karnasiewicz opines that "it all fits together" (Depo. Tr. Dr. Karnasiewicz, p. 22). Dr. Karnasiewicz also testified that he is not overly concerned with the opinions of the earlier treating physicians in Colorado in this case because he didn't find any Waddell's signs and the Claimant "has a very straightforward problem" (Depo. Tr. Dr. Karnasiewicz, p. 32). While he understood that Dr. Rauzzino was an expert hired by Respondent, Dr. Karnasiewicz did not feel that this was a reason to hold this against his opinion, since he, himself, does IMEs as well. Rather, Dr. Karnasiewicz testified that their findings were different. In the end, Dr. Karnasiewicz testified that some of the Claimant's other symptoms were resolving on their own, but the herniated disk on the MRI at L5-S1 is clearly displacing the left S1 nerve root and causing the Claimant's low back and leg symptoms (Depo. Tr. Dr. Karnasiewicz, p. 44).

21. On August 19, 2014, Dr. Paz, was asked to render an additional opinion as to the reasonable necessity of the surgical recommendation and he issued a written report which was submitted into evidence in lieu of further deposition testimony. Dr. Paz noted that before a surgical recommendation should be followed through with, both organic and non-organic causes of symptoms need to be fully evaluated. He opined that the clinical course he reviewed prior to the Claimant leaving Colorado did not support a finding that the symptoms the surgery seeks to relieve are related to the disc

pathology seen on MRI. Therefore, he opined that the surgery is not reasonable nor necessary to treat the Claimant's condition. Moreover, the evidence strongly suggests that the symptoms the surgery intends to treat are not related to the abnormalities seen at the L5-S1 level. Dr. Paz opines that the fluctuating signs and symptoms seen in the Claimant's medical records are more consistent with a non-organic low back pain condition. Moreover, Dr. Paz considered the Colorado Medical Treatment Guidelines for Chronic Pain which include additional diagnostic procedures and psychological evaluation in cases like this. Dr. Paz also notes that with respect to the Colorado Medical Treatment Guidelines in Rule 17, Exhibit 1 for Low Back Pain, it specifically states, "in order to justify operative interventions, clinical findings, clinical course and the diagnostic tests must all be consistent resulting in a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement." With respect to these Guidelines, Dr. Paz finds the absence of objective findings to support disk herniation with radiculopathy of the lumbar spine prior to July 13, 2013. Thus, he finds that the records do not support an organic etiology which is likely to improve with surgical intervention. As a result, Dr. Paz concludes that "the proposed surgery is not reasonable, necessary and causally related to the June 8, 2013 reported event." See Dr. Paz Supplemental Report, June 8, 2013.

22. There are a number of conflicting medical opinions in this case. However, the ALJ finds the opinions of Dr. Karnasiewicz and Dr. Patel more persuasive than the opinions of the peer review physicians and the opinions of Drs. Paz and Rauzzino.

## 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, the Claimant testified credibly that the onset of his low back pain and his cervical/upper extremity symptoms corresponded temporally with his work injury. He also testified that prior to the June 8, 2013 work injury, the Claimant did not have the symptoms and there are no persuasive medical records to indicate that the Claimant treated for his current symptoms prior to this claim. Respondents try to correlate the Claimant's trick bike-riding activities from 2 years prior to the incident to his symptoms and/or pathology with no persuasive medical evidence. In the alternative, Respondents' experts have opined that the Claimant's symptoms and reports of pain do not correlate with the objective pathology.

Drs. Karnasiewicz and Patel reasonably relate the Claimant's current symptoms to the pathology seen in the Claimant's MRIs. Dr. Karnasiewicz testified that the first time he saw the Claimant, he noted diffuse spinal complaints but did not have the benefit of lumbar imaging and he did not recommend surgery. When the Claimant was referred back a second time, Dr. Karnasiewicz testified that the pain complaints, which were more specific and with radiation down the left leg, along with the MRI of the lumbar spine, changed his recommendation. With the clinical presentation, visible leg atrophy, and the MRI, which clearly showed that the disc was herniated and had been abutting the nerve root, this pathology was a reasonable explanation for the Claimant's lower back pain and left leg pain. Dr. Karnasiewicz opined that his explanation for why the Claimant's complaints changed from his first visit to his second was that the tear in the annulus had progressed. While the herniation in the MRI is small, it is in the location to compress and abut the nerve root. Considering the Claimant's clinical findings, complaints of pain which are consistent with a herniated disc, along with a MRI which shows the herniated disc itself, Dr. Karnasiewicz opined that the surgery would more likely than not improve the Claimant's condition. Dr. Karnasiewicz has no other medical treatment to offer Claimant other than surgical intervention. He opined that it is reasonable and that there is no other option that will relieve the Claimant's symptoms and those symptoms will not abate on their own. He did not find it probable that the Claimant's symptoms were coming from some other pain generator (or none at all, as has been suggested). Dr. Karnasiewicz testified credibly and persuasively that "there is hard neurological evidence of compression of the S1 nerve root and the presence of atrophy. Atrophy, which is consistent with longstanding compression, doesn't happen in a matter of weeks. It takes several months, sometimes a year for that to happen. Since there are radiographic findings and clinical signs that are consistent with S1 radiculopathy, Dr. Karnasiewicz opines that "it all fits together" and the Claimant "has a very straightforward problem." Dr. Karnasiewicz testified that while his findings were different. In the end, Dr. Karnasiewicz testified that the herniated disk on the MRI at L5-S1 is clearly displacing the left S1 nerve root and causing the Claimant's low back and leg symptoms.

The medical records and the opinions of Drs. Karnasiewicz and Patel as well as the testimony of the Claimant, establish that the Claimant underwent extensive

conservative treatment but nothing offered sustained relief from the cervical and lumbar symptoms that the Claimant continues to suffer. Dr. Karnasiewicz persuasively opines that the pathology at L5-S1 on the Claimant's lumbar MRI is more likely than not the pain generator for the Claimant's symptoms and that the proposed surgery is more likely than not to provide relief and improvement from the lumbar and leg symptoms.

Crediting the opinions of Dr. Karnasiewicz it is found the proposed surgical intervention is the Claimant's best opportunity for relief and Claimant is a reasonable candidate for the proposed surgery. The Claimant has proven by a preponderance of the evidence that the findings at L5-S1 are causally related to the Claimant's June 8, 2013 work injury and that the surgery recommended by Dr. Karnasiewicz is reasonably necessary. The Claimant has also established that the medical requests by Dr. Patel at issue in this matter are reasonable and necessary.

***Temporary Disability Benefits***

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

In this case, the Claimant established that he suffered a compensable injury on June 8, 2013 and that he has missed work and suffered a wage loss since that time as a result of the June 8, 2013 work injury. The Claimant's initial treatment was conservative, and he was authorized to continue to work with restrictions. Later, per a Physician Work Activity Status Report by Dr. Cohen dated December 19, 2013, the Claimant's work status is "no activity." This status is later confirmed in a letter dated June 13, 2014, when the Claimant requested that Dr. Patel clarify his opinion that Claimant's working restrictions was "no activity." The letter was answered by Dr. Barinder Mahal on June 18, 2014, indicating that "Patient with symptomatic cervical & lumbar radiculopathy with restrictions lifting, pushing, pulling, standing, & sitting. His restrictions should remain "No Activity." The Claimant has not returned to any type of employment. It is noted that ALJ Felter previously found that the Claimant had voluntarily left modified employment with Employer to return to Connecticut to be with

family and that he was responsible for termination due to his decision to abandon medically approved modified work provided by the Employer. Thus, ALJ Felter ordered that the claim for temporary disability benefits from July 12, 2013 through the date of the hearing (November 21, 2013) was denied and dismissed (Claimant's Exhibit 1, pp. 6-8, Order of ALJ Felter dated December 3, 2013). However, the "no activity" work status occurs on December 19, 2013 after ALJ Felter's Order as does the further clarification on June 18, 2014. Claimant has not been released from his "no activity" work status yet and the opinions of Drs. Rauzzino and Paz that the Claimant is (and has been) at MMI are not found to be credible or persuasive. Therefore, the Claimant has not worked since December 19, 2013 due to the disability related to his June 8, 2013 work injury and he has suffered a wage loss entitling him to receive temporary total disability benefits until one of the occurrences listed in § 8-42-105(3), C.R.S.

## ORDER

It is therefore ordered that:

1. The L5-S1 discectomy recommended by Dr. Karnasiewicz is reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 lumbar spine work injury.

2. The CESI injection C-Spine recommended by Dr. Patel is reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 cervical spine work injury.

3. The cervical/upper extremity EMG recommended by Dr. Patel is reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 cervical spine work injury.

4. Respondent's liability shall specifically include medical treatment consisting of the above surgery, EMG and injection 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.

5. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing December 19, 2013 until one of the occurrences listed in § 8-42-105(3), C.R.S.

6. Respondents shall pay the Claimant statutory interest at the rate of 8% per annum on all amounts 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 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: February 6, 2015

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

## ISSUES

1. Whether Claimant is entitled to temporary total disability benefits.

2. Whether Claimant is responsible for the termination of her employment and resulting wage loss.

3. Whether the stipulated temporary partial disability benefits owed to Claimant shall terminate as of October 14, 2014.

## STIPULATIONS

The parties made the following stipulations at the outset of the hearing

1. Claimant's average weekly wage is $825.16, with a corresponding temporary total disability (TTD) rate of $550.11.

2. Claimant was injured April 2, 2013. She continued to work thereafter until August 7, 2013.

3. Claimant was off work and paid TTD benefits from August 7, 2013 through November 22, 2013.

4. Claimant returned to work on November 22, 2013 and worked through June 6, 2014. No claim is being made for TTD or temporary partial disability (TPD) benefits during this timeframe.

5. Claimant has been off work since June 7, 2014.

6. As a result of the Claimant's separation from employment, she was offered COBRA benefits commencing on July 1, 2014. Those benefits are in the amount of $1,137.38 per month and are being paid by Claimant.

7. If Claimant is successful in asserting a right to receive TTD benefits, her average weekly wage would be increased to $1,087.63 effective July 1, 2014, and the TTD rate would be $725.09.

8. Claimant received unemployment benefits for three weeks from June 15, 2014, through July 5, 2014, in an amount of $481.00 per week for a total payment of $1,443.00, which would be offset 100 percent from any amount found to be due and owing by Respondents.

9. The Respondents' job offer to Claimant, which is the basis for their contention that no TTD benefits are due and owing, was at a rate $2.60 less than the Claimant's rate as of June 6, 2014. Therefore, the Claimant would be entitled to TPD benefits at two-thirds (2/3) of $104.00 per week, or a total amount of $69.33 per week from June 7, 2014, and ongoing until the restrictions are removed, Claimant is released at MMI, or Respondents are entitled to terminate pursuant to rule or statute.

## FINDINGS OF FACT

1. Claimant was employed by Employer from May of 2010 until June 6, 2014. Claimant suffered an admitted work related injury on April 2, 2013. At the time of her injury, Claimant's title was Team Lead-Special Projects.

2. As Team Lead-Special Projects, Claimant's job duties were primarily customer service in nature. Claimant was also a supervisor and was responsible for coaching, managing, and providing direction to a team of customer service associates. The physical requirements of the job indicated that Claimant would be required to remain in the seated position for up to 90% of a shift. The physical requirements of the job description also indicate that reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions. *See* Exhibit A.

3. Due to the admitted work related injury on April 2, 2013, Claimant underwent hip surgery in August of 2013 and returned to work on November 23, 2013.

4. Upon her return, Claimant had work restrictions provided by John Papilion, M.D. The restrictions included: lifting no more than 10 pounds; no walking more than 2 hours per day, no sitting more than 6 hours per day, and no standing more than 1 hour per day. *See* Exhibit 2.

5. Employer accommodated Claimant's restrictions upon her return and Claimant continued working in the same position for Employer through June 6, 2014. Claimant worked full time and received her regular pre-injury pay. During this time Claimant was allowed to modify her job, as needed, to accommodate the restrictions given to her by Dr. Papilion.

6. In late May of 2014 Employer began making changes to Claimant's department due to the termination of a contract with a particular vendor. At the same time, a new contract had been executed and individuals within Claimant's department were being transferred from the contract that was ending to the new contract.

7. Claimant was aware of the changes going on and knew that positions within her department were being eliminated and that employees were being transferred to the new contract.

8. On June 2, 2014 Claimant emailed Employer's human resource department and inquired as to whether she was eligible to apply for any current job listings within the company due to her restrictions, including the 6 hour limitation on

sitting. The email was sent to Megan Cramer, Human Resources Recruiter, and Dawn Hart, Human Resources Business Partner. Claimant did not receive a reply to her inquiry by email. *See* Exhibit 5.

9. Two days later, on June 4, 2014, Claimant's inquiry was answered by Ms. Hart at a meeting held where Claimant and 14 other employees were present.

10. At the meeting, Claimant and the 14 other employees were advised that their contract was being downsized and that all of them, including Claimant, were being offered transfer positions to a new contract.

11. The employees were advised that they could accept the new transfer position or choose to end their employment with Employer. They were advised that the job offers for the transfer positions would be sent by email the following day.

12. The employees, including Claimant, were also advised by Ms. Hart that any work restrictions or accommodations would continue into the transfer position. At the meeting there were four or five individuals, including Claimant, who had current restrictions. Ms. Hart did not go into each restricted employees' details or schedules, but assured the entire group that the restrictions would be accommodated in the new positions.

13. Ms. Hart advised the employees that the job offers they would receive would be generic offers that would not outline or detail individual restrictions, but that once the job transfer was made, the employees would work with their new supervisors to make sure their restrictions continued to be accommodated.

14. Following the meeting, Claimant approached Ms. Hart in the elevator. Claimant asked Ms. Hart whether her restrictions would be accommodated during the three day training for the transfer position. Ms. Hart advised Claimant that it would not be a problem.

15. The testimony of Ms. Hart is found credible and persuasive.

16. The next day, on June 5, 2014, Claimant received the job offer discussed above via email from Ms. Cramer. The offer was for the position of Mortgage Servicing Specialist. The job duties again were primarily customer service in nature. The main difference between Claimant's position and the transfer position was that the transfer position was not a supervisory role. Ms. Cramer's email indicated Claimant must reply either accepting or declining the offer by 8:00 a.m. on June 6, 2014. *See* Exhibit 4.

17. The physical requirements listed in the transfer position required the employee to remain in the seated position for a minimum of 85% of their shift. The remaining requirements were essentially the same as Claimant's prior position. Like Claimant's prior position, the transfer job description also stated under physical requirements that "reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions." *See* Exhibit 4.

18. The transfer position job offer did not specify the number of days or number of hours that the Claimant was to work. The offer, on its face, did not violate Claimant's restrictions of sitting no more than 6 hours per day as imposed by Dr. Papilion.

19. On June 6, 2014 at 7:30 a.m. Claimant responded to the transfer position offer, declining the position. Claimant's email stated, "since one of the physical requirements for this position is to be seated for 85% of the time and that exceeds my restriction of sitting no more than 6 hours and there was no mention of what, if any, accommodations would be made, I need to decline this offer…" *See* Exhibit 4.

20. Several of Employer's employees who had restrictions in place accepted transfer positions and continued to work for Employer and their individual restrictions continued to be accommodated in the transfer positions.

21. Claimant's email declining the transfer position was a voluntary separation of her employment. Claimant's testimony is not logically credible or persuasive.

22. The transfer position would have resulted in a wage loss of $104.00 per week due to an hourly rate difference of $2.60 per hour, and would have started June 7, 2014.

23. Due to her voluntary separation of employment from Employer, Claimant lost health insurance benefits and began paying for COBRA benefits on July 1, 2014 in the amount of $1,137.38 per month.

24. Claimant received unemployment benefits from June 15, 2014 through July 5, 2014 in the amount of $481.00 per week.

25. On October 14, 2014 Claimant saw Dr. Papilion. Dr. Papilion indicated under assessment/plan that Claimant was ready to return to work. Dr. Papilion indicated his belief that Claimant was approaching MMI with regard to her hips and knee and noted that he would see her as needed. *See* Exhibit C.

26. Dr. Papilion did not remove Claimant's work restrictions nor did he place Claimant at MMI.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014).

Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

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

***Responsible for Termination***

Section 8-42-103(1)(g), C.R.S. (2014), and § 8-42-105(4)(a), C.R.S. (2014), provide that if a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* 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*, *supra.*

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). Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), opinion after remand, 908 P.2d 1185 (Colo. App. 1995); *Lozano v. Grand River Hospital District,* W.C. No. 4-734-912 (ICAO, February 4, 2009). However, an employee is not responsible for a termination from employment if the physical effects of the industrial injury preclude the performance of assigned duties and cause the termination. *See Gilmore v. Industrial Claim Appeals Office, supra; Colorado Springs Disposal v. Industrial Claim Appeals Office, supra* (concept of responsible for termination does not

refer to the claimant's injury or injury producing conduct); *Lozano v. Grand River Hospital District, supra.*

Here, Claimant was not terminated due to her injury. In fact, the evidence shows that Employer continued to employ Claimant and accommodated her work restrictions without issue upon her return from surgery in November of 2013. The evidence also establishes that Employer would have continued to accommodate Claimant's restrictions in the transfer position that they offered her when her position was being downsized. The transfer position offered to Claimant was almost identical in terms of hours worked, work that was mostly sedentary, and work that was also customer service in nature. The evidence establishes that Employer made accommodations not only for Claimant but for other employees before the offer of the transfer position and that Employer continued to accommodate those employees who accepted the transfer positions. Respondents have met their burden to show, more likely than not, that if Claimant had accepted the transfer position instead of resigning she would remain Employed by Employer at this time and her restrictions would have continued to be accommodated by Employer.

Further, Claimant was advised at the June 4, 2014 meeting that her restrictions would continue to be accommodated in the transfer position. In addition to this advisement at the June 4, 2014 meeting, the transfer job position stated on its face in the job description that reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions of the job duties. Further, the job offer on its face does not indicate that it would require Claimant to sit for more than 6 hours per day, only that it would require sitting for 85% of a shift. It is not logically credible that Claimant believed she had to decline the job offer because it would not accommodate her restrictions. Claimant had been working with restrictions and with no problem for Employer from November of 2013 until June of 2014. Her position, similar to the transfer offer, indicated under job description that reasonable accommodations may be made and Employer had made accommodations to allow Claimant to continue working following her return from surgery. With a transfer job offer that was almost identical in terms of duties and an almost identical job description also indicating reasonable accommodations may be made, Claimant's testimony that she believed she would not be accommodated in the transfer position is not credible or persuasive.

Claimant's testimony that at the June 4, 2014 meeting there was no discussion of accommodations for work restrictions is also not credible or persuasive. It is illogical to conclude that following the meeting Claimant would have asked Ms. Hart in the elevator about accommodations during the three day training period for the transfer position and not about the transfer position generally if Claimant had concerns that were not covered at the general meeting surrounding the position itself. Logically, one would be more concerned with the job accommodations than the training accommodations.

Claimant's resignation was the cause of her separation of employment from Employer. Her choice to resign was not caused by her injury. Further, as found above, the transfer position did not require or specifically list hours that would exceed Claimant's medical restrictions on its face. Claimant's argument that she had to resign

because she could not perform the job duties as listed in the job offer is not persuasive. Respondents have met their burden, by a preponderance of the evidence, to show that Claimant's separation of employment was due to her own volitional act of resigning. Claimant was aware of the transfer position duties, knew they were similar to her prior job duties, and was advised her restrictions would continue to be accommodated. Yet, she made a volitional decision to resign employment. Based on her resignation, the termination and separation of employment was the fault of Claimant. Claimant's resulting wage loss is not attributable to her injury and she therefore is not entitled to TTD payments.

### *Temporary Partial Disability*

Pursuant to the parties' signed stipulation offered to the court, temporary partial disability (TPD) benefits in the amount of $69.33 per week starting June 7, 2014 are owed to Claimant until the restrictions are removed, Claimant is released at maximum medical improvement, or Respondents are entitled to terminate benefits pursuant to rule or statute.

Although Respondents stipulated that TPD is owed, Respondents argue that the TPD benefits should end as of October, 14, 2014 and argue that at that time, Claimant was given a full release to return to work. This argument is not found persuasive. At the October 14, 2014 appointment Dr. Papilion merely indicated that Claimant was ready to return to work and was approaching MMI. Claimant's restrictions have not been removed, nor does the evidence show that Dr. Papilion has placed Claimant at MMI. Thus, there is insufficient evidence to support termination of the stipulated TPD benefits. In accordance with the parties' stipulation that TPD benefits are owed, Respondents must continue to pay TPD until termination consistent with § 8-42-106, C.R.S., (2014).

## ORDER

It is therefore ordered that:

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

2. Claimant was responsible for the termination of her employment and the resulting wage loss.

3. Pursuant to the stipulation of the parties, Respondents shall pay temporary partial disability benefits at a rate of $69.33 per week from June 7, 2014 and ongoing until termination consistent with § 8-42-106, C.R.S. (2014).

4. Pursuant to the stipulation of the parties, Respondents are entitled to an offset against temporary partial disability benefits for the

unemployment benefits Claimant received from June 15, 2014 through July 5, 2014.

5. 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: February 10, 2015

/s/ Michelle E. Jones

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

## STIPULATIONS AND PROCEDURAL MATTERS

A portion of testimony during the Claimant's cross-examination and redirect was not recorded due to error. The ALJ provided a transcription of her notes from this brief period of testimony on August 13, 2014 and the parties stipulated that the notes from the testimony missing from the digital recording accurately reflected the testimony and would substitute for the testimony or the need to retake the testimony. The ALJ's notes are made part of the record of the testimony in addition to the testimony that was available from the digital recording.

## ISSUES

The following issues were submitted for determination at hearing:

1. Whether the Claimant proved, by a preponderance of the evidence, that she suffered a compensable injury in the course and scope of her employment on May 22, 2013.

2. If the Claimant's claim is compensable, whether she proved, by a preponderance of the evidence, that any or all of the medical treatment that she received was authorized, causally related and reasonably necessary to cure and relieve the effects of her work injury.

3. If the Claimant's claim is compensable, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability indemnity benefits from September 1, 2013 ongoing.

4. If the Claimant's claim is compensable and she establishes that she is entitled to TTD benefits, whether Respondents proved, by a preponderance of the evidence, that the Claimant failed to timely report her injury to the Employer in compliance with C.R.S.§8-43-102, and if so, the amount of the penalty.

## FINDINGS OF FACT

1. The Claimant is a 36 year old female who was last employed by Employer. The last day that she worked was September 1, 2013 and she has not worked for Employer or anyone else since that date.

2. The Claimant has a long pre-existing history of low back pain with bilateral hip and lower extremity pain. The Claimant's medical records show pain in her low back associated with her fibromyalgia dating back 15 years. The medical records since 2008

demonstrate the Claimant's ongoing pain complaints and multiple associated symptoms. The Claimant was seen on December 10, 2008 at Memorial Emergency Department for five days of pain in her right buttocks running down the back of her leg to her foot. The Claimant complained of constant pain in her back. The Claimant listed sciatica and low back pain. The Claimant was again seen at Memorial on March 28, 2009 for her low back. On December 20, 2010, the Claimant was seen by her primary care doctor for an evaluation regarding chronic/constant back, lumbar, knee and left shoulder pain that she had been experiencing for the past 10 years. The Claimant also noted being nearly blind in her right eye and she has suffered from headaches since 2005 (Claimant's Exhibits 7, 9, 11,13 and 20; also see Respondents' Exhibit B, pp. 16-17). The Claimant underwent another examination with her primary care physician on December 9, 2011. At that examination, the Claimant stated she had low back and leg pain that was aggravated by ascending stairs, daily activities, rolling over in bed, sitting, standing, and walking. The Claimant noted that she has declined back surgery for years (Claimant's Exhibit 11, p. 581; Respondents' Exhibit C, p. 108). The Claimant had another follow-up examination with her primary care doctor on May 10, 2012. It was noted the Claimant had mild spinal stenosis at L4-5 and was again referred to a surgeon (Claimant's Exhibit 11, p. 604; Respondents' Exhibit B, p. 18). The Claimant's symptoms associated with her low back pain include a loss of balance, decreased mobility, limping, tingling in the legs, joint instability, joint tenderness, swelling and leg weakness. These are documented in the medical reports dated October 10, 2012 and July 18, 2012 (Claimant's Exhibit 11, p. 612 and p. 625; Respondents' Exhibit C, p.66 and p. 78). The Claimant was again seen on April 5, 2013 complaining of pain to the bilateral buttock, bilateral calf, bilateral hip, and bilateral thigh (Claimant's Exhibit 11, p. 643; Respondents' Exhibit B at p. 19). Thus, the Claimant testified inconsistent with her medical records that she has never complained about her hip (Hearing Tr. 08/13/2014 at p. 63). The Claimant had associated symptoms that included leg numbness, leg pain, spasms, and tightening and numbness in her extremities (Claimant's Exhibit 20; Respondents' Exhibit B at p.19). The pain was described as aching, discomforting and dull. The Claimant's medical records are replete with the symptoms associated with her low back pain. On December 10, 2012, the Claimant was examined by Dr. Shriver for nausea, anxiety and low back pain (Claimant's Exhibit 11, p. 632; Respondents' Exhibit C at 58). The Claimant presented with anxious/fearful thoughts, excessive worry, racing thoughts and relentlessness. The Claimant's anxiety is aggravated by conflict or stress. The Claimant described pain in her middle and low back that radiated into her legs. Claimant described the pain as an ache, discomforting, sharp, shooting and throbbing (Claimant's Exhibit 11, p. 632; Respondents' Exhibit C at 58). On March 7, 2013, the Claimant returned for a follow-up regarding her anxiety and back pain (Claimant's Exhibit 11, p. 639; Respondents' Exhibit C at p. 51). The Claimant stated the location of the pain was in her upper, middle, and lower back. The Claimant described the pain as burning, deep, sharp, shooting and stabbing. The Claimant was examined by Dr. Shriver again on April 5, 2013 for her anxiety and degenerative disc disease (Claimant's Exhibit 11, p. 643; Respondents' Exhibit C, p. 47). The Claimant described the location of pain in her bilateral lower back and bilateral lumbar area. The Claimant noted the pain radiated into her bilateral buttock, bilateral calf, bilateral foot and bilateral thigh. The Claimant described the pain as aching, discomforting and dull. Aggravating factors

included bending and standing. Associated symptoms included leg numbness, leg pain, numbness in extremities, spasms, tightening in legs, tightening in thighs and tenderness (Claimant's Exhibit 11, p. 643; Respondents' Exhibit C, p. 47). On May 2, 2013, the Claimant described her low back pain as deep and diffuse (Claimant's Exhibit 11, p. 647; Respondents' Exhibit C, p. 43).

3. In addition to the medical records, the Claimant testified regarding her extensive history of low back pain radiating down her right leg. The Claimant also testified regarding blurred vision and blindness in her right eye. The Claimant also testified that she has experienced numbness in her right leg. The Claimant testified there are some portions of her leg that she cannot feel and gets electric feelings in her feet. Claimant stated she had concerns regarding her leg and back pain that she wore special Doc Martin shoes to prevent her from falling (Hearing Tr. 8/13/2014 at p. 67).

4. The Court notes that the Claimant testified inconsistently from the medical records in that she stated she had never been referred for a surgical consultation for her back condition (Hearing Tr. 08/13/2014 at p.65). The Claimant further inconsistently testified that she only had intermittent leg pain in the past although the medical records document consistent leg pain (Hearing Tr. 08/13/2014 at p. 64). When asked whether her low back pain was chronic the Claimant testified that it was not chronic (Hearing Tr. 08/13/2014 at p.68). The Claimant also denied, inconsistent with her medical records, that daily activities such as walking aggravated her leg pain. The Claimant's medical records show that she had constant chronic back pain and had declined surgical recommendations multiple times in the past. Medical records show the Claimant's pain is aggravated by daily living activities outside of work.

5. The Claimant worked for the Employer as a nighttime sales associate. The Claimant's job duties for the Employer included working as a sales associate during business hours, then, once the store closed to the public, cleaning the bathroom, sweeping the floors, wiping down countertops, organizing and straightening up the store. The Claimant testified that she was working on the night of May 22, 2013 from 5 to 10 pm. (Hearing Tr. 8/13/2014 at p.19). Claimant testified that around 9:00 p.m. on May 22, 2013, "Josh" was the manager on duty that evening and he was closing up the front cash register. The Claimant testified that she was headed back to the break room to hang her apron up. Upon leaving the break room to head back out to the sales floor, the Claimant stated she made a right hand turn in the stockroom and her right leg came out from under her. The Claimant testified that she fell so hard she hit the ground and bounced back up to her feet (Hearing Tr. 8/13/2014 at pp. 19-20). The Claimant testified that she hit the side portion of her right knee and her right hip and buttocks area and the area of impact was mainly in the right side of her buttocks (Hearing Tr. 8/13/2014 at p. 20). The Claimant testified that due to the layout of the store and a wall separating the area where she fell and the front of the store, the manager on duty would not have had a direct line of site so as to view the Claimant's alleged fall (Hearing Tr. 8/13/2014 at p. 20). The Claimant testified that she did not slip on anything in particular, including water, but that she just slipped on the concrete (Hearing Tr. 8/13/2014 at pp. 23-24). The Claimant testified that her knee did not buckle and she was not having back

pain that night that caused her to fall (Hearing Tr. 8/13/2014 at p. 24). She testified that she was wearing a pair of Doc Marten shoes to prevent a slip since she does have a preexisting back and knee condition (Hearing Tr. 8/13/2014 at p. 25). The Claimant attributed her fall simply to the sealed concrete floor that she testified was "quite slick" with a "high shine to it" (Hearing Tr. 8/13/2014 at p. 25).

6. Ms. Butler credibly testified about her knowledge of the area in which Claimant's alleged fall occurred. Ms. Butler stated the ground was flat concrete with no topical liquids or oils applied to it. (Tr. 2 at 19-20). Ms. Butler stated they have never had any complaints regarding the ground in the stockroom and break room being slippery. (Tr. 2 at 20).

7. The Claimant testified that she did not feel immediate pain when she fell. She stated that she was in shock more than anything else and embarrassed and had a slight discomfort on the right side of her leg (Hearing Tr. 8/13/2014 at p. 25). She testified that the discomfort was different than pain she had experienced in the past. It was in a different specific spot in her DI up on her top flank of her hip where there is a bulging knot on her right side (Hearing Tr. 8/13/2014 at pp. 28-29).

8. The Claimant testified that she did not report her fall to the manager, Josh, that evening because she felt very uncomfortable around him (Hearing Tr. 8/13/2014 at p. 26).

9. The Claimant testified that within a few days after the incident that the pain/discomfort progressed and she noticed discomfort when she put on her work belt and she felt an odd feeling in her back. The work belt rubbed a spot right on her SI (Hearing Tr. 8/13/2014 at pp. 29-30). On the date of the alleged injury the Claimant further testified that she was on pain medications for her pre-existing back pain. The Claimant stated she could not feel her back pain because she was on her medications (Hearing Tr. 8/13/2014 at p. 74). The Claimant claimed the only pain she felt after falling was from a small bruise on her right knee. She stated the fall was nothing big and did not find it was a big ordeal, she was just embarrassed (Hearing Tr. 8/13/2014 at p. 80). The Claimant testified no medical treatment was needed on the date of injury and she didn't have pain in her buttocks until a couple of days after the fall (Hearing Tr. 8/13/2014 at p. 82).

10. The Claimant's medical records also document a motor vehicle accident that occurred a few days after the fall at work (Claimant's Exhibit 11, p. 654; Respondents' Exhibit C, p. 37). During cross examination, the Claimant confirmed that she was in a motor vehicle accident after the fall at work, but before the first time she sought medical care for her alleged work injury. Although the Claimant testified that the MVA was minor and the car just bumped a guardrail at low speed and the Claimant only had a headache from this MVA and there was no aggravation to her back (Hearing Tr. 08/13/2014 pp. 86-88 and stipulated ALJ notes of testimony missing from digital recording).

11. There was considerable discrepancy between the testimony of the Claimant and the testimony of the Claimant's supervisors and co-workers as to how and when the Claimant reported a fall occurring on May 22, 2011.

12. Although the Claimant claimed she fell at work on the evening of May 22, 2013, the Claimant's supervisor Shelley Jocson testified that she reviewed time records for the store and determined the Claimant was not working on May 22, 2013 although she had worked on May 21, 2013. Additionally, according to Ms. Jocson, the manager "Josh" who the Claimant testified was working the night of her fall, did work on May 22nd but on May 21st, the date that the records show that the Claimant worked, he left at 6:30pm and he was not the closing manager. Instead, a female manager Lynn Henderson was the closing manager on May 21, 2013 (Hearing Tr. 10/6/2014 at p. 43).

13. The Claimant testified the first person to whom she reported the injury was Ms. Butler, an assistant store manager for the Employer, and she reported it the next time they worked together. The Claimant stated she was not sure what day this was, but it was within two days from the alleged date of injury (Hearing Tr. 08/13/2014 at p. 31). In that conversation, the Claimant testified Ms. Butler told her the store surveillance cameras were not working at the time (Hearing Tr. 08/13/2014 at pp. 32-33). However, Ms. Butler credibly testified that the Claimant never approached her and told her she fell in the two to three days following the injury (Hearing Tr. 10/6/2014 at p. 10). Ms. Butler stated that she never had a conversation with Claimant regarding security cameras (Hearing Tr. 10/6/2014 at pp. at 10-11).

14. The Claimant also testified that on June 9, 2013, when she attended a work party at P.F. Changs in the evening, she talked to Ms. Butler again about her fall and how she had gone to urgent care that morning and that the Claimant felt the problem was becoming worse (Hearing Tr. 08/13/2014 at p. 36). The Claimant stated that Ms. Butler sat up looked, gazed around and said "ok" (Hearing Tr. 08/13/2014 at p. 37). However, Ms. Butler credibly testified the Claimant never told her about her alleged fall at the June 9, 2013 Pier 1 work party. Ms. Butler stated that, had the Claimant told her she fell at work, she would have immediately told her supervisor, Shelly Jocson, who was sitting across the table from her (Hearing Tr. 10/6/2014 at p.12). Ms. Jocson further testified that neither Ms. Butler nor the Claimant told her anything about a back injury at the Pier 1 party on June 9, 2013 (Hearing Tr. 10/6/2014 at p. 39).

15. Ms. Butler credibly testified the first time the Claimant told her about a workplace event was in mid to late June (Hearing Tr. 10/6/2014 at p.12). The Claimant told Ms. Butler in a light hearted manor, akin to joking, about the fall (Hearing Tr. 10/6/2014 at p.14). Ms. Butler further testified that the Claimant told Ms. Butler that she was not hurt and was really just more embarrassed about the fall so she hurried up looked around to see if anyone was watching and kept walking (Hearing Tr. 10/6/2014 at p.14). At that time, Ms. Butler testified that she asked the Claimant if she tripped or slipped on anything, which the Claimant replied she had not (Hearing Tr. 10/6/2014 at p.14). Ms. Butler testified that she told Ms. Jocson the following day. Ms. Butler informed Ms. Jocson because the conversation with the Claimant struck her as "odd,"

she believed she should report the conversation (Hearing Tr. 10/6/2014 at p.18). Ms. Jocson, the store manager, credibly testified that the Claimant told Ms. Butler she fell in the stockroom in mid-June. Ms. Jocson knew something happened but did not have notice of an injury from the Claimant (Hearing Tr. 10/6/2014 at p.38).

16. The Claimant's primary care physician told her on June 24, 2014 that she should notify her human resources department about reporting a potential injury (Claimant's Exhibit 11, p. 653; Respondents' Exhibit C at p. 168). The medical note does not document that during this visit the Claimant told her physician she had already reported it twice.

17. The Claimant testified she reported her injury to Ms. Jocson, the general manager of the store, for the first time on the day before they put in the workers' compensation claim (Hearing Tr. 08/13/2014, pp. 38-39). There is a form completed by Ms. Jocson titled "Telephone Reporting Workers' Compensation Report." The report notes that the injury was reported to the Employer on July 1, 2013 with an injury date of May 22, 2013. The loss description was, "walking from breakroom to mop room to shut off water. Foot placement did not take hold and fell (Claimant's Exhibit 4, p. 15). The Employer's First Report of injury was completed by Ms. Jocson on July 2, 2013. In describing the injury it states, "EE walked into the stock room and fell, with no cause, she saw a doctor but her diagnosis is unknown, she complains of back pain…" (Respondents' Exhibit A, p. 1).

18. Overall, the more credible testimony and the documents support a timeline that the Claimant did not report her fall to Ms. Butler around late June 2012 and then to Ms. Jocson on July 1, 2013, after her June 24, 2013 visit with her primary care physician where the Claimant's doctor advised her to report the fall to her Employer.

19. The Claimant stated Ms. Jocson told her she could no longer work until they figured out what was going on. The Claimant testified Ms. Jocson provided her a list of physicians at that time (Hearing Tr. 08/13/2014 at pp.38-39).

20. In the midst of the confusion about the date the Claimant reported she fell at work, the Claimant had actually sought care two weeks following her alleged fall, before reporting it to her Employer and before a workers' compensation claim was commenced. There is a medical record dated June 9, 2013 at Memorial Urgent Care. The Claimant was examined by Dr. Stanley Johnson. The Claimant arrived on a Sunday, over two weeks following her alleged injury, talking about how terrible her hip pain was. The Claimant stated the bruising and pain in her leg were gone and denied ever having pain in her low sacrum or tailbone areas (Claimant's Exhibit 9, p. 453). It was noted that the Claimant had chronic pain troubles before, including fibromyalgia and migraines, as well as, surgery on her right knee along with a number of other medical issues (Claimant's Exhibit 9, p. 453). Dr. Johnson's examination showed the Claimant's thigh was negative to palpation with no loss of range of motion. The Claimant underwent X-rays on her hip and back which were negative (Claimant's Exhibit 9, p. 453). These medical records show no objective signs that an injury

occurred to her back, buttocks or hip.

21. The Claimant testified that her shoulder was a separate issue that had been going on "for years" and was not related to the motor vehicle accident (Hearing Tr. 08/13/2014 at p. 87). The Claimant had stated to Dr. Ridings she had been having recurrent left shoulder dislocations since age 17 and reported 19 dislocations over the past six years (Respondents' Exhibit B, p.14). However, Claimant's medical records for a year leading up to the alleged date of injury do not mention any shoulder problems (Respondents' Exhibit B).

22. The Claimant treated again after another two weeks passed, when she was seen by her primary care provider Dr. Phillip Shriver on June 24, 2013. Dr. Shriver noted that the Claimant should notify her human resource department at work as her pain could be work-related (Claimant's Exhibit 11, p. 653; Respondents' Exhibit C at p. 168). The Claimant was complaining of right hip pain that radiated down her leg that was piercing and sharp. Dr. Shriver noted that there was an injury and a motor vehicle accident according to the history given by the Claimant. The Claimant complained of a headache and left arm dislocation from the motor vehicle accident. The Claimant complained of tailbone pain from her fall at work. The Claimant described pain that hurts all the time and makes it difficult to sleep (Claimant's Exhibit 11, p. 654; Respondents' Exhibit C, p. 169).

23. The Claimant was seen by Dr. Shriver again on July 2, 2013. Claimant was seen at this visit for musculoskeletal pain and instability in her left shoulder. The Claimant was referred for physical therapy and referred to an orthopedic surgeon for a surgical evaluation for her left shoulder. There was discussion about a 15 year history of her shoulder history which she reported had increased significantly in the last 6 months. There was no mention of the Claimant relating back pain to her alleged injury on May 22, 2013, nor discussion of any back, hip or leg pain at this visit (Claimant's Exhibit 11, p. 656; Respondents' Exhibit C, p. 33).

24. The Claimant selected Concentra as her authorized treating provider. The Claimant presented no credible evidence that the Employer did not give her a list of two designated physicians. The Claimant was first examined on July 8, 2013 at Concentra by Dr. Daniel Peterson. Dr. Peterson reported that the Claimant described her injury as a slip and fall where she landed right on her right buttock cheek. He noted that the injury occurred about 7 weeks prior, but the Claimant did not file a workers' compensation claim until just recently. Dr. Peterson noted that the Claimant reported not having any trouble at the time of the fall, but that by June 9, 2013, the Claimant went to Memorial Urgent Care and they did an x-ray of her sacrum and coccyx which revealed only developmental (not acute) abnormalities and an x-ray of her right hip which was completely normal. Dr. Peterson noted, but did not explore in detail, Claimant's history of low back problems before the fall at work, noting a prior MRI scan that showed typical age-related mild disc degeneration at L4-5. There was no nerve root displacement or spinal canal compromise. Dr. Peterson also noted Claimant had a history of migraines degenerative disk disease, fibromyalgia, blindness in her right eye, blurred vision, eye

pain, head injuries, leg swelling, joint pain, back pain and joint stiffness and she claims that she has celiac disease. Dr. Peterson had the Claimant's lumbar spine X-rayed and noted it was read as normal. Dr. Peterson noted that Claimant stated this had been accepted as a workers' compensation claim because of the fall at work even though it did not occur in the performance of her work duty. He diagnosed the Claimant with a back contusion and a sacroiliac strain. Dr. Peterson additionally opined "this is the ridiculous thing; it could happen anywhere, but has been accepted apparently by the work comp insurance already (Claimant's Exhibit 15, pp. 690-691; Respondents' Exhibit F, pp. 147-148). Contrary to the Claimant's statements to Dr. Peterson, Respondents contested the claim.

25. On follow-up with Dr. Peterson on July 23, 2013, the Claimant stated her symptoms were only slowly getting better and that she had been working regular duty. The Claimant advised that she had been to physical therapy multiple times and this made her feel better. Dr. Peterson noted that the Claimant agreed that she has SI joint dysfunction. Dr. Peterson also noted the Claimant was frustrated with slow progress being made on her SI stabilization. Dr. Peterson also noted that in the meantime Dr. Topper planned for Claimant's left shoulder surgery (Claimant's Exhibit 15, p. 698; Respondents' Exhibit F, p. 144).

26. At a re-check appointment with Dr. Peterson on August 6, 2013, the Claimant was working regular duty but she reported her pattern of symptoms only slowly getting better although the medications provided relief. The Claimant reported that the SI joint was finally staying stable although she still reported a lot of pain in the SI area (Claimant's Exhibit 15, p. 701; Respondents' Exhibit F, p. 140).

27. The Claimant underwent an orthopedic evaluation for her left shoulder in August of 2013. Following the orthopedic evaluation, Ms. Butler testified she had a conversation with Claimant regarding her shoulder and her needing surgery. The Claimant came to her in tears and told Ms. Butler that she could not even lift a pillow. When Ms. Butler told the Claimant she needed to talk to Ms. Jocson about her shoulder, the Claimant protested stating she did not want to because Shelly would have to cut her hours, and she needed the money. Ms. Jocson testified that in late August, one of the last days Claimant worked, she came to work with a sling on her shoulder (Hearing Tr. 10/6/2014, pp. 21-22).

28. Dr. Peterson examined the Claimant again on August 29, 2013. The Claimant told Dr. Peterson that she had not been working because she chose not to work. Claimant took herself off of work for two weeks. Dr. Peterson reported that the Claimant did get an SI injection on the right side from PA Peter Brumlich and reported 100% temporary relief from the injection. Dr. Peterson did note that the Claimant was getting ready to have shoulder surgery for a non-workers' compensation issue (Claimant's Exhibit 15, p. 21; Respondents' Exhibit F, p. 135). The Claimant's statements about taking herself off work voluntarily is contrary to the testimony of Ms. Jocson who testified that the Claimant was off work because of her left shoulder (Hearing Tr. 10/06/2014, pp. 45-46).

29. Claimant underwent an arthroscopic left shoulder surgery on October 11, 2013 (Claimant's Exhibit 20, pp. 773; Respondents' Exhibit B, p. 15).

30. The Claimant was not seen again for her workers' compensation injury until November 7, 2013. The Claimant came in as a walk-in and saw Dr. Lori Rossi who noted the Claimant was reporting increased pain and that she felt "back to square one." A referral was made to PA Peter Brumlich for a repeat SI injection (Claimant's Exhibit 15, p. 709; Respondents' Exhibit F, p. 125).

31. On December 10, 2013, the Claimant saw Dr. Peterson again and reported her symptoms were no better. Claimant stated she was not working because there was no light duty available. Dr. Peterson referred the Claimant to a physiatrist and pain specialist. He also made a referral for "case review and management due to complexity and delayed recovery" (Claimant's Exhibit 15, p. 320; Respondents' Exhibit F, p. 124).

32. The Claimant saw Dr. Eric O. Ridings for an IME on January 6, 2014. In conjunction with the IME, Dr. Ridings reviewed extensive medical records and provided a thorough medical record review. He also conducted an interview with the Claimant about the history of her present illness and conducted a physical examination. Dr. Ridings opined that Claimant's description of the fall was not reasonable stating that her right leg shot out in front of her, then, she fell very hard onto her right buttocks which resulted in her bouncing back up again onto her two feet again, all in the same movement. Dr. Ridings further opined that her current complaints are consistent with those she has documented on many occasions and are related to her chronic pain syndrome for which she has been on daily opiates for years. Consistent with her prior medical history, Dr. Ridings notes that the Claimant reported no benefit with multiple conservative treatment interventions. He opined that his examination revealed "diffuse pain to palpation in the lateral lumbar region, not over spinal joints or the SI joint" and "diffuse non-dermatomal numbness in the bilateral lower extremities." Dr. Ridings opined that he did "not see any objective evidence of any ongoing injury that [he] can relate within a reasonable degree of probability to the patient's claimed fall at work on 05-22-13." Dr. Ridings further opined Claimant's evaluation was not consistent with pain of a discogenic, facet, SI joint or neurologic etiology. He essentially found the Claimant was at her long-term baseline and requires no additional treatment and suffered no aggravation of her pre-existing conditions (Claimant's Exhibit 20, p. 778; Respondents' Exhibit B, p. 20).

33. Dr. Ridings persuasively testified at hearing consistent with his written IME report dated January 6, 2014. Dr. Ridings was present during both days of testimony for this hearing and heard the testimony of the Claimant, Ms. Butler and Ms. Jocson. Dr. Ridings testified that he could not say whether the Claimant actually fell or not on May 22, 2013. However, he did testify that regardless of whether or not she fell, there was no evidence that would connect any of the Claimant's ongoing symptoms to a fall at work (Hearing Tr. 10/06/2014, pp. 74-75). Notwithstanding the Claimant's testimony that the pain she has is different somehow, Dr. Ridings testified that based on his examination,

his questioning of her about where she was having pain, and his review of the medical records, the symptoms that the Claimant attributes to a fall occurring on May 22, 2013 are, in reality, the same symptoms that have been documented for years (Hearing Tr. 10/06/2014, pp. 75-79). Dr. Ridings also expressed concerns about the mechanism of the injury that the Claimant has described to several physicians and in her testimony. He opined that the description of her right foot being out in front of her then landing on her buttock and somehow also striking the outside of the knee in a position with her hip externally rotated and then bouncing back up to her feet would not be physically possible unless the fall was on a trampoline (Hearing Tr. 10/06/2014, p. 81). Dr. Ridings testified that, someone with fibromyalgia who hit the ground as the Claimant stated she did, would expect to have significant pain right away, not a couple days later as the Claimant had testified (Hearing Tr. 10/06/2014, p. 83). Dr. Ridings also testified that in reviewing the initial medical reports closest to the reported incident, there were fractures or bruising in any areas where she reported pain (Hearing Tr. 10/06/2014, pp. 82-84). Ultimately, Dr. Ridings testified that if the Claimant did fall, she did not sustain any injury as a result of that fall (Hearing Tr. 10/06/2014, p. 87).

34. Overall, the ALJ finds that the Claimant is not as credible a witness as Ms. Butler and Ms. Jocson. The Claimant also has credibility issues related to conflicts in her testimony and the extensive medical records in this case. The Claimant's testimony is also legitimately questioned due to the testimony of Dr. Ridings. Notably, the Claimant's description of her fall and the ensuing injury is not likely to have occurred in the manner the Claimant stated it did. The Claimant testified she stepped on flat concrete lost her footing and fell down bouncing back up onto her feet before coming to a stop. Dr. Ridings noted this simply was not physically possible. Dr. Peterson also noted this was "ridiculous." The Claimant also recalls conversations she had with her supervisor Ms. Butler that do not appear to have occurred. The Claimant testified the first person to whom she reported the injury was Ms. Butler, an assistant store manager for the Employer, the next time she worked. The Claimant stated she was not sure what day this was, but it was within two days from the alleged date of injury. In that conversation. The Claimant testified Ms. Butler told her the cameras were not working at the time. The Claimant testified she told Ms. Butler she took a fall in the stockroom and if she would replay the footage, she would "get a good laugh." The Claimant inconsistently testified she was not aware of there being any cameras in the backroom. The Claimant also testified she never had hip pain or chronic back pain prior to her workplace injury; however, the medical evidence showed the Claimant had an extensive prior history of chronic back and hip pain in the months and years prior to her alleged workplace injury. The Claimant further testified her usual back pain was not constant but was intermittent. The prior medical records show the Claimant had constant chronic back pain prior to her workplace injury. The Claimant testified she was given work restrictions for her workers' compensation claim and was never given work restrictions for her shoulder injury. The medical records indicate she received work restrictions for her shoulder. The Claimant testified it was her work restrictions from her alleged fall that Pier 1 took her off of work. The medical records and testimony from Dr. Ridings indicate the Claimant was taken off work for her shoulder injury. Testimony from Ms. Butler was that the Claimant was off work for her shoulder surgery. The Claimant made clear

misstatements to Dr. Peterson regarding the fact the insurance company had already accepted the claim when, in fact, it was not accepted.

35. There is no objective credible, or persuasive medical evidence that the Claimant suffered a new injury from her alleged slip and fall. Dr. Ridings noted in his report and testified that the Claimant was suffering from no new symptoms. While Claimant stated she had a "new pain that was sharp" and in a new area, the medical records showed the Claimant to have the same pain complaints she has had for the previous 10 years. The medical records indicate that the Claimant had prior hip pain, prior back pain, prior bilateral radiating leg pain, and bilateral buttock pain.

36. Overall, the Claimant's testimony was inconsistent and not generally substantiated by witnesses or the evidence. The testimony of Ms. Butler, Ms. Jocson and Dr. Ridings was generally found to be more credible and persuasive than that of the Claimant where there were conflicts in the testimony and evidence.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

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

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

### ***Compensability***

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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).

In resolving whether the Claimant has met her burden of proof to establish that she suffered a compensable injury, the ALJ must examine the totality of the evidence and consider credibility. In addition to issues related to the initial reporting of the alleged work injury, there are other inconsistencies in the Claimant's statements to medical providers, supervisors and in her testimony. In addition, Dr. Ridings testified that the mechanism of injury the Claimant provided to him and during testimony at the hearing was medically improbable and, even if it did occur, it was not likely to be the cause of the symptoms that the Claimant was now attributing to the slip and fall. He further

testified that if the symptoms were related to the slip and fall, the pain would have had a more immediate onset than that reported by the Claimant. After hearing the Claimant's testimony and reviewing medical records, Dr. Ridings concluded that if the Claimant fell, she did not sustain any injury as a result of the fall.

The first red flag in this case is the Claimant's very description of her mechanism of injury. The Claimant's ATP Dr. Peterson who saw the Claimant approximately 7 weeks after the alleged fall noted that the claim was "ridiculous." Dr. Ridings also expressed concerns about the mechanism of the injury that the Claimant has described to several physicians and in her testimony. He opined that the description of her right foot being out in front of her then landing on her buttock and somehow also striking the outside of the knee in a position with her hip externally rotated and then bouncing back up to her feet would not be physically possible unless the fall was on a trampoline. Further, Dr. Ridings testified that, someone with fibromyalgia who hit the ground as the Claimant stated she did would expect to have significant pain right away, not a couple days later as Claimant had testified. Dr. Ridings also testified that in reviewing the initial medical reports closest to the reported incident, there were fractures or bruising in any areas where she reported pain. Dr. Ridings further opined that the Claimant's current complaints are consistent with those she has documented on many occasions and are related to her chronic pain syndrome for which she has been on daily opiates for years. Consistent with her prior medical history, Dr. Ridings notes that the Claimant reported no benefit with multiple conservative treatment interventions. He opined that his examination revealed "diffuse pain to palpation in the lateral lumbar region, not over spinal joints or the SI joint" and "diffuse non-dermatomal numbness in the bilateral lower extremities." Dr. Ridings opined that he did "not see any objective evidence of any ongoing injury that [he] can relate within a reasonable degree of probability to the patient's claimed fall at work on 05-22-13." Dr. Ridings further opined Claimant's evaluation was not consistent with pain of a discogenic, facet, SI joint or neurologic etiology. He essentially found the Claimant was at her long-term baseline and requires no additional treatment and suffered no aggravation of her pre-existing conditions Notwithstanding the Claimant's testimony that the pain she has is different somehow, Dr. Ridings testified that based on his examination, his questioning of her about where she was having pain, and his review of the medical records, the symptoms that the Claimant attributes to a fall occurring on May 22, 2013 are, in reality, the same symptoms that have been documented for years.

In addition to the issues over the mechanism of injury, the Claimant's testimony regarding the reporting of the incident and her initial treatment for injuries she attributed to the fall also raise concerns as to the Claimant's credibility and her recollection. Overall, the ALJ finds that the Claimant is not as credible a witness as Ms. Butler and Ms. Jocson. There were conflicts between the Claimant's testimony and the extensive medical records in this case. The Claimant also recalls conversations she had with her supervisor Ms. Butler that do not appear to have occurred. The Claimant testified the first person to whom she reported the injury was Ms. Butler, an assistant store manager for the Employer, the next time she worked. The Claimant stated she was not sure what day this was, but it was within two days from the alleged date of injury. In that

conversation, the Claimant testified Ms. Butler told her the cameras were not working at the time. The Claimant testified she told Ms. Butler she took a fall in the stockroom and if she would replay the footage, she would "get a good laugh." The Claimant inconsistently testified she was not aware of there being any cameras in the backroom. The Claimant also testified she never had hip pain or chronic back pain prior to her workplace injury; however, the medical evidence showed the Claimant had an extensive prior history of chronic back and hip pain in the months and years prior to her alleged workplace injury. The Claimant further testified her usual back pain was not constant but was intermittent. The prior medical records show the Claimant had constant chronic back pain prior to her workplace injury. The Claimant testified she was given work restrictions for her workers' compensation claim and was never given work restrictions for her shoulder injury. The medical records indicate she received work restrictions for her shoulder. The Claimant testified it was her work restrictions from her alleged fall that Pier 1 took her off of work. The medical records and testimony from Dr. Ridings indicate Claimant was taken off work for her shoulder injury. Testimony from Ms. Butler was that the Claimant was off work for her shoulder surgery. The Claimant made clear misstatements to Dr. Peterson regarding the fact the insurance company had already accepted the claim when, in fact, it was not accepted.

Ultimately, there is no objective credible or persuasive medical evidence that the Claimant suffered a new injury from her alleged slip and fall. Dr. Ridings noted in his report and testified that the Claimant was suffering from no new symptoms. While Claimant stated she had a "new pain that was sharp" and in a new area, the medical records showed the Claimant to have the same pain complaints she has had for the previous 10 years. The medical records indicate that the Claimant had prior hip pain, prior back pain, prior bilateral radiating leg pain, and bilateral buttock pain.

Based on the foregoing, it hereby determined that the Claimant's testimony with regards to critical elements related to the purported work injury on May 22, 2013 is not credible and persuasive. Given the circumstances, including the inconsistent statements made by the Claimant, and the contrasting and more persuasive testimony of other witnesses, and the extensive medical records, the ALJ determines that the Claimant has failed to meet her burden of proof to establish that she sustained a work injury on May 22, 2013. As such, the Claimant's claims for compensation for WC 4-928-545-01 is denied and dismissed.

### ***Remaining Issues***

The Claimant failed to prove that an unwitnessed slip and fall that she alleges occurred on May 22, 2013 resulted in a compensable injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issues regarding temporary disability benefits, medical benefits and penalties are moot.

## ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain her burden of proving by a preponderance of the evidence that she suffered a compensable injury resulting from work activities on May 22, 2013.

2. The Claimant's claims for benefits under the Workers' Compensation Act of Colorado under case number WC 4-928-545-01 are denied and dismissed.

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

DATED: February 18, 2015

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

## STIPULATIONS

To the extent that the Claimant's alleged vertigo and hearing loss in his right ear are found to be related to the Claimant's February 19, 2013 work injury, the parties agree that, as of February 25, 2014, the Respondents would be liable for TTD benefits from that date ongoing.

## ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that medical treatment for the Claimant's cognitive and memory issues, vertigo, and hearing loss in his right ear (including surgery performed on the right ear on March 5, 2014) is reasonably necessary and causally related to the Claimant's industrial injury on February 19, 2013.

2. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits from April 5, 2013 ongoing.

3. If the Claimant proves that he is entitled to temporary total disability indemnity benefits, whether the Respondents' proved that the Claimant is responsible for his termination of employment and resulting wage loss.

## FINDINGS OF FACT

1. The Claimant worked for Employer for about six years prior to a work related injury on February 19, 2013. He initially was employed as a building maintenance engineer, level I (Hearing Tr. 07/29/2014, p. 14). While he held this position, his job duties included general electrical, heating, air conditioning, painting, repair, hot tub chemistry, locks, window and doors and just general building maintenance. The Claimant was not initially a supervisor and his supervisor was Terry Kressler (Hearing Tr. 07/29/2014, p. 15). After some time, the Claimant was promoted to maintenance engineer II. In addition to his other duties, he provided his supervisor with more assistance with the paperwork and he had a few more responsibilities. The Claimant testified that his work ratings as maintenance engineer II were not as good as when he was a maintenance engineer I, but he still generally received a good report on his reviews (Hearing Tr. 07/29/2014, p. 16; Claimant's Exhibit 14, pp. 200-207). Then, in May of 2012, the Claimant's supervisor retired and recommended the Claimant for the position of chief engineer. The Claimant applied for the position and he was hired for it (Hearing Tr. 07/29/2014, pp. 16-17). The Claimant testified that he was concerned about some of the computer and paperwork aspects of the chief engineer position but

he was assured that he would be trained. However, due to management travelling off-site and management changes, the Claimant testified that he was not properly trained and the management was not available to discuss issues with the Claimant (Hearing Tr. 07/29/2014, pp. 17-18). The Claimant also testified that he was understaffed almost the whole time he was chief engineer, having not been able to fill his old position, so there was only him with 2 other engineers instead of 3 (Hearing Tr. 07/29/2014, pp. 19-20). The Claimant also testified that when he took over the chief engineer position he took it upon himself to tackle some larger, long-standing maintenance problems. So, he would get frustrated that his supervisor would stress small issues and not recognize the overall job that he was performing (Hearing Tr. 07/29/2014, p. 21).

2. Ms. Gina Weeks testified by telephone at the hearing on July 29, 2014. Ms. Weeks is the resort director for the Employer and is familiar with the Claimant. She worked with him for a number of years when she was working with the developer and then she was his manager when she was promoted to resort director. Ms. Weeks testified that when the Claimant was in the position of maintenance technician, he was a great employee, responding to all of his calls and doing what he was supposed to and even going beyond that to do extra stuff (Hearing Tr. 07/29/2014, p. 63). Ms. Weeks testified that the Claimant was promoted to chief engineer on June 19, 2012 (Hearing Tr. 07/29/2014, p. 63). As a result of this, the Claimant had about 30 days of on the job training with Terry Kressler, the outgoing chief engineer who was retiring. Ms. Weeks does not recall any other training provided to the Claimant (Hearing Tr. 07/29/2014, p. 64). Once the Claimant was in the chief engineer position, Ms. Weeks described his job performance as "very poor." She testified that the main performance issue was the Claimant's lack of urgency. He never did anything "now" but put everything on hold for a later day (Hearing Tr. 07/29/2014, p. 64). Ms. Weeks had a counseling session and issued a written warning to the Claimant on November 12, 2012. Ms. Weeks testified the write-up was for a few issues, the main issue being that "he showed male chauvinistic tendencies towards me being a manager" and that he had no sense of urgency. The remaining issues in the write-up were smaller issues (Hearing Tr. 07/29/2014, p. 65). The written warning is consistent with Ms. Weeks testimony. The Performance Improvement plan was for "[the Claimant] to work on his leadership skills and his sense of Now. These are 2 important [Employer] values that have not been present in [the Claimant's] demeanor since his shift from Maintenance Tech to Chief Engineer." It was noted that if the Claimant could not manage his staff and himself more efficiently, then the consequences could lead up to termination (Respondents' Exhibit A, p. 3).

3. Ms. Weeks testified that when she returned to work on October 1, 2012, after having a baby, she came back to the Claimant having been promoted to chief engineer. She noticed that the Claimant hadn't hired a maintenance tech to replace his old position and some other employees came into her office telling her that morale was down. Ms. Weeks testified that she approached the Claimant about this to let him know morale was down with the engineering staff and that they needed to hire someone sooner rather than later. She testified that the Claimant looked at her and asked if she thought that morale was down because they were working for a woman, which Ms. Weeks characterized as a statement "which came out of nowhere." Ms. Weeks did not

agree with the Claimant's recollection of the conversation that they were "commiserating." She testified that she told the Claimant clearly that morale was down because they needed to hire somebody because everybody was feeling overworked (Hearing Tr. 07/29/2014, p. 65-66). The Claimant testified that he never indicated that the staff's morale was down because they worked for Gina who was a woman. The Claimant described the situation differently. He testified that Gina had come into the Claimant's office and mentioned that in her new position as property manager she wasn't getting much respect from some of the employees. In response to this, the Claimant asked if Gina thought that this might be because she was a woman and some men have a problem with working for women. The Claimant testified that he did not say he ever had a problem working for women, only that this may be the issue, and they were having this discussion in the context of commiserating with each other. Then, the Claimant testified, that they went on to discuss other things that day and he felt that in a later write-up the conversation was taken out of context to make it sound like the Claimant didn't respect her because she was a woman. He felt that his word had been twisted into something that couldn't be any farther from the truth (Hearing Tr. 07/29/2014, pp. 56-57).

4. Ms. Weeks testified that the Claimant's 2012 performance review done in January 2013 was not a good review and he was found to be below "partially meets expectations" (Hearing Tr. 07/29/2014, p. 68). Ms. Weeks testified that the problems the Claimant was having included, difficulty from transitioning from an hourly to a salary employee, a lack of urgency, and failure to take direction from Ms. Weeks (Hearing Tr. 07/29/2014, p. 69). The 2012 Performance review confirms Ms. Weeks testimony and the Claimant received marks of either "partially meets expectations" or "does not meet expectations" in 7 of 8 reviewed categories. As for his overall performance it was noted that [the Claimant] does a great job in Maintenance. When asked to perform a task, [the Claimant] gets it done to satisfaction. [The Claimant] is a great Maintenance Tech, however, [the Claimant] needs to be a great Chief Engineer. He needs to see the whole big picture of taking care of the building and taking care of his team (Claimant's Exhibit 14, pp. 221-222; Respondents' Exhibit A, pp. 5-6).

5. Ms. Weeks testified that the Claimant received another write-up on February 2, 2013 (Hearing Tr. 07/29/2014, p. 69). The written write-up is for performance transgression. The write-up specifically details that the sidewalk had not been shoveled after snowfall for the second day in a row. After asking the Claimant to do this, Ms. Weeks found out a different employee actually did the work. The Claimant had also failed to install breaks on the double doors at the front of the building. There were other examples of projects that the Claimant was slow to begin or complete that had to be completed by the resort manager. The resort manager also noted that the Claimant had difficulty working with Housekeeping Department and does not always communicate with the Front Desk in the way that he should. It also came to light that the Claimant was apparently drawing pictures and writing songs in the Engineering log when he should have been working (Respondents' Exhibit A, p. 8).

6. Ms. Weeks testified that the Claimant missed one day of work after his February 19, 2013 work injury and when he returned his work restrictions included not

being able to climb on a ladder. However, the Claimant did not follow that restriction (Hearing Tr. 07/29/2014, p. 70). Ms. Weeks testified that the Claimant's behavior following his February 19, 2012 work injury was not any different than before. Specifically, Ms. Weeks testified that he did not seem any more forgetful (Hearing Tr. 07/29/2014, p. 70). Ms. Weeks testified the Claimant's employment was ultimately terminated due 100% to his job performance, but not related to any one specific circumstance (Hearing Tr. 07/29/2014, pp. 70-71). On cross-examination, Ms. Weeks confirmed that in mid-2012 the Claimant was promoted to chief engineer, Rafe Sykes was promoted to regional general manager and Ms. Weeks, who was previously the assistant GM was promoted to resort director. She characterized this as natural progressions and testified that "none of it was a big surprise" (Hearing Tr. 07/29/2014, p. 72). Ms. Weeks agreed that the Claimant received good reviews as a maintenance tech and that he didn't have bad performance reviews until he was promoted to chief engineer (Hearing Tr. 07/29/2014, p. 73).

7. On cross-examination, the Claimant was questioned about write-ups the Claimant received for work performance. The Claimant did not initially recall the details a write-up from November 12, 2012, but he believed he did receive a write-up around that time, about 3 months after he had been promoted to chief engineer (Hearing Tr. 07/29/2014, p. 37). In discussing the issues listed in the November 12, 2012 write-up, the Claimant testified that he believes he set his priorities differently from his supervisor Gina and that he felt it was a disagreement about priorities (Hearing Tr. 07/29/2014, pp. 38-39). The write-up also noted that the Claimant came in late for shifts, left in the middle of shifts and left early from shifts. However, the Claimant testified that this was a rare occurrence that he left mid-shift and it only happened one time when he had to give medicine to a sick pet (Hearing Tr. 07/29/2014, p. 40). The write-up also noted that the Claimant was asked to work extra shifts, but instead, he had another staff member work overtime. Regarding this issue, the Claimant did not have a specific recollection but he recalled that it was an emergency situation (Hearing Tr. 07/29/2014, pp. 40-41). The Claimant was also questioned about a poor performance review in January 2012. The Claimant attributes the problems brought up in this review to being understaffed and not having enough workers to take care of all of the issue that came up, so he would have to prioritize (Hearing Tr. 07/29/2014, pp. 42-43). On February 2, 2013, the Claimant received a final written warning, and he testified that he was aware that this meant his job was on the line if his performance did not improve. He testified that the way that he felt was that it seemed like the harder he worked, the more mistakes he made. He testified that "it was not for a lack of effort. I just felt like the victim of circumstances that I couldn't control" (Hearing Tr. 07/29/2014, p. 44).

8. The Claimant testified that on February 19, 2013 ice fell right on the back of his head just below the crown. He reported the injury within a few minutes of it happening to Gina Weeks, his supervisor (Hearing Tr. 07/29/2014, p. 22). The Claimant testified that Ms. Weeks did not provide a list of 2 providers, but rather sent the Claimant to the Breckenridge Clinic which was about a mile away. The hotel's shuttle driver took the Claimant to the clinic as the Claimant couldn't drive due to the loud whistle going off in both ears, the double vision and the dizziness/vertigo he was experiencing (Hearing Tr. 07/29/2014, pp. 23-24). The Claimant testified that he saw Dr.

Hay, the attending physician and she took the Claimant off work for a couple of days. Then, she released him to modified duty (Hearing Tr. 07/29/2014, p. 25). On cross-examination Ms. Weeks confirmed that the Claimant wasn't given a list of two doctors because there is only one medical center in Breckenridge, but that if it were after hours or more urgent, then an employee can go to St. Anthony's Hospital in Frisco (Hearing Tr. 07/29/2014, p. 77).

9. The Claimant was initially seen by Dr. Erin Hay at High Country Health Care Breckenridge. Dr. Hay noted that the Claimant reported "working on a fence when a large piece of ice fell from the 5th story roof landing on posterior of patient's head. Ice then exploded into smaller pieces." The Claimant complained of ringing in ears, tunnel vision at the time of injury and some double vision at the time he was at the clinic, slight dizziness and some overall weakness. The Claimant reported his head was full with pressure, worse later than when the incident occurred. Dr. Hay assessed the Claimant with a mild concussion and encouraged hydration, rest and Tylenol or ibuprofen as needed. He was taken off work until a follow-up visit in 2 days. He was sent to the hospital for a CT scan of his head (Claimant's Exhibit 4, pp. 5-8; Respondents' Exhibit F, pp. 130-133). In follow up on February 21, 2013, the Claimant reported feeling much better but he still had the ringing in bilateral ears and a headache. The CT scan was negative. The Claimant was released to return to work but was not to climb until further follow up (Claimant's Exhibit 4, pp. 9-11; Respondents' Exhibit F, pp. 126-129).

10. The Claimant received another final written warning for job performance on February 22, 2013, three days after his work injury. This write up was for performance transgression again. While dated on February 22, 2012, all of the specific transgression items took place between 2/2/13 and 2/17/2013, prior to the Claimant's injury. The performance transgressions included: the common hot tubs being unusable and dirty with one out of order; a Christmas wreath still being up on 2/3/13; failure to paint a wall that Claimant was asked to paint for 2 months; walking into a guest room with a "do not disturb" sign and encountering a guest in the bathroom in his underwear and then telling the guests they could not use their bathroom, leaving the guests angry and requiring the front desk agent to refund their entire stay; continued failure to work with the Housekeeping Department; and on 2/17 giving two employees the same week off so that the third employee and the Claimant had to cover all of the shifts that week and requiring overtime (Claimant's Exhibit 14, pp. 223-224; Respondents' Exhibit A, pp. 16-17). The Claimant testified that he was able to draft a rebuttal to the write up addressing each of the points in the written warning. The Claimant testified that it took him a long time to write this rebuttal compared to the other ones that he had written to his prior written discipline (Hearing Tr. 07/29/2014, p. 45).

11. On March 1, 2013, the Claimant returned to see Dr. Hay at High Country Health Breckenridge and he reported constant tinnitus, with his left ear worse than the right. The Claimant reported occasional mild headaches that occurred every few days. The Claimant reported no dizziness and stated he felt like he could climb ladders. The Claimant was returned to work with no work restrictions (Claimant's Exhibit 4, pp. 12-15; Respondents' Exhibit F, pp. 122-125).

12. When the Claimant saw Dr. Hay on March 18, 2013, he reported that the headaches went away and he has no dizziness. The Claimant still had ringing in his ears and was going to see Dr. Mawn about that. Dr. Hay noted that her ear exam of the Claimant was unremarkable (Claimant's Exhibit 4, pp. 15-17; Respondents' Exhibit F, pp. 118-120).

13. The Claimant testified that while he was working modified duty until about March 31, 2013, he was having mental and physical difficulties performing his job. He testified that his short-term memory suffered and he would forget things he had done or forget to do things that he should have done (Hearing Tr. 07/29/2014, p. 25). The Claimant testified that the types of problems that he was having at work before his injury were very different from the types of problems he was having after the injury. On one occasion, he recommended an employee for a raise and put it into the computer, but he told the employee he gave him a much bigger raise than he actually had, since he did not remember what he had put into the computer (Hearing Tr. 07/29/2014, p. 26). The Claimant's employment was terminated and he testified that his last day was April 5, 2013.

14. A termination reference was drafted on April 5, 2013 but was not provided to the Claimant. This write-up included all of the performance issues between the last write-up and April 5, 2013. Many of the listed items are continuations of problems for which the Claimant received write-ups in the past including the failure to complete maintenance projects such as a leak into the parking garage between 4/1 and 4/4; failure to hold meetings and complete paperwork; continued failure to communicate effectively with the Housekeeping Department and the Front Desk and failing to answer his phone; arriving at work late on the day a new engineer was starting; failing to paint an area that the manager had been asking him to paint since last fall; hot tub maintenance issues; continued failure to shovel walkways; a continued lack of urgency and inability to assist with hotel guests who were angry; and working on ladders before he was cleared to go on ladders by his doctor. Many of these performance issues are the same issues that management had been addressing with the Claimant since November of 2012 (Respondents' Exhibit A, pp. 22-24). The Claimant testified that he recalled that Dr. Hay released him to work, but with the restriction that he was not to be on ladders. The Claimant testified that he violated this recommendation because he did not remember he wasn't supposed to be on a ladder. He remembers being dizzy on the ladder and not feeling safe, but he was so worried about losing his job he has doing things that he probably shouldn't have done (Hearing Tr. 07/29/2014, p. 47).

15. After the Claimant was terminated, the Claimant testifies that his memory problems continue and now he forgets things around the house and doesn't remember chores he has already done. The Claimant also testified that he continued to have dizzy spells in the morning (Hearing Tr. 07/29/2014, p. 27). When the Claimant was referred to Dr. Mawn, he testified that he told Dr. Mawn about the continuing dizziness as well as the tinnitus (Hearing Tr. 07/29/2014, p. 29). The Claimant then saw an audiologist who gave him hearing tests and told him that his hearing was good for his age, but diagnosed tinnitus in a lower frequency in his right ear and in a higher frequency in his left ear (Hearing Tr. 07/29/2014, p. 30). The Claimant testified that he was told there

was no effective treatment for tinnitus but he suggested a medication that was essentially a mood enhancer. The Claimant did not like the way the pills made him feel so he discontinued them after a few days. Dr. Mawn also suggested a white-noise generator to mask the tinnitus at night so it would be less bothersome and the Claimant could sleep better (Hearing Tr. 07/29/2014, p. 31). The Claimant testified that over the next months his cognition problems lingered and he became depressed (Hearing Tr. 07/29/2014, pp. 32-33).

16. On July 12, 2013, the Claimant saw Dr. Christopher Mawn on referral from Dr. Hay for evaluation of posttraumatic head injury tinnitus. The Claimant denied any hearing loss but reported headaches which were diffuse in nature and controlled with Motrin. The Claimant reported difficulty making decisions. Dr. Mawn stated, that he asked the Claimant about his memory and "he does not think that he has decreased memory." The Claimant reported nausea with no vomiting and no vision changes. With respect the ear examination, Dr. Mawn noted,

> The external ears are normal there are no deformities and no masses. The external auditory canals are normal. The tympanic membranes are normal they are in good position with a normal light reflex. There is no middle ear effusion and the tympanic membranes move well. The hearing is normal as estimated through our conversation.

From the audiology test, Dr. Mawn noted that there was hearing loss on the left at 6000 Hz and there is only one frequency with asymmetry. Dr. Mawn prescribed amitriptyline for his daily headache and to see if it would help with the tinnitus. Dr. Mawn recommended a neurology evaluation to someone who specializes in post concussive cognitive deficits (Claimant's Exhibit 7, pp.104-106; Respondents' Exhibit F, pp. 139-141).

17. The Claimant did not see Dr. Hay again until August 12, 2013. The Claimant returned to Dr. Hay because he was referred to a neurologist by Dr. Mawn due to complaints of memory loss. However, due to this being a workers' compensation matter, the Claimant needed to be evaluated by Dr. Hay before seeing the specialist. The Claimant reported being very frustrated as he reports he was laid off for memory issues, but he feels that the memory issues only started after his head injury. Dr. Hay referred the Claimant to Dr. Lynn Parry a neurologist who specializes in mild head trauma post concussive symptoms. Dr. Hay noted no work restrictions at this time (Claimant's Exhibit 4, pp. 20-23; Respondents' Exhibit F, pp. 114-117).

18. The Claimant saw Dr. Mawn again on August 23, 2013 and complained of worsening tenderness of the ears bilaterally, worse on the right. Dr. Mawn noted that the Claimant's tinnitus was secondary to his head trauma and post concussive syndrome. The Claimant stopped taking the medication Dr. Mawn prescribed at the last visit as it made him nauseous and dizzy. Dr. Mawn noted that the Claimant was now exhibiting depression secondary to his mental status changes. Dr. Mawn advised the Claimant to go back to Dr. Hay for evaluation of a different antidepressant and follow up with a neurology appointment. However, Dr. Mawn opined that he has nothing else to

help him since the Claimant was not interested in trying tinnitus masking (Claimant's Exhibit 7, pp.109-110; Respondents' Exhibit F, pp. 136-137).

19. On September 26, 2013, Dr. Hay notes that Dr. Parry provided a neurological evaluation on 9/5/2013, but the Claimant and Dr. Hay did not have the reports. Dr. Hay additionally noted that the Claimant was "really concerned about his memory loss since the injury. He was fired due to forgetfulness and he has to write things down to remember them. Long term memory ok but new memory and short term memory have deficits." Dr. Hay noted that the Claimant "clearly has a more flat affect now" due to stress from losing his job and his memory difficulty. The Claimant was referred to neurologist Dr. Moon and for an MRI of the brain (Claimant's Exhibit 4, pp. 26-30; Respondents' Exhibit F, pp. 109-112).

20. On October 25, 2013, Dr. Hay noted that she still did not have the notes from Dr. Lynn Parry and her evaluation of the Claimant so she referred the Claimant to Dr. Moon. Additionally, Dr. Hay noted "this patient is out of a job due to his memory loss after his head trauma and I think it is related. Unfortunately he lost his job and there was a large amount of time when I did not see him and he did not relay to me how much memory difficulty he was having until after he lost his job. Once I saw him again he had lost his job. Memory difficult all after his injury per patient and I do think there is true memory difficulty now and I see a different affect in [the Claimant] (Claimant's Exhibit 4, pp. 31-34; Respondents' Exhibit F, pp. 1104-107).

21. On November 11, 2013, the Claimant was evaluated by Dr. Justin S. Moon. The Claimant described his mechanism of injury consistent with prior reports. Dr. Moon notes the Claimant complained of having "dizziness with room spinning, lightheadedness, and a rocking sensation that were all mile but fairly frequent." The Claimant reported that Dr. Mawn diagnosed him with tinnitus, but no other findings. He reported that Dr. Lynn Parry, who saw him once, diagnosed him as having memory deficits. An MRI was unremarkable. The Claimant told Dr. Moon that what he is most concerned about is his cognition and memory. "He states that he went back to work and was making mistakes and was disoriented and was eventually fired." The Claimant also reported he has been depressed since the incident and has a daily bilateral temporal low-grade headache. He reports sleep problems and some nausea. Dr. Moon performed an examination reporting no abnormalities. He diagnosed the Claimant with concussion, postconcussion syndrome and memory impairment. Dr. Moon noted that the Claimant's primary complaint of memory and cognition seemed to be "greater than one would suspect in association with the other postconcussion syndrome symptoms. In most cases, patients with memory complaints following a concussive state improve once the headaches, sleep issues and dizziness are controlled, but in this case, I am not certain that is going to take place." Dr. Moon prescribed Nortripytyline for the headache and central vertigo (Claimant's Exhibit 8, pp. 115-116; Respondents' Exhibit E, pp. 94-95).

22. The Claimant saw Kevin Reilly, Psy.D., on December 11, 2013 for evaluation of his neuropsychological status to assist in diagnosis and treatment planning. Dr. Reilly conducted a clinical interview and administered the

Neuropsychological Assessment Battery (NAB), the Medical Symptom Validity Test (MSVT), the Memory Complaints Inventory (MCI) and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). In terms of validity and reliability, Dr. Reilly noted that the Claimant's pattern of performance on verbal learning tasks was indicative of inconsistent/poor effort. The MCI also demonstrated a pattern of magnified memory complaints. The Reliable Digit Span score was indicative of poor effort. Based on this, Dr. Reilly opined that the results of this evaluation "cannot be considered a valid and reliable estimate of the patient's 'true' neurocognitive capacities." Dr. Reilly's ultimate impression is that the results of the evaluation are indicative of non-organic/psychosocial factors contributing to symptom production and/or maintenance. Further, "while the neurophsychometrics cannot be considered a valid and reliable measure of the patient's 'true' cognitive abilities, they were not indicative of memory impairments." Dr. Reilly further opined that "the ongoing reported cognitive difficulties are not likely due to the patient's possible concussion in February of this year (Respondents' Exhibit I).

23. The Claimant returned to see Dr. Moon again on January 13, 2014. The Claimant reported that he did not try the Nortriptyline that Dr. Moon recommended previously. The Claimant continues to report headaches and dizziness with fluctuations in his sleep. Dr. Moon noted that formal neurocognitive testing "seemed to suggest psychosomatic issues relating to the patient's memory. He was very inconsistent in his testing, as per report from Dr. Kevin Reilly." The Claimant expressed disappointment in the neuropsychological report and Dr. Moon advised that the only option is to get a second opinion. To treat the symptoms of headache, dizziness and sleep problems, Dr. Moon again recommended Nortriptyline (Claimant's Exhibit 8, p. 120; Respondents' Exhibit E, p. 87).

24. On January 23, 2014, Dr. Carolyn Burkhardt performed an independent medical examination of the Claimant including a review of medical and employment records from February 19, 2013 to October 9, 2013 (Claimant's Exhibit 9, pp. 122-127; Respondents' Exhibit C, pp. 58-63). Dr. Burkhardt also conducted an interview and a physical examination of the Claimant. Dr. Burkhardt noted the medical records initially report dizziness, but by March 1, 2013, the Claimant denied dizziness although he reported he still had tinnitus and occasional mild headaches (Claimant's Exhibit 9, p. 58; Respondents' Exhibit C, p. 122). Dr. Burkhardt noted that the Claimant was referred to Dr. Chris Mawn, an ENT. Dr. Burkhardt notes that in a July 1, 2013 medical report, Dr. Mawn described the pain when he was first on the head "like an explosion" and then he had head pain for a number of days with vertigo that resolved. There was no hearing loss reported at that time and the Claimant had a complexly normal exam with a hearing test that showed only one frequency with asymmetry on the left at 6000 Hz. Dr. Burkhardt notes that Dr. Mawn diagnosed the Claimant with headache, tinnitus and traumatic brain injury (Claimant's Exhibit 9, pp. 123; Respondents' Exhibit C, pp. 59). Dr. Burkhardt notes that the Claimant saw Dr. Hay on August 12, 2013 and the Claimant reported memory issues with things that happened after his injury, but had no problem remembering things that happened before the injury. At this visit, Dr. Burkhardt notes the Claimant denied headaches but was frustrated because he was laid off from work for memory issues that he felt started only after the head injury. The Claimant was

assessed with post-concussive symptoms including memory difficulty and he was referred to Dr. Parry and for follow up with Dr. Mawn (Claimant's Exhibit 9, pp. 123; Respondents' Exhibit C, pp. 59). In follow up with Dr. Mawn, the Claimant was still having tinnitus and the trial of amitriptylline caused nausea and dizziness so the Claimant stopped it after a week. Dr. Burkhardt noted that at an appointment with Dr. Parry on September 5, 2013, the Claimant was felt to have depression due to mental status changes and issues with sleep (Claimant's Exhibit 9, pp. 123; Respondents' Exhibit C, pp. 59). Dr. Burkhardt notes that when the Claimant saw Dr. Hay on 9/26/2013, he was worried about his memory issues and was afraid he could not get another job. The Claimant was referred to Dr. Moon for a neurology consult and an order of a brain MRI (Claimant's Exhibit 9, p. 123; Respondents' Exhibit C, p. 59). Dr. Burkhardt then reviewed and commented on work evaluations and discipline from 11/12/2012, 1/3/2013, 2/2/2013, 2/22/2013 and 4/5/2013 (Claimant's Exhibit 9, pp. 123-127; Respondents' Exhibit C, pp. 59-63). In the patient interview with the Claimant, Dr. Burkhardt notes that the Claimant reports he doesn't recall his accident that well. He told Dr. Burkhardt that something struck him on the head and at first he thought there was an explosion or that he was shot. He advised her that his ears were ringing loudly and he developed tunnel vision. He advised Dr. Burkhardt that he saw a doctor who determined that the Claimant had a concussion. He was disoriented and confused and was off work for several days before returning. When the Claimant went back to work he would forget things and he told Dr. Burkhardt that he has a bad memory now and he gets dizzy in the morning when he sits up. He also has constant ringing in his ears. The Claimant advised Dr. Burkhardt that he has always had a good memory and now he is missing things he is supposed to do as part of his job because of his memory issues (Claimant's Exhibit 9, pp. 127-128; Respondents' Exhibit C, pp. 63-64). In reviewing the records, Dr. Burkhardt concludes that the Claimant's memory problems and the issues he was having with his job predate the injury date and that the Claimant was having difficulties before the injury that he now states occurred after the injury (Claimant's Exhibit 9, p. 130; Respondents' Exhibit C, p. 64). Ultimately, Dr. Burkhardt opines that none of the Claimant's complaints, including the memory problems are related to the injury other than the tinnitus/ringing in the ears (Claimant's Exhibit 9, p.130; Respondents' Exhibit C, p.64). Dr. Burkhardt put the Claimant's date of MMI at 8/23/2013, the date the ENT stated there were no further treatments for tinnitus. Dr. Burkhardt provides an impairment rating of 1% for the tinnitus which does not impair the Claimant's hearing. She found the complaints of dizziness to be "minimal" and falling into "Class I vestibular function" which does not merit a rating. She finds that any memory issues are unrelated to the injury and provided no rating for such. Dr. Burkhardt did suggest a work up for dementia outside the workers' compensation system (Claimant's Exhibit 9, p.131; Respondents' Exhibit C, p.64).

25. In January of 2014, the Claimant testified that the dizziness he had been experiencing became more frequent, not just in the mornings but when he was driving and at night (Hearing Tr. 07/29/2014, p. 33). Then, the Claimant began to hear a "swishing" sound in his right ear. He testified that it sounded exactly like the washing machine running at the other end of the house. After several days, the Claimant testified, he realized that the sound was his own blood rushing through his middle ear (Hearing Tr. 07/29/2014, p. 34). Then, on February 25, 2014, the Claimant testified the

rhythmical swishing sound in his right ear was louder than it had been and he started to experience mild dizziness. When he rolled over onto his right side, the Claimant testified that he heard a kind of thump, thump swishing sound and then he realized he had gone completely deaf in his right ear. He testified that when he sat up in bed the vertigo set in and the room was spinning uncontrollably and he began to vomit. The Claimant's stepson called an ambulance and they took him to St. Anthony's Hospital. They called Dr. Mawn to evaluate the Claimant and he determined that the Claimant had a perilymphatic fistula in his right middle ear (Hearing Tr. 07/29/2014, pp. 34-35). The Claimant was transferred to the St. Anthony's Hospital in Lakewood after several days and the Claimant testified that Dr. Mawn performed surgery on his ear. At that point the Claimant was taken completely off work and put on bed rest (Hearing Tr. 07/29/2014, p. 36).

26. Regarding his dizziness, the Claimant testified that sometimes it would get better for a period of days when the dizziness was not as intense, but some days would be worse. The Claimant testified that when Dr. Mawn reported in a medical note that the Claimant's initial vertigo resolved, he thinks this likely refers to the Claimant telling Dr. Mawn that he might have been feeling better for some period of time (Hearing Tr. 07/29/2014, pp. 49-50). So, if Dr. Mawn noted that the Claimant "denies any vertigo," the Claimant testified that if he wasn't feeling dizzy right at that time, he would have said he didn't feel dizzy (Hearing Tr. 07/29/2014, p. 51).

27. The Claimant testified that he began monitoring his blood pressure in January and February of 2013 because he was losing weight and feeling stressed so a friend lent him a blood pressure monitor. He did not directly relate his blood pressure to the swishing sound he was hearing in his ear. There were times when he took his blood pressure and it was high and there was no swishing sound and times when he noted his blood pressure was normal but he was hearing the swishing sound, so he did not think these were related symptoms (Hearing Tr. 07/29/2014, p. 53).

28. On March 5, 2014, Dr. Mawn performed surgery on the Claimant. He noted that complete hearing loss and vertigo was the indication for the surgery. He performed a right middle ear exploration and right round window perilymphatic fistula repair. Dr. Mawn did note that there was "no obvious fluid leak from the oval window." Although Dr. Mawn did note a small amount of fluid in one of the edges of the round window. After suctioning this, there was no immediate reaccumulation (Claimant's Exhibit 7, pp. 111-112; Respondents' Exhibit N, pp. 186-187). The Claimant was discharged on March 8, 2014 with worsening tinnitus in his right ear and dizziness. The Claimant suffered hearing loss that the surgery did not correct (Claimant's Exhibit 5; Respondents' Exhibit N). On May 21, 2014, Dr. Mawn responded to interrogatories from the Claimant's counsel that medical care and treatment that began on February 25, 2014, including ambulance service, hospitalization at St. Anthony's and surgery performed on March 5, 2014 was more likely than not related to the Claimant's head injury at work on February 19, 2013 (Claimant's Exhibit 7, pp. 113-114; Respondents' Exhibit G, pp. 134-135).

29. On March 17, 2014, the Claimant was evaluated by Dr. Alan Lipkin. Dr. Lipkin noted the Claimant had a fistula repair on the right ear several weeks prior and that the packing remains. The Claimant's vertigo symptoms have been gradually improving since the surgery. The Claimant has not been able to hear from the right ear since the acute worsening. Dr. Lipkin noted that the case presented a "complicated history of probably right sided labytinthine fistula with a repair of the possible fistula three weeks ago. Dr. Lipkin opined that the Claimant's hearing loss is likely permanent but that the tinnitus will hopefully become less bothersome with time. Dr. Lipkin found no additional medication, surgery or imaging warranted at this time. He recommended discontinuation of ear drops, keeping the right ear dry and vestibular rehabilitation to be referred by Dr. Mawn (Claimant's Exhibit 11; Respondents' Exhibit K).

30. On May 20, 2014, the Claimant was evaluated by Dr. Bennet I. Machanic to assess for maximum medical improvement and permanent partial impairment. Dr. Machanic interviewed the Claimant, provided a review of the medical records and performed a physical examination and a mental status exam. Dr. Machanic found that the Claimant was at maximum medical improvement as of May 20, 2014. Dr. Machanic rated the Claimant for permanent, very mild and subtle cognitive problems, posttraumatic emotional depression and complete hearing loss in the right ear associated with the perilymphatic fistula along with continued vestibular dysfunction. In reference to the AMA Guidelines, 3rd Edition, for the 100% hearing loss in the right ear, Dr. Machanic provided a rating of 6% whole person, a rating of 7% whole person for his balance issues, an 8% whole person impairment for complex integrated cerebral function and 1% for the tinnitus. In combining the 6%, 7%, 8% and 1%, Dr. Mechanic provides a 20% whole person impairment rating (Claimant's Exhibit 12; Respondents' Exhibit H).

31. On May 31, 2014, Dr. Alan Bruns evaluated medical records of the Claimant and prepared a written report of his record review. Dr. Bruns did not interview or perform a physical examination of the Claimant in conjunction with this record review (Claimant's Exhibit 13; Respondents' Exhibit D). Dr. Bruns reviewed medical records from February 19, 2013, the date when a large piece of ice fell from a fifth story roof and landed on the posterior part of the Claimant's head, through March 17, 2014 (Claimant's Exhibit 13, p. 81-84; Respondents' Exhibit D, p. 149-152). Dr. Bruns ultimately concludes that the Claimant's memory loss, hearing loss and vertigo are not related to the Claimant's work related injury on February 19, 2013. Rather, Dr. Bruns finds that it is more likely that in February of 2014, the Claimant's acute and sudden hearing loss with associated vertigo is more likely attributable to a viral or vascular event. Dr. Bruns does not associate the February 14, 2014 event with a perilymphatic fistula. In any event, Dr. Bruns opined that, regardless of the final diagnosis, the February 25, 2014 event is not temporally related and was not caused by the traumatic icicle injury that occurred on February 19, 2013 (Claimant's Exhibit 13, p. 154; Respondents' Exhibit D, p. 86).

32. At the hearing, Dr. Burkhardt testified as an expert who is board certified in neurology and Level II accredited. Dr. Burkhardt generally testified in accord with her written IME report and she maintained that by and large the Claimant's memory and

cognition issues were not related to the Claimant's February 2013 work injury (Hearing Tr. 07/29/2014, pp. 83-84). Subsequent to the IME she performed, Dr. Burkhardt reviewed a record related to a neuropsychological test that the Claimant underwent (Hearing Tr. 07/29/2014, p. 88). She testified that this testing confirmed her opinion regarding the non-relatedness of the Claimant's memory issues to the work injury (Hearing Tr. 07/29/2014, p.90). Dr. Burkhardt testified that partly this was due to the Claimant failing the validity testing, indicative of poor effort, and suggestive of symptom magnification and response bias. Also, in some of the detailed testing, the Claimant tested as average. Overall, Dr. Burkhardt felt that this did not present a clear pattern suggesting a post-concussive picture (Hearing Tr. 07/29/2014, p. 90).

33. Dr. Bruns testified by deposition in this matter on August 13, 2014. Dr. Bruns has practiced medicine for 24 years and is board certified in otolaryngology and testified as an expert in that field (Depo. Tr. Dr. Alan Bruns, pp. 4-6). Dr. Bruns testified that he conducted a record review of the Claimant's medical records and, in conjunction with that, he researched online medical literature related to tinnitus vertigo hearing loss and trauma (Depo. Tr. Dr. Alan Bruns, p. 7). Dr. Bruns testified that there can be a number of differential diagnoses for a sudden onset hearing loss, including a viral insult, a vascular incident, autoimmune disease, trauma, ototoxic drugs or tumors. Dr. Bruns testified that of the 8-10 patients per year that come in with a sudden hearing loss, about half of those have a viral etiology (Depo. Tr. Dr. Alan Bruns, p. 9). Dr. Bruns testified that vascular etiologies are likely the second most common cause of sudden hearing loss (Depo. Tr. Dr. Alan Bruns, p. 12). Dr. Bruns testified that as for perilymphatic fistulas, he believes that it may be hard to relate this to sudden onset symptoms, other than those related to barotraumas or a penetrating top trauma to the temporal bone (Depo. Tr. Dr. Alan Bruns, p. 13). Dr. Bruns testified that in about 30-60% of patients who experience sudden hearing loss, there is associated vertigo (Depo. Tr. Dr. Alan Bruns, pp. 14-15). In the Claimant's case, Dr. Bruns testified that his record review noted "dizziness" at the time of the February 19, 2013 icicle injury, but not necessarily vertigo contemporaneous with the initial incident. Additionally Dr. Bruns noted that the dizziness went away within a couple of days although the Claimant still had tinnitus (Depo. Tr. Dr. Alan Bruns, pp. 17-18). Then, Dr. Bruns notes that the Claimant's dizziness returned but was related to the medication taken for the tinnitus. Dr. Bruns also notes that it did not sound like the dizziness was accompanied by the "spinning sensation" that more describes vertigo (Depo. Tr. Dr. Alan Bruns, p. 18). Dr. Bruns notes that it is not until the event on February 24, 2014, as documented in the ER medical records on February 25, 2014, that the Claimant specifically complains of vertigo (Depo. Tr. Dr. Alan Bruns, p. 18). Dr. Bruns also testified that in that record, the Claimant made the comment that the vertigo was a newer sensation for him in terms of the way the dizziness felt (Depo. Tr. Dr. Alan Bruns, p. 19). Dr. Bruns testified that a perilymphatic fistula is a disruption of the membrane within the inner ear and the perilymph, which is the fluid on the outer side of the inner ear, starts to leak into the middle ear. This can happen in several places, but most notably would happen in the round window or the oval window (Depo. Tr. Dr. Alan Bruns, p. 20). Dr. Bruns testified that this is often documented in an airplane or scuba diving and there is a change in pressure and the inner ear doesn't adjust and can pop like a balloon causing immediate hearing loss and vertigo and usually ringing (Depo. Tr. Dr. Alan Bruns, p. 20-21). In

cases of direct trauma, a significant head trauma with temporal bone fractures can cause a perilymphatic fistula (Depo. Tr. Dr. Alan Bruns, p. 21). Dr. Bruns also testified that this is usually a sudden onset as opposed to delayed symptoms (Depo. Tr. Dr. Alan Bruns, p. 22). Dr. Bruns testified that typical treatment of a perilymphatic fistula is 4-5 days of bed rest, and if the symptoms did not resolve, then a surgical procedure where the disruption is closed or a blood patch is put over the oval window and the round window (Depo. Tr. Dr. Alan Bruns, p. 23). As to when a perilymphatic fistula may have occurred in the Claimant, if it did, Dr. Bruns testified that the Claimant did not initially have hearing loss at the February 2013 incident and about 5 months after that a hearing test showed normal hearing on that side, so Dr. Bruns does not think that it would make sense that he had a fistula at that time (Depo. Tr. Dr. Alan Bruns, p. 24). In reviewing Dr. Mawn's operative note, Dr. Bruns testified that there wasn't anything that he read in the report that objectively confirmed there was a fistula because Dr. Mawn didn't see any evidence of fluid coming from the inner ear. While Dr. Mawn did suction some fluid, there was no re-accumulation, so the initial fluid could have been drainage from surrounding tissues or from the local that was injected. However, Dr. Bruns conceded that there is not a lot of fluid in the inner ear and if it were to drain out, you probably wouldn't see it, which is why Dr. Bruns opines that the operation is a bit nebulous and whether or not it really helps is nebulous (Depo. Tr. Dr. Alan Bruns, pp. 25-26). Dr. Bruns ultimately opined that it is hard to say whether or not the Claimant had a perilymphatic fistula in February of 2014. However, even if that could be proven, Dr. Bruns opined that it would not be probable that it was the result of a head trauma that the Claimant had the year prior in February of 2013 (Depo. Tr. Dr. Alan Bruns, pp. 27-28). Dr. Bruns also finds the Claimant's vertigo unrelated to the event of February 2013 (Depo. Tr. Dr. Alan Bruns, p. 29). On cross-examination, Dr. Bruns agreed that he did not evaluate the Claimant and did not take a history from him (Depo. Tr. Dr. Alan Bruns, p. 30). Dr. Bruns did not agree that the surgery performed in February 2014 to treat a diagnosed fistula was necessary, but he did agree that it was reasonable (Depo. Tr. Dr. Alan Bruns, p. 31). While it is hindsight that the surgery didn't provide benefit to the Claimant, Dr. Bruns did acknowledge that this is simply a risk of surgery, that it might provide benefit and it might not (Depo. Tr. Dr. Alan Bruns, pp. 32-33). Because the initial complaint was dizziness and didn't mention spinning or nausea or hearing loss, Dr. Bruns does not believe the Claimant had vertigo after the February 2013 incident, and this is not merely because the specific term vertigo was not used, it is also because of the lack of other items associated with vertigo (Depo. Tr. Dr. Alan Bruns, pp. 34-35). While Dr. Bruns agreed that "certain convincing head traumas" can cause perilymphatic fistulas, this would be rare and usually associated with severe head trauma (Depo. Tr. Dr. Alan Bruns, p. 61).

## CONCLUSIONS OF LAW

### *Generally*

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

entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

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

***Medical Benefits - Reasonable, Necessary and Causally Related***

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). 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).

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).

This is an admitted claim and the Claimant has received conservative medical treatment for the initial symptoms that his treating physicians attributed to the February 19, 2013 industrial injury when a piece of ice fell from several stories up and landed on the posterior of the Claimant's head. The Claimant was initially seen by Dr. Erin Hay at High Country Health Care Breckenridge. Dr. Hay noted that the Claimant reported "working on a fence when a large piece of ice fell from the 5th story roof landing on posterior of patient's head. Ice then exploded into smaller pieces." At that time, the Claimant complained of ringing in ears, tunnel vision at the time of injury and some double vision at the time he was at the clinic, slight dizziness and some overall weakness. The Claimant reported his head was full with pressure, worse later than when the incident occurred. Dr. Hay assessed the Claimant with a mild concussion and encouraged hydration, rest and Tylenol or ibuprofen as needed. He was taken off work until a follow-up visit in 2 days. He was sent to the hospital for a CT scan of his head. The CT scan was negative. The Claimant was released to return to work but was not to climb until further follow up. On March 1, 2013, the Claimant returned to see Dr. Hay at High Country Health Breckenridge and he reported constant tinnitus, with his left ear worse than the right. The Claimant reported occasional mild headaches that occurred every few days. However, the Claimant reported no dizziness and stated he felt like he could climb ladders so he was returned to work with no work restrictions. When the Claimant saw Dr. Hay on March 18, 2013, he reported that the headaches went away and he has no dizziness. The Claimant still had ringing in his ears and was going to see Dr. Mawn about that. Dr. Hay noted that her ear exam of the Claimant was unremarkable.

The Claimant testified that while he was working modified duty until about March 31, 2013, he was having mental and physical difficulties performing his job. He testified

that his short-term memory suffered and he would forget things he had done or forget to do things that he should have done. The Claimant testified that the types of problems that he was having at work before his injury were very different from the types of problems he was having after the injury. However, in the initial medical records in February and March, the Claimant was not raising these complaints and the Claimant's ATP was not noting these issues independently.

The Claimant's employment was terminated on April 5, 2013. After the Claimant was terminated, the Claimant testifies that his memory problems continue and now he forgets things around the house and doesn't remember chores he has already done. The Claimant also testified that he continued to have dizzy spells in the morning When the Claimant was referred to Dr. Mawn, he testified that he told Dr. Mawn about the continuing dizziness as well as the tinnitus. The Claimant then saw an audiologist who gave him hearing tests and told him that his hearing was good for his age, but diagnosed tinnitus in a lower frequency in his right ear and in a higher frequency in his left ear. The Claimant testified that he was told there was no effective treatment for tinnitus but he suggested a medication that was essentially a mood enhancer. The Claimant did not like the way the pills made him feel so he discontinued them after a few days. Dr. Mawn also suggested a white-noise generator to mask the tinnitus at night so it would be less bothersome and the Claimant could sleep better. The Claimant testified that over the next months his cognition problems lingered and he became depressed. However, the Claimant only started to raise these memory and cognition complaints after his employment was terminated and he argued that this was the reason that he was terminated.

Yet, even in the summer of 2013, the Claimant made conflicting statements to his medical providers about the memory and cognition issues. On July 12, 2013, the Claimant saw Dr. Christopher Mawn on referral from Dr. Hay for evaluation of posttraumatic head injury tinnitus. The Claimant denied any hearing loss but reported headaches which were diffuse in nature and controlled with Motrin. The Claimant reported difficulty making decisions. Dr. Mawn stated, that he asked the Claimant about his memory and "he does not think that he has decreased memory." The Claimant reported nausea with no vomiting and no vision changes. With respect the ear examination, Dr. Mawn noted,

> The external ears are normal there are no deformities and no masses. The external auditory canals are normal. The tympanic membranes are normal they are in good position with a normal light reflex. There is no middle ear effusion and the tympanic membranes move well. The hearing is normal as estimated through our conversation.

From the audiology test, Dr. Mawn noted that there was hearing loss on the left at 6000 Hz and there is only one frequency with asymmetry. Dr. Mawn prescribed amitriptyline for his daily headache and to see if it would help with the tinnitus. Dr. Mawn recommended a neurology evaluation to someone who specializes in post concussive cognitive deficits. Essentially, at this point, the Claimant's initial symptoms following the injury had generally subsided other than the tinnitus and headaches and the Claimant

was likely aware that there was not much more that could be done medically to improve his condition.

It was only after this that the Claimant began to raise the cognitive issues and connect them with his injury. The problem with this is that although the Claimant perceives that he was fired for cognitive and memory issues that impacted his job performance only after the February 19, 2013 injury, the employment records tell a different story. In reviewing the employment records, it is clear that the Claimant's job performance actually altered at the time he was promoted from being an hourly maintenance technician to a salaried chief engineer and supervisor. The write-ups show that the types of things for which the Claimant was disciplined after the injury were actually the same types of incidents (in some cases a continuation of the very same incidents) that were occurring as early as October of 2013, shortly after his employment change. To the extent that the Claimant has memory and cognitive issues, if he does, then these issues were certainly manifesting themselves months prior to a February 19, 2013 work injury. However, the treating physicians did not have access to the employment records and disciplinary write-ups and reviews, and therefore, they took the Claimant at his word that the problems that he was having commenced after the injury date and had not been ongoing for quite some time.

As a result of the Claimant's memory and cognitive complaints, starting in August of 2013, the physicians began to focus more on these issues as opposed to the initial treatment focus. When the Claimant returned to see Dr. Hay after an absence of several months, he had to see her because he was referred to a neurologist by Dr. Mawn due to complaints of memory loss. However, due to this being a workers' compensation matter, the Claimant needed to be evaluated by Dr. Hay before seeing the specialist. The Claimant reported being very frustrated as he reports he was laid off for memory issues, but he feels that the memory issues only started after his head injury. The Claimant saw Dr. Mawn again on August 23, 2013 and complained of worsening tenderness of the ears bilaterally, worse on the right. Dr. Mawn noted that the Claimant's tinnitus was secondary to his head trauma and post concussive syndrome. The Claimant stopped taking the medication Dr. Mawn prescribed at the last visit as it made him nauseous and dizzy. Dr. Mawn noted that the Claimant was now exhibiting depression secondary to his mental status changes. However, Dr. Mawn opined that he has nothing else to help him since the Claimant was not interested in trying tinnitus masking.

As of October 25, 2013, Dr. Hay was of the opinion that the Claimant "is out of a job due to his memory loss after his head trauma and I think it is related." Again, Dr. Hay was relying on the Claimant's reports and not the employment records which told a different picture. On November 11, 2013, the Claimant was evaluated by Dr. Justin S. Moon. Dr. Moon performed an examination reporting no abnormalities. He diagnosed the Claimant with concussion, postconcussion syndrome and memory impairment. Dr. Moon noted that the Claimant's primary complaint of memory and cognition seemed to be "greater than one would suspect in association with the other postconcussion syndrome symptoms. In most cases, patients with memory complaints following a concussive state improve once the headaches, sleep issues and dizziness are controlled, but in this case, I am not certain that is going to take place." Dr. Moon

recommended a psych evaluation and the Claimant was sent to Kevin Reilly, Psy.D., on December 11, 2013 for evaluation of his neuropsychological status. Dr. Reilly conducted a clinical interview and administered the Neuropsychological Assessment Battery (NAB), the Medical Symptom Validity Test (MSVT), the Memory Complaints Inventory (MCI) and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). In terms of validity and reliability, Dr. Reilly noted that the Claimant's pattern of performance on verbal learning tasks was indicative of inconsistent/poor effort. The MCI also demonstrated a pattern of magnified memory complaints. The Reliable Digit Span score was indicative of poor effort. Based on this, Dr. Reilly opined that the results of this evaluation "cannot be considered a valid and reliable estimate of the patient's 'true' neurocognitive capacities." Dr. Reilly's ultimate impression is that the results of the evaluation are indicative of non-organic/psychosocial factors contributing to symptom production and/or maintenance. Further, "while the neurophsychometrics cannot be considered a valid and reliable measure of the patient's 'true' cognitive abilities, they were not indicative of memory impairments." Dr. Reilly further opined that "the ongoing reported cognitive difficulties are not likely due to the patient's possible concussion in February of this year.

On January 23, 2014, Dr. Carolyn Burkhardt performed an independent medical examination of the Claimant including a review of medical and employment records from February 19, 2013 to October 9, 2013. Ultimately, Dr. Burkhardt opines that none of the Claimant's complaints, including the memory problems are related to the injury other than the tinnitus/ringing in the ears. Dr. Burkhardt spent a good deal of time comparing the employment records with the medical records and concluded that the Claimant's reported memory problems and issues he was having with his job predated the injury. Dr. Burkhardt put the Claimant's date of MMI at 8/23/2013, the date the ENT stated there were no further treatments for tinnitus. Dr. Burkhardt provides an impairment rating of 1% for the tinnitus which does not impair the Claimant's hearing. She found the complaints of dizziness to be "minimal" and falling into "Class I vestibular function" which does not merit a rating. She finds that any memory issues are unrelated to the injury and provided no rating for such. Dr. Burkhardt did suggest a work up for dementia outside the workers' compensation system. At the hearing, Dr. Burkhardt generally testified in accord with her written IME report and she maintained that by and large the Claimant's memory and cognition issues were not related to the Claimant's February 2013 work injury. Subsequent to the IME she performed, Dr. Burkhardt reviewed a record related to a neuropsychological test that the Claimant underwent. Dr. Burkhardt testified that was due to the Claimant failing the validity testing, indicative of poor effort, and suggestive of symptom magnification and response bias, this did not present a clear pattern suggesting a post-concussive picture.

Then, in January of 2014, the Claimant testified that the dizziness he had been experiencing became more frequent, not just in the mornings but when he was driving and at night and he began to hear a "swishing" sound in his right ear. On February 25, 2014, the Claimant testified the rhythmical swishing sound in his right ear was louder than it had been and he started to experience mild dizziness. When he rolled over onto his right side, the Claimant testified that he heard a kind of thump, thump swishing sound and then he realized he had gone completely deaf in his right ear. He testified

that when he sat up in bed the vertigo set in and the room was spinning uncontrollably and he began to vomit. The Claimant's stepson called an ambulance and they took him to St. Anthony's Hospital. They called Dr. Mawn to evaluate the Claimant and he determined that the Claimant had a perilymphatic fistula in his right middle ear. The Claimant was transferred to the St. Anthony's Hospital in Lakewood after several days and the Claimant testified that Dr. Mawn performed surgery on his ear. At that point the Claimant was taken completely off work and put on bed rest.

On March 5, 2014, Dr. Mawn performed surgery on the Claimant. He noted that complete hearing loss and vertigo was the indication for the surgery. He performed a right middle ear exploration and right round window perilymphatic fistula repair. Dr. Mawn did note that there was "no obvious fluid leak from the oval window." Although Dr. Mawn did note a small amount of fluid in one of the edges of the round window. After suctioning this, there was no immediate reaccumulation. The Claimant was discharged on March 8, 2014 with worsening tinnitus in his right ear and dizziness. The Claimant suffered hearing loss that the surgery did not correct. On May 21, 2014, Dr. Mawn responded to interrogatories from the Claimant's counsel that medical care and treatment that began on February 25, 2014, including ambulance service, hospitalization at St. Anthony's and surgery performed on March 5, 2014 was more likely than not related to the Claimant's head injury at work on February 19, 2013.

On March 17, 2014, the Claimant was evaluated by Dr. Alan Lipkin. Dr. Lipkin noted the Claimant had a fistula repair on the right ear several weeks prior and that the packing remains. The Claimant's vertigo symptoms have been gradually improving since the surgery. The Claimant has not been able to hear from the right ear since the acute worsening. Dr. Lipkin noted that the case presented a "complicated history of probably right sided labytinthine fistula with a repair of the possible fistula three weeks ago. Dr. Lipkin opined that the Claimant's hearing loss is likely permanent but that the tinnitus will hopefully become less bothersome with time. Dr. Lipkin found no additional medication, surgery or imaging warranted at this time. He recommended discontinuation of ear drops, keeping the right ear dry and vestibular rehabilitation to be referred by Dr. Mawn.

On May 20, 2014, the Claimant was evaluated by Dr. Bennet I. Machanic to assess for maximum medical improvement and permanent partial impairment. Dr. Machanic interviewed the Claimant, provided a review of the medical records and performed a physical examination and a mental status exam. Dr. Machanic found that the Claimant was at maximum medical improvement as of May 20, 2014. Dr. Machanic rated the Claimant for permanent, very mild and subtle cognitive problems, posttraumatic emotional depression and complete hearing loss in the right ear associated with the perilymphatic fistula along with continued vestibular dysfunction. In reference to the AMA Guidelines, 3rd Edition, for the 100% hearing loss in the right ear, Dr. Machanic provided a rating of 6% whole person, a rating of 7% whole person for his balance issues, an 8% whole person impairment for complex integrated cerebral function and 1% for the tinnitus. In combining the 6%, 7%, 8% and 1%, Dr. Mechanic provides a 20% whole person impairment rating.

Shortly after this, on May 31, 2014, Dr. Alan Bruns evaluated medical records of the Claimant and prepared a written report of his record review. Dr. Bruns ultimately concluded that the Claimant's memory loss, hearing loss and vertigo are not related to the Claimant's work related injury on February 19, 2013. Rather, Dr. Bruns finds that it is more likely that in February of 2014, the Claimant's acute and sudden hearing loss with associated vertigo is more likely attributable to a viral or vascular event. Dr. Bruns does not associate the February 14, 2014 event with a perilymphatic fistula. In any event, Dr. Bruns opined that, regardless of the final diagnosis, the February 25, 2014 event is not temporally related and was not caused by the traumatic icicle injury that occurred on February 19, 2013. Dr. Bruns testified by deposition in this matter on August 13, 2014. Dr. Bruns testified that he conducted a record review of the Claimant's medical records and, in conjunction with that, he researched online medical literature related to tinnitus vertigo hearing loss and trauma. Dr. Bruns testified that there can be a number of differential diagnoses for a sudden onset hearing loss, including a viral insult, a vascular incident, autoimmune disease, trauma, ototoxic drugs or tumors. Dr. Bruns testified that about half of patients who suffer a sudden loss of hearing have a viral etiology and that that vascular etiologies are likely the second most common cause of sudden hearing loss. Dr. Bruns testified that as for perilymphatic fistulas, he believes that it may be hard to relate this to sudden onset symptoms, other than those related to barotraumas or a penetrating top trauma to the temporal bone. Dr. Bruns notes that it is not until the event on February 24, 2014, as documented in the ER medical records on February 25, 2014, that the Claimant specifically complains of vertigo and that the Claimant made the comment that the vertigo was a newer sensation for him in terms of the way the dizziness felt. Dr. Bruns testified that a perilymphatic fistula is a disruption of the membrane within the inner ear and the perilymph, which is the fluid on the outer side of the inner ear, starts to leak into the middle ear. This can happen in several places, but most notably would happen in the round window or the oval window. Dr. Bruns testified that this is often documented in an airplane or scuba diving and there is a change in pressure and the inner ear doesn't adjust and can pop like a balloon causing immediate hearing loss and vertigo and usually ringing. In cases of direct trauma, a significant head trauma with temporal bone fractures can cause a perilymphatic fistula. Dr. Bruns also testified that this is usually a sudden onset as opposed to delayed symptoms. Dr. Bruns testified that typical treatment of a perilymphatic fistula is 4-5 days of bed rest, and if the symptoms did not resolve, then a surgical procedure where the disruption is closed or a blood patch is put over the oval window and the round window. As to when a perilymphatic fistula may have occurred in the Claimant, if it did, Dr. Bruns testified that the Claimant did not initially have hearing loss at the February 2013 incident and about 5 months after that a hearing test showed normal hearing on that side, so Dr. Bruns does not think that it would make sense that he had a fistula at that time. In reviewing Dr. Mawn's operative note, Dr. Bruns testified that there wasn't anything that he read in the report that objectively confirmed there was a fistula because Dr. Mawn didn't see any evidence of fluid coming from the inner ear. While Dr. Mawn did suction some fluid, there was no re-accumulation, so the initial fluid could have been drainage from surrounding tissues or from the local that was injected. However, Dr. Bruns conceded that there is not a lot of fluid in the inner ear and if it were to drain out, you probably wouldn't see it, which is why Dr. Bruns opines that the operation is a bit nebulous and whether or not it really helps is nebulous.

Dr. Bruns ultimately opined that it is hard to say whether or not the Claimant had a perilymphatic fistula in February of 2014. However, even if that could be proven, Dr. Bruns opined that it would not be probable that it was the result of a head trauma that the Claimant had the year prior in February of 2013. Dr. Bruns also finds the Claimant's vertigo unrelated to the event of February 2013. Because the initial complaint was dizziness and didn't mention spinning or nausea or hearing loss, Dr. Bruns does not believe the Claimant had vertigo after the February 2013 incident, and this is not merely because the specific term vertigo was not used, it is also because of the lack of other items associated with vertigo.

Ultimately, based upon review of the medical records in conjunction with the employment records, and taking into account the credible testimony of Ms. Gina Weeks, it is clear that to the extent that the Claimant does exhibit a cognitive and/or memory condition, this was evident months prior to the February 19, 2013 work injury. In looking at the Claimant's job employment complaints subsequent to the work injury, there does not appear to be any substantial difference in the type or frequency of the complaints. Additionally, the objective testing performed by Dr. Reilly, as analyzed by both Dr. Moon and Dr. Burkhardt, point to a lack of significant cognitive problems and possible symptom magnification for secondary gain. Therefore, any cognitive or memory issues that the Claimant has are not related to the industrial injury.

As for the relation of the Claimant's possible perilymphatic fistula, or any other condition that resulted in his total loss of hearing in the right ear, the medical records and the persuasive opinion of Dr. Bruns point to this being an unfortunate, but ultimately unrelated, event that occurred a year after his injury and after most of the initial symptoms from the work injury had abated or stabilized. The only conditions that are related to the original injury are the tinnitus, occasional headaches and mild dizziness. While the surgery performed by Dr. Mawn on March 5, 2014 may have been reasonable to address the Claimant's condition at that time, the condition itself was not related to the work injury.

***Temporary Disability Benefits – Responsible for Termination***

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

regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, as the only medical conditions that were found to be related to the work injury were the tinnitus, headaches and dizziness, the Claimant's entitlement to temporary disability benefits hinges entirely on the issue of whether or not he was responsible for his own termination which would bar him from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

At issue in this case is the Employer's allegation that the Claimant was terminated for cause for ongoing work performance issues. The Claimant argues that his termination was, instead, due to memory and cognitive issues that arose only after his February 19, 2013 work injury.

The work performance issues are well-documented in the record and there was credible and persuasive testimony from the Claimant's supervisor, Ms. Gina Weeks, to provide further support and details regarding the documented issues.

Ms. Gina Weeks testified by telephone at the hearing on July 29, 2014. Ms. Weeks is the resort director for the Employer and is familiar with the Claimant. She worked with him for a number of years when she was working with the developer and then she was his manager when she was promoted to resort director. Ms. Weeks testified that when the Claimant was in the position of maintenance technician, he was a great employee, responding to all of his calls and doing what he was supposed to and even going beyond that to do extra stuff. Ms. Weeks testified that the Claimant was promoted to chief engineer on June 19, 2012. Once the Claimant was in the chief engineer position, Ms. Weeks described his job performance as "very poor." She testified that the main performance issue was the Claimant's lack of urgency. He never did anything "now" but put everything on hold for a later day. Ms. Weeks had a counseling session and issued a written warning to the Claimant on November 12, 2012. Ms. Weeks testified the write-up was for a few issues, the main issue being that "he showed male chauvinistic tendencies towards me being a manager" and that he had no sense of urgency. The written warning is consistent with Ms. Weeks testimony. The Performance Improvement plan was for "[the Claimant] to work on his leadership skills and his sense of Now. These are 2 important [Employer] values that have not been present in [the Claimant's] demeanor since his shift from Maintenance Tech to Chief Engineer." It was noted that if the Claimant could not manage his staff and himself more efficiently, then the consequences could lead up to termination.

Ms. Weeks testified that the Claimant's 2012 performance review done in January 2013 was not a good review and he was found to be below "partially meets expectations." Ms. Weeks testified that the problems the Claimant was having included, difficulty from transitioning from an hourly to a salary employee, a lack of urgency, and failure to take direction from Ms. Weeks. The 2012 Performance review confirms Ms. Weeks testimony and the Claimant received marks of either "partially meets expectations" or "does not meet expectations" in 7 of 8 reviewed categories. As for his overall performance it was noted that the Claimant does a great job in Maintenance. When asked to perform a task, the Claimant gets it done to satisfaction. However, the Claimant needs to be a great Chief Engineer. He needs to see the whole big picture of taking care of the building and taking care of his team.

Ms. Weeks testified that the Claimant received another write-up on February 2, 2013. The written write-up is for performance transgression. The write-up specifically details that the sidewalk had not been shoveled after snowfall for the second day in a row. After asking the Claimant to do this, Ms. Weeks found out a different employee actually did the work. The Claimant had also failed to install breaks on the double doors at the front of the building. There were other examples of projects that the Claimant was slow to begin or complete that had to be completed by the resort manager. The resort manager also noted that the Claimant had difficulty working with Housekeeping Department and does not always communicate with the Front Desk in the way that he should.

Ms. Weeks testified that the Claimant's behavior following his February 19, 2012 work injury was not any different than before. Specifically, Ms. Weeks testified that he did not seem any more forgetful. Ms. Weeks testified the Claimant's employment was

ultimately terminated due 100% to his job performance, but not related to any one specific circumstance

On cross-examination, the Claimant was questioned about write-ups the Claimant received for work performance. The Claimant did not initially recall the details a write-up from November 12, 2012, but he believed he did receive a write-up around that time, about 3 months after he had been promoted to chief engineer. In discussing the issues listed in the November 12, 2012 write-up, the Claimant testified that he believes he set his priorities differently from his supervisor Gina and that he felt it was a disagreement about priorities. The Claimant was also questioned about a poor performance review in January 2012. The Claimant attributes the problems brought up in this review to being understaffed and not having enough workers to take care of all of the issue that came up, so he would have to prioritize. On February 2, 2013, the Claimant received a final written warning, and he testified that he was aware that this meant his job was on the line if his performance did not improve. He testified that the way that he felt was that it seemed like the harder he worked, the more mistakes he made. He testified that "it was not for a lack of effort. I just felt like the victim of circumstances that I couldn't control."

The Claimant received another final written warning for job performance on February 22, 2013, three days after his work injury. This write up was for performance transgression again. While dated on February 22, 2012, all of the specific transgression items took place between 2/2/13 and 2/17/2013, prior to the Claimant's injury. The performance transgressions included: the common hot tubs being unusable and dirty with one out of order; a Christmas wreath still being up on 2/3/13; failure to paint a wall that Claimant was asked to paint for 2 months; walking into a guest room with a "do not disturb" sign and encountering a guest in the bathroom in his underwear and then telling the guests they could not use their bathroom, leaving the guests angry and requiring the front desk agent to refund their entire stay; continued failure to work with the Housekeeping Department; and on 2/17 giving two employees the same week off so that the third employee and the Claimant had to cover all of the shifts that week and requiring overtime.

The Claimant testified that while he was working modified duty until about March 31, 2013, he was having mental and physical difficulties performing his job. He testified that his short-term memory suffered and he would forget things he had done or forget to do things that he should have done. The Claimant testified that the types of problems that he was having at work before his injury were very different from the types of problems he was having after the injury. However, the records paint a different picture and show that the types of problems after the work injury were generally the same types of problems that he was having since October of 2013, well before the injury.

A termination reference was drafted on April 5, 2013 but was not provided to the Claimant. This write-up included all of the performance issues between the last write-up and April 5, 2013. Many of the listed items are continuations of problems for which the Claimant received write-ups in the past including the failure to complete maintenance projects such as a leak into the parking garage between 4/1 and 4/4; failure to hold

meetings and complete paperwork; continued failure to communicate effectively with the Housekeeping Department and the Front Desk and failing to answer his phone; arriving at work late on the day a new engineer was starting; failing to paint an area that the manager had been asking him to paint since last fall; hot tub maintenance issues; continued failure to shovel walkways; a continued lack of urgency and inability to assist with hotel guests who were angry; and working on ladders before he was cleared to go on ladders by his doctor. Many of these performance issues are the same issues that management had been addressing with the Claimant since November of 2012.

The weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant had been receiving progressive discipline related solely to job performance issues that were serious enough to warrant employment termination with this Employer. As early as November of 2013, the Claimant was put on notice that unless he addressed the job performance issues, he was subject to further employment discipline, up to and including termination of his employment. As the record documents, the Claimant did not correct his performance transgressions, but rather, continued in the same fashion over a period of months. Therefore, the Claimant's wage loss is the result of the Claimant's volitional acts, which are unrelated to the Claimant's injury, and the Claimant is not entitled to TTD benefits.

## ORDER

It is therefore ordered that:

1. The Claimant's request for medical benefits to treat memory and cognitive issues, depression, vertigo, and hearing loss in the right ear is denied and dismissed as these conditions are not causally related to the February 19, 2013 work injury.

2. The Claimant is responsible for his termination and the Claimant's claim for total temporary disability benefits is denied and dismissed.

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, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For

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

DATED: February 19, 2015

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

## ISSUE

The following issue was raised for consideration at hearing:

> Whether Claimant sustained his burden of proof to establish that he is entitled to an award of reasonably necessary and related medical benefits. Specifically, Claimant seeks an order finding that the proposed right shoulder arthroscopy, rotator cuff repair, biceps tenodesis, and possible need for a subscapular repair are related to the November 1, 2013, industrial injury.

## FINDINGS OF FACT

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

1. Claimant sustained an admitted industrial injury on November 1, 2013, when he was cleaning a Zamboni and he backed into the machinery and flipped over a low open door. A Zamboni is a large machine used to clean floors in a commercial setting. Claimant is a 63 year old man employed by Employer, a bulk food distributor. Claimant works for Employer performing plant and equipment maintenance.

2. On November 1, 2013, Claimant was using a water hose to clean the Zamboni when he backed into and flipped over the low open door with his right arm up above his head. Claimant landed directly on his elbow with his arm raised and behind his back. Claimant's testimony regarding the mechanism of injury is found credible and persuasive.

3. Claimant did not have right shoulder pain complaints, medical treatment, or impairment of the right upper extremity prior to this injury. No credible or persuasive evidence established that he sustained an intervening injury after the November 1, 2013, industrial injury. Claimant has a medical history which includes nicotine addiction, osteoporosis, chronic obstructive pulmonary disease, thyroid disease, and hypertension.

4. Claimant credibly testified that, on November 1, 2013, he fell backward landing on his arm outstretched. When asked on direct examination whether Claimant landed on the tip of his elbow, he testified that he landed on his arm outstretched. When Claimant was reminded during cross examination that

the medical records from Claimant's emergency room examination on November 2, 2013, reflected that he did not have shoulder pain, Claimant credibly explained that he did not report pain in the shoulder because he was focused on the pain in his elbow. Claimant credibly testified that he could not affirm that his shoulder was examined; however, he was aware that his right arm was examined in the emergency room.

5. To further explain Claimant's lack of awareness of his shoulder injury, Claimant testified that his arm was in a sling "all the time." The medical records on November 2, 2013, indicate that Claimant's arm was placed in a splint. Claimant had surgery on the elbow fracture on November 7, 2013, six days after the injury, and thereafter the records reflect that Claimant's arm was in a sling.

6. On November 6, 2014, Dr. Armodios M. Hatzidakis, MD, an orthopaedic specialist, opined, "In my opinion it is more likely than not that his [Claimant's] fall onto his right upper extremity in not only abduction/external rotation but also with axial load did cause his symptomatic rotator cuff tear. He had no shoulder symptoms whatsoever before that time and did not have any doctor visits for the shoulder and only had shoulder pain after the work-related injury."

7. Dr. Wallace K. Larson testified at hearing, and was qualified as an expert in orthopaedic surgery. When asked to identify the critical factors supporting his opinion that Claimant's right shoulder problems were neither caused, nor aggravated, by the November 1, 2013, fall, the doctor identified three concerns. They were, as follows: (1) the mechanism of the injury did not include trauma to the shoulder; (2) the pain complaints did not commence until the end of December 2013; and (3) the findings on the MRI.

8. Dr. Larson's understanding of the mechanism of injury contradicts Claimant's testimony and the medical records. It is undisputed in the medical records, and Claimant's testimony, that he fell backwards while backing up and landed on his elbow. Dr. Larson twice demonstrated during his testimony the mechanism of injury as Claimant hitting his elbow in front of him.

9. Dr. Larson testified that he could not state with certainty that Claimant's right shoulder was examined by medical personnel and that remarks in the medical records regarding the shoulder were based on thorough examination. He testified that he assumed that the reference to no shoulder pain in the November 2, 2013, emergency room report was an indication that Claimant right shoulder was examined, but he testified that he could not be sure of that. He explained that it could have been medical personnel reciting that Claimant was reporting no shoulder pain on November 2, 2013, when Claimant was in the emergency room for the more acute elbow fracture. Dr. Larson testified that in subsequent medical reports he also found it difficult to discern the

extent of the examination of the right shoulder. He testified the first report of shoulder problems came on December 6, 2013, when Claimant complained of "stiffness in the shoulder."

10. Claimant's shoulder pain complaints did not begin until the end of December 2013, however, the evidence established that Claimant's arm was "in a sling almost all of the time" following his injury on November 1, 2013, largely immobilized until December 20, 2013, when Claimant began physical therapy. Claimant first described his shoulder condition as painful on December 30, 2013; 10 day after physical therapy was started.

11. Claimant has demonstrated that it is more probably true than not that his right shoulder pain complaints and symptoms were caused and/or aggravated by the November 1, 2013, industrial injury. Claimant treated with Jonathan T. Bravman, M.D. for the right shoulder condition on August 15, 2014. Dr. Bravman proposed treatment for the right shoulder was shoulder arthroscopy, rotator cuff repair, bicep tenodesis and possible need for subscapularis repair. The proposed surgical treatment by authorized treating physician Jonathan Bravman is reasonable, necessary and related medical treatment.

## CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. 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 burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (Industrial Claim Appeals Office (ICAO), March 20, 2002).

3. 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.

4. 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).

5. 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).

6. In this case, the totality of the evidence, including Claimant's credible testimony and the medical record, supports the conclusion that Claimant's right shoulder pain complaints and symptoms were caused and/or aggravated by the November 1, 2013, industrial injury. The evidence credibly established that Claimant's shoulder pain complaints did not begin until the end of December 2013, however Claimant's right arm was "in a sling almost all of the time" following his injury on November 1, 2013, largely immobilized until December 20, 2013, when Claimant began physical therapy. Claimant testified that, initially, he was more focused on the fracture of his elbow. He testified that, although, he was conscious that the right arm was injured, he did not isolate the right shoulder pain until December 30, 2013, when he started physical therapy. Claimant's description of the mechanism of injury and his course of treatment supports the conclusion that the November 1, 2013, injury caused or aggravated the right shoulder injury.

7. Claimant has demonstrated that it is more probably true than not that his right shoulder pain complaints and symptoms were caused and/or aggravated by the November 1, 2013, industrial injury. Claimant treated with Jonathan T. Bravman, M.D. for the right shoulder condition on August 15, 2014. Dr. Bravman proposed treatment for the right shoulder was shoulder arthroscopy, rotator cuff repair, bicep tenodesis and possible need for subscapularis repair. The proposed surgical treatment by authorized treating physician Jonathan Bravman is reasonable, necessary and related medical treatment.

## ORDER

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

1. Respondents shall be liable for Claimant's medical treatment for the right shoulder, specifically the proposed right shoulder arthroscopy, rotator cuff repair, biceps tenodesis, and possible need for a subscapular repair is granted.

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

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

DATED: February 12, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

## ISSUES

The Claimant endorsed the following issues for hearing in her application: compensability, medical benefits, reasonably necessary, average weekly wage, disfigurement, temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, permanent total disability benefits, and death benefits. The Employer did not file a response to the application for hearing, thus no issues were properly endorsed, although the issue of offsets was raised by the Employer at the commencement of hearing.

After a lengthy discussion between the parties, the issues presented for determination are whether Employer has established by a preponderance of the evidence that Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S. If the Claimant is not an independent contractor, whether Claimant has established by a preponderance of the evidence that she sustained an injury while in the course and scope of her employment with the Employer, and whether she is entitled to medical benefits. The ALJ also determined that if the Claimant met her burden on compensability, the issue of penalties for failure to maintain insurance would be addressed. All of the remaining issues, including whether any offsets are applicable, were reserved for future determination.

## FINDINGS OF FACT

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

1. The Claimant's native language is Spanish.

2. The Employer operates a cleaning business. The Employer's business involves cleaning both houses and business properties. The Employer's principal owner is Stephanie Hart. She started the business in 2011.

3. The business is set up as a Chapter S corporation and her Articles of Incorporation list only Ms. Hart as an employee.

4. Ms. Hart requires that the individuals who clean her clients' properties sign a Subcontractor Agreement.

5. Ms. Hart maintains that she cannot financially afford to operate her business in any manner other than through subcontracting workers.

6. The Employer does not maintain workers' compensation insurance. Ms. Hart testified that she applied for a waiver of the workers' compensation insurance

requirement to a committee within the Division of Workers' Compensation, and that her waiver request was granted. Ms. Hart provided no documentation to support this assertion. The ALJ is unaware of a process by which a company can request an exemption or waiver from the requirement to maintain workers' compensation insurance other than that available to sole proprietors, corporate officers or members of LLCs such as Ms. Hart pursuant to §8-41-202, C.R.S.

7. The Claimant was apparently introduced to Ms. Hart through Arturo Bueno who was also performing cleaning services for the Employer.

8. The Claimant admitted to receiving a copy of the Subcontractor Agreement. She denied understanding it because it was written in English. The Claimant did not sign the Subcontractor Agreement. Instead, she returned it to Ms. Hart unsigned.

9. Helen Montoya also provides cleaning services for the Employer through a Subcontractor Agreement. Ms. Montoya speaks both Spanish and English.

10. Ms. Montoya claims that she met with the Claimant before Claimant's first work assignment and explained, in Spanish, the contents of the Subcontractor Agreement to the Claimant. Ms. Montoya claims she explained to the Claimant that Claimant would not be an employee, there is no insurance coverage, the subcontractors work when they want to, they are not supervised, there is no training and they get paid for each job completed.

11. The Claimant denied that Ms. Montoya provided the explanation described in paragraph 10 above. Rather, the Claimant asserts that Ms. Montoya gave her the Subcontractor Agreement and told Claimant that she would explain it to her later. Claimant signed only a W-9 form and was never asked for identification. Claimant believed she was an employee.

12. The existence of the Subcontractor Agreement in and of itself is not sufficient to prove that Claimant was an independent contractor rather than an employee. The Subcontractor Agreement fails to comply with §8-40-202(2)(b)(IV), C.R.S., in that both parties did not sign the agreement.

13. The Employer paid the Claimant and other individuals a flat rate on a per job basis. There was little explanation at hearing concerning the bases for the rate per job. The wage records admitted into evidence reflect that the Employer paid the Claimant various rates of pay. For instance, the Claimant was paid $30 for cleaning a property on Ash Street, but paid $40 for a property on Elizabeth Street. The ALJ infers that the Employer set the rate for each work order and that the Claimant had no input into negotiating that rate.

14. The Claimant did not have a trade name, and there was no persuasive or credible evidence that Claimant operated her own cleaning business.

15. The Employer issued checks to the Claimant as an individual.

16. The Employer provided no training to the Claimant.

17. The Employer issued work orders to the workers with instructions detailing the areas within each property that required cleaning, and the time each work order should be performed.

18. A work order dated October 30, 2013, included the following language and instructions. The Claimant is identified as Patti:

> Nancy, Helen, Lisa, Patti, Connie, Pat meet at storage at 8 A.M. Helen drop Lisa, Nancy and Patti off at [Address] Fairgate Way and go to your crew's job one and then pick Lisa, Nancy, Patti up at finish. Then drop Lisa, Nancy and Patti off at their job 2 and call the homeowner when 30 minutes away and then go to your crew's job 2. Pick up Lisa, Nancy and Patti after their job 2.

19. For all of the work orders on October 30, 2013, each job had a lead crew member and three additional crew members. Each work order provided a detailed list of the areas to clean within the property, including which cleaning product to use on the floors.

20. Claimant denied having the freedom to decline work order requests made by the Employer.

21. Ms. Montoya testified that the workers were not supervised yet she was often designated as the lead crew member. In addition, Claimant credibly testified that Ms. Montoya supervised the quality of the work performed by Claimant and the other non-lead workers.

22. Ms. Montoya also testified that there was no pressure put on her or the other workers to arrive at job sites, and that she had the freedom to decide which clients to work for. This statement is contradicted by the language in the work orders that reflects the Employer identifying which locations the workers will perform work, what time to arrive at the locations, and that workers were dropped off at the clients' properties by Ms. Montoya herself. It follows that once a worker was dropped off at a site, she would be unable to leave that site unless she found some alternative form of transportation.

23. Claimant asserts, and the ALJ finds, that cleaning supplies were provided to her. There was no persuasive evidence that Claimant ever purchased or provided her own supplies in order to complete the work she performed for the Employer.

24. Ms. Montoya drove the Claimant to the jobs the Claimant performed during her tenure as a cleaner for the Employer.

25. The Claimant was not working for any other employer on or around November 4, 2013, although the Employer did not specifically preclude Claimant from obtaining other work.

26. According to the work order dated November 4, 2013, the Claimant met Nancy and Helen at "storage" at 8:30 a.m. From there, the three cleaned a property beginning at 9:00 a.m. on West 3rd Avenue. Job number two commenced at 10:30 a.m., followed by job number three which commenced between 12:30 and 1:00 p.m.

27. Also on November 4, 2013, Ms. Hart received a call from a client on Smokey Hill Road in Aurora around midday asking if she could arrange for cleaning services on that day. Ms. Hart contacted Ms. Montoya to ask if she, Nancy and the Claimant had time to clean an additional apartment. Ms. Montoya and Claimant agreed but Nancy was unable to clean the fourth property on that day. Because the client made a last minute request, no specific work order exists for the fourth job on November 4, 2013.

28. Claimant and Ms. Montoya arrived at the Smokey Hill apartment on November 4, 2013, between 3:00 and 4:00 p.m. As Claimant stepped down from a ladder she was using to clean lamps, she fell backward and fractured her left wrist.

29. Ms. Montoya drove the Claimant to St. Joseph's hospital emergency department where she was admitted for treatment.

30. Claimant sustained fractures to her left wrist that resulted in surgery, which Dr. Mordick performed on November 20, 2013. Following surgery, the Claimant underwent physical therapy, and attended follow-up medical appointments. It is Claimant's understanding that the screws and plates surgically installed into her wrist will need to be removed through a surgery sometime in the future.

31. Claimant attempted to make a claim against Travelers Insurance. It is unclear from the record which entity Travelers insured although there was some indication it was the property owner at the Smokey Hill apartment. In any event, Claimant selected Healthone as an authorized provider and had at least one appointment there on November 18, 2013. At that time, the physician released her to modified duty work which included no use of the left hand. She was referred to Dr. Davis for a surgical consultation.

32. The Claimant made several emergency room visits in addition to the initial visit on November 4, 2013. Claimant provided little or no explanation concerning the reasons for these visits.

33. The Claimant explained that she is still having some residual problems with her left wrist making it difficult for her to maintain any type of employment that requires the use of her hands. For instance, Claimant started working as a caregiver for an elderly lady but had difficulty lifting the lady due to her left wrist injury.

34. A review of Claimant's medical bills shows she was charged in excess of $40,000 for all of the medical care she has received. Claimant's medical bills to the various hospitals have been covered through a debt forgiveness program. However, the Claimant maintains that all of the expenses associated with her surgery were not covered. The Claimant did not explain how much she paid out-of-pocket for any of her medical expenses or how much she still owes, if any.

35. The Employer has failed to show that Claimant was free from direction and control in the performance of her duties or that she was customarily engaged in an independent business related to property cleaning. Although the Employer provided only minimal training to Claimant and did not require the Claimant to work exclusively for it, the Employer dictated specific times when Claimant was required to arrive at job sites, and dictated, in detail, the work to be performed. In addition, the Employer supervised the Claimant's work performance (including quality assurance) through the lead crew members assigned to each job. The Employer paid the Claimant a flat rate per job, at a non-negotiable rate. The Employer issued payment to Claimant, individually, rather than to a trade name. Balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S. reflects that the Employer has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

36. Claimant has proven that on November 4, 2013, she sustained an injury to her left wrist within the course and scope of her employment. Claimant has also proven entitlement to medical benefits to cure and relieve her of the effects of her injury.

## 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" (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 worker's 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 worker's 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 worker's 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 (2005).

***Employment Status***

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The "employer" may establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II) creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Nelson v. Industrial Claim Appeals Office, supra.*

5. As found, The Employer has failed to show that Claimant was free from direction and control in the performance of her duties or that she was customarily engaged in an independent business related to property cleaning. Although the Employer provided only minimal training to Claimant and did not require the Claimant to work exclusively for it, the Employer dictated specific times when Claimant was required to arrive at job sites, and dictated, in detail, the work to be performed. In addition, the Employer supervised the Claimant's work performance through the lead crew members assigned to each job. The Employer paid the Claimant a flat rate per job, at a non-negotiable rate. The Employer issued payment to Claimant, individually, rather than to a trade name. Balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S. reflects that the Employer has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

***Compensability***

6. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

7. The Claimant has proven that she sustained an injury to her left wrist while in the course and scope of her employment with the Employer. The Claimant's testimony was credible and persuasive. Further, there was little dispute that the Claimant fell and injured her wrist while in the property belonging to Employer's client. Ms. Montoya, who was cleaning alongside the Claimant on November 4, 2013, drove the Claimant to the hospital after the Claimant fell. Further, the medical records support that Claimant injured her left wrist, and that her injury required surgery. No credible or persuasive evidence rebutted the testimony of the Claimant concerning the circumstances of her fall from a ladder while performing cleaning work for the Employer. As such, Claimant's claim for workers' compensation benefits is granted.

8. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant received medical treatment from various providers to cure and relieve her of the effects of her injury. The treatment Claimant has received thus far is authorized since the Employer did not refer Claimant to a physician. The treatment has also been reasonable and necessary to cure and relieve the Claimant of the effects of her injury. The Claimant is also entitled to future medical treatment to cure and relieve her of the effects of her injury.

9. This case presents a unique situation because much of Claimant's debt for medical expenses has been forgiven or written off. Regardless, it is the Employer who is responsible for the payment of the medical expenses associated with this claim. As such, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S. Further, the Employer is liable for any outstanding medical expenses associated with Claimant's injury. Claimant mentioned that not all of the expenses associated with her surgery were covered, but she did not specify a dollar amount. Finally, Claimant is likely to require an additional surgery.

***Penalties – Failure to Maintain Insurance***

10. In any case where the employer fails to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. It is not in serious dispute that the Employer failed to carry the requisite workers' compensation insurance. As such, Claimant is entitled to a fifty-percent increase in her compensation or benefits. Medical benefits, however, are not subject to the fifty percent increase. *See Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957). Because this decision does not award a benefit that is subject to the fifty-percent increase, the penalty shall not be specifically imposed at this time but may be applicable to benefits awarded in the future.

## ORDER

It is therefore ordered that:

1. The Claimant is an employee rather than an independent contractor.

2. Claimant sustained a compensable injury to her left wrist on November 4, 2013.

3. The Claimant is entitled to medical benefits, including all treatment which she has already received and future medical benefits that are reasonable, necessary and related to this claim. Because Employer is liable for payment of Claimant's medical costs associated with her work injury, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S.

4. The Employer failed to maintain workers' compensation insurance which shall subject the Employer to a penalty pursuant to § 8-43-408(1), C.R.S.

5. All matters not determined herein are reserved for future determination. Any additional issues that the parties wish to raise must be endorsed in a separate application for hearing.

6. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

   a. Within ten (10) days of the date of service of this order, deposit the sum of $10,000.00 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. Within ten (10) days of the date of service of this order, file a bond in the sum of $10,000.00 with the Division of Workers' Compensation:

      (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 Employer 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 employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

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

DATED: February 2, 2015

DIGITAL SIGNATURE:

L. Broniak

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

## ISSUE

The issue raised for consideration at hearing is whether Respondents proved by clear and convincing evidence that the Division independent medical examination of Dr. Henke is most probably incorrect.

## FINDINGS OF FACT

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

1. On September 10, 2013, Claimant, a 59 year old male, employed with Employer as a truck driver, groundskeeper, and mechanic suffered an admitted work-related injury. On that day, while stepping from a mowing machine, Claimant slipped and fell approximately two feet striking his right lower back and posterior hip against a piece of steel. He reported the injury to his supervisor and proceeded to Lutheran Medical Center where he was examined in the emergency room.

2. Claimant returned to work and continued his regular duties until November 15, 2013, when he experienced pain in the low back radiating down the leg and thigh. Walking and standing were painful. He was not able to work, and went to Saint Joseph Hospital when his Employer did not refer him for medical evaluation.

3. On December 4, 2013, Claimant was referred to Dr. Craig Anderson for evaluation and treatment. Dr. Anderson opined that the injury was work-related based on Claimant's report. Dr. Anderson referred Claimant for physical therapy, MRI, and further treatment. Dr. Anderson stated in his December 4, 2013, report: "In my opinion, the development of right lower extremity pain that is possibly consistent with a radiculopathy at 2 months approximately post his work accident, and is probably consistent with a work-related mechanism of injury.

4. On December 13, 2013, Claimant saw Dr. Anderson again, this time "…with persisting pain to a moderate severe degree, and mild weakness in the right lower extremity.", according to Dr. Anderson's report. Additionally, Claimant experienced "…tingling and numbness at the bottom of the right foot." Straight leg raise test was found to be "… strongly positive on the right." A MRI was ordered by Dr. Anderson.

5. On January 2, 2014, Claimant again saw Dr. Anderson, who noted "…lumbar strain associated with radiating right leg pain, possibly consistent with a right-sided lumbar radiculopathy." Claimant reports a constant level of low back pain at 5/10 that is constantly present in the right leg, radiating into the S1 distribution. He has

occasional sharp radiating pains in the left lower extremity, but this is intermittent. Some days, the left leg is not involved." Dr. Anderson diagnosed Claimant with "… L4-5 and L5 nerve root impingement on the right."

6. As of March 7, 2014, two to three months prior to the anticipated maximum medical improvement (MMI) date, Dr. Anderson placed Claimant at MMI with no impairment rating and released Claimant from treatment, stating in his MMI report: "MRI evidence of degenerative disease, severe at L5-S1. …Probably not work-related." Yet, in Dr. Anderson's prior handwritten notes of December 4, 2014, December 13, 2014, December 18, 2013, January 17, 2014, January 20, 2014, January 31, 2014, February 21, 2014, and even March 7, 2014, in response to the question, "Are your objective findings consistent with history and work-related mechanism of injury/illness?" Dr. Anderson consistently indicated that objective findings were consistent with history and work-related mechanism of injury/illness. On the last page of his MMI report, Dr. Anderson indicates: "The more severe MRI findings do not correlate with clinical symptoms and signs of right leg pain. Right leg pain probably not due to a true radiculopathy." Dr. Anderson offers no explanation why he changed his mind from his earlier findings that Claimant's condition is work-related. Only at the time of MMI does Dr. Anderson find Claimant's condition to be, "Probably not work-related…."

7. Two weeks following his placement at MMI and release from restrictions to full duty employment, Claimant felt extreme pain when riding and bouncing on a piece of machinery called a "Bobcat." In the following weeks, Claimant went to the emergency room twice and saw Dr. Robert Springs, M.D., approximately six times.

8. On July 18, 2014, Claimant was seen by Dr. Clarence Henke for a Division independent medical examination (DIME) where he was found to be not at MMI. Dr. Henke's DIME report concludes that, consistent with Claimant's statements to Dr. Shih, Claimant sought post MMI medical treatment with Dr. Springs. on March 12, 2014, five days after he was released by Dr. Anderson. Dr. Springs ordered laboratory tests, x-rays and scheduled Claimant to return in two months on May 5, 2014. On May 5, 2014, Dr. Springs saw Claimant and indicated that Claimant had been to two emergency rooms since mid-April, and was treated with a Medrol Dosepak without benefit. On May 5, 2014, Claimant complained of the same pain in his back with radiation into his right leg, which he complained of throughout the course of his treatment, and again after his release and return to full-time duty.

9. On August 27, 2014, Dr. Franklin Shih was retained by Respondents to conduct an independent medical evaluation of Claimant. During the examination, Claimant reported to Dr. Shih that he had doubts about Dr. Anderson's decision to place him at full duty, that he experienced severe pain after being returned from restricted duty to full-duty while riding a Bobcat, and that he went to the emergency room twice, and Dr. Springs several times in succession, for treatment of his back pain. In Dr. Shih's report regarding Claimant, the doctor describes Claimant's history as inconsistent.

10. Dr. Shih prepared a written report dated August 27, 2014, opining that he relied on Dr. Anderson's medical records finding the doctor's records were more credible than Claimant's oral history. Dr. Shih concluded that it was not within medical probability to relate Claimant's complaints to the September 20, 2013, work injury.

11. On November 21, 2014, at his deposition, Dr. Anderson testified that Claimant had no impingement and no radiculopathy. Dr. Anderson reports as support for his opinion of no impingement and no radiculopathy, "… we don't have any mention of displacement of the nerve roots or impingement of the nerve roots, which would be indicative of a true radiculopathy." Yet, in Dr. Anderson's earlier written reports of January 2 and 31, 2014, Dr. Anderson reports that Claimant has L4-5 and L5 nerve root impingement on the right. Significantly, Claimant complained of pain radiating into the right leg throughout the course of his treatment.

12. At hearing, Dr. Shih testified that his role was to resolve discrepancies in the medical history. Dr. Shih opined that he disagreed with Dr. Henke's determination that Claimant was not at MMI. He further testified that Dr. Henke's report was not performed in accordance with the *AMA Guides because* Dr. Henke did not provide impairment rating worksheets and that he did not measure Claimant's range of motion three times. Dr. Shih credibly testified that his opinion that Dr. Henke's MMI determination is incorrect amounts to a difference of opinion between physicians and does not constitute clear and convincing evidence that the DIME is most probably incorrect.

13. Dr. Henke's DIME determination that Claimant is not at MMI has not been overcome. Dr. Henke recommends: 1. Bilateral lower level extremity EMG (electromyogram) examination; 2. Neurosurgical consultation; 3. Restricted work activities of lift limit 10 pounds, avoid bending, lifting or ladder climbing; and 4. Continue current medications for pain relief. Dr. Henke's recommendations are intended to cure and relieve Claimant of the effects of the industrial injury.

## CONCLUSIONS OF LAW

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

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness'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, C.R.S. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. Respondents contend that it overcame the opinion of the DIME by clear and convincing evidence on the issue of MMI. Claimant takes the opposite position arguing that Respondents failed to sustain their burden of proof to establish that the DIME is most probably incorrect, he is not at MMI and the DIME properly determined that he is not at MMI. It is concluded that Respondents failed to sustain their burden of proof to establish by clear and convincing evidence that Dr. Henke's opinion of MMI is most probably incorrect.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

5. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Whether a particular component of Claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the *AMA Guides*. *See Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo.1996) (a rating of overall medical impairment necessarily includes consideration of apportionment of the impairment to other causes). Indeed, the *AMA Guides* specifically require the treating physician to determine the cause or causes of Claimant's overall impairment. See, *AMA Guides* ch. 2.2. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

6. Dr. Henke determined that Claimant is not at MMI and requires additional treatment to cure and relieve him of the effects of the industrial injury.

7. Dr. Shih testified for Respondents after conducting an independent medical examination and providing a written report. Dr. Shih credibly testified that his opinion that Dr. Henke's MMI determination is not correct amounts to a difference of opinion between physicians. As such, it is concluded that Dr. Shih's opinion is not clear and convincing evidence that the DIME is most probably incorrect. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician *Javalar v. Monte Vista Head Start, Inc.* W. C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004). Further, even if the ALJ finds the DIME physician deviated from the rating protocols of the *AMA Guides*, the party challenging the rating must still demonstrate that the deviation casts substantial doubt on the overall validity of the rating. *Schrameck v. USA Waste Management*, W.C. No. 4-407-221 (ICAO May 18, 2001), *Rivale v. Beta Metals, Inc.*, W.C. No. 4-2655-360 (April 16, 1998), *aff'd. Rivale v. Industrial Claim Appeals* Office, (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication). Deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAP Nov. 13, 2006) Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.*

8. Dr. Anderson's testimony and medical reports were found to be less credible and persuasive than Claimant's testimony regarding his pain and other symptoms. Dr. Anderson's written reports are internally inconsistent, and inconsistent with his deposition testimony. Dr. Anderson indicates throughout his reports that there is a radiculopathy, until the date of release at MMI, when he finds that there is not a true radiculopathy. Dr. Anderson says in his reports that there is nerve root impingement, but then at deposition says that there is no nerve root impingement. Dr. Anderson noted moderate to severe pain consistent with the mechanism of injury throughout his reports, and then on the date of Claimant's release at MMI, Dr. Anderson said that the MRI findings do not correlate with clinical symptoms and signs of right leg pain.

9. Despite the fact that Dr. Shih indicated at hearing that his role was to resolve discrepancies, the above described discrepancies in Dr. Anderson's record and testimony regarding Claimant were never resolved by Dr. Shih. By contrast, Claimant's testimony at hearing is found to be consistent and credible. Claimant's testimony is consistent with the evidence contained in medical reports, and consistent with Dr. Henke's findings. Throughout his medical history, Claimant consistently complained of low back pain, hip pain, pain into the buttocks, and pain radiating down the right leg, and occasionally into the left leg. Claimant never deviated to other parts of the body which were not anatomically related to his pain complaints. Further, Claimant reported to Dr. Shih that he began to have pain two weeks after he returned to work full duty.

10. Dr. Henke's rating has not been overcome by clear and convincing evidence. Dr. Henke recommends: 1. Bilateral lower level extremity EMG (electromyogram) examination; 2. Neurosurgical consultation; 3. Restricted work

activities of lift limit 10 pounds, avoid bending, lifting or ladder climbing; and 4. Continue current medications for pain relief. Dr. Henke's recommendations are intended to cure and relieve Claimant of the effects of the industrial injury.

## ORDER

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

1. Respondents have failed to produce clear and convincing evidence to overcome the Division Independent Medical examination and opinion of Dr. Clarence Henke, M.D. that Claimant is not at MMI.

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

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

DATED: February 19, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

## ISSUE

Whether the Claimant has established by a preponderance of the evidence that Dr. Kristin Mason's prescription for a modification to the Claimant's home providing an emergency exit from the Claimant's bedroom with an extended porch is reasonably necessary and related to the injury pursuant to C.R.S. 8-42-101(1)(a).

## FINDINGS OF FACT

1. The Claimant was born on October 2, 1953 and he is 61 years old.

2. The Claimant was driving a forklift in the Employer's warehouse when the forklift malfunctioned and ran into a column. The Claimant suffered an industrial injury to his C2 spinal cord with central cord syndrome along with a moderate traumatic brain injury and lacerations to the front and back of his head during the course and scope of his employment on November 29, 2013 (Claimant's testimony and Claimant's Exhibit 6, p. 18).

3. The Claimant has been assessed as C2-3 tetraplegia with preservation of more muscle groups in the lower extremities than upper extremities and he is status post C3 through C7 posterior spinal decompression and fusion along with other complications from his injury and current condition (Claimant's Exhibit 6, pp. 20-21).

4. The Claimant was initially hospitalized at Medical Center for the Rockies and later transferred to Craig Hospital on March 6, 2014. The Claimant was then transferred to a facility called CareMeridian (Claimant's Exhibit 6, p. 18).

5. The Claimant's family purchased a home that was modified to make it accessible for him. He has a definitive electric wheelchair with Tilt-in-Space feature and requires a Hoyer lift for toilet transfers. On May 2, 2014, Dr. Mason notes that the Claimant is medically delicate and opined that "the best thing for him, both physically and psychologically, is to complete home modifications with due haste and get him into a different care environment (Claimant's testimony and Claimant's Exhibit 6, pp. 18-19).

6. On May 23, 2014, Dr. Kristin Mason issued a note prescribing an emergency exit from the Claimant's bedroom in case of fire. On this note, she was asked the reasons that the emergency exit is medically reasonable and necessary. Her response is below:

> "The patient feels strongly he needs an exit door in his bedroom that is ramped for emergency escape in case of fire, and I believe that is fairly obvious and agree with that as medically reasonable and necessary" (Claimant's Exhibit 6, p. 27.)

7. The Claimant submitted the original 3/19/2014 proposed modification to the Claimant's home (Claimant's Exhibit 4) and the 5/13/2014 Amended Modified Floor plan which illustrates the actual modification to the Claimant's home for the emergency exit from the Claimant's bedroom (Claimant's Exhibit 5).

8. Dr. Mason did express opinions in the medical records that the Claimant was experiencing "situational depression and anxiety" due to his living situation in the care facility and not being able to be in his home while construction modifications were progressing but not completed. After the Claimant transitioned to his own home in December of 2014, Dr. Mason's follow up medical note no longer references the situational depression and anxiety (Claimant's Exhibit 6).

9. At hearing, the Claimant testified that he was not currently diagnosed or taking any medication for anxiety or depression nor is he in treatment with a psychologist or psychiatrist.

10. At hearing, the Claimant testified that other home modifications were completed, including carpet removal, hall and door widening, and air conditioning installation.

11. At hearing, the Claimant testified that he would like the emergency exit in his bedroom prescribed by Dr. Mason. Importantly, the Claimant testified that he was concerned about a fire and being able to get out of the house, since the only other exit that would accommodate him goes through hallways past the kitchen. He testified that the emergency exit would provide him with peace of mind as the second exit would allow him to get straight out of the house from his bedroom. This exit also provides him the ability to exit the home for medical appointments and allows his at-home medical care staff to enter and exit.

12. On cross examination, the Claimant testified that he has twenty-four hour nursing care in his home and that the nurses are able to use a medical lift to get him from his bed into his wheelchair.

13. The Claimant did not testify that without the exit, medical providers could not access him for medical care. The Claimant did not testify that the exit was necessary in order for him to leave his home to obtain medical care. The Claimant did not testify that the lack of the second exit would have a negative effect on his physical condition related to the work injury.

14. Based on the testimony and the documents in evidence, the ALJ finds that while an emergency exit would provide peace of mind for a tetraplegic and would provide an alternative exit from the home in the event of a fire, the proposed home modification does not provide a therapeutic benefit.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

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

### *Medical Benefits – Reasonably Necessary*

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). 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 or modality 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); *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

Employers are required to provide services which are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment. *See Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116, 1117-18 (Colo. App. 1997) (upholding child care services as medical in nature because they relieved the symptoms and effects of the injury and were directly associated with claimant's physical needs). However, in interpreting the scope of C.R.S. 8-42-101(1)(a), the Colorado Court of Appeals has narrowly construed the Act by stating that an apparatus must be necessary for the treatment of the injury or it must provide therapeutic relief from the effects of the injury. *Cheyenne Cnty. Nursing Home v. Indus. Claim Appeals Office*, 892 P.2d 443, 446 (Colo. App. 1995) (upholding employer's refusal to pay for a stair glider as being a medical apparatus because it did not provide a therapeutic benefit to the disabling injury although it provided peace of mind and access to lower levels of a home in a tornado-prone area). If the apparatus is not medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment then the employer will not be liable to pay for it. *See ABC Disposal Servs. v. Fortier,* 809 P.2d 1071, 1073 (Colo. App. 1990) (upholding employer's refusal to pay for a snow blower because it was not prescribed as a medical aid to cure or relieve claimant from the symptoms of his injury but rather provided an easier way to accomplish a household chore). In other recent cases, the courts have likewise denied an "apparatus" or a service where it was not found to be medically necessary, but was rather prescribed as a means to achieve an independent lifestyle or provided peace of mind in emergencies. *Bogue v. SDI Corporation, Inc.,* 931 P. 2d. 477 (Colo. App. 1996)(holding that a wheelchair accessible van was not medically necessary and therefore beyond the intent of C.R.S. 8-42-101(1)(a)); *Robertson v. Vincam Staff Administrators,* WC 4-389-907 (ICAO January 10, 2007)(a cell phone denied because it was not prescribed for therapeutic relief but for medical emergency needs); *Hillen v. Tool King,* 851 P.2d 289 (Colo. App. 1993)(Although lawn care services necessitated by Claimant's work-related condition, they are unrelated to physical condition and the lawn care was not prescribed to cure or relieve Claimant of symptoms of the injury, but simply to relieve the Claimant of the rigors of yard work).

In the Colorado cases where an apparatus or services were authorized, the courts found that the apparatus or service was medically necessary. *Bellone,* supra; *Atencio v. Quality Care,* 791 P.2d 7 (Colo. App. 1990)(housekeeping services allowed where Claimant had severely restricted use of hands and could not perform activities of daily living or chores without assistance); *City and County of Denver, School District 1 v. Indus. Claims Appeals Office,* 682 P.2d 513 (Colo. App. 1984)(Hot tub installed in home found medically necessary where Claimant's work hours prevented use of health club and hot tub was prescribed to cure and relieve the Claimant from the effects of his work injury).

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).

Here, the Claimant has failed to establish by a preponderance of the evidence that the emergency exit prescribed by Dr. Mason is reasonable and necessary to cure or relieve the effects of his industrial injuries. Dr. Mason prescribed the emergency exit door in his bedroom stating that "I believe that is fairly obvious and agree with that as medically reasonable and necessary." In contrast, the Claimant testified that he does not have a diagnosis or take any medication for anxiety or depression. Rather, Claimant stated that the emergency exit would provide him with peace of mind. However, the Claimant's home already has an exit that would enable him to exit the home in an emergency, paired with the fact that he is provided with twenty-four hour medical care. The main exit to the home also allows Claimant to exit the home for medical appointments and allows for his homecare medical staff to enter and exit his home. As there is no therapeutic benefit to the proposed modification to the Claimant's home, the Claimant's claim for this specific medical benefit is denied and dismissed.

## ORDER

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

1. The Claimant's request for an emergency exit from his bedroom as prescribed by Dr. Kristin Mason is hereby denied and dismissed.

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

DATED: February 18, 2015

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

## ISSUES

The issues for determination are:

1. The respondents' request to withdraw admissions of liability based on fraud;

2. Medical benefits;

3. Average weekly wage ("AWW");

4. Temporary disability benefits; and

5. Overpayment.

## FINDINGS OF FACT

1. On December 23, 2008, the claimant was seen by Michael Messner, D.O. for right elbow pain and swelling which he reported began two months earlier without any specific injury. The claimant reported the pain would shoot down the arm and wake him at night. Dr. Messner diagnosed lateral epicondylitis and recommended ice, rehabilitation, and an elbow sleeve.

2. On August 12, 2012, the claimant reported right elbow pain, and he underwent right elbow x-rays which did not reveal any acute problems.

3. On September 28, 2012, the claimant was seen by Dr. Messner and reported pain in both shoulders, which he related to his job duties at his additional job at Safeway. Dr. Messner also diagnosed a right wrist contusion, for which he recommended wrist/forearm physical therapy.

4. At the hearing, the claimant testified that he did not have any right shoulder problems prior to the work-related accident. The claimant also testified that he had right elbow pain just "one time" before the alleged accident, which had existed for only two days before he underwent a single evaluation for the condition.

5. On Thursday, December 5, 2013 the claimant sustained a minor injury involving the right upper extremity while he was shoveling snow and working for the

respondent-employer. The claimant completed his regular shift that day. The School was closed on the following day due to the weather.

6. The claimant reported his accident to Angel Thomas and Paula Prater (employees of the respondent-employer), individually, on December 5, 2013. The ALJ finds the testimony of Ms. Thomas and Ms. Prater to be credible.

7. Frank Beeman (who sometimes volunteers for the respondent-employer) had a conversation with the claimant on December 10, 2013 during which the claimant reported injuring himself while shoveling snow at the School. The ALJ finds the testimony of Mr. Beeman to be credible.

8. At the time of the accident, the claimant was working for the respondent-employer (a school) as a custodian from Monday through Friday, for an average of approximately 40 to 45 hours per week. The claimant's gross annual wages with the respondent-employer were approximately $25,494.58, which equates to an AWW of $490.28.

9. The claimant had two other jobs at the time of the accident. In addition to his job with the respondent-employer, he was working as a custodian for a cleaning company named Paramount Building Solutions ("Paramount"), and as a server for a restaurant named Fiesta Mexicana ("Fiesta").

10. The claimant worked for Paramount every night, where he averaged approximately 37 hours of work per week over the four weeks preceding the accident. The claimant's job duties with Paramount included waxing and cleaning the floors of the Safeway store in Woodland Park. To wax the floors, the claimant used a mop to apply a stripping solution. To clean the floors, the claimant would guide a large floor cleaning machine up and down every aisle. The machine frequently broke down and required repairs, which the claimant would perform by laying on the floor and pushing and pulling a drive chain with his arms until it returned to the correct position.

11. The claimant worked at Fiesta on Fridays, Saturdays, and Sundays, where he averaged 15 hours of work per week over two weeks preceding the accident. The claimant worked at Fiesta over the weekend following the work-related accident, on December 6, 7, and 8, 2013. There is no dispute that the claimant's AWW with Fiesta was $241.85.

12. The claimant first sought treatment for the injury on December 11, 2013, at Penrose-St. Francis, where he reported worsening right shoulder and elbow pain. Douglas Smith, FNP diagnosed rotator cuff strain, shoulder bursitis, and lateral

epicondylitis. Mr. Smith assigned temporary restrictions which essentially prohibited the claimant from using his right upper extremity. Despite these restrictions, the claimant continued working for Paramount.

13. On December 13, 2013, the claimant participated in a recorded telephone conversation with Jeni Schietzelt, who is the respondent-insurer's claim representative assigned to this case. The claimant made the following representations during that conversation: he had no right shoulder or right elbow problems before the accident; he worked at Fiesta on the three days following the accident; and he was not working anywhere else.

14. On December 30, 2013, the respondent-insurer filed the first general admission of liability. The respondents have since admitted liability for an AWW of $732.13, based on the claimant's earnings with Fiesta ($241.85) and the respondent-employer ($490.28), in addition to ongoing temporary disability benefits beginning on December 6, 2013.

15. On December 31, 2013, Dr. Messner assigned a "total work restriction." Despite this restriction, the claimant continued working for Paramount.

16. On January 14, 2014, the claimant was seen by Dr. Messner, who reported that the claimant's lateral epicondyle tenderness had improved. Dr. Messner diagnosed lateral epicondylitis (which he had previously diagnosed in 2008), and did not make any mention of medial epicondyle symptoms.

17. On January 16, 2014, the claimant underwent a right shoulder MRI, which did not reveal any acute abnormalities.

18. On January 22, 2014, the claimant returned to work with the respondent-employer in a modified position.

19. On February 17, 2014, the claimant underwent an initial evaluation by Ronald Fisher, PT. The claimant reported being employed by the respondent-employer, but he apparently did not disclose his job with Paramount.

20. On February 19, 2014, Dr. Messner noted that the claimant's shoulder and lateral epicondyle tenderness were still improving. That same day, Dr. Messner released the claimant to modified duty, with a restriction of no overhead arm/hand placement.

21. On March 17, 2014, the claimant was seen by Dr. Snyder and reported that his elbow was swollen and his pain was worse.

22. On March 19, 2014, the claimant was seen by Dr. Messner and reported that his elbow pain had increased over the last week. Dr. Messner observed increased tenderness at the lateral epicondyle and added a 15-pound lifting restriction.

23. On March 31, 2014, the claimant was examined by Katherine Leppard, M.D. and reported worsening elbow pain. Dr. Leppard diagnosed myofascial shoulder pain based on the normal MRI.

24. Dave Gordon (a co-worker employed by the respondent-employer) prepared a written statement dated April 16, 2014 regarding a conversation he had with the claimant around the same time that his symptoms were worsening:

> Jesus has told me that he also works at Safeway. He does hard surface floor maintenance there. One morning when Jesus came in for morning Crossing Guard duty he told me that he had been working all night at Safeway and had just gotten off. He said that he had only been off for about one hour and that his arm was hurting him very badly. He even had me look at it pointing out that it was swollen. He said that he had been stripping and re-waxing the floors at Safeway and that he had been mopping all night and that was why his arm was hurting so badly. He said it hurt so badly that he couldn't even lift it. I pointed out that he did not hurt it here at [the respondent-employer] because he is on very light duty. He did agree at that time that it was not from anything he did at [the respondent-employer] but was from mopping all night at Safeway.

25. Mr. Gordon was uncertain of the exact date on which the conversation occurred, but it was sometime in March or April of 2014, and he overheard the claimant have a similar conversation with Melanie Carter in March or April of 2014. The ALJ finds the testimony of Mr. Gordon to be credible.

26. Melanie Carter also testified, via deposition on November 13, 2014 regarding a similar conversation which she had with the claimant around the same time. Ms. Carter is employed by a company named Chartwells and she works in the same building as the claimant. Ms. Carter had a conversation with the claimant sometime in March or April of 2014 (before the April 5, 2014 MRI noted below), which occurred in the presence of Dave Gordon. During that conversation, the claimant reported pain and swelling above and about the elbow, he related his symptoms to "mopping and doing floors all night at Safeway," and Ms. Carter observed swelling of the elbow. Ms. Carter

also testified that she likes the claimant and was concerned about his medical condition. The ALJ finds the testimony of Ms. Carter to be credible.

27. Notably, the number of hours which the claimant worked for Paramount increased after the accident. As compared to the 37 hours he had previously averaged, the claimant averaged roughly 40 hours of work per week over the two-week pay period ending December 27, 2013 and roughly 42 hours of work per week over the following three pay periods. The claimant's work with Paramount peaked over the next five pay periods, when he averaged at least 46 hours per week.

28. Andres Yarasca was the claimant's supervisor at Paramount; the claimant was the only person who would perform the basic floor cleaning duties at the Safeway in Woodland Park; and the claimant's job responsibilities for Paramount remained the same after his accident until he quit in April 2014, though he was encouraged to do "light" work. Mr. Yarasca could only speculate why the claimant resigned. The ALJ finds the testimony of Mr. Yarasca to be credible.

29. Brandon Heedt previously worked with the claimant at the Safeway in Woodland Park, while Mr. Heedt was employed by Safeway as a night crew manager. Mr. Heedt observed that the claimant's job duties with Paramount stayed the same after the accident, though he would sometimes get help when moving large items after his elbow symptoms worsened. Mr. Heedt testified that the operator of the floor cleaning machine must "push the bar down" to move it, some pushing and pulling is required to turn the machine, and mopping the floor requires repetitive use of the upper extremities. The ALJ finds the testimony of Mr. Heedt to be credible.

30. Matthew Maconachy is the head night clerk at the Safeway in Woodland Park. He worked with the claimant at the Safeway during the period of December 2013 through April 2014; the claimant continued performing his regular job duties for Paramount during that timeframe*;* and the claimant commonly performed those duties without assistance. Mr. Maconachy observed that the claimant began reporting increased right arm pain in March or April 2014; the claimant told him that those symptoms could be due to his job duties with Paramount, including waxing floors and operating the machine; and the claimant did not attribute those symptoms to his injury with the respondent-employer initially. When asked whether pushing and pulling the chain was difficult, Mr. Maconachy said "it was always a pain." Mr. Maconachy further observed that the claimant's explanation regarding the cause of his increased symptoms later changed: "It seemed like it was more in the direction of things that had happened at Safeway, and then, it seemed as though he had finally come to a conclusion that he had actually hurt himself at the [respondent-employer]. . . . He hurt

himself at Safeway, until he said that: He might have hurt himself at the [respondent-employer]." The claimant informed Mr. Maconachy that he might need to testify on his behalf, and, during that conversation, the claimant asked, "You have never seen me waxing floors at Safeway, just supervising, right?" Mr. Maconachy had in fact seen the claimant waxing floors, however. The ALJ finds the testimony of Mr. Maconachy to be credible.

31. On April 5, 2014, the claimant underwent a right elbow MRI, which revealed a partial tear of the common flexor tendon with edema/hemorrhage tracking into the flexor carpi radialis muscle. The radiologist, Nicholas Moore, M.D., diagnosed tendinopathy, sprain of the common extensor tendon and radial collateral ligament, and mid distal biceps insertional tendinopathy.

32. On April 16, 2014, the claimant was seen by Karl Larsen, M.D., who diagnosed lateral and medial epicondylitis, and assigned work restrictions of no use of the right arm.

33. On April 17, 2014, the claimant participated in a second recorded telephone conversation with Ms. Schietzelt, during which he made the following representations: He was "so pissed off" about having to shovel the snow; he had not performed any work besides his modified job with the respondent-employer; and the only wages he was earning were with the respondent-employer. Upon being confronted by Ms. Schietzelt regarding his job with Paramount which the respondent-insurer had learned about through an investigation, the claimant admitted that he had lied about his employment status.

34. On April 17, 2014, the claimant resigned from Paramount. The corresponding paperwork from Paramount does not suggest he resigned due to medical problems.

35. On May 21, 2014, Dr. Snyder opined that the claimant had exacerbated his condition possibly due to "continued repetitive motion activity." Dr. Snyder later opined it was reasonable to assume that the claimant's condition "was aggravated by certain activities between his visit on February 10, 2014 and March 17, 2014."

36. On June 20, 2014, the claimant was evaluated by Scott Primack, D.O., who diagnosed a right shoulder strain, right elbow strain, and lateral epicondylitis. Dr. Primack opined that no further medical treatment was reasonably necessary for the work-related injury, because the claimant's injury had improved before his job duties with Paramount significantly aggravated his elbow and shoulder conditions.

37. On July 29, 2014, the claimant was seen by Derek Purcell, M.D., who opined that the MRI findings indicate that the claimant's "shoulder is essentially within normal limits with no evidence of rotator cuff tear."

38. On November 14, 2014, Dr. Messner testified via deposition. Dr. Messner explained that a "total work restriction" means no work whatsoever; he verbally advised the claimant of the "total work restriction" both times that he assigned it; and he was unaware of the claimant's job with Paramount despite asking him about his employment status. The ALJ finds these factual portions of Dr. Messner's testimony to be credible, but the ALJ also finds that the causation opinions offered by Dr. Messner were not credible, in light of the credible and persuasive medical evidence to the contrary.

39. On November 20, 2014, Dr. Purcell testified via deposition. Dr. Purcell diagnosed AC joint osteoarthritis and rotator cuff tendinitis (i.e. impingement syndrome), and explained that this diagnosis was based on his physical examination given the minimal MRI findings. For impingement syndrome, Dr. Purcell typically recommends conservative treatment. Dr. Purcell testified that osteoarthritis is very common, and patients with osteoarthritis can become symptomatic from a wide range of activities. Besides the MRI report dated January 16, 2014 and Dr. Primack's report, Dr. Purcell did not review any other medical records before testifying. The ALJ finds that the causation opinions offered by Dr. Purcell were not credible, in light of the credible and persuasive medical evidence to the contrary.

40. Dr. Primack testified that the two months' of nighttime elbow pain which the claimant had leading up to the September 28, 2012 visit with Dr. Messner was suggestive of a recurrent and degenerative condition such as osteoarthritis or arthritic pain. Dr. Primack also testified that the imaging of the claimant's right shoulder revealed only common degenerative changes. Dr. Primack explained that the MRI from April 5, 2014 confirms that another injury must have occurred after the work-related accident, because it revealed an acute tear of the medial epicondyle with effusion, rather than the lateral epicondylitis which Dr. Messner had previously diagnosed. Dr. Primack reasoned that, although shoveling snow could cause an injury, the claimant's repetitive and demanding job duties with Paramount were the most likely cause of his shoulder and elbow problems, based on his failure to promptly seek treatment for what would have been a very painful torn tendon, his heightened workload with Paramount after the accident, and his conversations with Mr. Gordon and Mr. Carter regarding his job at Paramount being the cause of the increased symptoms. The ALJ finds the testimony of Dr. Primack to be credible and persuasive, except that the ALJ rejects Dr. Primack's opinion that claimant did not sustain a compensable injury in the first instance.

41. Ms. Schietzelt testified that the respondent-insurer had paid the claimant $17,859.95 in compensation benefits prior to the hearing. The ALJ finds the testimony of Ms. Schietzelt to be credible.

42. With the exception of the claimant's original injury complaint, the ALJ finds that the claimant is not credible. The ALJ specifically finds the claimant's testimony regarding the existence of any disability or need for medical treatment beyond December 11, 2013 which are causally related to the work-related accident to not be credible.

## CONCLUSIONS OF LAW

1. The respondents have the burden to prove that the claimant committed fraud by a preponderance of the evidence. *Section 8-43-201(1), C.R.S.* A preponderance of the evidence is that which would lead 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). "Fraud" is a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005)*, citing Black's Law Dictionary* 685 (8th ed. 2004). When a claimant has supplied materially false information upon which a respondent relied in filing an admission of liability, the admission may be withdrawn retroactively in addition to prospectively. *Vargo v. ICAO,* 626 P.2d 1164 (Colo. App. 1981). Here, the ALJ concludes that respondents failed to carry their burden of proof on the issue of fraud and are therefore not permitted to withdraw their admission of liability for the initial accident.

2. The claimant had the burden to prove his entitlement to additional medical benefits by a preponderance of the evidence*. §8-43-201, C.R.S.* The respondents are only liable for the medical treatment which is reasonable and necessary to cure and relieve the alleged work-related injury. *§8-42-101(1)(a), C.R.S.* Even after an admission of liability is filed, the 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). Here, the ALJ concludes that the claimant failed to carry his burden of proof to establish that any further medical treatment is reasonably necessary for and related to the December 5, 2013 work-related injury, and any need for medical

treatment which the claimant had after December 11, 2013 was most likely caused by his preexisting condition or his job duties with Paramount. This conclusion is bolstered by the testimony of Dr. Primack, Mr. Heedt, Mr. Maconachy, Ms. Carter, and Mr. Gordon.

3. The respondents have the burden to establish that the claimant's temporary disability benefits should be terminated by a preponderance of the evidence. *§8-43-201, C.R.S.* An injured worker is only entitled to temporary disability benefits to compensate for wage loss which is causally related to the work-related injury. *See, generally, sections 8-42-105 and 8-42-106, C.R.S.* Here, the ALJ concludes that the respondents carried their burden of proof and the claimant's temporary disability benefits should be terminated as of December 11, 2013, because the work-related injury was minor in nature, any disability caused by the work-related injury ended by December 11, 2013, the claimant continued working for Paramount after December 11, 2013 despite the restrictions he was assigned, and any disability which the claimant had after December 11, 2013 was most likely caused by his job duties with Paramount. This conclusion is bolstered by the testimony of Dr. Primack, Mr. Heedt, Mr. Maconachy, Ms. Carter, and Mr. Gordon.

4. If a temporarily disabled injured worker is earning wages which are less income than his AWW, then TPD benefits are payable rather than TTD benefits, and the respondents are entitled to offset the TPD benefits payable based on any such partial earnings. *Section 8-42-106(1), C.R.S.* Here, because the claimant earned some wages during the period of disability which was caused by the work-related injury (i.e. December 6, 2013 through December 11, 2013), claimant is entitled to TPD benefits from December 6, 2013 through December 11, 2013, and respondents are entitled to offset their corresponding TPD liability based on the wages which the claimant earned during this period.

5. The responsible for termination of employment defense created by section 8-42-103(1)(g), C.R.S. applies to subsequent employers. *Garbiso v. Wal-Mart Stores, Inc.*, W.C. No. 4-695-612 (ICAO 2008); *Colorado Springs Disposal v. ICAO*, 58 P.3d 1061 (Colo. App. 2002). The ALJ concludes that this issue is moot based on his conclusion that claimant does not have any ongoing disability which is causally related to the December 5, 2013 work-related injury.

6. The claimant had the burden to establish by a preponderance of the evidence that the admitted AWW should be increased. *Section 8-43-201, C.R.S.* An injured worker's AWW should be fair. *Section 8-42-102(3), C.R.S.* When a worker is concurrently employed, an ALJ has the discretion to exclude the concurrent wages from

the AWW. *Broadmoor Hotel and Continental Ins. Co. v. ICAO*, 939 P.2d 460 (Colo. App. 1996); *Coleman v. National Produce Service*, W.C. No. 4-601-676 (ICAO July 12, 2005) (disagreeing with the ALJ's conclusion that the worker's concurrent wages needed to be included in the AWW). Here, the ALJ concludes that the claimant failed to carry his burden of proof to increase the admitted AWW, the admitted AWW fairly reflects claimant's earnings with the respondent-employer and Fiesta at the time of the accident, and it would be unfair to include the claimant's wages with Paramount in the AWW in light of his intentional concealment of that employment from the respondent-insurer.

7. The respondents have the burden to prove their entitlement to an overpayment or an offset by a preponderance of the evidence. *Section 8-43-201(1), C.R.S.; Quintana v. Sunstrand Aviation*, W.C. No. 3-062-456 (ICAO Sep. 24, 2007). An "overpayment" is defined as "money received by a Claimant that exceeds the amount that should have been paid, or which the Claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." *Section 8-40-201(15.5), C.R.S.* Repayment of any overpayment is now required even in the absence of fraud. *Simpson v. ICAO,* 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds by Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777 (Colo. 2010); *see also Haney v. Shaw*, W.C. No. 4-796-763 (ICAO 2011). Here, the ALJ concludes that the claimant was paid temporary disability benefits in excess of what he should have been paid and was entitled to receive. The ALJ further concludes that the respondents are entitled to recoup the overpayment from the claimant, and the overpayment shall be calculated by subtracting the amount of TPD benefits owed for the period of December 6, 2013 through December 11, 2013 from the total amount of indemnity benefits which have been paid in the claim.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The respondents' request to withdraw their admission of liability for the initial accident based on fraud is denied and dismissed.

2. The claimant's request to increase the admitted AWW is denied and dismissed. The AWW shall remain $732.13.

3. The claimant's requests for additional medical benefits for his right shoulder and right elbow conditions are denied and dismissed. No further medical benefits are payable for the work-related injury.

4. The respondents' request to terminate the claimant's temporary disability benefits is hereby granted. The claimant is entitled to temporary partial disability benefits from December 6, 2013 through December 11, 2013, but respondents are not liable for any temporary disability benefits after December 11, 2013.

5. The respondents are hereby awarded an overpayment in an amount equal to the indemnity benefits which have been paid in this claim minus the temporary partial disability benefits which are payable for the period of December 6, 2013 through December 11, 2013. The respondent-insurer shall file an admission of liability in which the overpayment shall be claimed consistent with this Order. The respondent-insurer is then entitled to repayment of the overpayment, though the claimant may file an application for hearing concerning how the overpayment shall be repaid or to contest whether the calculation of the overpayment is consistent with this Order.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

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

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 19, 2015

/s/ original signed by:

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

## ISSUES

1. Whether the claimant has established by clear and convincing evidence that he is not at maximum medical improvement (MMI) for his December 12, 2013 compensable injury.

2. If the claimant is at MMI, whether the respondents have overcome the impairment rating provided by the Division IME, Dr. William Griffis, by clear and convincing evidence.

3. If the claimant is not at MMI, whether the claimant is entitled to temporary total disability (TTD) or temporary partial disability (TPD) benefits.

4. Whether the claimant has established his average weekly wage.

## FINDINGS OF FACT

1. The claimant is a 48 year old man. His date of birth is November 16, 1966. He was 47 years old on December 12, 2013 when he sustained a compensable injury while working for the respondent-employer.

2. On December 12, 2013, the claimant was performing his typical work duties when an industrial sized clamp came loose and struck him in the head. There was two to three tons of pressure on the clamp when it came loose. The force of the impact split open the claimant's eyebrow and left orbital rim.

3. The claimant sought immediate emergency treatment at Penrose St. Francis Hospital. He was instructed to follow up with an otolaryngologist.

4. The claimant posted on his Facebook page on December 14, 2013 that he was "still wicked dizzy" from the incident. After the incident, the claimant was experiencing headaches, dizziness, vertigo, and memory loss.

5. The claimant began treatment with a workers' compensation physician on December 19, 2013. He saw Dr. Walter Larimore at Concentra. The claimant complained of dizziness when he would stand too quickly.

6. The claimant was not seen by a physician again until March 7, 2014, when he was examined by Dr. Randall Jones. The claimant complained to Dr. Jones of ongoing headaches. Dr. Jones placed the claimant at MMI on that date, March 7, 2014.

7. Dr. Jones' March 7, 2014 report states that the claimant was no longer experiencing dizziness. The claimant disagreed with this report and believes that he was still experiencing dizziness at this time, but that he was feeling overall better than he had been months ago.

8. The respondents filed a Final Admission of Liability on April 14, 2014.

9. On April 13, 2014, the claimant walked into his garage to smoke a cigarette. While stepping into the garage, he felt a strong vertigo sensation and it "was like the whole room was spinning." He fell into a refrigerator and hit his head. The claimant believes that this sensation that caused him to fall was the same sensation that he had been experiencing since his injury on December 12, 2013.

10. The claimant began experiencing increased dizziness and vertigo while at work on April 14, 2014. The respondent-employer sent him to the emergency room for an evaluation.

11. The claimant returned to Dr. Jones on April 21, 2014. He explained to Dr. Jones that his headaches and dizziness have increased in both frequency and intensity since being placed at MMI the previous month. Dr. Jones stated that the claimant was medically unable to work. He further referred the claimant to Dr. Bowser for a neurology evaluation and also for a NeuroPsych evaluation. Dr. Jones opined that the claimant was no longer at MMI and that MMI would not be reached for another three to six months.

12. Dr. Eric Ridings, a physiatrist, performed an independent medical examination (IME) at the request of the respondents on July 16, 2014. Dr. Ridings opined that the medical record does not support that the claimant suffered a brain injury due to the accident. Dr. Ridings further stated that the claimant did in fact reach MMI on March 7, 2014 and he remains at MMI.

13. Dr. Ridings further opined that the dizziness and vertigo that the claimant was experiencing prior to his April 14, 2014 emergency room visit was not related to his December 12, 2013 incident. Despite Dr. Ridings being of the opinion that none of the

claimant's current complaints were work related, he urged the claimant to seek further evaluation for his condition outside of the workers' compensation system.

14. The claimant underwent a Division IME with Dr. William Griffis on August 11, 2014. The claimant complained to Dr. Griffis of ongoing, moderately severe headaches, occurring four to five times per week. The claimant also complained of short-term memory loss and difficulty concentrating.

15. Dr. Griffis diagnosed the claimant with posttraumatic concussion headaches and a closed head injury with cognitive deficits. He provided the claimant with a 10% whole person rating for Episodic Neurologic Disorders.

16. Dr. Griffis recommended that the claimant receive a neuropsychological evaluation to further investigate the claimant's cognitive deficits including short-term memory loss and difficulty concentrating. However, Dr. Griffis recommended this be performed as maintenance care and found the claimant to be at MMI.

17. Dr. Bennett Machanic, a specialist in neurology, performed an IME of the claimant at the request of the claimant's counsel on November 24, 2014. The claimant reported dizziness, vertigo, falling due to the vertigo, headaches, memory loss, and mood swings.

18. Dr. Machanic's examination demonstrated the claimant's difficulty recalling items over a three minute time period. Dr. Machanic performed a modified Hallpike procedure that supported the claimant's subjective complaints of vertigo. The claimant's tandem gait was very unsteady and he veered forward while walking.

19. Dr. Machanic believes that the December 12, 2013 incident was associated with a mild cerebral concussion. Although the forehead laceration was repaired, the claimant continues to have problems with the left suborbital branch of the trigeminal nerve. He finds the more important issue to be the effect of the injury on the claimant's headaches, and on his vestibular and cognitive functions.

20. Dr. Machanic diagnosed the claimant as having posttraumatic muscle contraction headaches and posttraumatic vestibular dysfunction. He explained that "the possibility of a more extensive traumatic brain injury has not been excluded to date."

21. Dr. Machanic concluded that he is "quite concerned" about the claimant's situation. "I fully disagree that [the claimant] has reached any semblance of maximum

medical improvement and I do think that his Workers' Compensation case should immediately be reopened and I would suggest strongly that [the claimant] be evaluated thoroughly and fully by an otolaryngologist."

22. Dr. Machanic indicated that the claimant's impairment rating would be "very close to 30%," but opined that it is not appropriate to provide an impairment rating at this point given the claimant's need for further treatment.

23. Brian Gessel testified at hearing that he is the General Manager of the Motor City branch of the respondent-employer. He verified that the claimant continued working with the respondent-employer after the injury. He did recall an event wherein the claimant told him he was experiencing dizziness and headaches. He instructed the claimant at that time to "go back and have it checked out."

24. Mr. Gessel testified that the claimant continued to work with the respondent-employer through April 14, 2014. He had no interaction with the claimant after that date. Mr. Gessel testified that the claimant told him that he was resigning because he found a new job.

25. The notes of Dr. Jones indicate that the claimant told him that he quit his job because he does not like it.

26. The ALJ finds that the claimant quit his job voluntarily and not as a result of the effects of his industrial injury.

27. Dr. Ridings testified at hearing for the respondents as an expert in physical medicine and rehabilitation. He is not a neurologist. He testified that the natural history of a closed head injury is to have maximum problems shortly after the injury and then a gradual decrease in symptoms.

28. Dr. Ridings testified that it was his opinion that the claimant's symptoms in April of 2014 were not related to his original, December 12, 2013 trauma. It was his ultimate opinion that the claimant obtained MMI on March 7, 2014 without any permanent impairment.

29. Dr. Ridings acknowledged at hearing that the claimant only had two visits with two different doctors before being placed at MMI. He testified that his report stated the claimant did not have a brain injury, but testified that dizziness can be a sign of a head injury.

30. Dr. Ridings testified that if a person were to have balance problems caused by a head injury, it would be reasonable to send that person to an ENT doctor. If the claimant's ongoing symptoms are related to the December 12, 2013 incident, Dr. Ridings agreed he should be evaluated by an ENT doctor under workers' compensation and also have a neuropsych evaluation as recommended by Dr. Griffis.

31. Dr. Ridings agreed that there is some evidence in the record to suggest that the claimant's headaches had never fully resolved prior to his examination with Dr. Griffis. Dr. Ridings testified that headaches often do not have objective findings and are solely documented through subjective complaints. The diagnosis would have to be based solely on the history of the patient and the medical record. Dr. Ridings agreed that the claimant's own history documented ongoing headaches and that the medical record documented ongoing headaches to a degree.

32. The claimant has continued to experience symptoms that he attributes to the December 12, 2013 incident. He has ongoing dizziness/vertigo, headaches, memory loss, and mood swings.

33. Prior to December 12, 2013, the claimant never had problems with recurring headaches. The record is absent of any documentation of headaches prior to December 12, 2013.

34. The claimant has never had dizziness, vertigo, or memory issues prior to December 12, 2013. The record is absent of any documentation of dizziness, vertigo, or memory issues prior to December 12, 2013.

35. The claimant's symptoms continue to cause him to fall and he has fallen recently. He recently fell attempting to use his home bathroom and struck his hip on the toilet. He explained this to be the same sensation that caused his fall on April 13, 2014. The claimant testified that he had never had issues with falling prior to December 12, 2013.

36. The claimant was hired on November 25, 2013. There is only one pay stub available from his employment with the respondent-employer prior to his December 12, 2013 date of injury. The claimant earned $1,965.95 between November 25, 2013 and December 8, 2013. $1,965.95 divided by 2 weeks equals $982.98.

37. The ALJ finds the claimant to be credible with respect to his medical condition.

38. The ALJ finds that the claimant has established that Dr. Griffis' opinion determining that the claimant was at MMI on March 7, 2014 is clearly erroneous.

39. The ALJ finds that the claimant is not at MMI for his industrial injury.

40. The ALJ finds that the claimant has failed to establish that it is more likely than not that he is entitled to temporary indemnity benefits.

41. The ALJ finds that the claimant has established that it is more likely than not that his average weekly wage is $982.98 per week.

## CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

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

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and

convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, (W.C. No. 4-874-745-01, ICAO February 14, 2014); *See also Javalera v. Monte Vista Head Start, Inc.,* (W.C. No. 4-532-166, ICAO July 19, 2004); *Gonzales v. Browning Industries of Colorado*, (W.C. No. 4-350-356, ICAO March 22, 2000).

8. The ALJ concludes that that the opinions of Dr. Machanic and Dr. Jones, that the claimant is not at MMI, are more credible and more persuasive than medical opinions to the contrary, and that Dr. Griffis clearly erred when finding the claimant to be at MMI as of March 7, 2014. The ALJ concludes that this is not a mere difference of opinion but a clear error on Dr. Griffis' part.

9. As found above, the ALJ concludes that the claimant has established by clear and convincing evidence that the claimant is not at MMI.

10. As a result of the conclusion that the claimant is not at MMI, the respondents' challenge to the impairment rating is moot.

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

12. The ALJ concludes that the claimant voluntarily quit his employment with the respondent-employer and that the wage loss is therefore not attributable to the industrial injury.

**13.** The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), See Also Section 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p.

1457. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

14. The claimant was hired on November 25, 2013. There is only one pay stub available from his employment with the respondent-employer prior to his December 12, 2013 date of injury. The claimant earned $1,965.95 for the two week period from November 25, 2013 to December 8, 2013. $1,965.95 divided by 2 weeks equals $982.98.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The respondents' request to overcome the opinion of the DIME physician is denied and dismissed.

2. The claimant is not at maximum medical improvement and the respondent-insurer shall provide medical care necessary to cure or relieve the claimant from the effects of his industrial injury.

3. The claimant's request for temporary indemnity disability benefits is denied and dismissed.

4. The claimant's average weekly wage is $982.98.

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: February 2, 2015

/s/ original signed by:

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

## ISSUE

Whether the need for the arthroscopic shoulder surgery recommended by Dr. Weinstein is causally related to Claimant's October 22, 2013 industrial injury.

## FINDINGS OF FACT

1. The claimant was employed as a Correctional Officer I on October 22, 2013 when he was called to a unit to help restrain an inmate who was refusing medications. The claimant used a 2 x 6 plastic shield weighing between 6½ and 10 pounds to help gain control of a restrained inmate. The claimant used the handles on either side of the shield to hold the shield up to about shoulder level for the 1½ minutes that it took to gain control of the restrained inmate. About 30 seconds into the confrontation the claimant felt a pop in his left forearm. The claimant did not seek medical treatment and finished out his shift.

2. The claimant delayed seeking any medical treatment for approximately two and a half months at which time, on January 7, 2014, he then sought treatment at CCOM. The claimant reported that while pinning an offender to the wall with a shield, he left a "pop" in his left forearm with immediate pain in the back of his left elbow. On January 7, 2014, the claimant complained of pain, weakness and swelling in the left forearm and hand. Dr. Schwender noted that the claimant's pain diagram included left elbow/forearm pain. The claimant did not report any symptoms or problems regarding his left shoulder to Dr. Schwender and did not document any left shoulder problems on his pain diagram. On physical examination, the claimant's shoulders revealed full range of motion. Dr. Schwender diagnosed the claimant with left medial epicondylitis, recommended occupational therapy, and released the claimant to return to work with no restrictions.

3. The claimant returned to CCOM on January 22, 2014, February 26, 2014, and March 19, 2014 for his left elbow. At each visit the claimant only complained of left elbow pain and only noted pain in his left elbow down to his left hand on his pain diagrams. Dr. Nanes continued to release the claimant to work with no restrictions.

4. The claimant saw Dr. Leppard on February 28, 2014 for an EMG study. The claimant's chief complaint was left elbow pain and hand numbness. The claimant

reported having persistent left inner elbow pain since his injury on October 22, 2013. The claimant did not report any left shoulder pain or problems. Dr. Leppard did not note any left shoulder problems arising out of her physical examination and did not provide the claimant with a diagnosis for his left shoulder.

5. The claimant saw Dr. Larsen on February 3, 2014, March 3, 2014, and April 2, 2014. The claimant only complained of left elbow pain. Dr. Larsen did not note that the claimant had any left shoulder complaints or problems, did not document any left shoulder complaints or problems during his physical examination, and did not provide the claimant with a diagnosis related to his left shoulder on any of those dates.

6. The claimant had continued to work his regular job for over 5 months from October 22, 2013 through April 8, 2014 when he underwent surgery on his left elbow.

7. The claimant initially testified that he first reported having left shoulder pain when he came out of his sling approximately 4-5 days following his left elbow surgery. The claimant later testified that his left shoulder pain had always been present since the October 22, 2013 injury but that his elbow was his primary concern.

8. The claimant completed a pain diagram on April 14, 2014, 6 days following his left elbow surgery. The claimant only circled the area around his left elbow. The claimant did not mark any symptoms in his left shoulder.

9. The claimant returned to CCOM on April 16, 2014, 8 days following his left elbow surgery complaining of left elbow pain only. Dr. Nanes did not note any left shoulder complaints from the claimant on that date.

10. The claimant saw Dr. Larsen for a surgical follow-up on April 21, 2014, 13 days following his surgery. Dr. Larsen did not note any left shoulder problems or complaints at that time.

11. The first notation of left shoulder problems in the claimant's medical records appears in Dr. Nanes' May 14, 2014 chart note. Dr. Nanes noted that the claimant "continues to have considerable pain and discomfort in the left elbow and actually in the left upper extremity including the left shoulder."

12. The claimant saw Dr. Larsen on May 21, 2014 for a surgical follow-up. Dr. Larsen did not note any left shoulder problems or complaints.

13. The claimant saw Dr. Gray at CCOM on May 28, 2014. The claimant's only complaint at that time was left elbow pain. Dr. Gray did not note any left shoulder problems or complaints.

14. On June 11, 2014, Dr. Nanes noted that the claimant "has developed left shoulder limitation [and] discomfort and Dr. Larsen feels that this was from the prolonged wearing of his cast." This is not consistent with Dr. Larsen's records which do not document any left shoulder complaints or attribute any left shoulder problems to the prolonged wearing of a cast. This is also inconsistent with the claimant's testimony that he developed left shoulder pain 4-5 days after his left elbow surgery. On July 16, 2014, Dr. Nanes offered an opinion that the claimant's left shoulder condition "is due to his injury of the left elbow and was probably caused by wearing his brace for a prolonged period." Dr. Nanes did not opine that the claimant injured his left shoulder during the October 22, 2013 incident and his opinion that the claimant's left shoulder condition is due to the prolonged wearing of a brace is not consistent with the claimant's testimony that his left shoulder started hurting 4-5 days after his left elbow surgery.

15. The claimant had a left shoulder MRI on July 24, 2014.

16. The claimant saw Dr. Weinstein on one occasion, August 16, 2014, for an orthopedic consultation. The claimant reported to Dr. Weinstein that he had a twisting injury to his left arm with immediate pain in his left shoulder as well as his left elbow. This history is not consistent with the claimant's medical records or his testimony at hearing. Dr. Weinstein's report does not summarize or refer to any of the claimant's prior medical records or otherwise indicate that he had any of the claimant's prior medical records to review as part of his consultation. Dr. Weinstein diagnosed the claimant with left rotator cuff tendinitis and left superior labral/biceps inflammation/tear. Dr. Weinstein recommended left shoulder surgery given that the claimant "has been symptomatic over a year despite rest, modification of activity, physical therapy and anti-inflammatory medication". This is not consistent with the claimant's medical records or his hearing testimony. According to his testimony and his medical records, the claimant did not become symptomatic until after his left elbow surgery in April, only 4 months before seeing Dr. Weinstein. Prior to that time, the claimant had been working full duty with no rest or modification of his activities. Dr. Weinstein did not offer an opinion on the cause of the claimant's left shoulder condition or specifically relate the need for the surgery to either the incident on October 22, 2013 or the prolonged wearing of a cast/sling.

17. Dr. Ciccone performed an Independent Medical Evaluation (IME) for Respondent on November 12, 2014. As part of the IME, Dr. Ciccone reviewed copies

of the claimant's medical records, took a history from the claimant, and performed a physical examination. The claimant told Dr. Ciccone that at the time of injury, he felt a pop on the lateral side of his left elbow that radiated up to the shoulder but that he noted mostly forearm pain at the time. Dr. Ciccone opined that the claimant's testimony of first experiencing shoulder pain after his elbow surgery was consistent with his review of the claimant's medical records. However, the claimant told him that he notified CCOM of his shoulder problems when he first obtained treatment on January 7, 2014. This is not consistent with the claimant's medical records or his testimony at hearing. Dr. Ciccone credibly testified that he did not question the claimant's veracity, that he agreed with Dr. Weinstein's diagnoses, and that the shoulder surgery recommended by Dr. Weinstein was reasonably necessary. Dr. Ciccone credibly and persuasively testified that the MRI was essentially normal revealing only generative changes and no acute injury.

18. Dr. Ciccone credibly and persuasively opined that the need for the surgery was not causally related to the claimant's October 22, 2013 injury. The claimant's MRI showed only degenerative changes with no acute injury. Dr. Ciccone credibly explained that if the claimant had injured his shoulder on October 22, 2013, he would have complained of left shoulder pain initially. Rather, two and a half months after the injury, the initial visit at CCOM revealed no shoulder complaints, no shoulder problems were noted on the pain diagram, and physical examination showed full range of motion in the claimant's bilateral shoulders.

19. Dr. Ciccone's opinion that the recommended surgery is not related to the claimant's October 22, 2013 injury is found to be more credible and persuasive than the written opinion of Dr. Nanes that the claimant's left shoulder condition was the result of the prolonged wearing of a cast/sling following the claimant's left elbow surgery. Dr. Weinstein did not offer an opinion on the cause or need for the recommended surgery. Moreover, it does not appear that Dr. Weinstein had the benefit of the claimant's medical records. The history that Dr. Weinstein documented was inconsistent with a review of those medical records and with the claimant's testimony at hearing.

20. The claimant has failed to establish that it is more likely than not that the need for the left shoulder surgery recommended by Dr. Weinstein is causally related to his October 22, 2013 industrial injury.

## CONCLUSIONS OF LAW

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

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

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

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

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *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. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

5. 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).

6. The ALJ concludes that Dr. Ciccone's opinion that the recommended surgery is not related to Claimant's October 22, 2013 injury is found to be more credible and persuasive than the written opinion of Dr. Nanes that Claimant's left shoulder condition was the result of the prolonged wearing of a cast/sling following Claimant's left elbow surgery.

7. As found, the claimant has failed to establish by a preponderance of the evidence that the need for the left shoulder surgery recommended by Dr. Weinstein is causally related to his October 22, 2013 industrial injury.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Weinstein 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: February 24, 2015

/s/ original signed by:

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

## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from February 4, 2014 to June 17, 2014 and from July 24, 2014 to August 26, 2014.

2. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment on November 5, 2014

## FINDINGS OF FACT

1. Claimant was employed by Employer as a courtesy clerk.

2. On January 7, 2014 Claimant suffered an admitted industrial injury to his right knee and low back when a customer backed into a row of grocery carts that Claimant was pushing.

3. On January 8, 2014 Claimant was evaluated by Jonathan H. Bloch, D.O. Dr. Bloch assessed Claimant with contusions of both knees, contusions of both wrists, and lumbar strain. Dr. Bloch assigned work restrictions of: no significant kneeling, crawling, squatting, or climbing; limit bending to less than 6 times per hour; and no ongoing lifting greater than 15 pounds. *See* Exhibit 4.

4. On January 13, 2014 Claimant was evaluated by Terrell R. Webb, M.D. Claimant reported to Dr. Webb that his knee and wrist symptoms had resolved but that he continued to have mild pain in the low back. Claimant reported he was not working as there was no light duty work available with Employer. Dr. Webb assessed: contusion of knee, resolved; contusion of wrist, resolved; and lumbar strain, improving. Dr. Webb released Claimant to a trial of regular duty work, and scheduled a follow up visit for one week later. *See* Exhibit 4.

5. In late January or early February, Claimant slipped and fell on ice on his way to school. In the slip and fall he aggravated his knee injury and had additional pain for approximately one week before his knee returned to its baseline condition. The slip and fall did not cause a new injury but merely aggravated his already injured knee for approximately one week.

6. Claimant attended school during both the fall semester of 2013 and the spring semester of 2014. In the fall semester he took a tai chi class and also, on occasion during this time period, practiced martial arts in the park with his friends.

7. On February 4, 2014 Claimant was evaluated by Glen D. Peterson, P.A. P.A. Peterson noted that Claimant was improving when he fell on the ice. P.A. Peterson noted no significant change in subjective complaints from prior visits, and assessed Claimant with lumbar strain. P.A. Peterson assigned work restrictions of: no squatting and/or kneeling; must wear brace; should be sitting 50% of the time; and no climbing stairs or ladders. *See* Exhibit 4.

8. Claimant provided a copy of the restrictions to Employer and Employer was unable to accommodate the restrictions or provide work that Claimant could do within the restrictions.

9. On March 4, 2014 Claimant was again evaluated by P.A. Peterson. Claimant's work restrictions were not changed. P.A. Peterson noted that Claimant had slight improvement in his condition and ordered a left knee MRI to rule out internal derangement. *See* Exhibit 4.

10. On March 19, 2014 Claimant again saw P.A. Peterson and his work restrictions were continued. *See* Exhibit 4.

11. On May 2, 2014 Claimant was evaluated by Matthew Miller, M.D. Dr. Miller assessed Claimant with Chondromalacia. Claimant reported to Dr. Miller that he was not working as no work was available. Dr. Miller assigned work restrictions of: no repetitive lifting over 20 pounds; no pushing/pulling over 20 pounds of force; no squatting; no kneeling; and should be sitting 50% of the time. *See* Exhibit 4.

12. On May 13, 2014 Claimant saw P.A. Peterson who assessed Claimant with lumbar sprain. PA Peterson noted Claimant's bilateral knee and lower back pain was getting better. PA Peterson assigned work restrictions of: no repetitive lifting over 20 pounds; no pushing/pulling over 30 pounds of force; no squatting; and no climbing. *See* Exhibit 4.

13. On May 27, 2014 Claimant saw PA Peterson. PA Peterson again assessed lumbar sprain. PA Peterson noted that Claimant was doing better. PA Peterson released Claimant to a trial of regular full duty work with a limit of 4 hours per day. PA Peterson noted Claimant would follow up in 1-2 weeks for less restrictions and possibly a trial of 8 hours per day. *See* Exhibit 4.

14. On June 17, 2014 Claimant saw PA Peterson. PA Peterson assessed lumbar sprain, chondromalacia, and ACL injury tear. PA Peterson released Claimant to regular full duty work with no activity restrictions and advised Claimant to wear knee brace when working. *See* Exhibit 4.

15. Claimant returned to work for Employer at this time, but was not able to perform his normal job duties due to the pain in his knees and back.

16. On July 24, 2014 Claimant saw PA Peterson. PA Peterson assessed lumbar sprain and ACL injury tear. PA Peterson assigned new work restrictions of 6 hours per day. *See* Exhibit 4.

17. Claimant had further visits on July 30, 2014, August 11, 2014, and August 27, 2014 where his work restrictions of 6 hours per day were not changed or lifted. *See* Exhibit 4.

18. Claimant is unsure as to whether or not he worked for Employer subsequent to July 24, 2014 and indicated in his testimony that the records would show.

19. Employer records show that Claimant worked on July 27, 2014, then called in sick for two shifts, then worked a shift, then called in sick again. Employer records show that Claimant worked on August 9, 2014 and that August 9, 2014 was his last day of work. Claimant called Employer on August 15, 2014 indicating he could not work for two weeks as he had to watch his niece. *See* Exhibit G, Exhibit I.

20. From July 24, 2014 through August 26, 2014 Employer provided Claimant the opportunity to work within his restrictions of 6 hours per day.

21. Employer had a policy that required all employees on leave due to work-related injuries to present up to date documentation from their physicians. Claimant was aware of the policy and submitted paperwork from his physicians to Employer on February 4, 2014 and March 4, 2014.

22. Claimant failed to provide paperwork from his physician in April and was contacted by Employer. Claimant assured Employer that he would provide the documentation. *See* Exhibit G.

23. Claimant failed to do so. On April 28, 2014 store manager Kevin Quigley sent Claimant a letter stating that Claimant must contact him or one of the two assistant store managers within three days to discuss his status with King Soopers. The letter advised Claimant that if he failed to contact them within three days, his employment would be terminated for being absent without leave. *See* Exhibit F.

24. Claimant responded to the April 28, 2014 letter from Mr. Quigley. Claimant contacted Employer and provided updated paperwork from his physicians.

25. On October 2, 2014 Claimant sent a fax to Employer with a note on the cover page stating "Sorry about the lack of contact on my part. Depression and my injuries have made it hard for me to leave my house lately. Here is my schedule and I will send a document from my doctor soon." *See* Exhibit J.

26. On October 23, 2014 Mr. Quigley once again sent Claimant a letter. The letter indicated Claimant must contact him or an assistant store manager within three days to discuss his status with King Soopers. The letter advised Claimant if he failed to contact Employer within three days that he would be terminated. *See* Exhibit K.

27. Claimant received the October 23, 2014 letter. Claimant did not respond to the letter or contact Employer within three days.

28. Claimant testified that he did not contact Employer within three days because he did not have an updated doctor's note and thought Employer needed that. Claimant did not call Employer to ask if they needed a doctor's note and made the decision not to respond to the letter.

29. After failing to respond to the October 23, 2014 letter, Claimant was terminated from employment, effective November 5, 2014. *See* Exhibit L.

## 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. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

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

### *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). 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. (2014).

Here, Claimant was under restrictions that impaired his ability to effectively and properly perform his regular employment from February 4, 2014 through June 17, 2014. During this time, Employer was unable to offer modified employment that met Claimant's work restrictions and claimant was unable to resume his prior work. Claimant's slip and fall on the way to school occurred just prior to February 4, 2014 and only aggravated his underlying work related injury for one week. Even after he returned to baseline, Claimant remained unable to perform his regular employment duties and remained under restrictions until June 17, 2014. Claimant has established by a preponderance of the evidence that during this time, he suffered an impairment of earning due to his work injury and thus has met his burden to show entitlement to TTD benefits from February 4, 2014 through June 17, 2014.

However, during the period from July 24, 2014 through August 26, 2014, Claimant has failed to meet his burden to show loss of wages attributed to his injury. As found above, Claimant was unable to establish or recall any specific dates that he missed work due to his injury. Employer records show that he in fact worked during this time period, and that he missed work during this time for various reasons not related to his injury. As found above, he missed two weeks during this period of time due to his need to care for his nieces. He also missed work during this time due to unspecified sickness. Employer records also show that he worked on July 27, 2014, called in sick for two shifts, then worked, then again called in sick. Although Claimant clearly suffered a compensable injury on January 7, 2014 Claimant has failed to meet his burden to show that he suffered a loss of wages between July 24, 2014 and August 26, 2014 due to his injury. It is just as likely that the wage loss during this time period was a result of other events including unrelated illnesses and Claimant's choice to take time off to care for his nieces. Further, Employer records indicate on certain dates during this time period that Claimant actually worked, which contradicts his claim of total wage loss. Claimant has failed to meet his burden and has not shown an entitlement to TTD

benefits during this period time and has not met his burden to show that the loss of wages from July 24, 2014 through August 26, 2014 was more likely than not due to his injury.

### ***Responsible for Termination***

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term “responsible” as used in the termination statutes reintroduces the concept of “fault” as it was understood prior to the Supreme Court’s decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office, supra; Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). A claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*.

However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

Here, Claimant was not terminated due to his injury. In fact, the evidence shows that Employer continued to employ Claimant and gave him several chances to remain employed by simply communicating with Employer. Claimant, as found above, failed to adequately communicate with Employer over the course of several months. Claimant missed work for many non-injury related reasons and often called in sick without specific information as to whether he could not work due to his injury or do to other illnesses. Employer had to go the extreme of sending Claimant a letter in April of 2014 advising Claimant he would be terminated if he did not contact them within three days. Claimant responded to this letter, but later his communication again became

inadequate. In early October Claimant apologized for the lack of communication on his part. Later that month, and on October 23, 2014 Employer again had to send a letter to Claimant surrounding his lack of communication. Claimant received this letter, which explained that he would be terminated if he did not contact management within three days, and unlike in April, this time Claimant failed to respond to the letter.

Claimant's decision not to respond to the October 23, 2014 letter was a volitional decision and volitional act on his part. Claimant could have simply contacted management in response to the letter. Had Claimant responded to the letter by contacting management, it is likely he would remain employed. Claimant knew his employment would be terminated if he did not contact management, and he made that choice. Respondents have shown that Claimant had a history of poor communication with Employer and that Employer had to send letters to Claimant twice, in attempts to get Claimant to communicate. Although Claimant responded to the April letter, he failed to respond to the October letter despite knowing it would lead to his termination. Therefore, Respondents have met their burden of showing that Claimant's termination was justified. Any wage loss after the termination date of November 5, 2014 was due to the fault of Claimant and he is not entitled to any benefits following his at fault termination.

## ORDER

It is therefore ordered that:

1. Claimant has met his burden to show entitlement to temporary total disability benefits for the time period of February 4, 2014 through June 17, 2014.

2. Claimant has failed to meet his burden to show entitlement to temporary total disability benefits for the time period of July 24, 2014 through August 26, 2014. The claim for temporary total disability benefits during this time period is denied and dismissed.

3. Respondents have met their burden to establish that Claimant was responsible for his termination from employment on November 5, 2014.

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: February 13, 2014

/s/ Michelle E. Jones

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

## ISSUES

- Did the claimant prove by a preponderance of the evidence that the respondents are subject to penalties because they failed timely to deny a request for prior authorization for surgery as provided in WCRP 16?

- If the respondents failed timely to deny authorization for surgery is the proposed surgery "deemed" authorized by operation of WCRP 16-10(E)?

- If the surgery was not "deemed" authorized did the claimant prove by a preponderance of the evidence that carpal tunnel release surgery is reasonable, necessary and related to the industrial injury of January 12, 2014?

## FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 15 were admitted into evidence. Respondents' Exhibits A through H were admitted into evidence. The deposition of Wallace Larson, M.D., was received into evidence.

2. On October 9, 2008 the claimant was seen at Poudre Valley Health System for a report of groin pain. At that time the claimant gave a history of "hand surgery." The report does not state which hand was operated on or what the diagnosis was.

3. In July 2011 the claimant was treated for a bite to his right little finger. There is no credible or persuasive evidence in these records that the claimant was complaining of wrist symptoms or numbness in his first three digits.

4. On January 12, 2014 the claimant sustained an admitted injury to his right hand and wrist. The respondents filed a General Admission of Liability (GAL) for this injury on February 18, 2014. The GAL admitted for medical benefits. The GAL was filed by Ms. Shannon Browne (Browne) for the insurer in care of Sedgwick Claims Management Services, Inc. (Sedgwick). The ALJ infers that Sedgwick is the respondents' third-party adjusting firm.

5. The claimant testified as follows concerning the admitted injury. On January 12, 2014 he was employed as a driver taking passengers to and from the airport. In this capacity he was unloading a 50 pound bag that began to fall from the back of a vehicle. He grabbed the luggage handle to keep the bag from falling. The bag pulled his hand downwards and he felt an immediate "pop" in his wrist and also

experienced immediate pain. Within one hour his right hand became numb except for his little finger. He was not experiencing these symptoms prior to January 12, 2014. The claimant immediately reported the injury to the employer and was referred to Concentra Medical Centers (Concentra) for medical care.

6. On January 13, 2014 the claimant was seen at Concentra by Robert Nystrom, D.O. Dr. Nystrom noted the claimant had "no previous injuries to the right wrist or hand." Dr. Nystrom noted the claimant gave a history that he was pulling luggage out of the back of a shuttle vehicle. The claimant had his hand on the handle of the suitcase and it started to fall. The claimant reported that he "felt a pop in his right wrist." The claimant also reported some immediate pain and shortly thereafter, swelling. On physical examination Dr. Nystrom noted diffuse swelling around the right wrist and to a lesser extent the right hand. He also noted some altered sensation to pinprick and soft touch of the first 3 digits of his right hand and some pain to palpation over the ventral aspect of the wrist. An x-ray of the right wrist showed no "bony abnormality." Dr. Nystrom assessed a "right wrist sprain". He prescribed a wrist brace, ibuprofen and occupational therapy. Dr. Nystrom imposed restrictions of no lifting over 5 pounds and no pushing or pulling with greater than 5 pounds of force. Dr. Nystrom wrote that he would have a "low threshold" for performing and MRI if there was not improvement in the claimant's condition.

7. On January 13, 2014 the claimant completed a medical history questionnaire at Concentra. The claimant answered affirmatively to the question of whether he had prior surgeries. The claimant wrote on a line describing the type of surgery performed but his writing is illegible and indecipherable. The claimant mentioned having symptoms in his "right hand." It is not clear if the claimant was indicating past or present symptoms in the right hand.

8. The claimant returned to Dr. Nystrom on January 16, 2014. The claimant reported his wrist wasn't any better and he could hardly grasp with the right hand. Dr. Nystrom noted diffuse pain and swelling of the right wrist and decreased range of motion (ROM) and grip strength. Dr. Nystrom ordered an MRI "on [an] urgent basis" and referred the claimant to hand surgeon Jeffrey Chapman, M.D.

9. The claimant underwent an MRI of the right hand on January 22, 2014. The radiologist's impression was small cortical erosions of the third and fifth metacarpal heads.

10. Dr. Chapman examined the claimant on January 28, 2014. The claimant gave a history of injuring his hand when lifting a bag out of the back of a van on January 12, 2014. He reported numbness and tingling since as well as some diffuse pain. The claimant reported no history of numbness or tingling in the upper extremities. Dr. Chapman reviewed the MRI and noted some "STT arthritis, pisotriquetral effusion but otherwise no real findings." On physical examination Dr. Chapman noted a "minimally positive Tinel's over the median nerve at the wrist and a negative Phalen's test. The claimant had decreased sensation in a classic median distribution and "severe weakness of the APV on the right." Dr. Chapman opined that the claimant had

sustained a neurapraxic injury of the median nerve. He recommended that an EMG/nerve conduction studies be considered if there was no improvement within one month.

11. On February 25, 2014, Dr. Chapman again examined the claimant. The claimant reported continued numbness and tingling in the thumb, index and long fingers. Dr. Chapman noted that the patient had a positive Tinel's from the middle of the forearm up into the palm with the median nerve. There was "decreased sensation in the median distribution and a very weak APB." Dr. Chapman diagnosed median nerve neurapraxic injury. Because it had been 6 weeks since the injury and the claimant still had a significant median nerve deficit Dr. Chapman and ordered an EMG/nerve conduction study. Dr. Chapman recommended a restriction of no repetitive use of the right upper extremity.

12. On March 11, 2014 Eric Hammerberg, M.D., performed electrodiagnostic testing of the claimant's right upper extremity. Dr. Hammerberg reported that nerve conduction velocity "studies showed a delayed and attenuated distal motor response (recording from the 2nd lumbrical muscle) and no distal sensory response in the right median nerve." Other nerves tested were normal. Dr. Hammerberg also noted that needle EMG "studies of the upper extremity showed signs of acute partial denervation in the opponens pollicis muscle." Other tested muscles were normal. Dr. Hammerberg wrote that the findings were "compatible with the clinical diagnosis of a severe acute" right carpal tunnel syndrome (CTS).

13. Dr. Chapman examined the claimant again on March 25, 2014. The claimant still had complaints of numbness in the median distribution. On examination Dr. Chapman noted the EMG/ nerve studies suggested "acute carpal tunnel syndrome." However, Dr. Chapman wrote "that it certainly would be unusual to have a single injury cause such an abrupt severe carpal tunnel syndrome". Dr. Chapman assessed right "median nerve neuropathic injury versus acute carpal tunnel syndrome." The claimant elected to try a steroid injection which Dr. Chapman performed.

14. On April 1, 2014 Virginia Hrywnak, D.O., examined the claimant at Concentra. The claimant reported he was not doing any better and was described as "frustrated." The claimant denied a history of diabetes or thyroid conditions but thought he had "been injected on in the past." He reported "no change at all" in response to the steroid injection administered by Dr. Chapman. Dr. Hrywnak assessed CTS, right wrist sprain, lesion median nerve and right hand pain. She recommended fasting blood work to rule out diabetes and thyroid conditions.

15. Dr. Chapman examined the claimant on April 8, 2014 and completed an office note concerning this examination. Dr. Chapman wrote the claimant reported the injection "helped with his feeling of fullness" but he was still experiencing numbness and weakness. On examination Dr. Chapman noted "dense median nerve sensory loss as well as weakness of his abductor pollicis brevis." He assessed right "median neuropathy, likely carpal tunnel syndrome." Dr. Chapman wrote that he discussed with the claimant "his EMG nerve conduction study results as well as the fact he did get

some response to the steroid injection." Dr. Chapman recommended a "carpal tunnel release" and discussed "endoscopic versus open release" as well as possible complications from these procedures.

16. On April 9, 2014 Rosalinda Pineiro, M.D., examined the claimant at Concentra. She took a history that the claimant was "in a motor vehicle accident on January 12, 2014" and felt his wrist popped. She noted he had undergone three months of medications, restrictions and physical therapy but still had pain and reduced grip. Dr. Pineiro noted the claimant had an EMG that showed "acute carpal tunnel," that he responded positively for 2 or 3 days to an injection and had positive Phalen's and Tinel's tests of the right wrist. Dr. Pineiro diagnosed a motor vehicle accident and "traumatic acute carpal tunnel syndrome." Dr. Pineiro continued light duty restrictions and noted the claimant was awaiting approval for surgery by Dr. Chapman. She also referred the claimant to Dr. Joel Cohen for evaluation of depression.

17. Ms. Amanda Bluel (Bluel) testified as follows. She is employed by Dr. Chapman's office to perform scheduling and requests for surgical authorization. On April 9, 2014 she received from Dr. Chapman an order for surgery. On April 9 she contacted Concentra to obtain their referral and notes. On April 10, 2010 she faxed to Browne a request for prior authorization for surgery. The request included a Pre-Authorization Request for Surgery form requesting permission to perform a right endoscopic carpal tunnel release. The request also included a Patient Referral form in which Dr. Chapman noted diagnoses of a lesion of the median nerve and wrist sprain and referred the claimant for surgery. The request also included Dr. Chapman's office note of April 8, 2014. The request for prior authorization did not include a copy of Dr. Hammerberg's electrodiagnostic study results. Ms. Bluel explained that if the fax had not been received her office would get a "kickback message" stating that the fax had not gone through. However, no kickback message was received after she transmitted the request on April 10, 2014.

18. Bluel further testified as follows. On April 17, 21, 23 and 30, 2014 she telephoned Browne to check on whether the request for prior authorization had been received and the status of the request. She left voice mail messages for Browne but Browne did not call back. On April 23 Browne's voice mail message stated she would be out of the office until "Monday." On May 6, 2014 Bluel called Browne as well as Sedgwick's "main number" but no one answered.

19. Bluel testified that on May 7, 2014 she called the Sedgwick switchboard to check on the prior authorization request. She spoke to an operator who stated that Sedgwick had just received the request for prior authorization from claimant's attorney on April 29, 2014 and it had not yet been determined. Bluel advised the operator that she had faxed the request for prior authorization on April 10 and the operator replied that Sedgwick had "some internal fax problems" on April 10 and 11 and perhaps that was why the April 10 request for prior authorization had not been received. Bluel told the operator that she had left several unreturned voicemails with Browne. The operator transferred the claimant to Browne's supervisor and Bluel left a voicemail regarding the unreturned calls. Later that day Browne called Bluel and stated that Browne had

decided to deny the request for prior authorization because the need for surgery was not work related. Bluel stated that this was the first time she spoke with Browne.

20. Bluel kept business notes documenting her actions regarding the request for prior authorization that she allegedly faxed to Browne. These notes indicate the request was faxed to Sedgwick on April 10, 2014. The notes reflect that she called Browne on April 17, 21, 23 and 30, 2014 and left messages. The notes further indicate she called Sedgwick's switchboard operator on May 7, 2014 and was advised that "they were having internal fax issues on 04-10." The May 7 note further reflects that Bluel told the operator that it was "unacceptable" that she made 4 phone calls to Browne and had not received a call back. The notes also state that she left a message for Browne's supervisor and then received a call from Browne. Browne advised that a decision had been made to deny the request for prior authorization "as not work related."

21. Browne testified as follows. She has been employed with Sedgwick since 2002. She has adjusted workers' compensation claims for nearly twenty years. She handled Colorado claims between 1995 and 1998 and from 2012 onward. She did not receive the request for prior authorization allegedly faxed by Bluel on April 10, 2014. Browne explained that faxes to Sedgwick are received by an outside vendor that then routes the fax to the correct adjuster in an electronic format similar to email. If the vendor routes the fax to the wrong adjuster that adjuster may determine the correct adjuster and forward it, or may send the fax to a "default" system which then determines the correct adjuster. The alleged request for prior authorization faxed on April 10, 2014 has not "emerged" in the employer's system. Browne did not have any knowledge of calls made to her by Bluel between April 17, 2014 and April 30, 2014. She was in her office on all of the days of the alleged calls except for April 23, 2014.

22. Browne further testified as follows. She received the request for prior authorization faxed by claimant's counsel on April 28, 2014. She testified that in her opinion the request was not "complete" within the meaning of WCRP 16 because Dr. Chapman's note did not explain the reasonableness and necessity for the requested surgery. Nevertheless Browne submitted the request to Wallace Larson, M.D., for an opinion and denied the request for prior authorization on May 7, 2014. Even though Browne did not believe the request was "complete" she denied it because she was "proactive." Browne acknowledged that claimant's counsel used Sedgwick's correct fax number (303 713-6056) to send the April 28 request for prior authorization. Browne does not know what fax number Bluel may have dialed on April 10, 2014.

23. At the respondents' request Dr. Larson conducted a WCRP 16 records review. Dr. Larson is a hand specialist, board certified in orthopedic surgery and level II accredited. Dr. Larson authored a report dated May 1, 2014. Dr. Larson reviewed medical records from January 13, 2014 through April 9, 2014. Dr. Larson opined the claimant had "severe right carpal tunnel syndrome, not related to occupational exposure." He stated the diagnosis of CTS "is not consistent with the described injury". Rather, the claimant's condition was "consistent with a history of long-standing pre-existing carpal tunnel syndrome". According to Dr. Larson, the claimant's CTS "was not caused or aggravated by his occupational exposure."

24. On May 7, 2014 Browne wrote a letter to Dr. Chapman denying the request for surgery received by Sedgwick on "4/28/14." The letter stated the request was being denied for both medical and non-medical reasons. Specifically the letter states the proposed surgery is "not reasonable and necessary to address the alleged work injury." The letter further stated Dr. Larson's May 1, 2014 report that supports "the fact that the requested surgery may not be reasonable and necessary under the circumstances of this case."

25. On May 13, 2013 Dr. Nystrom wrote that he was going to refer the claimant for a second opinion regarding his hand. Dr. Nystrom assessed CTS and reactive depression. He wrote that CTS "can be caused by repetitive use, but anything that causes swelling can also cause it." Dr. Nystrom opined the claimant had an "injury to his wrist and developed carpal tunnel symptoms for the first time following his work-related injury." Dr. Nystrom stated that he considered the claimant's injury and CTS symptoms "temporally related."

26. On May 28, 2014 Mark Durbin, M.D., performed a surgical consultation at Orthopaedic & Spine Center of the Rockies. Dr. Durbin noted a history that the claimant suffered a "traumatic injury to his right hand" when trying to "catch a suitcase when it fell from the truck and it pulled on him." Dr. Durbin's physician's report of injury notes the date of injury as January 12, 2014. The claimant reportedly experienced severe numbness and tingling throughout his thumb, index and middle finger. The claimant advised that a "long time ago" he had a "nerve study" that showed "mild carpal tunnel" but denied "any history of problems with his carpal tunnel" before the injury. Dr. Durbin noted the "recent nerve study that shows significant injury to the [the claimant's] median nerve as well as the opponens muscle" and that the claimant was "getting significantly weaker." Dr. Durbin diagnosed "right median nerve traumatic injury with swelling in the forearm." He opined the claimant had a "traumatic injury to his median nerve with swelling that is now causing him almost compartment carpal tunnel type syndrome." Dr. Durbin recommended the claimant undergo a "right median nerve neurolysis and decompression at the wrist level" secondary to the January 12, 2014 injury.

27. On May 30, 2014 Dr. Durbin's office submitted to Sedgwick a request for prior authorization to perform the recommended surgery.

28. Browne submitted Dr. Durbin's request to Dr. Larson. Dr. Larson issued a report on June 4, 2014 stating he had reviewed Dr. Durbin's report as well as the medical records. Dr. Larson again opined that the claimant's CTS was not "occupationally related." He explained that "objective evidence" does not indicate that the claimant sustained an injury to his nerve. Dr. Larson opined the mechanism of injury "would possibly" cause a "strain or sprain" of a wrist ligament but would not be the cause of CTS.

29. On June 5, 2014 Browne sent a letter to Dr. Durbin denying the request for surgery. The letter stated the request was being denied based on Dr. Larson's June 4, 2014 report that supports "the fact that the requested surgery may not be reasonable and necessary under the circumstance of this case."

30. Dr. Larson testified by deposition. Dr. Larson stated his opinion to a reasonable degree of medical probability that the claimant's CTS was not caused or aggravated by the work-related injury of January 12, 2014. Dr. Larson explained that the vast majority of CTS cases are idiopathic in origin. Another set of CTS cases is caused by metabolic disorders. Dr. Larson agreed that CTS can be traumatic in origin where people experience wrist fractures, dislocations of the lunate bone and severe crush injuries. He explained that such injuries cause pressure on the median nerve or bleeding in the carpal tunnel as a result of the deformity or fracture. Dr. Larson opined the claimant's CTS was not traumatic in origin because there was no evidence of a fracture or a clotting disorder that would cause inordinate bleeding in the carpal tunnel. He further stated there was nothing "objective" in the medical records that "would indicate trauma sufficient to be posttraumatic acute carpal tunnel."

31. On cross-examination Dr. Larson was asked if agreed that a wrist sprain could cause acute carpal tunnel syndrome. He replied that he supposed he "would need to look at that in context to see what kind of strain that someone is looking at." However, he opined that a minor strain of the wrist would not cause carpal tunnel syndrome." Dr. Larson agreed that "severe sprains, such as ligamentous ruptures" of the wrist can cause CTS. Dr. Larson agreed that in cases of traumatic CTS paresthesias can occur in the fingers within an hour or two of the precipitating event. Dr. Larson opined that the word "acute" does not necessarily eliminate something that is longstanding but "it does, by its nature, imply something very recent."

32. The respondents are not subject to a penalty for violation of WCRP 16-10(A) as alleged by the claimant. The request for prior authorization was not a "completed request" within the meaning of WCRP 16-9(F) because it did not include "supporting documentation" including "documents used in the provider's decision making process to substantiate the need for the requested treatment." Here, it is clear from Dr. Chapman's April 8, 2014 office note that he considered Dr. Hammerberg's "EMG nerve conduction study findings" in formulating his recommendation that the claimant undergo surgery for his CTS. However, Ms. Bluel admitted that she did not include a copy of Dr. Hammerberg's test results when she allegedly submitted the request for prior authorization on April 10, 2014. Thus, the April 10 request for prior authorization was not a "completed request" for purposes of WCRP 16-10(A) and there was no rule violation on which to predicate an award of penalties.

33. The claimant proved it is more probably true than not that his CTS and need for surgery were proximately caused by the industrial injury of January 12, 2014.

34. The claimant credibly testified that on January 12, 2014 he experienced a pop in his wrist and the immediate onset of pain when he grabbed the handle of a heavy piece of luggage as it was falling from a vehicle. He also credibly testified that within one hour of this event he experienced the onset of numbness in his right hand except for his little finger. The claimant credibly testified that he was not experiencing similar symptoms prior to this incident. Although there is some evidence the claimant may have had prior symptoms of CTS in the remote past, the record does not contain any persuasive medical documentation that the claimant was reporting or seeking treatment

for right upper extremity symptoms between 2011 (when his right small finger was bitten) and January 2014.

35. Dr. Durbin credibly opined the claimant sustained a "right median nerve traumatic injury" that was causing "almost compartmental carpal tunnel type syndrome." Dr. Durbin received an accurate description of the onset of the claimant's symptoms after trying to catch the suitcase. Dr. Durbin was even aware the claimant reported a history of an old "nerve study" showing "mild carpal tunnel." Considering the claimant's history, the absence of CTS symptoms before the injury, the "recent nerve study" showing "significant injury" to the median nerve and the progression of the claimant's symptoms, Dr. Durbin persuasively opined that the claimant's CTS was the result of the January 12, 2014 injury.

36. Dr. Durbin's opinion is corroborated by the persuasive opinions of Dr. Chapman, Dr. Pineiro and Dr. Nystrom. Dr. Nystrom, who was the first physician to examine the claimant after the injury, persuasively opined that there was a causal relationship between the CTS and the injury. Dr. Nystrom persuasively argues that the temporal relationship between the onset of the claimant's symptoms and the occurrence of the injury supports the existence of a causal relationship between the two events. Even Dr. Larson agreed that in cases of traumatic carpal tunnel syndrome numbness may appear in the hands within one to two hours of the precipitating event. Although Dr. Chapman does not elaborate, he did request prior authorization to perform surgery and listed the date of injury as January 12, 2014. The ALJ infers from these facts that it is Dr. Chapman's opinion that the claimant's CTS resulted from the January 12 injury.

37. Dr. Durbin's opinion is also corroborated by the results of Dr. Hammerberg's electrodiagnostic testing. Dr. Hammerberg credibly stated that the test results were "compatible" with "severe acute right carpal tunnel syndrome." Dr. Larson admitted that the term "acute" implies something "very recent." Thus, the electrodiagnostic tests reinforce the inference that there is a significant temporal relationship between the industrial injury and the development of the CTS.

38. Dr. Larson's opinion that there is no relationship between the admitted wrist injury and the development of the CTS is not persuasive. Dr. Larson did not persuasively refute the inference that the temporal relationship between the injury and the development of the "acute" CTS argues for a finding of a causal relationship. Dr. Larson did not deny that CTS can be traumatic in origin; he merely stated that trauma is a less common cause than other etiologies such as idiopathic disease. For the reasons stated above, the particular facts of this case support the inference that the claimant's CTS is traumatic in origin.

39. Based on the reports of Dr. Chapman and Dr. Durbin, the claimant proved it is more probably true than not that carpal tunnel release surgery constitutes reasonable and necessary medical treatment to cure and relieve the effects of the injury-related CTS.

## 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.

### PENALTIES FOR ALLEGED VIOLATION OF WCRP 16

The claimant seeks the imposition of penalties against the "respondents" pursuant to § 8-43-304(1), C.R.S. Specifically the claimant argues that on April 10, 2014 Bluel submitted to Sedgwick a "complete" request for prior authorization of surgery within the meaning of WCRP 16-9(F). The claimant further alleges the respondents failed to contest the request for prior authorization for surgery within seven (7) business days, or by April 21, 2014, as required by WCRP 16-10(A). The claimant contends that the respondents' conduct constituted the violation of an "order" within the meaning of § 8-43-304(1). The respondents argue the claimant failed to prove that the request for prior authorization was received by Sedgwick until claimant's attorney faxed the request on April 28, 2014. Thus, the respondents assert Browne's May 7, 2014 denial of the request was timely and there was no violation of the rule. The respondents further contend the evidence establishes that Dr. Chapman's request for prior authorization was not "completed" within the meaning of WCRP 16-10(A) and WCRP 16-9(F). Therefore, the respondents reason the rule did not obligate them to respond and there was no violation of the rule that could subject them to penalties. The ALJ concludes that because the request for prior authorization was not "complete" within the meaning of the rules no penalties may be imposed.

Section 8-43-304(1) authorizes the imposition of penalties of not more than $1000 per day if an insurer "fails, neglects, or refuses to obey any lawful order made by

the director or panel." An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." Section 8-40-201(15), C.R.S. Thus, violation of a rule of procedure constitutes violation of an "order." *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002).

Whether statutory penalties may be imposed under § 8-43-304(1) involves a two-step analysis. First, the ALJ must first determine whether the insurer's conduct constituted a violation of a rule of procedure. If so, the ALJ must determine whether the action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

WCRP 16-10(A), the rule that the claimant alleges was violated by the respondents, provides as follows:

> If the payer contests a request for prior authorization for non-medical reasons as defined under 16-11(B)(1), the payer shall notify the provider and parties, in writing, of the basis for the contest within seven (7) business days from receipt of the provider's completed request as defined in 16-9(F). A certificate of mailing of the written contest must be sent to the provider and the parties.

WCRP 16-9(F) provides as follows:

> To complete a prior authorization request, the provider shall concurrently explain the reasonableness and necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the provider's decision making process to substantiate the need for the requested service or procedure.

The question of whether the provider has submitted a "completed request" for prior authorization is one of fact for determination by the ALJ. *Lichtenberg v. J.C. Penny Corp.,* WC 4-814-897 & 4-842-102 (ICAO July 19, 2012); *Skelly v. Wal-Mart Stores, Inc.,* WC 4-632-887 (ICAO July 31, 2008). If a provider fails to submit a completed request for prior authorization, as defined by the rules, the insurer's duty to respond is not triggered and its failure to do so does not subject it to penalties. *Skelly v. Wal-Mart Stores, Inc., supra.*

The ALJ concludes that the respondents, through Browne, took the position that the request for prior authorization allegedly submitted on April 10, 2014 should be denied, at least in part, for the "non-medical reason" that the need for the carpal tunnel release surgery was not causally related to the admitted industrial injury. See WCRP 16-11(B)(1) (non-medical reasons for contesting prior authorization include contention that services are not related to the admitted injury). This was the clear import of Dr. Larson's May 1, 2014 report and the Browne's' May 7, 2014 letter denying prior authorization for Dr. Chapman's proposed surgery. (Findings of Fact 23 & 24). For this reason the ALJ concludes that the provisions of WCRP 16-10(A) were triggered.

However, as determined in Finding of Fact 32, the respondents did not violate WCRP 16-10(A) by failing to deny the request for prior authorization within 7 business days of its alleged receipt on April 10, 2014. WCRP 16-10(A) requires respondents to deny a request for prior authorization within 7 days of receipt of a "completed request" for prior authorization. A "completed request" is defined by WCRP 16-9(F) to include "documents used in the provider's decision-making process to substantiate the need" for the requested procedure. Bluel admitted that the request for prior authorization she allegedly submitted on April 10, 2014 did not include a copy of Dr. Hammerberg's electrodiagnostic study results. As found, the ALJ is persuaded by Dr. Chapman's April 8, 2014 note that he relied on these results when arriving at his conclusion that the claimant should undergo the proposed carpal tunnel release surgery. Because Dr. Hammerberg's results were not included in the request for prior authorization the ALJ finds and concludes that the April 10, 2014 request for prior authorization was not "complete" within the meaning of WCRP 16-9(F), and the respondents had no obligation to respond to it under WCRP 16-10(A). For this reason there was no violation of an order of the Director under which penalties could be imposed. *Skelly v. Wal-Mart Stores, Inc., supra.*

In light of this determination the ALJ need not address the respondents' contention that the evidence fails to establish that Sedgwick "received" the request for prior authorization on April 10, 2014. The ALJ further notes that the claimant does not argue that the respondents failed timely to contest any of the subsequent requests for prior authorization.

MEDICAL BENEFITS

The claimant contends the evidence establishes that he is entitled to reasonable and necessary medical benefits in the form of the carpal tunnel release surgery recommended by Dr. Chapman and Dr. Durbin. The ALJ agrees with the claimant.

The claimant first argues that because the respondents failed timely to contest the April 10, 2014 request for prior authorization the surgery proposed by Dr. Chapman is "deemed" authorized by operation of WCRP 16-10(E). That rule provides that the payer's failure "timely to comply in full with the requirements of 16-10(A) or (B), shall be deemed authorization for payment of the requested treatment" except in certain circumstances.

The ALJ notes that the ICAO has held that WCRP 16-10(E) should not be read as depriving ALJ's of their statutory jurisdiction to determine whether medical treatment is reasonable and necessary to cure and relieve the effects of an industrial injury. *See Lichtenberg v. J.C. Penny Corp., supra*. In any event, as determined above the respondents did not violate WCRP 16-10(A) as the claimant alleges. Consequently, by its own terms WCRP 16-10(E) does not operate to "deem" the surgery authorized. Because the proposed surgery is not "deemed" authorized by operation of law the ALJ must determine whether it can be awarded as a medical benefit under the standard legal principles.

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).

Further, the claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). 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 preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting 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).

Expert medical opinion "is neither necessary nor conclusive in determining causation." However, when expert medical opinions are presented it is for the ALJ to determine the weight to be accorded such opinions. *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990).

As determined in Findings of Fact 33 through 38 the claimant proved it is more probably true than not that his CTS was proximately caused by the admitted wrist injury sustained on January 12, 2014. The ALJ is persuaded by Dr. Durbin's opinion that the claimant sustained traumatic CTS as a result of the January 12 injury. Dr. Durbin credibly and persuasively based his opinion on the history of the accident, the absence of CTS symptoms before the injury, Dr. Hammerberg's electrodiagnostic studies showing "significant injury" to the median nerve and the progression of the claimant's symptoms after the injury. Further, as determined in Finding of Fact 36, Dr. Durbin's opinion regarding the cause of the CTS is corroborated by the credible opinions of Dr.

Nystrom, Dr. Pineiro and Dr. Chapman. Dr. Durbin's opinion is also corroborated by Dr. Hammerberg's opinion that the March 2014 electrodiagnostic studies demonstrate "severe acute right carpal tunnel syndrome." For the reasons stated in Finding of Fact 38 the ALJ is not persuaded by the opinions of Dr. Larson.

As determined in Finding of Fact 39 the claimant proved it is more probably true than not that carpal tunnel release surgery recommended by Dr. Chapman and Dr. Durbin constitutes reasonable and necessary medical treatment to cure and relieve the effects of the CTS.

ADMISSIBILITY OF DEPOSTION EXHIBIT 1

The ALJ reviewed the parties' written arguments concerning the admissibility of Deposition Exhibit 1 offered by the claimant at the conclusion of Dr. Larson's deposition. The ALJ agrees with the respondents that the documents contained in Deposition Exhibit 1 are hearsay. The ALJ further agrees with the respondents that on review of the deposition transcript Dr. Larson never testified that the documents contained in the exhibit constitute "reliable authorities" so as to be admissible as "Learned treatises" within the meaning of CRE 803(18). Dr. Larson merely stated that he had read one of the documents "quite a while" ago (Hoppenfeld's book) but otherwise did not testify that it was a medically reliable source. Otherwise, Dr. Larson was asked if he agreed or disagreed with statements contained in the documents but was never asked to vouch for their reliability.

The ALJ declines the claimant's invitation to take judicial or administrative notice of the "reliability" of the documents contained in Deposition Exhibit 1. Applying CRE 201 (b) the ALJ concludes that the question of whether these documents are medically reliable authorities is not "generally known within the territorial jurisdiction" of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The ALJ concludes Deposition Exhibit 1 is not admissible in evidence because it is hearsay that is not subject to any cited exception, including CRE 803(18).

## ORDER

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

1. The claimant's request for the imposition of penalties against the "respondents" for an alleged violation of WCRP 16 is denied.

2. The insurer shall pay for reasonable and necessary medical benefits in the form of carpal tunnel release surgery and related expenses.

3. Issues not addressed in this order are reserved for future determination.

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

DATED: February 4, 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

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

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

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 January 11, 2013 through March 2, 2014.

4. Whether Respondents have established that Claimant is subject to a penalty for late reporting pursuant to §8-43-102(2), C.R.S.

## STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,256.54.

## FINDINGS OF FACT

1. Claimant is a 63 year old male who works as a Social Work Counselor at Employer's Limon Correctional Facility. He began working for Employer in June 2012. Claimant's job duties involve providing mental health therapy and treatment to inmates in the Facility.

2. Claimant explained that when he initially began working for Employer he was one of two mental health counselors aiding medium and closed custody inmates at Employer's Limon Correctional Facility. In December 2012 Employer hired a female psychologist to also help treat inmates. However, by May 2013 Employer instituted policy changes that involved transferring medium custody offenders out of the facility and bringing closed custody offenders into the facility. Claimant remarked that approximately 25-40 closed custody inmates were brought into the Limon Facility each week. He commented that closed custody inmates are typically more violent offenders and have greater mental health needs. They require more daily monitoring and counseling.

3. In October 2013 the female psychologist left employment with Employer. Claimant's caseload thus increased to approximately 150 inmates.

4. On January 11, 2014 Claimant was at home taking down Christmas decorations and carrying boxes up stairs when he experienced dizziness and shortness of breath. He visited the Littleton Hospital Emergency Room. Claimant was admitted to the hospital for testing. The tests did not reveal any acute abnormalities and Claimant was discharged on January 12, 2014.

5. On January 17, 2014 Claimant again visited the Littleton Hospital Emergency Room because he was experiencing dizziness and shortness of breath. He underwent additional testing and was discharged on the same day.

6. On January 21, 2014 Claimant again reported to the Littleton Hospital Emergency Room because he was suffering shortness of breath. Testing again did not reveal any acute abnormalities. Claimant reported significant work stress and associated anxiety.

7. On January 23, 2014 Claimant underwent a psychiatry consultation with Clinical Nurse Specialist (CNS) Adriana Frazier. Under chief complaint CNS Frazier noted that Claimant stated "[y]ou're going to help me with dealing with my stress…work and my family is sick." Claimant reported a history of depression and that he had stress associated with his family life. CNS Frazier detailed:

> [Claimant] states that he has quite a bit of stress, especially over the last 2 years: wife has colitis, which has changed some of their lifestyle; daughter is in remission after breast cancer; another daughter has Chron's disease; and the youngest daughter has fibromyalgia and will undergo a hysterectomy within the next 2 weeks. The latter daughter (youngest) has moved in back home (which he does not identify as a stressor). He works as a social worker in a federal prison, which requires his being away from home for a week and a half at a time. He's been doing that for a least 1 and a half years, living in one bedroom room in Limon. His job is quite stressful, and over the last week he found out that his supervisor may be fired.

Claimant also explained that his work was stressful and thinking about work could lead to anxiety. Claimant added that he has a very large caseload and no clinical supervision. CNS Frazier determined that Claimant had significant stress associated with his family situation and job. The stress manifested itself with physical symptoms including shortness of breath. CNS Frazier diagnosed Claimant with major depressive disorder, anxiety and seasonal affective disorder. She recommended outpatient counseling.

8. From January 28, 2014 through February 25, 2014 Claimant received treatment from Bob Whitehouse, Ed.D. Claimant detailed his work history and responsibilities. Claimant's symptoms resolved through treatment.

9. On February 27, 2014 Claimant filed a claim for Workers' Compensation benefits. Claimant attached a written statement detailing the circumstances of his

injury. He stated that beginning in May 2013 he experienced increased job-related stress and anxiety. As a result he suffered a physical breakdown in January 2014. Claimant noted that, because of his stress and anxiety, he experienced severe shortness of breath, dizziness, chronic fatigue, chronically reduced energy and physical stamina, impaired concentration and memory/decision making, agitation and irritability. Claimant related his increased stress and anxiety, as well as his related symptoms, to Employer's policy decisions. The policy decisions changed the make-up of the inmate population. He specifically noted that medium custody offenders were transferred out of the Limon Correctional Facility while closed custody offenders were transferred into the Facility. Claimant explained that closed custody offenders, who are the highest risk and most dangerous inmates, require significantly more work than medium custody offenders. The process increased Claimant's caseload from 125 to 190 inmates. Claimant summarized that, because of the changes and stress associated with working with closed custody offenders, he experienced significant anxiety that prevented him from working.

10. On March 3, 2014 Claimant resumed full-time employment for Employer without restrictions. Claimant explained that he had simply needed to be off of work.

11. On November 20, 2014 Claimant underwent an independent medical examination with Psychiatrist Stephen A. Moe, M.D. Claimant reported that he works as a counselor at a correctional facility. He noted that he feels comfortable with the intensity of working in a prison. Claimant explained that in May 2013 Employer made a policy decision to transfer closed custody offenders into the prison and transfer medium custody offenders out of the Facility. He remarked that the change in the makeup of the inmate population increased his work demands. Claimant stated that his work demands became so overwhelming that he was unable to effectively perform his job duties. By January 2014 he suffered an acute onset of shortness of breath, dizziness and lightheadedness. Claimant attributed his physical symptoms to his increased job duties and work stress.

12. Dr. Moe agreed that physical symptoms in January 2014 were "significantly influenced" by emotional stress. He remarked that Claimant experienced progressively greater emotional stress as a result of his escalating work demands. However, Dr. Moe disagreed that Claimant's emotional stress in the fall of 2013 and early 2014 was primarily caused by his job demands. He thus concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that

> excessive work demands are not explicitly mentioned among the exclusions listed in the statute, which include disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination and retirement. However, even as it should not be minimized as an important cause of emotional stress, feeling overwhelmed by one's assigned duties is a stressor similar in kind to those that are specifically listed in the statute as exclusions to bringing a mental stress claim, each of which can also be a significant cause of emotional stress.

13. Dr. Moe summarized that Claimant's mental stress concerns relating to his job were simply related to increased work demands common to all forms of employment. He explained:

> Although [Claimant] worked in an intense and potentially dangerous setting of a prison where his decision had important consequences, the fundamental symptom-causing issues he described – demands that he regarded as too voluminous and too intense to meet – are common to all forms of employment. In other words, the type of work he did, and the setting in which he worked, are not meaningful elements of his claim. [Claimant's] claim boils down to a straightforward 'excessive-work-demands narrative.'

14. Dr. Moe also testified at the hearing in this matter. He reiterated that Claimant failed to meet the legal criteria for a work-related mental stress claim. He considered the effect of work stress as opposed to other factors on Claimant's condition. Dr. Moe explained that, in the Workers' Compensation context, there are three separate influences on an individual's stress level: 1) work-related stressors; 2) personal attributes, which are the individual's own subjective tendencies or vulnerabilities to feel anxious or depressed; and 3) non-work related stressors. He gave equal weight to each element. Dr. Moe commented that Claimant's main stressors outside of work were his medical condition, family-related concerns involving his wife and three daughters and his living arrangement apart from his family. He also noted Claimant's history of treatment for mental health conditions and stress reactions to previous jobs. Dr. Moe determined that it is probable that the work stress had less influence than the other two elements in causing Claimant's stress reaction during January 2014.

15. Claimant has failed to establish that it is more probably true than not that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his increased work demands as a Social Work Counselor at Employer's Limon Correctional Facility. He explained that by May 2013 Employer instituted policy changes that involved transferring medium custody offenders out of the Facility and bringing closed custody offenders into the Facility. Claimant remarked that approximately 25-40 closed custody inmates were brought into the Limon Facility each week. He commented that closed custody inmates are typically more violent offenders and have greater mental health needs. They require more daily monitoring and treatment from the counselors.

16. By January 2014 Claimant experienced several episodes of dizziness and shortness of breath. He visited the Littleton Hospital Emergency Room and testing did not reveal any acute abnormalities. The medical records reflect that Claimant's physical symptoms were caused by emotional stress. The record reveals that Claimant was not only experiencing work stress but family health concerns. In January 2014 CNS Frazier determined that Claimant had significant stress associated with his family situation and job. The stress manifested itself with physical symptoms including shortness of breath.

CNS Frazier diagnosed Claimant with major depressive disorder, anxiety and seasonal affective disorder.

17. Dr. Moe persuasively concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that, although excessive work demands are not specifically delineated in the mental health statute, they are "similar in kind to those that are specifically listed in the statute as exclusions to bringing a mental stress claim." Dr. Moe detailed that in the Workers' Compensation context there are three separate influences on an individual's stress level: 1) work-related stressors; 2) personal attributes, which are the individual's own subjective tendencies or vulnerabilities to feel anxious or depressed; and 3) non-work related stressors. Dr. Moe testified that it is probable that the work stress had less influence than the other two elements in causing Claimant's stress reaction. Dr. Moe gave equal weight to each element. He noted Claimant's history of treatment for mental health conditions and stress reactions to previous jobs. Based on the medical records and persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Social Work Counselor for Employer.

## CONCLUSIONS OF LAW

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

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

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

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

5. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

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

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

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

generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his increased work demands as a Social Work Counselor at Employer's Limon Correctional Facility. He explained that by May 2013 Employer instituted policy changes that involved transferring medium custody offenders out of the Facility and bringing closed custody offenders into the Facility. Claimant remarked that approximately 25-40 closed custody inmates were brought into the Limon Facility each week. He commented that closed custody inmates are typically more violent offenders and have greater mental health needs. They require more daily monitoring and treatment from the counselors.

8. As found, by January 2014 Claimant experienced several episodes of dizziness and shortness of breath. He visited the Littleton Hospital Emergency Room and testing did not reveal any acute abnormalities. The medical records reflect that Claimant's physical symptoms were caused by emotional stress. The record reveals that Claimant was not only experiencing work stress but family health concerns. In January 2014 CNS Frazier determined that Claimant had significant stress associated with his family situation and job. The stress manifested itself with physical symptoms including shortness of breath. CNS Frazier diagnosed Claimant with major depressive disorder, anxiety and seasonal affective disorder.

9. As found, Dr. Moe persuasively concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that, although excessive work demands are not specifically delineated in the mental health statute, they are "similar in kind to those that are specifically listed in the statute as exclusions to bringing a mental stress claim." Dr. Moe detailed that in the Workers' Compensation context there are three separate influences on an individual's stress level: 1) work-related stressors; 2) personal attributes, which are the individual's own subjective tendencies or vulnerabilities to feel anxious or depressed; and 3) non-work related stressors. Dr. Moe testified that it is probable that the work stress had less influence than the other two elements in causing Claimant's stress reaction. Dr. Moe gave equal weight to each element. He noted Claimant's history of treatment for mental health conditions and stress reactions to previous jobs. Based on the medical records and persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Social Work Counselor for Employer.

## ORDER

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

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

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

DATED: February 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

## ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Brian Shea, M.D. that Claimant reached Maximum Medical Improvement (MMI) on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury.

## FINDINGS OF FACT

1. On August 8, 2012 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. Claimant had been carrying a heavy roll of plastic weighing approximately 100-150 pounds with a coworker when she experienced a "pull" in her lower back. Employer referred Claimant to the Workwell Occupational Medical Clinic for an evaluation.

2. On August 9, 2012 Claimant visited Kerry Kamer, D.O. at Workwell for an examination. He diagnosed Claimant with a lumbar spine sprain. Dr. Kamer prescribed medications, physical therapy and chiropractic treatment. He assigned work restrictions of lifting, carrying and pulling not to exceed 10 pounds constantly, 20 pounds frequently and 30 pounds occasionally. Claimant did not lose any time from work as a result of her lumbar strain and thus did not receive any temporary partial or total disability benefits.

3. On August 16, 2012 Claimant visited Frederick Scherr, M.D. at Workwell for an evaluation. Claimant reported lower back pain with some intermittent pain radiating down her right leg. Dr. Scherr referred Claimant to Scott Parker, D.C. for chiropractic treatment. He limited Claimant's work activities to no lifting in excess of 10 pounds.

4. On September 17, 2012 Claimant returned to Dr. Scherr for an evaluation. Dr. Scherr remarked that Claimant continued to improve through physical therapy and chiropractic treatment with Dr. Parker. He decreased Claimant's work restrictions so that she could lift, carry, push and pull up to 25 pounds.

5. On September 28, 2012 Claimant was involved in a non-work-related motor vehicle accident. She was rear-ended while stopped at a red light and could not move by the next morning. On the following Monday Claimant visited Associates of Family Medicine and was diagnosed with whiplash.

6. On October 2, 2012 Claimant returned to Dr. Scherr for an evaluation. She continued to improve with physical therapy and chiropractic treatment but mentioned her September 28, 2012 motor vehicle accident. Dr. Scherr noted "[a]ll

symptoms are gradually improving. ROM is better. She has no new complaints. She tolerated the 25 pounds and was doing well until she was rear ended on Friday. She now has neck and upper back issues. Her low back and hip issues remain stable. It does not appear that the accident made the low back or hip worse. She is going to see her PCP in regards to this recent accident and her neck and upper back." Dr. Scherr released Claimant to regular duty.

7. On October 16, 2012 Claimant returned to Dr. Kamer for an examination. Dr. Kamer reported Claimant "is better. Chiro and PT have really helped. She is no longer taking any medication." Dr. Kamer also noted that "all symptoms are improving. ROM is better. She has no new complaints. She tolerated full duty and is doing well." Dr. Kamer also commented that Claimant had been rear-ended in a motor vehicle accident and continues to have neck and upper back issues but her "low back and hip issues remain stable." Dr. Kamer stated that: "[i]t does not appear that the accident made the low back or hip worse. She is going to see her PCP in regards to this recent accident." Dr. Kamer determined that Claimant had reached MMI with no impairment. He also released Claimant to full duty employment. Claimant did not request or receive any subsequent medical care for her August 8, 2012 work injury.

8. Claimant continued to receive physical therapy at Advanced Spine and Rehabilitation for injuries sustained in her non-work-related motor vehicle accident. On October 8, 2012 Claimant reported neck and scapular pain. She also experienced trapezius, shoulder and headache symptoms. By. November 15, 2012 Claimant suffered a worsening of lower back pain and pain on both sides of her pelvis.

9. In April 2013 Claimant visited Brooke Bennis, D.O. for an examination. Dr. Bennis remarked that Claimant had lower back and right hip pain. She had undergone an SI joint injection on the right without significant relief. An MRI revealed a disk extrusion at L4-5. He diagnosed Claimant with the following: an L4-5 disk extrusion; right SI joint dysfunction; right hip pain; right trochanteric pain; myofascial pain; radicular symptoms and lumbar facet pain. Dr. Bennis commented that, if Claimant continued to have back pain, she might require additional procedures in the form of medial branch blocks. Dr. Bennis referred Claimant to lumbar spine surgeon Douglas Beard, D.O.

10. On April 11, 2013 Claimant visited Dr. Beard for an examination. Claimant reported mid to lower back pain and right hip pain that moved down the legs, under the buttocks and into the left hip. Claimant explained that following the motor vehicle accident, she felt neck pain, lower back pain and right groin pain. Since the accident Claimant had relative resolution of her neck pain, but her lower back, buttock and inguinal pain had worsened. Dr. Beard diagnosed Claimant with right-sided sciatica and right anterior inguinal pain.

11. During May 2013 Claimant continued to visit Dr. Bennis and report lower back and hip pain. Dr. Bennis thus referred Claimant to surgeon Joshua Snyder, M.D. for an examination.

12. On June 4, 2013 Claimant visited Dr. Snyder for an evaluation of her hip pain. Dr. Snyder commented that Claimant had been suffering right hip pain since her September 2012 motor vehicle accident. He summarized that, after the motor vehicle accident, Claimant suffered "right leg pain and she has been dealing with some other right-sided back pain and occasionally right-sided leg pain and left-sided leg pain as well. She has had injections into the back which give her fleeting relief, but she has never had complete relief of pain that is in her right groin. Apparently, Dr. Bennis obtained an MRI of her right hip and found that she did have a labral tear and therefore sent her over here." Dr. Snyder diagnosed Claimant with a traumatic tear from the motor vehicle accident that had not resolved with conservative treatment. He thus recommended a right hip arthroscopy and labral repair surgery.

13. On June 17, 2013 Claimant underwent a right hip arthroscopy and labral repair surgery. Claimant did not request authorization for the surgery in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for surgery was related to the admitted industrial injury in the present case.

14. On August 19, 2013 Dr. Beard recommended a lumbar arthroplasty at L4-L5 for Claimant. He reported that Claimant had been experiencing increasing lower back pain and pain radiating into her right leg as a result of the September 28, 2012 motor vehicle accident.

15. On October 29, 2013 Claimant underwent an anterior lumbar arthroplasty at L4-L5. Claimant did not request authorization for the surgery in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for surgery was related to the admitted industrial injury in the present case.

16. On March 3, 2014 Respondents filed a Final Admission of Liability (FAL) based on Dr. Kamer's determination that Claimant had reached MMI with no impairment on October 12, 2012.

17. Claimant retained Ryan H. Heatherman, Esq. to represent her in her motor vehicle accident case against the insurance company. He wrote a letter to the insurance company. The letter provided that Claimant "continues to experience significant and persistent hip and low back pain due to the collision." The letter details that the "collision occurred Friday September 28, 2012 while [Claimant] was stopped for a red light, facing North in her jeep at an intersection" when [her] jeep was rear-ended. According to the letter "[t]he forces from the impact of [the other driver's] truck caused severe injuries to [Claimant's] neck, hips and lower back . . . " Claimant "has so far had 60 different medical visits since the collision in September 2012, including multiple injections in the lower back, hip surgery and low back surgery." The letter provided that "[p]rior to the collision, [Claimant] experienced low back and hip pain while moving a heavy object for her job on 8 August 2012. She was in the final stages of recovery for pre-existing low back and hip pain . . . before the collision. This accident caused much more severe symptoms in the lower lumbar and hip as well as new injuries to the neck and back."

18. Claimant testified that she had not previously reviewed the letter from Mr. Heatherman but stated that the delineated facts were incorrect. She specified that she did not suffer any new injuries to her back or hip during the motor vehicle accident. Claimant remarked that she underwent hip and back surgery through her private health insurance because she was unaware that she could pursue the surgeries through Workers' Compensation. She commented that her back and hip problems did not worsen as a result of her motor vehicle accident but instead arose from her August 8, 2012 industrial incident.

19. Claimant challenged Dr. Kamer's determination that she reached MMI on October 16, 2012 with no permanent impairment. She underwent a DIME with Brian Shea, M.D. on July 15, 2014. Dr. Shea recounted that Claimant had been placed at MMI on October 16, 2012 but "[n]o impairment rating was done." He noted that Claimant had undergone two surgeries since reaching MMI. Dr. Shea explained that "[t]he first surgery was for a right hip joint labral tear repair on 6/17/13. A second surgery was done 10/29/13 for a lumbar disk repair and replacement." He thus concluded that Claimant reached MMI on July 15, 2014 and assigned a 15% whole person impairment rating. The impairment consisted of 5% for a specific disorder of the lumbar spine, 7% for loss of range of motion from spine surgery and 3% for right hip surgery.

20. However, Dr. Shea did not engage in a causality assessment regarding Claimant's need for hip or back surgery. Dr. Shea lacked medical records regarding the hip or back surgery in order to perform a causality determination. Moreover, Dr. Shea did not have copies of x-rays or MRI's of the lumbar spine or right hip joint. He assigned Claimant a rating for the back and hip surgeries because he was under the impression that both surgeries pertained to the Workers' Compensation claim. Claimant did not request authorization for the surgeries as part of her Workers' Compensation claim. Finally, no physician has determined that Claimant's need for surgery was related to the admitted industrial injury in the present case.

21. On September 29, 2014 Claimant underwent an independent medical examination with John Raschbacher, M.D. Dr. Raschbacher also testified at the hearing in this matter. Dr, Raschbacher explained that Dr. Shea erroneously assigned Claimant an impairment rating for her hip and back surgeries because they were not related to her August 8, 2012 industrial injury. He specifically noted that Claimant did not seek care for her back and hip for quite a period of time after she was discharged from treatment on October 16, 2012 in her Workers' Compensation claim. Prior to her discharge from medical care Claimant was progressing and had returned to regular work status.

22. Dr. Raschbacher detailed Dr. Shea's errors in performing the DIME. Initially, Dr. Shea assigned Claimant a 15% whole person impairment rating based on his impression that her lumbar disc disease and hip joint pathology were related to her August 8, 2012 admitted industrial injury. However, no physicians have determined that Claimant's surgeries were related to her industrial injury.

23. Second, Dr. Shea did not have the medical records of Claimant's treatment in 2013. Dr. Raschbacher explained that Dr. Shea rated two body parts for which he did not have adequate records. It would thus not have been possible for Dr. Shea to perform a rating based on objective pathology because he did not know the objective symptoms or causes. Dr. Raschbacher remarked that there was no clear, objective basis for Dr. Shea's ratings other than knowing that surgery had been performed and Claimant's subjective history. Dr. Shea did not request operative reports or medical records and therefore could not have known Claimant's specific medical diagnoses.

24. Dr. Raschbacher explained that Dr. Shea simply failed to delineate between Claimant's admitted August 8, 2012 Workers' Compensation claim and her September 28, 2012 non-work-related motor vehicle accident. Although Claimant reported a worsening of her symptoms during 2013, Dr. Shea could not assess whether the increased symptoms were caused by the natural progression of Claimant's industrial injuries or the intervening motor vehicle accident. Dr. Raschbacher summarized that providing an impairment rating for Claimant's back and hip in the absence of medical records and a causation analysis was erroneous. In assigning Claimant a 15% whole person impairment rating and determining that she did not reach MMI until July 15, 2014, Dr. Shea's analysis failed to comply with Table 53 II, B of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or the *Impairment Rating Tips*.

25. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury. On August 8, 2012 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. On September 28, 2012 Claimant was involved in a non-work-related motor vehicle accident. After undergoing conservative treatment for the Workers' Compensation claim, Dr. Kamer determined that Claimant had reached MMI with no permanent impairment on October 12, 2012. On June 17, 2013 Claimant underwent a right hip arthroscopy and labral repair surgery. On October 29, 2013 Claimant underwent an anterior lumbar arthroplasty at L4-L5. Claimant did not request authorization for the surgeries in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for the surgeries was related to her admitted industrial injury.

26. On July 15, 2014 Claimant underwent a DIME with Dr. Shea. He concluded that Claimant reached MMI on July 15, 2014 and assigned a 15% whole person impairment rating. The impairment consisted of 5% for a specific disorder of the lumbar spine, 7% for loss of range of motion from spine surgery and 3% for right hip surgery. However, Dr. Shea did not engage in a causality assessment regarding Claimant's need for hip or back surgery because he lacked medical records regarding the surgeries. Moreover, Dr. Shea did not have copies of x-rays or MRI's of the lumbar spine or right hip joint. He assigned Claimant a rating for the back and hip surgeries because he was under the impression that both surgeries pertained to the Workers' Compensation claim.

27. Dr. Raschbacher persuasively explained that Dr. Shea erroneously assigned Claimant an impairment rating for her hip and back surgeries because they were not related to her August 8, 2012 industrial injury. Dr. Shea lacked the medical records of Claimant's treatment in 2013 and failed to perform a causation analysis. Dr. Raschbacher remarked that Dr. Shea simply failed to delineate between Claimant's admitted August 8, 2012 Workers' Compensation claim and her September 28, 2012 non-work-related motor vehicle accident. Although Claimant reported a worsening of her symptoms during 2013, Dr. Shea could not assess whether the increased symptoms were caused by the natural progression of Claimant's industrial injuries or the intervening motor vehicle accident. Dr. Raschbacher summarized that providing an impairment rating for Claimant's back and hip in the absence of medical records and a causation analysis was erroneous. In assigning Claimant a 15% whole person impairment rating and determining that she did not reach MMI until July 15, 2014, Dr. Shea's analysis failed to comply with Table 53 II, B of the *AMA Guides* or the *Impairment Rating Tips*. Accordingly, based on Dr. Kamer's determination, Claimant reached MMI on October 16, 2012 with no permanent impairment as a result of her August 8, 2012 industrial incident.

## CONCLUSIONS OF LAW

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

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

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

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial*

*Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

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

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

. 7. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury. On August 8, 2012 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. On September 28, 2012 Claimant was involved in a non-work-related motor vehicle accident. After undergoing conservative treatment for the Workers' Compensation claim, Dr. Kamer determined that Claimant had reached MMI with no permanent impairment on October 12, 2012. On June 17, 2013 Claimant underwent a right hip arthroscopy and labral repair surgery. On October 29, 2013 Claimant underwent an anterior lumbar arthroplasty at L4-L5. Claimant did not request authorization for the surgeries in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for the surgeries was related to her admitted industrial injury.

8. As found, on July 15, 2014 Claimant underwent a DIME with Dr. Shea. He concluded that Claimant reached MMI on July 15, 2014 and assigned a 15% whole person impairment rating. The impairment consisted of 5% for a specific disorder of the lumbar spine, 7% for loss of range of motion from spine surgery and 3% for right hip

surgery. However, Dr. Shea did not engage in a causality assessment regarding Claimant's need for hip or back surgery because he lacked medical records regarding the surgeries. Moreover, Dr. Shea did not have copies of x-rays or MRI's of the lumbar spine or right hip joint. He assigned Claimant a rating for the back and hip surgeries because he was under the impression that both surgeries pertained to the Workers' Compensation claim.

9. As found, Dr. Raschbacher persuasively explained that Dr. Shea erroneously assigned Claimant an impairment rating for her hip and back surgeries because they were not related to her August 8, 2012 industrial injury. Dr. Shea lacked the medical records of Claimant's treatment in 2013 and failed to perform a causation analysis. Dr. Raschbacher remarked that Dr. Shea simply failed to delineate between Claimant's admitted August 8, 2012 Workers' Compensation claim and her September 28, 2012 non-work-related motor vehicle accident. Although Claimant reported a worsening of her symptoms during 2013, Dr. Shea could not assess whether the increased symptoms were caused by the natural progression of Claimant's industrial injuries or the intervening motor vehicle accident. Dr. Raschbacher summarized that providing an impairment rating for Claimant's back and hip in the absence of medical records and a causation analysis was erroneous. In assigning Claimant a 15% whole person impairment rating and determining that she did not reach MMI until July 15, 2014, Dr. Shea's analysis failed to comply with Table 53 II, B of the *AMA Guides* or the *Impairment Rating Tips*. Accordingly, based on Dr. Kamer's determination, Claimant reached MMI on October 16, 2012 with no permanent impairment as a result of her August 8, 2012 industrial incident.

## ORDER

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

1. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury. Based on Dr. Kamer's determination, Claimant reached MMI on October 16, 2012 with no permanent impairment as a result of her August 8, 2012 industrial incident.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

## ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on January 13, 2014.

## STIPULATIONS

Claimant endorsed the issue of temporary benefits for hearing. Respondents endorsed the affirmative defense of responsibility for termination. Evidence was taken on both issues. Subsequent to hearing, Claimant withdrew his claim for temporary benefits, therefore the issue of temporary benefits and responsibility for termination is moot.

## FINDINGS OF FACT

1. Claimant worked for Employer as the director of maintenance from November of 2004 to March of 2014.

2. Employer is a long-haul trucking company. As the director of maintenance Claimant's duties included overseeing Employers' trucks, trailers, forklifts, and working on equipment as needed.

3. On December 23, 2006 Claimant sustained a torn left rotator cuff when he slipped and fell shoveling snow for Employer. Claimant reported the injury to Employer's general manager, Don Losasso, within three days of the injury and Claimant was immediately referred for medical treatment.

4. On March 9, 2007, Claimant underwent arthroscopic repair of his supraspinatus and infraspinatus tendons. Claimant reached maximum medical improvement for that injury on October 10, 2007. Claimant continued to work for Employer following this injury.

5. Following his 2007 surgery Claimant frequently complained to his co-workers and Employer's co-owner Mark Nolan about ongoing pain and discomfort in his left shoulder. Claimant occasionally left work early due to his shoulder pain complaints.

6. On January 13, 2014 Employer was undergoing an audit by Commerce City. Claimant was tasked on that day with finding and retrieving three file boxes that were believed to be in a storage trailer on Employer's property.

7. Employer stored records in a semi trailer in file boxes, stacked on wooden pallets and wrapped in shrink wrap. The file boxes were stacked up to six feet high and were on four separate pallets with the boxes facing outwards so that the date of the information contained within the box could be read.

8. Claimant went to the trailer to search for the three requested boxes. Claimant had to climb over the front pallets to get to the rear pallets and to look at the dates on the boxes.

9. Claimant found two of the three requested file boxes while in the storage trailer. Claimant moved the two boxes, one at a time, to the door of the storage trailer. While moving the second box from one stack to another Claimant alleges that he reached his arm above his head and backward when he felt a sharp pain in his left shoulder.

10. Claimant then brought the two boxes to Employer's co-owner Mike Reilly and advised Mr. Reilly that he could not find the third box. Claimant did not tell Mr. Reilly that he had injured his left shoulder. Mr. Reilly's testimony was credible that if Claimant had made a report of injury, he would have been referred to Mr. Losasso to fill out a report.

11. Claimant then went to lunch with Mr. Nolan. Claimant did not tell Mr. Nolan that he had injured his left shoulder. Mr. Nolan's testimony was credible that if Claimant had made a report of injury, he would have been referred to Mr. Losasso to fill out a report or if Mr. Losasso was unavailable, that Mr. Nolan would have filled out a report himself.

12. After lunch, Claimant pulled the storage trailer up to Employer's main office space. Mr. Nolan used a pallet jack to move the pallets from the back of the trailer to the front of the trailer so they could be unloaded to the ground. The pallets full of the file boxes were unloaded to the ground and the third file box was located by Mr. Reilly.

13. Claimant did not report his alleged left shoulder injury to Mr. Losasso until March 13, 2014.

14. Claimant worked for two days following January 13, 2014 and then went to Florida due to the death of his father-in-law. While in Florida, Claimant and Claimant's daughter's boyfriend performed maintenance at his mother-in-law's home including pulling weeds, putting in landscaping rock and paving stones, and repairing an air conditioner. While in Florida, Claimant sent a text message to Mr. Nolan describing all the above maintenance that he and his daughter's boyfriend performed. Claimant did not mention any left shoulder pain in this text message.

15. Claimant returned to work on January 31, 2014. Claimant made no mention of left shoulder pain or the January 13, 2014 alleged injury upon his return to work.

16. On February 4, 2014 Claimant was involved in a physical altercation with another employee, Jim Barnes. Claimant had used Mr. Barnes' truck cab to conduct a road test for a prospective employee. Mr. Barnes had a cat and kept a litter box in the truck cab. Claimant removed the litter box prior to the road test and forgot to replace it afterwards and left it outside.

17. When Mr. Barnes arrived at work and noticed the litter box outside he was upset and confronted Claimant. The two exchanged words and Mr. Barnes went outside to prepare for a trip. Claimant stated he was leaving to get breakfast and drove toward the exit of Employer's premises.

18. Claimant saw Mr. Barnes preparing for a trip. Claimant did an abrupt u-turn in his vehicle, sped toward Mr. Barnes, stopped abruptly, and got out of his truck to approach Mr. Barnes. The two got into a physical altercation, and struck one another. Claimant struck Mr. Barnes with his left arm, and knocked out one of Mr. Barnes' teeth.

19. Both Claimant and Mr. Barnes were suspended for three days and were required to complete anger management training before returning to work.

20. Employer made a decision to terminate Claimant's employment based on a number of factors including Claimant's poor attendance record, history of anger issues and physical altercations with other employees, and declining job performance.

21. Claimant was terminated on March 12, 2014. Employer asked Claimant to remain on the job to assist in training his replacement.

22. After being notified he was being terminated, Claimant asked about his left shoulder injury. This was the first time Claimant informed Employer of his left shoulder injury that allegedly occurred on January 13, 2014, the day of the audit.

23. As this was Claimant's first report of an alleged injury, Claimant was referred to Mr. Losasso to fill out paperwork. Claimant met with Mr. Losasso on March 13, 2014 and advised Mr. Losasso that he had injured his left shoulder in January when searching for the audit boxes. Mr. Losasso asked Claimant why it took Claimant almost two months to make the report of injury and Claimant stated "I know this doesn't look good."

24. Mr. Losasso filled out a first report of injury and provided Claimant with a designated provider list. *See* Exhibit Z.

25. The same day, and on March 13, 2014 Claimant saw Michael Ladwig, M.D. Claimant told Dr. Ladwig that he was moving boxes overhead from pallet to pallet

when he felt injured his left shoulder. Dr. Ladwig noted that x-rays showed no acute changes. Dr. Ladwig diagnosed left shoulder strain and opined based upon Claimant's description of the mechanism of injury that the injury was work related. Dr. Ladwig imposed work restrictions of no lifting, repetitive lifting, carrying, pushing, or pulling with left arm. He also imposed no reaching overhead or away from body with left arm. *See* Exhibit 2.

26. Claimant was referred to orthopedic surgeon Michael Hewitt, M.D. Dr. Hewitt ordered an MRI. Dr. Hewitt noted Claimant's prior rotator cuff repair seven years prior and Claimant reported to Dr. Hewitt that he had no postoperative issues, no problem with overhead reaching, and had minimal shoulder pain prior to the January 2014 incident. Dr. Hewitt recommended surgical repair of the rotator cuff. *See* Exhibit 6.

27. On April 8, 2014 Claimant underwent an MRI which showed: near complete undersurface supraspinatus tendon tear with mild retraction near its myotendinous junction with a single bursal sided fiber possibly intact; severe infraspinatus tendinopathy including partial-thickness undersurface tear; moderate-severe subscapularis tendinopathy including high grade partial thickness undersurface tear; posterior superior subluxation of the humeral head; and moderate tendinopathy of the intact long head of the biceps tendon. *See* Exhibit 3.

28. Insurer denied the claim and Claimant went forward with treatment under his own medical insurance.

29. On July 14, 2014 Nicholas Olsen, D.O. performed an Independent Medical Examination on Claimant. Dr. Olsen opined that Claimant's left shoulder injury was chronic in nature rather than acute. Dr. Olsen opined that there was no marked edema on the April 2014 MRI that would be noted with an acute rotator cuff injury. Rather, Dr. Olsen noted that there was severe atrophy and fatty infiltration of the supraspinatus muscle consistent with chronic degenerative condition that extended from the 2007 surgical repair/injury. *See* Exhibit E.

30. Dr. Olsen opined that if Claimant in fact suffered an acute rotator cuff tear in January, Claimant would not have been able to strike Mr. Barnes with sufficient force to knock out a tooth in February. Dr. Olsen opined that on the day of the fight with Mr. Barnes, Claimant's shoulder was functioning at a high level and that Claimant did not therefore sustain a torn rotator cuff on January 13, 2014.

31. Dr. Olsen opined that it was not physically possible for Claimant to have generated enough force to knock out a tooth even if Claimant was in "fight or flight" mode as adrenaline only works when there is an intact muscle available for the adrenaline to act on. Dr. Olsen opined that because a punch requires the arm be extended at or above shoulder height, that Claimant did not have a completely torn rotator cuff prior to the February fight.

32. Dr. Olsen is found credible and persuasive.

33. On October 20, 2014 Claimant saw PA-C Brandon Kolodzek. Claimant reported to PA-C Kolodzek that he felt that he tore his left shoulder rotator cuff while unloading boxes at work. Surgery was discussed with Claimant and Claimant chose to schedule surgery with Robert Greenhow, M.D. *See* Exhibit 4.

34. On November 3, 2014 Elizabeth Bisgard, M.D. performed an Independent Medical Examination on Claimant. Dr. Bisgard diagnosed Claimant with left rotator cuff tear with severe tendinopathy. Dr. Bisgard opined that based on the history given by Claimant, there was a specific injury in January of 2014 that caused a substantial worsening of underlying shoulder pathology. Dr. Bisgard opined that Claimant was asymptomatic until the incident lifting boxes in January of 2014 and was working full time and full duty without difficulty. Dr. Bisgard noted that the MRI showed chronic changes, but despite the chronic changes Claimant was asymptomatic until January of 2014 when the incident lifting boxes occurred. *See* Exhibit 1.

35. Dr. Bisgard opined based on a reasonable degree of medical probability that Claimant sustained a work related left shoulder injury. *See* Exhibit 1.

36. On November 18, 2014 Claimant had surgery on his left shoulder performed by Robert Greenhow, M.D. Dr. Greenhow found a left shoulder full-thickness rotator cuff tear and a superior labral tear which he repaired. *See* Exhibit 5.

37. Claimant's testimony is not credible or persuasive. The medical doctors who opined that the injury was work related based their opinion on Claimant's history of injury. Therefore, the opinions of Dr. Ladwig and Dr. Bisgard are also not found persuasive as they rely upon Claimant's incredible description of injury

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). 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*, 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***

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 was proximately caused by the performance of such service. § 8-41-301(1)(b) & (c), C.R.S. (2014) 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). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2013). The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo.2001).

In the present case, Claimant has failed to meet his burden to show that he suffered an injury that arose out of his employment or occurred in the course of his employment on January 13, 2014. The opinion of Dr. Olsen is persuasive that the injury to Claimant's left shoulder was not acute in nature as shown by MRI. Additionally, the Claimant's course of action following his alleged injury on January 13, 2014 is not logically consistent with an injury on that date. Claimant suffered a similar injury in 2006 and reported the injury immediately, spoke with general manager Losasso immediately, filled out an incident report, and was referred for treatment. In the present case, despite allegedly suffering a similar injury to the 2006 injury, Claimant did not make any report of injury for approximately two months. This does not make logical sense considering Claimant was familiar with the process to report a work injury.

The evidence also establishes that Employer promptly responded to Claimant's 2006 injury and referred him for treatment. Similarly, in this case, Employer promptly filled out a "first report of injury" and referred Claimant for treatment when Claimant finally made a report of injury in this case in March of 2014. The evidence and testimony shows that it was Employer's practice to act promptly upon notification of any injury from any Employee. Claimant's testimony that he reported the injury to several people at work on the date of injury is not credible or persuasive. It is incredible that Claimant made would have made several reports of a left shoulder injury with no response from Employer. The testimony of Mr. Reilly, Mr. Nolan, and Mr. Losasso is credible that if Claimant had reported an injury in January of 2014, they would have referred him to fill out a report of injury and would have referred him for treatment immediately.

Further, the evidence shows that Claimant performed maintenance work at his mother in law's home, returned to work for two months and struck a co-worker with enough force to knock out a tooth following his alleged injury with no problems or reported complaints of left shoulder pain. If Claimant had a left shoulder injury that he suffered on January 13, 2014 it would logically follow that striking someone with enough force to knock out a tooth would cause significant pain to an already "injured" shoulder. Yet, after striking Mr. Barnes in early February, Claimant still did not report any pain or any alleged injury for another month. Despite Claimant's prior immediate treatment following an injury in 2006, in this case Claimant did not make a report or see any medical provider for approximately two months following his alleged injury. As found above, Claimant did not report any alleged injury until the day he was terminated by Employer.

Although the evidence shows that at the time of Claimant's MRI in early April of 2014 he had an almost complete tear of his rotator cuff, the explanation by Claimant of when and where this occurred is not found credible or persuasive. Claimant has failed to link the tear shown on the MRI to the time and place limits of his employment or to an employment related activity. The ALJ concludes that the tear did not occur acutely on January 13, 2014 as the action by Claimant following this date are inconsistent with someone who has suffered an acute injury. Claimant has failed to show, more probably than not, that he suffered a work related injury on January 13, 2014.

## ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show that he suffered a compensable work injury on January 13, 2014.

2. Claimant's claim for benefits is denied and dismissed.

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

DATED: February 3, 2015

/s/ Michelle E. Jones

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 4-946-453-01WC 4-**

## ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an injury to her right arm, right shoulder, and cervical spine on March 19, 2014 that was proximately caused by the performance of service arising out of and in the course of employment?

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of reasonable, necessary, and authorized medical benefits as a result of the alleged work injury.

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of temporary total disability benefits from March 19, 2014 and continuing.

## STIPULATION

The parties stipulated Claimant's average weekly wage was $423.97.

## PROCEDURAL ISSUES

Maria Bravo acted as an interpreter for Claimant during the hearing. She was properly sworn at the beginning of the proceeding.

Claimant requested a sequestration order which the Court granted. A potential Employer witness was excluded from the courtroom.

Claimant's exhibits 1-21 and Respondents' exhibits A-F, excluding Bates Nos. 81-84 under Exhibit D, were admitted into evidence.

## FINDINGS OF FACT

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

1. Claimant is a laborer who began working for Employer, a temporary work company, on February 12, 2014. Claimant alleges she was injured on March 19, 2014, less than five weeks after she was hired.

2. Claimant's job on the date of alleged injury required her to take cake pops (small balls of cake) from a conveyer belt end point and transfer the pops to trays. The conveyer moved cake pops to a stationary table top landing in front of Claimant and other workers who loaded trays with the pops. Claimant testified that on the date of her alleged injury, two other women worked in the same space also transferring cake pops from the conveyer landing to the trays. Both other workers were away from the area

when Claimant was allegedly injured, and the alleged injury was unwitnessed.

3. Claimant's last day of work for Employer was March 19, 2014. She remained unemployed as of the hearing date.

## CAUSATION

4. Claimant provided inconsistent versions of how she was allegedly injured on March 19, 2014. Initially, Claimant alleged her right upper extremity was compressed in the machine between the roller and the plate; the compression on her right forearm caused an injury in the form of a bruise slightly larger than a quarter in size. Claimant testified that she showed the bruise to co-workers and her supervisor. Employer's first report of injury is consistent with such an injury. In addition, after Claimant reported her injury to her supervisor, she spoke with a triage nurse who had Claimant treat the bruise with first aid and return to work.

5. Claimant later alleged her arm was trapped long enough to cause her to panic and try to free her arm from the machine using all of her bodily force. She claimed such force caused an injury to her right shoulder and cervical spine in addition to her right arm. Claimant variably testified her arm was stuck in the machine for "seconds" and her arm was caught for "an instant."

6. Video of the machine was submitted into evidence. It shows a regular back and forth motion of plates to the sides of the conveyor belt. When the machine moves to the tightest position, there is an opening of at least three or four inches. The machine then immediately opens wider. The entire cycle takes approximately one second.

7. There is a gap that widens and narrows as the belt moves back and forth. Only with great difficulty was Claimant able to describe what parts of the machine "trapped" her arm, causing what she describes as a crush or compression injury and a subsequent pulling injury to her right shoulder and neck.

8. The video demonstrates how it is possible for Claimant to have sustained a bruise on her forearm, if she put her hand in the machine in the space between the roller (that moves back and forth) and the side-rail of the machine.

9. Claimant was unable to explain how she became stuck or trapped in a machine that had a wide enough gap and fast enough movement to instantly release her hand even if her forearm was momentarily compressed.

10. Even if Claimant had the time to react to the machine closing by beginning to pull her arm away, the machine would be open and her hand would have been free by the time she started pulling.

11.

12. Claimant testified inconsistently at hearing about the onset of her alleged shoulder and neck injuries. One version was that she had immediate onset of shoulder and neck pain. For example, Claimant testified when the machine let her go, "that's when I felt all the pain." "When I pulled really hard was [when] I felt the pain all the way up to my ear." Claimant also testified "when I pulled my hand was when I felt the pain go up." "When I pulled my arm out of the machine, when I pulled against the machine so hard that's when I hurt myself."

13. However, later in her direct examination, Claimant testified to a second version: that her shoulder and neck pain came on two hours after the incident with the machine. She testified that she did not tell co-workers about her other injuries because she did not discover pain in her neck and shoulder area until approximately two hours after the alleged injury "because [her] arm had gotten – grown cold."

14. In addition, versions one and two of Claimant's hearing testimony were inconsistent with her third version that those symptoms did not develop until the next day. Claimant reported during her IME with Dr. Paz that her neck and shoulder symptoms developed "the day following" the alleged injury.

15. Claimant testified she told Dr. Paz her right upper extremity was trapped in the machine, and when the machine moved she was able to free herself from the machine. Dr. Paz performed Respondents' IME on June 9, 2014 and his report is dated July 7, 2014. He testified as an expert in occupational medicine at the hearing.

16. Claimant reported her alleged injury to her supervisor, Tito Texidor, within twenty to thirty minutes. His written statement indicated that Claimant complained of pain in her forearm and a bruise beginning on her forearm. She did not report any other pain to Mr. Texidor or to the triage nurse at MedCor who advised her by telephone to ice her forearm and take some pain medication. Mr. Texidor's written statement provided he sent Claimant home for the day to do so. His statement indicates that Claimant called back that day requesting to go to the hospital because the pain in her forearm was increasing. Again, nothing in Mr. Texidir's report indicates Claimant reported any injury other than a bruise on her forearm and pain in her forearm.

17. MedCor documented the call in a March 19, 2014 record. Claimant spoke about her complaint through an interpreter. Claimant said she put her arm into the machine, the machine moved, and her forearm was caught between the machine and a plate. Claimant reported 9/10 pain that restricted her activities, including movement of her thumb. MedCor documented Claimant was to use minor first aid on the bruise. Claimant called back through her son-in-law after work because her arm was "swollen and tingly." MedCor provided her with the designated provider information.

18. Claimant testified that later that afternoon she spoke with Michelle Donnel, Employer's safety manager, and reported, "I had a lot of pain in my arm; that it was hurting so bad and that it was hurting all the way to – to below my ear and my neck." While Ms. Donnel sent Claimant for medical treatment, when she completed Employer's First Report of Injury dated March 31, 2014, she reported that Claimant's injury was to her "lower arm" and did not mention Claimant's alleged report of pain extending from her forearm up to her ear.

19. Claimant was initially treated on March 20, 2014 by Dr. Lorenzo Ladwig at Aviation Occupational Medicine. Claimant reported that the machine had stopped when "she went to grab the pops" and "the machine suddenly started and caught her right forearm." Contrary to Dr. Ladwig's report, Claimant testified that she never said that the machine stopped and then started suddenly. Claimant reported pain in her neck radiating into her right shoulder and then into her right hand and fingers. She also reported tenderness on range of motion testing. A quarter size bruise was present. X-rays of Claimant's cervical spine, right shoulder, and right forearm were all negative for

acute changes. Thus, while Claimant had subjective reports of pain, the objective evidence was positive only for a small bruise.

20. Regardless of the objective evidence, Dr. Ladwig's report diagnosed cervical radiculopathy, lumbar radiculopathy, and "dorsal strain." However, it appears from Dr. Ludwig's handwritten notes that the actual diagnoses were cervical radiculopathy, right shoulder strain, and right forearm strain. The ALJ finds that Dr. Ladwig including inaccurate diagnoses on his report reflects poorly on his credibility and makes his reports less persuasive.

21. Based on his diagnoses, Dr. Ladwig's report concluded -- in quotation marks -- that based on the patient's history, mechanism of injury, and objective findings on examination, that it was his medical opinion that there is a greater than 51% probability that this is a work-related injury or condition. Dr. Ludwig prescribed anti inflammatories, muscle relaxants, and pain medications; he also restricted Claimant to no use of her right arm.

22. On March 27, 2014 Claimant had a follow-up exam with Dr. Hector Brignoni, also with Aviation Occupational Medicine. He noted that Claimant's symptoms had not improved despite being off work and on medications. Claimant testified at hearing that pain medications helped her, however her testimony is contradicted by Dr. Brignoni's account that she continued to report pain even while on pain medication. He referred Claimant to physical therapy and continued her restrictions.

23. On April 4, 2014 Claimant followed up with Dr. Brignoni again. He continued her temporary restriction of no right arm use and continued her medications. He noted that Claimant had pain magnification with only mild movement. He also continued to note that medications, not working, and physical therapy were not helping.

24. On April 8, 2014 Claimant followed up with Dr. Ladwig. She reported her pain level as 8/10 while on pain medication and that pain only lets her sleep for a couple of hours at a time. Dr. Ladwig continued her temporary restriction of no right arm use and continued her medications, despite Claimant's statements that they were not providing her with relief.

25. On April 16, 2014 Claimant returned for another follow up. She reported that she was not improving because she was not receiving physical therapy. She reported that her pain remained the same despite not working and medications which "only help for a little while."

26. Claimant's May 1, 2014 visit was the same – Claimant reported no change in her condition and that her pain medications only worked for short periods of time.

27. On May 28, 2014 Claimant reported to Dr. Brignoni that her cervical and right shoulder problems were "mostly gone" but that she was having pain radiating down to the palm of her hand. In contrast though, during a June 2, 2014 physical therapy session, Claimant reported increased pain in her right shoulder at a level of 9/10.

28. On June 4, 2014, Dr. Ladwig recommended an MRI of Claimant's cervical spine after her pain was "really high this weekend." Claimant reported she almost went to the emergency room for the pain.

29. On June 13, 2014 an MRI of Claimant's cervical spine was performed. It showed no evidence of an objective pain generator and no acute findings.

30. Dr. Ladwig discussed the MRI with Claimant on June 16, 2014. The results of the MRI were "essentially benign." Dr. Ladwig discussed Claimant's need for a physiatry referral and Claimant was sent to Dr. Franklin Shih.

31. In testimony, Claimant denied telling Dr. Ladwig that the machine stopped before she put her hand inside it. In her initial report to Dr. Ladwig, Claimant asserted the machine stopped, she put her hand into the machine, and then suddenly it restarted without warning trapping her hand. Again, the machine did not close sufficiently to trap Claimant's hand (which claimant asserts caused her to violently struggle to free herself, injuring her shoulder and neck). But Claimant's allegation the machine stopped and then started suddenly is abandoned in later medical records, including Dr. Paz's IME, and in Claimant's testimony. Claimant's story evolved after this initial report to Dr. Ladwig. This change in the "mechanism of injury" makes Dr. Ladwig's determination that Claimant sustained a work-related injury less reliable and less persuasive. He relies on a version of the story which Claimant denied at hearing. Dr. Ladwig never corrected the mechanism of injury in his reports to harmonize it with Claimant's revised mechanism of injury, as stated to Dr. Paz or as reported by Claimant in her testimony.

32. Dr. Shih, a physiatrist, evaluated Claimant for the first time on July 2, 2014. Claimant described her alleged injury as occurring when she reached across a sorting table when a sweeping device pinched her right hand. Claimant did not report to Dr. Shih that she pulled so hard to free her hand from the machine that she sustained right shoulder and neck injury. Instead, Claimant told Dr. Shih her "symptoms evolved" to encompass her "entire right upper extremity" with pain extending to her right upper trunk and neck area. In contrast, Claimant had told Drs. Ladwig and Dr. Brignoni she had cervical and shoulder complaints because she attempted to pull her trapped arm out of the machine.

33. Dr. Shih diagnosed claimant with a "non-specific" right upper extremity pain complex. Claimant had no acute distress. Claimant's cervical range of motion was "within functional limits." Palpation by Dr. Shih was remarkable for nonspecific tenderness in the upper trunk on the right. The tenderness was "diffuse and non-focal."

34. Dr. Shih noted that Claimant's history was remarkable for previous back injury and a laceration to her right elbow area.

35. Claimant's complaints "did not fall into a specific peripheral nerve or nerve root distribution." Dr. Shih concluded Claimant had a "relatively nonspecific examination." Claimant was given the options of trying to progress back to work, to try alternative treatments such as chiropractic or acupuncture, or to return to physical therapy. She chose acupuncture with Dr. Shih.

36. Regarding causation, Dr. Shih never stated Claimant's complaints were work-related. Instead, Dr. Shih left blank the boxes where he was asked to opine whether Claimant's symptoms were consistent with a work related injury. His characterization of the complaints as "nonspecific" is consistent with his finding that Claimant had "diffuse" pain complaints that followed "no specific nerve root or

distribution" pattern.

37. Dr. Shih again did not characterize Claimant's pain complaints as work related when he saw her on July 8, 2014. In that examination, Dr. Shih expressed his hope Claimant's examination would "become more focal."

38. Claimant's final appointment with Dr. Shih was on July 15, 2014. Again, Dr. Shih refused to state that objective findings were consistent with a "work related mechanism of injury."

39. On July 7, 2014, Dr. Mark Paz performed an independent medical examination at Respondents' request. Dr. Paz was asked to perform a causation analysis to determine whether Claimant's reported mechanism of injury was consistent with the complaints she alleges were caused by the mechanism of injury. Dr. Paz testified as an expert in occupational medicine.

40. Claimant had difficulty providing Dr. Paz with a history of her complaints and what may have caused them. Dr. Paz spent 53 minutes of his examination time gathering a history from Claimant.

41. Claimant's description of how the machine allegedly injured her was inconsistent with what Dr. Paz saw in the video showing the machine in operation. Claimant told Dr. Paz she was trapped in the machine. While a contusion could have resulted from Claimant putting her hand in the machine, Claimant told Dr. Paz she also developed right shoulder and neck pain.

42. Claimant told Dr. Paz the shoulder and neck pain did not develop until the day after the alleged injury.

43. Dr. Paz considered whether Claimant's description of the mechanism of alleged injury could have caused shoulder and neck problems. He concluded he could not. "For a causation analysis, you need both a mechanism of injury as well as a diagnosis. For the symptoms in the neck and the shoulder and . . . right arm, there is no medical diagnosis." While there may have been a contusion, the persistence of symptoms is not consistent with the natural progression of a contusion.

44. Diagnostic tests did not confirm the presence of an injury, according to Dr. Paz. Dr. Shih's evaluation demonstrated diffuse, non-specific complaints which are consistent with Dr. Paz's findings. "Given the information available [to Dr. Paz], there continues to be no medical diagnosis of the neck, shoulder, or distal right upper extremity [that] is consistent with an injury."

45. Dr. Paz opined that both a mechanism of injury and a medical diagnosis are required when conducting a causation analysis. Further, the mechanism of injury and diagnosis must be related. Dr. Paz stated it was improbable that Claimant sustained a compensable injury to the neck, right shoulder or right arm on March 19, 2014.

46. While it is possible Claimant may have sustained a contusion, it required first aid at most, not medical treatment. First aid is providing a band-aid or an ice pack. Claimant did not need medical treatment for any contusion.

47. Further, the machine's constant cycling from open to less open is

inconsistent with the trapping of a body part as Claimant reported to Dr. Paz. As observed in the video and as Dr. Paz testified, the machine would have fully opened by the time an individual would have realized the machine was in its least open capacity. There was not sufficient time for an individual to react and generate a pull on one's upper extremity before the machine cycled to its fully open position. Claimant's allegation that she injured her shoulder and neck by pulling at her trapped arm is not medically probable given a body's reaction time. Even if Claimant pulled her arm, there would have been no counterforce that would have created the energy [resistance] necessary to injure Claimant's body. Viewing the totality of the evidence, the ALJ finds it unlikely that Claimant could have been trapped for seconds in the machine. Rather, the ALJ finds it likely that the machine compressed Claimant's forearm for an instant and immediately began opening upon reaching its most closed position.

48. The ALJ finds Claimant to be a poor and inconsistent historian regarding the onset, extent, and cause of her alleged injuries, other than the bruise on her forearm, and does not credit her testimony.

49. Claimant failed to present evidence that establishes it is more likely than not that she sustained a compensable work related injury. At most, Claimant may have suffered a bruise on her forearm that did not require medical treatment or compensation benefits.

50. No objective test showed any acute injury requiring medical treatment.

51. Dr. Paz credibly and persuasively testified it is not medically probable that Claimant sustained a work related injury on March 19, 2014. Dr. Paz concluded the mechanism of injury would not have caused the symptoms Claimant reported. The Judge finds Dr. Paz's opinions related to causation to be more credible and persuasive than Dr. Ladwig's.

52. Dr. Paz testified consistently with his report. The ALJ finds Dr. Paz's testimony provided a credible and persuasive assessment that Claimant's self-described mechanism of injury would not cause a work related injury.

53. Dr. Ladwig's reports rely on a mechanism of injury Claimant abandoned in her testimony. To the extent that Dr. Ladwig was unaware of Claimant's inconsistent reports, the ALJ finds his conclusions to be less persuasive than those of Dr. Paz.

54. The ALJ finds it more likely true than not that Claimant's allegation of an injury on March 19, 2014 is not credible given the above findings of fact. Claimant's allegation of an injury while stacking cake pops is less likely true than not given the credible and persuasive medical evidence that Claimant's mechanism of injury would not cause her cervical, right shoulder and right arm complaints.

55. Claimant bears the burden of proving by a preponderance of the evidence that she sustained a compensable injury on March 19, 2014. The Judge finds that Claimant has not met this burden.

## CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury 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 to establish the requisite causal connection is one of fact for determination by the judge. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's hearing testimony was both internally inconsistent and inconsistent with information she provided to Dr. Paz. Dr. Paz's opinions regarding the mechanism of injury being unable to cause the injuries she claimed, combined with a lack of any objective findings of injury, cause the ALJ to conclude that Claimant did not sustain an injury on March 19, 2014. To the extent that Claimant suffered a bruise requiring minor first aid, the ALJ concludes that such bruise does not rise to the level of an injury requiring medical treatment as contemplated by statute. The ALJ concludes that based on the totality of the evidence, Claimant failed to meet her burden of proof.

In light of this determination the Judge need not reach the other issues.

## ORDER

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

1. Claimant's claim for workers' compensation benefits in WC 4-946-453-01 is denied.

DATED: February 23, 2015

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

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

## ISSUES

The issues presented for determination are whether Claimant suffered a right knee injury in the course and scope of her employment on March 19, 2014; whether Claimant is entitled to medical benefits; and whether Claimant is entitled to temporary total disability (TTD) benefits commencing on March 21, 2014 and ongoing.

The parties stipulated that if the claim is compensable, the applicable average weekly wage is $985.37. The parties also stipulated that James Genuario, M.D., and Matthew Lugliani, M.D., are authorized treating physicians.

## FINDINGS OF FACT

1. Claimant has been employed by Employer as a Customer Service Agent for the past 14 years. As a part of her work-related duties, Claimant is required to squat down to pick up luggage or put tags on luggage and other carry-on items on a regular basis.

2. On March 19, 2014, at approximately 10 a.m., Claimant squatted down to put a tag on a customer's stroller. While Claimant arose from the squatted position, she turned to speak to the customer that she was assisting. She felt a pop in her right knee that was followed immediately by severe pain and swelling. Claimant managed to continue working for two or three hours after the injury, but due to the severe pain she was experiencing she requested to perform her duties from a seated position, which is generally not permitted by Employer. Claimant was also able to work her scheduled shift on March 20, 2014, but she was in such severe pain that she was unable to stay and complete the mandatory overtime shift.

3. The Claimant had experienced some minor aches in her right knee before March 19, 2014, but she had never experienced any symptoms as severe as those she felt after the squatting incident.

4. On March 21, 2014, Claimant sought treatment for her right knee symptoms with James Genuario, M.D. at Steadman Hawkins Clinic. During her visit, the Claimant completed a patient history form in which she reported that her right knee pain had begun "about a month earlier" with swelling in her right knee. Dr. Genuario's note indicated that Claimant was experiencing catching and sharp stabbing pain with the knee giving way when she attempted to walk. Dr.

Genuario ordered a MRI of Claimant's right knee, and the MRI showed a grade III chondral fissure of the median patellar ridge and acute lateral edema.

5. On March 28, 2014 On March 28, 2014, Dr. Genuario's assistant, Jeremy Smith, PA, saw Claimant and discussed the results of Claimant's right knee MRI. Claimant's right knee MRI revealed some cartilage thinning in the medial patellar facet with mild edema and no evidence of meniscus tear. PA Smith indicated that he reviewed Claimant's medical history with Claimant and that there were no changes from the information contained in the chart on file. There is no mention in the report of a squatting injury on March 19, 2014.

6. When Claimant saw Dr. Genuario on March 31, 2014, Dr. Genuario reported that Claimant had noticed increasing symptoms with twisting activities at work. Dr. Genuario stated that if Claimant failed conservative measures, she would be a good candidate for right knee lateral release surgery. Dr. Genuario recommended that Claimant seek further medical treatment through the workers' compensation system.

7. Shortly thereafter, Claimant reported her injury to the Employer on April 2, 2014. She reported that she injured her right knee while bending down to tag a customer's stroller.

8. After Claimant reported the injury, the Employer referred the Claimant for medical treatment. Claimant elected to pursue treatment at Healthone.

9. On April 2, 2014, the Claimant first saw Matthew Lugliani, M.D. at Healthone. Claimant reported that she injured her right knee at work on March 19, 2014 when she bent down to put a tag on a stroller. After completing a physical examination of Claimant, Dr. Lugliani diagnosed Claimant with chondromalacia and knee pain, and noted that in his professional opinion there was greater than 50% medical probability that Claimant's injuries were causally and proximally related to the March 19, 2014 accident at work. Dr. Lugliani referred Claimant back to Dr. Genuario for further evaluation and treatment.

10. On April 14, 2014, Dr. Genuario diagnosed right knee patellofemoral syndrome. Dr. Genuario also who opined that Claimant's condition failed to improve with non-operative treatment, and recommended an arthroscopic debridement and lateral release, which Claimant underwent on May 9, 2014.

11. Claimant's preoperative diagnosis was acute chondral defect of the patella with patellofemoral pain syndrome. Dr. Genuario's pre-operative report stated that Claimant suffered an acute injury while at work when she lifted baggage.

12. During surgery, Dr. Genuario noted that the cartilage surrounding Claimant's chondral defect looked smooth and healthy, and that the bone exposed under Claimant's chondral defect did not look sclerotic, or hardened.

13. Dr. Genuario testified by deposition. He explained that patellofemoral pain syndrome is a generic term for pain in the patellofemoral joint, and that it can be caused by a number of different conditions. In Claimant's case, the patellofemoral pain syndrome was caused by the chondral defect in the cartilage of Claimant's right kneecap. There are two types of chondral defects, those caused by degenerative changes and those caused by an acute injury. When chondral defects are caused by degenerative changes, the cartilage surrounding the patella will appear broken down and cracked upon arthroscopic exam. When chondral defects are caused by an acute injury, the cartilage surrounding the defect will look smooth and healthy. Dr. Genuario opined that because the area surrounding Claimant's chondral defect appeared smooth and healthy upon arthroscopic exam, it is clear that Claimant's chondral defect was caused by an acute injury rather than by degenerative changes.

14. Dr. Genuario also testified that when bone is exposed for a prolonged period of time it will become sclerotic, or hardened. Upon arthroscopic exam, the bone under Claimant's chondral defect did not look sclerotic, but instead looked like fresh bone that had recently been exposed. Dr. Genuario felt that the fresh bone was indicative of an acute injury.

15. Dr. Genuario noted that the edema present on Claimant's March 21, 2014 MRI provides further evidence that Claimant suffered from an acute injury.

16. At the Respondents' request, Claimant was evaluated by Wallace K. Larson, M.D. on July 29, 2014. Claimant told Dr. Larson that she injured her right knee when she bent down to tag a stroller and that by the time she left work her pain was severe and brought her to tears the following day. Dr. Larson opined that Claimant had not likely suffered an acute trauma at work and that, instead, Claimant's symptoms were due to patellofemoral pain syndrome. Dr. Larson opined that Claimant's diagnosis was unrelated to work and Claimant's symptoms were the product or a naturally progressing pre-existing condition.

17. Both Dr. Larson and Dr. Genuario testified that patellofemoral pain syndrome can be caused by cartilage defects, leg muscle weakness/imbalance, and arthritis. Both Dr. Larson and Dr. Genuario testified that women are more prone to developing patellofemoral pain syndrome than are men because of the angle of their hip compared to the knee joint and that development of this syndrome may have a genetic component.

18. After he acknowledged that he recalled Claimant's testimony describing her job duties, Dr. Larson testified that Claimant's right knee

patellofemoral syndrome was not caused by Claimant's work duties or the squatting event of March 19, 2014. When he was directed to WCRP 17, Exhibit 6 of the Medical Treatment Guidelines, Dr. Larson testified that the factors set forth for in the guidelines for determining the occupational relatedness of patellofemoral pain syndrome were not sufficiently present in Claimant's employment to establish an occupational relationship between Claimant's patellofemoral syndrome and her work.

19. Dr. Genuario opined that Claimant suffered an acute injury to her right knee because during surgery, he visualized a focal chondral defect where the damaged cartilage flap was still attached and surrounding cartilage was smooth and non-sclerotic**.** Dr. Genuario stated that right knee swelling prior to March 19, 2014 might be indicative of ongoing cartilage wear.

20. According to Dr. Larson, the occurrence of a focal chondral defect in Claimant's right knee does not establish that Claimant suffered a traumatic injury. Dr. Larson agreed that trauma can, in fact, cause a focal chondral defect but that the trauma would likely be in the nature of a dislocation of the patella or knee cap caused by an impact. Dr. Larson testified that Claimant's alleged injury of March 19, 2014 did not involve that kind of trauma. Dr. Larson opined that progressive degenerative changes associated with anatomic variation, unrelated to trauma, could account for the chondral defect in Claimant's right knee. Dr. Larson noted that the anatomy in Claimant's right knee is probably similar, if not identical, to the anatomy in Claimant's left knee, and Claimant suffered, previously, from patellofemoral pain syndrome in the left knee with cartilage involvement.

21. In June 2012, Claimant suffered an injury to her left knee when a piece of luggage struck her in the knee. Claimant's diagnosis for the injury was left patellofemoral pain syndrome. Claimant had lateral release surgery to her left knee on August 20, 2012.

22. Dr. Larson testified that if Claimant had suffered a dislocated knee cap that might constitute a traumatic explanation for the focal chondral defect in her right knee, Claimant would have, likely, experienced significant pain and would be certain that something serious had occurred in her right knee.

23. Dr. Larson also testified that healthy cartilage that is not suffering from degenerative changes usually looks smooth, and that it is possible to see hardening, or sclerosis, of a bone upon arthroscopic exam. However, Dr. Larson stated that in his opinion, this evidence is not enough to definitively state that Claimant suffered from an acute injury, and that even if she did, the findings do not necessarily pinpoint the exact date that the injury occurred. Because Dr. Larson believes that a dislocation of the knee is the most typical way in which an acute chondral defect is created, he refused to acknowledge that Claimant's

squatting and twisting motion on March 19, 2014 could be the mechanism of injury in this case.

24. Dr. Larson opined that Claimant suffered from a pre-existing condition in her right knee that was not aggravated by her work duties. Dr. Larson opined that Claimant suffers from an anatomical variation in both of her knees that predisposes her to patellofemoral pain syndrome and chondral defects. At hearing, Dr. Larson opined that in order for Claimant to have suffered an aggravation of a pre-existing condition, she must suffer a permanent change in her symptoms or a structural change to the injured body part. Dr. Larson's opinion concerning the standard for aggravation of a pre-existing condition is incorrect. Nevertheless, the Claimant did sustain a permanent change in her symptoms in that her symptoms were significantly worsened as a result of the squatting incident on March 19, 2014, such that she required surgery.

25. Claimant testified that in order to perform her work related duties for Employer she must squat down at least 30 times throughout each shift. At home, Claimant squats down very infrequently, and she does not engage in any sports or hobbies outside of work that require squatting on a regular basis.

26. Claimant testified that for approximately one month prior to March 19, 2014, she occasionally experienced minor aches, pains, and swelling in her right knee. However, prior to March 19, 2014, Claimant never experienced pain or swelling in her right knee that kept her from performing activities of daily living or made it difficult to perform her work-related duties. Claimant never sought medical treatment for her right knee prior to March 19, 2014, nor did she mention problems with her right knee to the medical providers that she was seeing for unrelated issues. This testimony is supported by medical records from Concentra Medical Center and Denver Vail Orthopedics for 2012 and 2013 that do not show any complaints or treatment for Claimant's right knee.

27. Claimant testified that she has no experience, knowledge, or training regarding how preexisting conditions are treated under the Colorado workers' compensation system. Given that Claimant was experiencing light aches, pains, and swelling in her knee for the month leading up to the March 19, 2014 injury, Claimant assumed that she could not report her injury as work-related, so she sought treatment on her own from Dr. Genuario. It was not until March 31, 2014, when Dr. Genuario informed her that her right knee injuries were caused by an acute injury at work, that Claimant knew she needed to report her injury to Employer.

28. Claimant testified regarding the questionnaire that she completed during her first appointment at Dr. Genuario's office on March 21, 2014. Claimant explained that in response to the question regarding when her problem started, she responded that her knee became swollen a month ago, and also put a question mark next to the question that asked if her injury was work related,

because she was not sure whether the mild swelling in the weeks leading up to March 19, 2014 was related to the sudden onset of severe right knee pain and swelling that she experienced on March 19, 2014 or not.

29. Claimant has been under work restrictions from Dr. Genuario since her first appointment with him on March 21, 2014, and that at her first appointment with Dr. Lugliani on April 2, 2014, Dr. Lugliani retroactively assigned work restrictions to Claimant that date back to her date of injury.

30. At the time of the hearing in this matter, Claimant had not worked for the Employer since March 20, 2014, and that she had not yet been released to return to work. Upon reporting her injury to the Employer, Employer told her that that they would not accommodate her work restrictions.

## CONCLUSIONS OF LAW

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

### *General Legal Principles*

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

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

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

***Compensability***

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. An industrial aggravation of a preexisting medical condition can result in a compensable injury as long as the aggravation is the proximate cause of the need for treatment. *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, when a claimant experiences symptoms while at work it is for the ALJ to determine whether subsequent need for treatment was caused by an industrial aggravation of a pre-existing condition or by the natural progression of the pre-existing condition. The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. The Claimant has proven that she sustained an injury to her right knee while in the course and scope of her employment. The Claimant had experienced only mild symptoms in her right knee in the past. After the March 19, 2014 work incident, the Claimant had significant symptoms that required treatment including surgery. The ALJ credits the opinions of Drs. Genuario and Lugliani over those of Dr. Larson. As the Claimant's surgeon, Dr. Genuario credibly explained that during the surgery he performed on Claimant's right knee, he visualized various structures in Claimant's knee that led him to conclude she suffered an acute injury. Even if Claimant did not suffer an acute injury, the credible and persuasive evidence reflects that Claimant suffered an aggravation or exacerbation of any pre-existing condition. Claimant was able to work full duty prior to March 19, 2014, and had only experienced mild symptoms in her knee before that day. After the squatting and twisting incident of March 19, 2014, Claimant required surgery. Dr. Larson's opinion that a claimant must suffer a permanent change in her symptoms or a structural change to the injured body part in order to establish a compensable aggravation of a pre-existing condition is inaccurate. Regardless, the Claimant did suffer a permanent change in her symptoms or a structural change to the injured body part in that after March 19, 2014, her symptoms became so severe that she could no longer work and she required medical treatment including surgery. The Claimant is, therefore, entitled to benefits under the Workers' Compensation Act for her right knee injury.

***Medical Benefits***

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

8. The Claimant has proven entitlement to medical treatment to cure and relieve her of the effects of her right knee injury, including treatment she has already received at Healthone with Dr. Lugliani, and with Dr. Genuario. The treatment Claimant thus far received is reasonable, necessary and related to her work injury. Per the stipulation of the parties, Dr. Lugliani and Dr. Genuario authorized treating providers although Dr. Genuario did not become an authorized provider until after Dr. Lugliani referred the Claimant back to him on April 2, 2014.

***Temporary Total Disability Benefits***

9. To prove entitlement to temporary total disability benefits, a claimant must prove the industrial injury caused a "disability." § 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements. The first is "medical incapacity," which is evidenced by loss or impairment of bodily function. The second is temporary loss of earning capacity, which is evidenced by the claimant's inability to perform his pre-injury full duty job. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). Whether the claimant has proved a disability is a question of fact for the ALJ. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo.App. 1997).

10. Claimant has not worked since March 21, 2014. Dr. Genuario and Dr. Lugliani imposed work restrictions dating back to the date of injury that prevented Claimant from performing her normal job duties as a customer service agent for the Employer. Claimant testified that Employer indicated they would not accommodate her restrictions. The Claimant has suffered a disability that prevented her from performing her normal job duties. Accordingly, the Claimant is entitled to TTD at the stipulated average weekly wage commencing on March 21, 2014 and ongoing until terminated pursuant to law.

## ORDER

1. Claimant suffered a compensable injury while working for Employer on March 19, 2014, and therefore, is entitled to benefits and compensation.

2. Respondents are responsible for the medical treatment Claimant received from Healthone Occupational Medicine and for the medical treatment Claimant received from Steadman Hawkins Clinic after Dr. Lugliani's April 2, 2014 referral, including Claimant's May 9, 2014 surgery.

3. Respondents shall pay for ongoing reasonable and necessary medical treatment needed to cure and relieve the effects of the March 19, 2014 injury.

4. Respondents shall pay Claimant temporary total disability benefits from March 21, 2014 and ongoing until terminable by law. The disability benefits will be calculated based on the average weekly wage of $985.37.

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

6. All other issues not determined herein are reserved for future determination.

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

DATED: February 2, 2015

DIGITAL SIGNATURE:

L. Broniak

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

## ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease to her left elbow arising out of and in the course of her employment with employer?

- The parties stipulated prior to the hearing that if claimant does prove a compensable occupational disease, respondents would be liable for the reasonable and necessary medical mileage pursuant to the Colorado Medical Fee schedule.

## FINDINGS OF FACT

1. Claimant is employed with employer as a student information systems specialist. Claimant testified her job duties include data entry involving a computer keyboard. Claimant testified at hearing that she generally works 40 hours per week, but has a busy period from August to November when she works 50 to 60 hours per week and is constantly keyboarding. Claimant testified that she is in charge of overseeing 15-20 data bases and keeping the information updated and that her work load increases at the beginning of each school year requiring her to be constantly keyboarding while at work.

2. Claimant testified at hearing that she has noticed 2 years ago during her busy period that symptoms develop in her left elbow. Claimant testified she reported the symptoms to her physician and received a cortisone shot in her left elbow. Claimant testified that the cortisone shot provided her with relief for approximately 6-7 months.

3. Claimant was seen by Dr. Salmen on January 12, 2012. Claimant was diagnosed with lateral epicondyliits of the left elbow. Claimant was provided with a cortisone shot and instructed to stretch hourly at work. Claimant testified her pain returned again in the fall with her increased hours and constant data entry. Claimant testified she reported her symptoms to her employer and her employer sent her back to the doctor.

4. According to the medical records, claimant returned to Dr. Salmen on December 21, 2012, after another busy season, and was again complaining of left lateral epicondylitis and extensor tendonosis symptoms. Dr. Salmen noted that claimant's symptoms were related to her intensive daily keyboard activity at work. Dr. Salmen again performed a cortisone injection and recommended physical therapy and work restrictions.

5. Claimant returned to Dr. Salmen on January 22, 2013 and reported that her symptoms had markedly improved. Dr. Salmen recommended claimant continue physical therapy. Claimant was re-evaluated by Dr. Salment on February 25, 2013 and was placed at MMI. Claimant testified at hearing that after the cortisone injection, her symptoms again receded for another 6-7 months.

6. Claimant testified that in August 2013, claimant had another extremely busy work month. Claimant testified her symptoms in her left elbow again returned and were far worse this time. Claimant testified she reported the injury to her employer and they again sent her back to the doctor.

7. Claimant was examined by Dr. Salmen on February 3, 2014. Dr. Salmen noted that this was claimant's third annual episode and opined that claimant's condition was related to her work with employer. Dr. Salmen again diagnosed claimant with left elbow epicondylitis and referred claimant to Dr. Golden for evaluation.

8. Claimant was examined by Dr. Golden on February 12, 2014. Dr. Golden noted claimant's ongoing complaints of left chronic tennis elbow that had been treated with 2 elbow injections and 2 courses of physical therapy. Dr. Golden noted that because this was claimant's third recurrence that she was recommending a different course of treatment. Dr. Golden recommended claimant undergo a PRP injection. Claimant testified at hearing that the PRP injection relieved her symptoms.

9. Claimant testified that in the Fall of 2013, her symptoms worsened, then got a bit better when she was off of work for 3 weeks. Claimant testified that her symptoms again returned after her three weeks off when she returned in December 2013.

10. Claimant testified her claim was then denied and she was not allowed to finish her physical therapy. Claimant testified she did not follow up with her doctor appointments because she advised by insurer that her claim was denied.

11. Respondents had Mr. Van Iderstine perform a job site analysis April 11, 2014. Mr. Van Iderstine issued a report dated May 19, 2014 and indicated claimant reported she typically worked from 7:30 a.m. until 5:30 p.m. form Monday through Thursday and 8:00 a.m. until 12:00 p.m. on Friday. Mr. Van Iderstine reported that claimant's workstation was redesigned approximately 2 years ago after insurer provided an occupational therapist to ergonomically reconstruct the work station. Mr. Van Iderstine reported that claimant typically spent 2/3 of her day keyboarding with the remaining time utilizing her mouse. The report also mentions tripad use by claimant. The ALJ finds that the reference to "tripad" use refers to a track pad claimant testified she used instead of a mouse.

12. Following the job site analysis, respondents had Dr. Sollender perform a physician advisory opinion on June 25, 2014. Dr. Sollender opined that the jobs demands analysis identified the presence of the only risk factor of computer work listed

as “7 hours of keyboard and tripad use.” Dr. Sollender noted this was an insufficient job site analysis.

13. Mr. Van Iderstine issued an addendum to the job analysis narrative on June 27, 2014 that indicated that claimant’s job duties require 7 hours of daily keyboarding and utilization of a tripad instead of using a mouse. Mr. Van Iderstine indicated that the specific breakdown was 4.7 hours keyboarding and 2.3 hours per day of tripad use.

14. Claimant testified that the job site analysis was not performed during her busy season and testified that she disagreed with some conclusions in the job site analysis. Claimant testified that she worked 10 your days during the fall and felt the amount of time on the keyboard was underestimated. The ALJ finds claimant’s testimony in this regard to be credible and persuasive.

15. Dr. Sollender issued another physician advisory opinion on July 9, 2014. Dr. Sollender reviewed the June 25, 2014 addendum and opined that the claimant’s job did not have the presence of any risk factor and therefore, claimant’s claims for injuries related to her occupation were unfounded.

16. Dr. Sollender subsequently performed an independent medical examination (“IME”) of claimant on October 28, 2014. Dr. Sollender issued a report in connection with his IME dated November 26, 2014. Claimant reported to Dr. Sollender during the IME that she works 10 hour days from August through November and during which all she does is “push and pull data on her computer”. Dr. Sollender noted that claimant reported she only does typing with her left hand and estimated that 95% of her work was performed on her computer. Dr. Sollender noted that in reviewing her records from her busy time from August 1, 2013 to November, there were numerous days with work hours of 10, 11 and up to 12 hours per day.

17. Dr. Sollender indicated in his report that he remained uncertain as to if claimant’s work was the cause of her condition because of discrepancies between claimant’s report versus the vocational expert report. Dr. Sollender noted that each would result in mutually different results. Dr. Sollender concluded that if you credited the vocational report, claimant’s condition was not caused by her work based on an analysis of the Colorado Medical Treatment Guidelines set forth by the Division of Workers’ Compensation. Dr. Sollender effectively concluded that if the vocational report is accurate, claimant’s time spent keyboarding is insufficient to cause her condition.

18. Dr. Sollender noted, however, that if you credited claimant’s report of her work activities as accurate, claimant would meet the exposure requirements to make her work a primary risk factor in causing her lateral epicondylitis. Dr. Sollender noted that this decision as to which report of work activities is accurate would be left up to a decision in the hearing involving the compensable nature of claimant’s condition.

19. The ALJ credits the testimony of claimant and determines that her report of her work activities during her busy period of August through November is an accurate description of her work with employer. The ALJ rejects the findings in the job site analysis as being less credible that claimant's testimony. The ALJ notes that the job site analysis was performed during a period of time in which claimant's work was not as busy. The ALJ further notes that Dr. Sollender indicated in his IME report that the issue of compensability in this case came down to which set of data is determined to be most accurate regarding claimant's work activities. In this regard, the ALJ finds claimant's description of her work activities to be more credible and persuasive that the Job Analysis Report.

20. The ALJ concludes that claimant has proven that it is more likely than not that her left lateral epicondylitis is a compensable occupational disease arising out of and in the course of her employment with employer. The ALJ credits the testimony of claimant regarding her work duties along with the opinions of Dr. Salmen, Dr. Golden and Dr. Sollender in coming to this conclusion.

21. The ALJ further credits claimant's testimony that her symptoms increase with her busy season each year as credible and persuasive. The ALJ notes that claimant's testimony in this regard is supported by the medical records, including the records from Dr. Salmen dated December 21, 2012 and February 25, 2013. The ALJ also credits claimant's testimony that her condition improved after taking three weeks off while her symptoms returned when she came back to work in December 2013 as credible evidence that her lateral epicondylitis is related to her work with employer.

22. Respondents shall pay for the medical mileage for the February 3, 2014 medical appointment with Dr. Salmen and the February 12, 2014 evaluation with Dr. Golden pursuant to the Colorado Medical Fee Schedule set forth by the Division of Workers' Compensation.

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

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

5. As found, claimant has proven by a preponderance of the evidence that she suffered an occupational disease arising out of and in the course of her employment as a result of her data entry and keyboarding. As found, the opinions expressed by Dr. Salmen and Dr. Sollender are credible and persuasive regarding the relatedness of claimant's left elbow epicondylitis to her work with employer. As found, claimant's testimony regarding her work duties is found to be more credible and persuasive than the Job Analysis Reports provided by Mr. Van Iderstine.

6. As found, pursuant to the stipulation of the parties, respondents shall pay for the reasonable and necessary medical mileage for the February 3, 2014 appointment with Dr. Salmen and the reasonable and necessary medical mileage for

the February 12, 2014 medical appointment with Dr. Golden pursuant to the Colorado Medical Fee Schedule.

**ORDER**

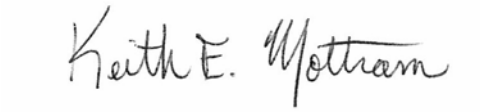
It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical mileage pursuant to the Colorado Medical Fee Schedule for the medical appointment with Dr. Salmen on February 3, 2014and Dr. Golden on February 12, 2014.

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

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

DATED: February 6, 2015



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

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**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 4-949-727-02**

## ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an injury on May 8, 2014 that was proximately caused by the performance of service arising out of and in the course of employment?

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of reasonable, necessary, and authorized medical benefits as a result of the alleged work injury.

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of temporary total disability benefits from May 9, 2014 and continuing.

## STIPULATION

The parties stipulated Claimant's average weekly wage was $281.80.

## PROCEDURAL ISSUES

Claimant requested a sequestration order. Fact witnesses for the employer, with the exception of an advisory witness, were excluded from the courtroom. Dr. D'Angelo, an expert witness called by Respondents, remained in the courtroom for the testimony of the fact witnesses.

Respondents took the evidentiary deposition of Carol Hulse, Business Manager for Employer. The transcript of Ms. Hulse's evidentiary deposition was received by the Court and admitted into evidence.

## FINDINGS OF FACT

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

### Braking Incident

1. Claimant has worked as a school bus driver for Employer since 2006.

2. Claimant alleges she injured her neck while driving her morning route on May 8, 2014. Claimant was stopped at Colfax. When she began to proceed slowly into the intersection, Claimant applied the bus's brakes to avoid a vehicle with the right-of-way. There was no collision. Claimant alleges the application of brakes caused her to have neck pain, headaches and left arm numbness.

3. Claimant described her stopping the bus as slamming on the brakes of the bus to avoid the vehicle on Colfax. Claimant testified she was looking to the right when

she slammed on the brakes; she felt like the braking caused her to go "forward and backwards." Claimant testified she was upset and wanted to make sure the passengers in the bus were okay. She radioed her manager and asked that she meet her at the bus.

4. Claimant testified she became nauseated, developed a headache and "a little ways down the line [her] neck started hurting." Claimant testified she was almost "in shock."

5. Claimant prepared a statement of what happened on May 8, 2014 for Employer. Claimant reported she "had to put the brakes on very hard to keep from having an accident." Claimant described the stop was hard enough to "[throw] me forward and backwards."

6. Ms. Overholser, a paraprofessional who helped a special needs student on the bus, testified the bus was stopped at the stop sign. Claimant began pulling away from the stop sign when another vehicle was approaching the intersection. Claimant "pressed on the brakes." The vehicle went by and the bus proceeded through the intersection.

7. Ms. Overholser testified Claimant's pressing on the brakes created a "little bit of a jolt, there was motion, but nothing too strong or hard." Ms. Overholser did not believe anyone on the bus sustained an injury when Claimant stopped the bus at the Colfax intersection.

8. Claimant testified that the special needs student went to the hospital later in the day. However, Ms. Overholser checked on the student and did not believe she sustained any injury as a result of Claimant applying the brakes.

9. Employer maintains three cameras on the bus Claimant drove. Video from the bus shows the interior of the bus from three views: Claimant in her seat as she drives, the front section of the bus, and the rear of the bus. Respondents' F, BN 175A is the 59 minute copy of the video from the bus on the morning of May 8, 2014. Claimant testified the actions around the 51:27 mark show the stop that allegedly caused her cervical spine injury.

10. The video depicts absolutely no movement in Claimant's upper body, much less any whiplash type of movement, when she applies the brakes. It does not even appear that the braking was sufficient to cause Claimant's shoulder restraint to tighten. While the video does show students sliding somewhat forward in their seats, no one on the bus appeared to sustain any injury. The video does not show Claimant being thrown forward and backwards in her seat. Rather, it depicts the bus accelerating slowly from the stop and then Claimant applying the brakes with no resulting movement in her body. The video shows no movement of Claimant's cervical spine. Claimant's neck remains rigid.

11. Braking and forces associated with braking appear on the video. But the braking is not violent or severe. Claimant brakes, then immediately looks left and right with no apparent restricted range of motion. She looks up with no apparent restricted range of motion and asks if everyone is okay. She proceeds with the route. She opens and closes the door. She continues to look up at her mirror and to talk to occupants of

the bus. Claimant does not demonstrate any behaviors that would indicate she sustained a neck injury. The video depicts no sign that Claimant is in pain. There is no sign of a headache or nausea. At 57:41, Claimant places her left hand on the left side of her neck, but she does not rub or massage her neck, and she drops her hand seconds later. She continues driving and moving her head freely left, right, up and down.

12. Although Claimant does not move in the video, she points to the two students riding in the front seat of the bus as evidence of the force caused by Claimant's braking. The students appear to be sleeping in the video with their feet up on the seats. As Claimant applies the brakes, they slide forward on their seats and wake up. They do not appear to be injured in any way and they are not thrown off of their seats.

13. Video of Claimant's alleged injury is wholly inconsistent with her statements to Employer and treatment providers that she was thrown forward and backward.

14. Claimant's description of what happened to her on May 8, 2014 on the bus is not credible or persuasive when compared to the video of the alleged injury and the testimony of Ms. Overholser, and Dr. D'Angelo below.

15. Respondents denied liability for the alleged injury. Claimant has preexisting degeneration in her cervical spine. Her cervical spine was treated regularly, along with her back, by a chiropractor. Diagnostic studies are consistent with pain from degenerative disc disease, not any acute injury. Video of the alleged injury does not support Claimant's allegation of injury.

16. David Spiller, Employer's information technology director, and Lora Blake, the transportation director, testified the video of the alleged injury was taken from the bus after Claimant reported she was hurt. The video was copied and the original was placed in a safe. The video is contained on a removable hard drive. Mr. Spiller testified there are no gaps on the video.

17. Ms. Blake, Claimant's supervisor, testified Claimant called her on the radio on May 8, 2014. Claimant indicated she had to step on the brakes hard and wanted Ms. Blake to meet her to check on the students. Claimant had asked if all of the kids were okay and they stated they were. When the bus reached the school, Ms. Blake and Claimant talked to the students and they all said they were okay.

18. Claimant came into Ms. Blake's office after finishing unloading the students. Ms. Blake asked if she needed medical treatment. Claimant did not want to travel into Denver. Ms. Blake offered to take her to a clinic in Strasburg. Claimant initially refused treatment but went back into the office a few minutes later and said she wanted treatment because her husband said she should be checked out. Ms. Blake suggested if the stop were severe enough to cause her to be treated; Claimant should call the mother of the special needs child on the bus. Claimant called the mother while Ms. Blake called Ms. Hulse, the business manager for the school, to arrange Claimant's treatment.

19. Ms. Blake reviewed the video with Mr. Spiller after the video was removed

from the bus.

20. Carol Hulse, business manager for the school district, testified via evidentiary deposition on January 15, 2015 that she took a history from Claimant on May 9, 2014. Claimant told Ms. Hulse "she had to slam on the brakes to avoid hitting a car . . . [*The] force from braking the bus was so hard that it had thrown her into the steering wheel, and then back into the back of the seat*." Video from the alleged injury does not show Claimant being thrown into the steering wheel and then back into the seat. Claimant's statements are not consistent with what is seen on video.

**Medical Treatment**

21. Employer provided Claimant with immediate medical attention.

22. Ms. Hulse's assistant, Teri Boon, took Claimant to Plains Medical Center on the morning of May 8, 2014.

23. Claimant told Dr. DeBuck at Plains Medical Center that braking caused her head to move forward and backwards. "Driving bus this morning had to apply brakes really hard. Went forward and back hard in seat." "Patient presents for neck pain following slamming on her school bus brakes very hard, flying forward and then back very hard." In the narrative report from Plains Medical Center, Claimant reported: "She was at a stop sign and went to accelerate but saw a car coming and had to slam on the brakes and her head went forward and backwards." The provider at Plains Medical Center described the injury as a "whiplash injury." On a July 22, 2014, medical report, Claimant's alleged injury was described as a "whiplash." On August 5, 2014, Claimant's description of injury was "slammed brakes on school bus – whiplash."

24. Claimant reported to Dr. Knight at Denver-Vail Orthopedics that she had to suddenly apply the brakes very hard. Dr. Knight described the alleged injury as a "Whiplash."

25. Claimant also reported a whiplash injury to her physical therapist at Pro Active physical therapy. "Patient slammed brakes hard, felt like whiplash." Claimant's description of the injury led her physical therapist to describe Claimant as presenting with "whiplash like symptoms."

26. Claimant's description of a whiplash injury led her medical providers to believe Claimant sustained a whiplash – from her head violently moving forward and back. They treated her for whiplash. Kathleen D'Angelo, M.D., Respondents' IME, credibly testified Claimant's head movement on May 8, 2014 is inconsistent with whiplash. Dr. D'Angelo credibly and persuasively testified the video of the alleged injury is inconsistent with the development of any work related condition. Claimant has preexisting osteoarthritis. She treated for this osteoarthritis for years. While she denies treatment for the neck after 2002, the records from her chiropractor demonstrate Claimant was in active treatment for her cervical spine through at least August 2011.

27. Contrary to Claimant's testimony that her neck pain developed "a little ways down the line," she told Plains Medical Center that she had "immediate pain in the neck." She also told Dr. D'Angelo she had immediate neck pain after the stop.

## Respondent's Independent Medical Examination

28. On August 18, 2014 Claimant was examined by Dr. D'Angelo at Respondents request for an independent medical evaluation. Dr. D'Angelo testified at hearing as an expert in occupational and internal medicine.

29. Dr. D'Angelo asked Claimant to describe the mechanism of alleged injury. Claimant reported, "I had to put the brakes on very hard to stop, so we would not get hit. The seat belt tightened across my shoulder [and] it threw students out of their seats. I felt like I was moved back and forth." "I saw just out of the corner of my eye . . . I saw a blue van so I slammed, I . . . I, mean slammed the brakes on."

30. Dr. D'Angelo reviewed the video of the alleged injury and compared it with Claimant's description of the alleged injury. Whiplash, according to Dr. D'Angelo, "involves the forceful forward and then back motion of the neck." What Dr. D'Angelo saw on the video was not whiplash. "I didn't see movement of the head," Dr. D'Angelo testified.

31. Dr. D'Angelo stated she could not correlate the complaints Claimant associates with driving the bus on May 8, 2014 with what was seen in the video.

32. According to Dr. D'Angelo, Claimant has degenerative spine disease. An MRI shows Claimant has disc bulges, sclerosis and spondylosis in her cervical spine which correlate with Claimant's prior examinations, including chiropractic records and Department of Transportation exams.

33. At almost every visit prior to August 2011, Claimant's chiropractor indicated Claimant "had tenderness to her cervical spine," or had some procedure, treatment plan, or complaint associated with her cervical spine.

34. Dr. D'Angelo noted Claimant has osteoarthritis throughout her spine.

35. Dr. D'Angelo reviewed the mechanism of injury as described by Claimant and compared it with what she saw on video.

> Also, of interest, was the discrepancy between the patient's account of the severity of the incident and the video recording I was able to view of the patient during the time of the alleged incident . . . The incident was very brief . . . Of significance, [Claimant] did not appear to be jostled at all during the actual incident and for the remainder of the video was moving her neck and head normally and without apparent discomfort except for one brief moment when [Claimant] turned to the left to look at traffic after which she reached for her left neck area. Following this, she continued to drive, turn her head, and look into the mirror to view the passengers, to whom she was talking."

36. Dr. D'Angelo continued: "At no time during the video did [Claimant] or any of the passengers appear to be in distress. Following the incident, the children and the paraprofessionals were seen laughing and smiling . . . . .[Claimant] does not appear to be in any discomfort except for that one brief moment during which she reached for her neck. . . [Claimant] reported that she had to slam her brakes on the school bus very hard, playing forward and then backwards very hard, and had resultant neck pain. As

mentioned previously, this was not appreciated on video."

37. As part of her causation analysis, Dr. D'Angelo next determined the diagnosis she would apply to Claimant's complaints and findings. Dr. D'Angelo determined Claimant has osteoarthritis in the cervical and thoracic spine. Claimant has had headaches and left arm numbness for many years. Claimant had no work related diagnosis.

38. The final step of Dr. D'Angelo's causation analysis was to determine whether there was any correlation between Claimant's diagnosis and the mechanism of injury. Dr. D'Angelo testified, "Clearly in this video I do not see a mechanism of injury."

39. Dr. D'Angelo opined within medical probability that Claimant "did not suffer a cervical strain or cervical neck injury as a result of applying her brakes abruptly on May 8, 2014." Dr. D'Angelo continued: "In viewing video documentation of the incident, [Claimant] was not jostled or moved in anyway. Furthermore, the motion of the passengers suggests this was not a severe event. The passengers did not appear to be in any distress during or after the incident." Dr. D'Angelo could not see any indication why any person on the bus would have been injured as a result of the stop.

40. Claimant's osteoarthritis is not linked to her occupation. Claimant's degenerative changes are related to osteoarthritis. Claimant had "identical complaints following her 1990 fall at work."

41. Claimant's osteoarthritis was symptomatic prior to the alleged injury on May 8, 2014. Claimant's report of neck pain, headaches and left arm numbness predate the alleged injury.

42. Dr. D'Angelo asked Claimant about her prior history of neck problems. Claimant initially told Dr. D'Angelo that treatment she received from her chiropractor prior to the alleged injury was for her back, not her neck. Review of the records show the treatment by Cooper Chiropractic clearly included treatment of the neck and complaints of headaches with left arm numbness.

43. After Dr. D'Angelo showed Claimant the prior records documenting neck, left arm, and headache complaints prior to the alleged May 8, 2014 injury, Claimant conceded she did have neck problems before, but they went away in after 1992. Dr. D'Angelo opined the records do not support Claimant's contention that the neck problems went away in 1992. In fact, the last chiropractic record from August 19, 2011 showed Claimant was treated for neck pain.

44. Claimant admitted to Dr. D'Angelo that her left arm numbness has been a problem since she fell in 1990. Claimant reports a neck injury in 1990 when a chair rolled out from underneath her. Also, prior to 1990, Claimant reported to Dr. D'Angelo, she had a motor vehicle accident where she experienced whiplash.

45. Dr. D'Angelo noted Claimant "underwent a decade of treatment for neck pain following a minor injury in 1990."

46. After review of the records with Claimant, Dr. D'Angelo noted in her report that Claimant "insisted" her treatment with the chiropractor was limited to the thoracic and lumbar spine. This is clearly inconsistent with the records from Cooper

Chiropractic.

47. Dr. D'Angelo's examination of Claimant demonstrated Claimant had normal symmetrical musculature of the cervical spine. There was no muscle spasm. Palpation of the cervical spine revealed no tenderness. Range of motion for the cervical spine was almost full, but definitely functional without apparent discomfort. Claimant's Spurling's test was negative. Neurologically, Claimant had normal muscle strength. Claimant had an "essentially normal examination today except for some subjective [complaints of pain] with palpation over the medial left parascapular muscles." Neurologically the patient was intact at the time of her initial evaluations and was intact in the examination conducted by Dr. D'Angelo.

48. Dr. D'Angelo's description of the video is consistent with Ms. Overholser's account of what happened that day on the bus and what the ALJ observed on the video.

49. Dr. D'Angelo considered whether Claimant's movement on video could have caused Claimant to have neck problems. She persuasively and credibly concluded the alleged mechanism of injury is inconsistent with a work related diagnosis. Dr. D'Angelo's opinion that the "described mechanism of injury did not cause the patient's present symptoms" is consistent with the totality of the evidence. The opinion is persuasive and credible. Treating provider opinions regarding causality are faulty because they are based on Claimant's reports of whiplash, which are inconsistent with the video of Claimant on the bus when she was allegedly injured.

50. The lay witnesses who testified for Respondents regarding the process and safeguards taken by Employer following the alleged injury, including securing the video that Claimant admits shows her on the alleged date of injury, are credible and persuasive. Ms. Overholser's testimony is consistent with the video showing what happened on the bus on the morning of May 8, 2014. Ms. Blake, Mr. Spiller, Ms. Peek, Ms. Hulse, and Ms. Boon all credibly testified to the events occurring after Claimant alleged she was injured.

51. Claimant's testimony is not credible. She repeatedly reported to Employer and her treatment providers movement of her body that is inconsistent with what is seen on video. Her history of prior complaints is inconsistent with the medical records.

52. The Judge finds it more likely true than not that Claimant's allegation of an injury on May 8, 2014, while braking her school bus, is not credible given the above findings of fact. Claimant's allegation of an injury while braking her school bus is less likely true than not given the credible and persuasive evidence that Claimant's mechanism of injury would not cause her cervical and extremity complaints and headaches.

53. Claimant bears the burden of proving by a preponderance of the evidence that she sustained a compensable injury on May 8, 2014. The ALJ finds that Claimant did not meet this burden.

## CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found above, Claimant is not credible. Dr. D'Angelo's opinions on causation are more credible than those of Claimant's treatment providers because Dr. D'Angelo viewed the videotape and diagnosed Claimant based on what objectively occurred. Claimant's treatment providers based their diagnoses on her misrepresentations of having suffered a whiplash injury.

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 claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1) (b) & (c), C.R.S. As found, Claimant did not establish she suffered any injury when she applied the brakes as described above.

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 judge. *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 the burden of proving an injury that was proximately caused by the performance of service arising out of and in the course of her employment with the employer on May 8, 2014. As found, Claimant failed to meet this burden of proof.

In light of this determination the ALJ need not reach the other issues raised by the parties as they are now moot.

## ORDER

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

1. The claim for workers' compensation benefits in WC 4-949-727-02 is denied and dismissed.

DATED: February 24, 2015

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

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

## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right knee injury on May 13, 2014 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 injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period May 14, 2014 through June 10, 2014.

## STIPULATIONS

**1.** The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $915.00.

2. If the claim is compensable Claimant is entitled to receive TPD benefits for the period May 14, 2014 through June 10, 2014. However, the parties reserved the right to litigate specific amounts owed to Claimant during the period if they are unable to reach an agreement.

## FINDINGS OF FACT

1. Claimant works for Employer as a Crane Technician. His job duties involve general maintenance and repair of large, hydraulic crane mechanisms.

2. On May 13, 2014 Claimant was repairing the hydraulic suspension struts on a crane. He had been working on the same piece of equipment for approximately one week. Claimant punched in to work that morning at 6:57 a.m. and began working on the crane. He repeatedly crawled underneath the equipment to align the bolts that attach the struts. Claimant was kneeling and standing during the repair. The underbody of the crane was elevated about 30 inches off the ground during the process.

3. While Claimant was down on both knees he tried to stand up and his right knee "popped." As he attempted to "walk it off" his knee continued popping and grinding. Claimant reported his injury to Service Manager Troy Nevergall. Employer's Safety Coordinator then directed Claimant to Aviation and Occupational Medicine for medical treatment.

4. Claimant visited Michael Ladwig, M.D. on the day of the incident for an examination. Dr. Ladwig recorded that Claimant reported "a right knee injury secondary to getting up from a kneeling position. The patient states he was kneeling down and when he stood up he felt a pop in his knee." Dr. Ladwig noted that Claimant continued to experience grinding and popping in his right knee. X-rays revealed no acute findings in Claimant's right knee. He diagnosed Claimant with a right knee strain and determined that there was a "greater than a 51% probability that this is a work-related injury or condition." Dr. Ladwig assigned work restrictions of no lifting or repetitive lifting in excess of 10 pounds, and no crawling, kneeling, squatting or climbing.

5. On May 19, 2014 Claimant underwent a right knee MRI. The MRI revealed multiple ligament strains and a mostly horizontal tear of the medial meniscus.

6. On May 28, 2014 Claimant visited Orthopedic Surgeon Mark S. Failinger, M.D. for an examination. Dr. Failinger diagnosed Claimant with a "right knee, complex tear of the medial meniscus, posterior horn." Based on Claimant's presentation, pain symptoms and MRI findings, Dr. Failinger recommended right knee surgery.

7. On June 4, 2014 Albert Hattem, M.D. performed a physician advisor review. He determined that Claimant merely "stood up" from a seated position and injured his right knee. Dr. Hattem explained that "standing up" is a "ubiquitous activity not unique to the workplace." Moreover, he commented that the mere act of "standing up" would not be expected to cause a meniscus tear. Accordingly, Dr. Hattem concluded that Claimant did not suffer a work-related injury to his right knee.

8. Claimant worked light duty because of his work restrictions until June 10, 2014. At his June 10, 2014 examination with Dr. Ladwig Claimant sought a full duty release because Employer was running out of light duty positions around the shop.

9. On August 26, 2014 Orthopedic Surgeon James P. Lindberg performed an independent medical examination of Claimant and testified at the hearing in this matter. He reviewed the medical records, including actual MRI films, and conducted a physical examination. Claimant reported right knee pain as a result of the May 13, 2014 work incident. Dr. Lindberg commented that he agreed with Dr. Hattem that standing up and feeling a right knee pop would not likely have caused Claimant's meniscus tear.

10. Dr. Lindberg testified that the specific tear sustained by Claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather than being torn around the rim (a vertical tear) Claimant exhibited a horizontal, internal tear, also known as a "shear tear." Dr. Lindberg drew an illustration that was admitted into evidence in order to explain the nature and uniqueness of the tear.

11. The meniscus, which is a c-shaped cartilage between the femur and the tibia, usually tears vertically if a traumatic or acute injury occurs. Claimant had a shear or horizontal tear that was confirmed on the MRI. Dr. Lindberg explained that the form of tear is significant because, as a general rule, a shear tear is "chronic" not acute. The symptoms from a shear tear manifest as popping and grinding when the patient is using

the knee for walking, standing, kneeling or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. He therefore concluded that Claimant's work activities on May 13, 2014 did not cause his right knee symptoms.

12. Dr. Lindberg commented that the MRI also revealed a mild collateral ligament strain, a mild medial collateral ligament strain, a mild posterior lateral corner strain/sprain and a mild strain of the popliteus. The popliteus is located in the posterior, lateral corner of the knee. Dr. Lindberg remarked that there was a 0% chance that the preceding types of strains could be caused by standing from a kneeling position.

13. Dr. Lindberg explained that the most likely scenario for Claimant's right knee injury required a significant lateral force on the knee or a major stress from lateral to medial that would have elicited significant acute pain. He testified that Claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. There is simply no mechanism of injury described in the medical records that would account for Claimant's injuries. Dr. Lindberg noted that examples of the types of lateral forces that would be necessary to cause Claimant's injuries would be a football-type event when a patient is hit on the side of the knee or a skiing injury in which the skier falls and the bindings do not release. Simple twisting would not cause the injuries revealed on Claimant's MRI. Dr. Lindberg thus concluded that there is substantial evidence that a force more significant than merely squatting and kneeling caused the medial collateral ligament strains and other strains identified on the MRI. Finally, he determined that there is no evidence that Claimant sustained an acute aggravation of the meniscus tear or any other condition in the right knee that caused or accelerated his need for medical treatment.

14. Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis. He explained that, as a treating surgeon, Dr. Failinger's job is to care for the patient, repair the injury and advocate for the patient regardless of how the injury occurred. In contrast, the job of an independent medical examiner is to review the record, perform a physical examination of the patient and form an unbiased medical opinion regarding the diagnoses, mechanism of injury and causation.

15. Dr. Lindberg testified extensively regarding the various histories provided by Claimant as to the mechanism of injury. Nothing in Dr. Ladwig's reports mentions Claimant crawling around under a crane or squatting. Dr. Ladwig's report simply stated that Claimant stood up from kneeling and felt a pop. Dr. Failinger's report noted that Claimant "stepped up" and had pain and discomfort. Claimant then told Dr. Lindberg that he was crawling around under a crane, kneeled down, felt a pop and then stood up. The version of events as sworn by Claimant in his discovery responses was also different. Claimant's comments that he was repeatedly kneeling and standing up prior to the work accident on May 13, 2014 did not change Dr. Lindberg's opinions regarding causation. Finally, although Dr. Lindberg reviewed medical reports at the time of the hearing that he had not seen before, he explained that the additional information did not change his causation opinion.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable right knee injury on May 13, 2014 during the course and scope of his employment with Employer. Claimant explained that on May 13, 2014 he was repairing the hydraulic suspension struts on a crane. He was down on both knees, tried to stand up and his right knee "popped." As he attempted to "walk it off" his knee continued popping and grinding. X-rays on the day of the incident revealed no acute findings in Claimant's right knee. Dr. Ladwig diagnosed Claimant with a right knee strain and determined that there was a "greater than a 51% probability that this is a work-related injury or condition." Orthopedic Surgeon Dr. Failinger subsequently diagnosed Claimant with a "right knee, complex tear of the medial meniscus, posterior horn." Based on Claimant's presentation, pain symptoms and MRI findings, Dr. Failinger recommended right knee surgery.

17. In contrast, Dr. Lindberg persuasively determined that Claimant's right knee condition was not caused by his work activities for Employer on May 13, 2014. Dr. Lindberg considered the various histories provided by Claimant as to the mechanism of injury. He explained that the specific tear sustained by Claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather than being torn around the rim (a vertical tear) Claimant has a horizontal, internal tear, also known as a "shear tear." Dr. Lindberg detailed that the form of tear is significant because, as a general rule, a shear tear is "chronic" not acute. The symptoms from a shear tear manifest as popping and grinding when the patient is using the knee for walking, standing, kneeling or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. Moreover, Dr. Lindberg remarked that there was a 0% chance that Claimant's right knee strains revealed on the MRI were caused by standing from a kneeling position. Furthermore, Dr. Lindberg testified that Claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. There was simply no mechanism of injury described in the medical records that accounted for Claimant's injuries. Dr. Lindberg noted that examples of the types of lateral forces necessary to cause Claimant's injuries would be a football-type event when a patient is hit on the side of the knee or a skiing injury in which the skier falls and the bindings do not release. Simple twisting would not cause the injuries revealed on Claimant's MRI. Dr. Lindberg thus concluded that there is substantial evidence that a force more significant than merely squatting and kneeling caused the medial collateral ligament strains and other strains identified on the MRI. Dr. Lindberg summarized that there is no evidence that Claimant sustained an acute aggravation of the meniscus tear or any other condition in the right knee that caused or accelerated his need for medical treatment. Finally, Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis. The temporal proximity of Claimant's symptoms at work does not establish a causal connection to his work activities. Claimant has thus failed to establish that his work activities on May 13, 2014 aggravated, accelerated or combined with a pre-existing condition to produce a need for medical treatment.

## CONCLUSIONS OF LAW

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18,

2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable right knee injury on May 13, 2014 during the course and scope of his employment with Employer. Claimant explained that on May 13, 2014 he was repairing the hydraulic suspension struts on a crane. He was down on both knees, tried to stand up and his right knee "popped." As he attempted to "walk it off" his knee continued popping and grinding. X-rays on the day of the incident revealed no acute findings in Claimant's right knee. Dr. Ladwig diagnosed Claimant with a right knee strain and determined that there was a "greater than a 51% probability that this is a work-related injury or condition." Orthopedic Surgeon Dr. Failinger subsequently diagnosed Claimant with a "right knee, complex tear of the medial meniscus, posterior horn." Based on Claimant's presentation, pain symptoms and MRI findings, Dr. Failinger recommended right knee surgery.

8. As found, in contrast, Dr. Lindberg persuasively determined that Claimant's right knee condition was not caused by his work activities for Employer on May 13, 2014. Dr. Lindberg considered the various histories provided by Claimant as to the mechanism of injury. He explained that the specific tear sustained by Claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather than being torn around the rim (a vertical tear) Claimant has a horizontal, internal tear, also known as a "shear tear." Dr. Lindberg detailed that the form of tear is significant because, as a general rule, a shear tear is "chronic" not acute. The symptoms from a shear tear manifest as popping and grinding when the patient is using the knee for walking, standing, kneeling or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. Moreover, Dr. Lindberg remarked that there was a 0% chance that Claimant's right knee strains revealed on the MRI were caused by standing from a kneeling position. Furthermore, Dr. Lindberg testified that Claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. There was simply no mechanism of injury described in the medical records that accounted for Claimant's injuries. Dr. Lindberg noted that examples of the types of lateral forces necessary to cause Claimant's injuries would be a football-type event when a patient is hit on the side of the knee or a skiing injury in which the skier falls and the bindings do not release. Simple twisting would not cause the injuries revealed on Claimant's MRI. Dr. Lindberg thus concluded that there is substantial evidence that a force more significant than merely squatting and kneeling caused the medial collateral ligament strains and other strains identified on the MRI. Dr. Lindberg summarized that there is no evidence that Claimant sustained an acute aggravation of the meniscus tear

or any other condition in the right knee that caused or accelerated his need for medical treatment. Finally, Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis. The temporal proximity of Claimant's symptoms at work does not establish a causal connection to his work activities. Claimant has thus failed to establish that his work activities on May 13, 2014 aggravated, accelerated or combined with a pre-existing condition to produce a need for medical treatment.

## ORDER

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

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: February 9, 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 to be determined by this decision are the following:

1. Whether the claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment duties for the respondent-employer on May 15, 2014;

2. If so, whether the claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits from June 11 until June 20, 2014, and July 28 until August 15, 2014, when she was released to full duty without restrictions.

3. If so, whether the claimant, has proven that the medical treatment received from and provided by C.C.O.M., Colorado Sport and Spine Center, and the Penrose Imaging MRI scan of June 22, 2014, is causally related to this claim's injury and is reasonable and necessary to treat this claim's injury.

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

## FINDINGS OF FACT

1. The claimant was a full time residence associate hired by the respondent-employer on July 16, 2013.

2. On May 15, 2014 the claimant was with a resident at the respondent-employer's facility, while the resident was in her bathroom.

3. The resident was sitting on her toilet. When the claimant turned to reach for a piece of toilet tissue she experienced pain in her lower back. This pain was very brief, lasting less than a second. It then disappeared.

4. The claimant continued to work her normal job tasks. The claimant was not lifting anything at the time this pain arose and immediately disappeared. She was not touching, lifting, or assisting the resident. She was not in an awkward position, was

not bending, was not stooping, and was not doing anything other than simply reaching for the piece of toilet tissue.

5. The claimant said she had no symptoms while continuing to work after this event. Approximately 5 minutes afterwards the claimant was standing still at the front door at the facility entering a code to open a door to allow a person to exit the facility. The claimant's left leg suddenly went out, and she went down to her knee. She did not injure herself while going down to her knee. She was not walking, twisting, shifting, or doing anything other than standing at the keypad when this second alleged incident occurred. The claimant reported this claim's injury to the respondent-employer after the incident at the door occurred, and completed paperwork to report the claim to the respondent-employer.

6. Eric Ridings, M.D. documented in his independent medical examination (IME) report, and testified at hearing, that the claimant received no relief with the exhaustive conservative treatment she was provided at through C.C.O.M. While the claimant alleged the pool therapy had been helpful, Dr. Ridings explained the alleged improvement was, "[B]arely perceptible . . . ." Dr. Ridings opined that this shows there is not an anatomic, identifiable injury or diagnosis.

7. The claimant's physical exam revealed non-anatomic findings, such as nondermatomal distribution of sensation, giveway weakness, invalid straight leg raising testing results, normal muscle tone despite pain complaints, range of motion differing substantially between formal testing and when tested while seated, severely self-limited and invalid range of motion of the lumbar spine, and pain to only light palpation and brushing of the skin. Other than subjective pain behaviors, claimant's physical examination was, "[B]enign."

8. Dr. Ridings found the claimant "[D]oes not describe any activity at the time of onset of symptoms that within a reasonable degree of medical probability would cause any injury."

9. Dr. Ridings opined that the slight bending to get the piece of toilet tissue would not stress the low back, and is an activity preformed numerous times daily. The slight motion would not have caused any injury to claimant's low back anatomy. The claimant's report of pain while standing still is also not injurious and could not cause any actual injury to her lower back. Again, he opined this is an idiopathic activity and did not injure claimant.

10. The claimant's history, Dr. Ridings wrote, "[I]s not consistent with a disc injury, or even a muscle strain, neither of which would cause a sharp pain lasting less than a second." The claimant's MRI showed no abnormalities or injury. Dr. Ridings wrote, and testified at hearing, "In my opinion within a reasonable degree of medical probability, the patient's symptoms are most likely related to psychological factors, particularly stress, leading to somatization."

11. The claimant's allegation that all her pain disappeared, but only temporarily, with trigger point injections supports this conclusion Dr. Ridings explained, and showed there is no anatomic basis for claimant's symptoms or any injury. Dr. Ridings opined that the claimant has no injury from her work duties and activities on May 15, 2014, as alleged in this claim.

12. Dr. Timothy Hall conducted an IME of the claimant and produced a reort dated November 14, 2104 in which he opined that the claimant's injury was work-related.

13. The ALJ finds that Dr. Ridings' opinions are credible, and more persuasive than medical opinions to the contrary.

14. The ALJ finds that the claimant has failed to establish that it is more likely than not that on May 15, 2014 she suffered an injury 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; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. 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) ("Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

5. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

6. 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).

7. The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an, "Unexpected, unusual, or undesigned occurrence." § 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the "accident" results in a compensable "injury." *Romine v. Air Wisconsin Airlines*, W. C. No. 4-609-531 (October 12, 2006)

8. 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).

9. To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. 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).

10. 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."

11. 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).

12. The ALJ concludes that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

13. The ALJ concludes, as found above, that the weight of the lay and medical evidence establishes that the claimant has failed to establish 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.

## 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: February 6, 2015

/s/ original signed by:

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

## ISSUES

The issues presented for determination are whether the Claimant is entitled to temporary total disability benefits from June 28, 2014 ongoing; and whether Claimant was responsible for the termination of his employment pursuant to § 8-42-103 and/or § 8-42-105, C.R.S.

## STIPULATIONS

The parties stipulated that Claimant's wage at the time of his termination was $622.00 per week. The parties reserved the issue of any change to Claimant's average weekly wage for future determination.

The parties also stipulated that Claimant had a right to designate his own physician pursuant to Rule 8, and the parties agreed to Dr. Greg Reichhardt as the new authorized treating physician.

## FINDINGS OF FACT

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

1. Claimant worked for the Employer for approximately five years. He became a shipping supervisor sometime in 2010.

2. Claimant's job duties involved shipping windows and doors. He coordinated shipping and delivery with customers, warehouse workers and transportation companies. He also packaged the products in preparation for shipping.

3. Claimant's job required heavy lifting up to approximately 120 pounds on his own and at times, heavier objects with the assistance of other employees.

4. On May 1, 2014, Claimant sustained an admitted injury to his back. As a result of his injury, the authorized treating physician, Dr. Terrell Webb, assigned a 30-pound lifting restriction, no climbing, and no kneeling/squatting.

5. Claimant returned to work and Employer provided modified duty.

6. Claimant did not miss any work as a result of his injury.

7. Claimant testified that after returning to work, his supervisor, Tom Hassell frequently asked him to perform tasks in excess of his restrictions, including lifting items that weighed more than 30 pounds and raising items above his head.

8. Claimant also testified that Hassell consistently criticized Claimant's job performance after returning to modified duty.

9. Hassell is Employer's production and operations manager and was Claimant's direct supervisor. Hassell testified that Employer was able to accommodate Claimant's restrictions, and that only part of Claimant's job duties involved lifting over 30 pounds, kneeling and/or squatting. Hassell testified that other employees pitched in to perform those tasks Claimant was unable to perform himself.

10. Hassell denied ever asking Claimant to perform tasks that exceeded his restrictions and denied constant criticism of Claimant. Rather, Hassell testified that he would ask Claimant to return to work only when observing Claimant taking unauthorized breaks or surfing the internet while not on break.

11. Hassell testified that Claimant never complained to him that he was being made to perform tasks exceeding his restrictions nor did any other employee complain to him about having to perform Claimant's job duties.

12. Hassell testified that it did not cause Employer any problems or hardship to allow Claimant to work modified duty.

13. Doug Wichlacz is Employer's general manager and oversees all Employer operations. Wichlacz observed Claimant working modified duty numerous times.

14. Wichlacz frequently reminded Claimant to work within his restrictions. Claimant never complained to Wichlacz that he was made to perform tasks in excess of his restrictions.

15. Wichlacz testified that it did not cause Employer any problems or hardship to allow Claimant to work modified duty.

16. In early June, Employer performed reviews for all employees, including Claimant.

17. Claimant's review occurred on June 6, 2014, after he had returned to work on modified duty.

18. Wichlacz and Hassell performed Claimant's review which was generally positive. Wichlacz specifically noted improvement in Claimant's attitude and ability to adjust to situations where Claimant felt he had been wronged.

19. Claimant's comments on the Employee Performance Evaluation form were, "Getting help for tasks; talked about scheduling. Will work on." Wichlacz recalled that he likely had a discussion with Claimant regarding getting Claimant more help.

20. At approximately the same time, Employer decided to give certain employees pay raises, including Claimant. The pay raises were scheduled to go into effect on June 23, 2014.

21. Wichlacz and Hassell reviewed each employee to determine whether each employee would receive a pay increase, and if so, the amount. After making the final determination, they would meet with the employee individually to discuss the increase.

22. On June 20, 2014, Hassell sent Employer's payroll manager, Cindy Serafin, an email with the final increase amounts for all employees receiving pay increases. Claimant's increase was included in this email, and went into effect on June 23, 2014.

23. Claimant was on vacation on June 23 and June 24, 2014. As a result, Hassell and Wichlacz were not able to meet with him prior to Friday, June 27, 2014.

24. Wichlacz and Hassell both testified that they intended to meet with Claimant to discuss his pay increase, but were unable to do so due to Claimant's vacation and the press of business.

25. Hassell did not discuss pay increases with any employee, including the Claimant, prior to June 23, 2014.

26. Claimant testified that both Hassell and Wichlacz told him that he would not be receiving a pay raise.

27. On June 27, 2014, Claimant sent Hassell an email stating "So everyone on the Production floor gets a raise and I get shit. That's real nice guys!"

28. Upon receipt of the email, Hassell attempted to find Claimant to discuss the matter. However, Claimant had already gone to lunch. Hassell sent Claimant an email response asking that the Claimant see him when he returned from lunch.

29. After returning from lunch, Claimant went to see Hassell and Wichlacz.

30. Wichlacz and Hassell both testified that Claimant was upset and angry during the meeting. Claimant's voice was raised and he became belligerent. Wichlacz questioned Claimant why he believed he was not receiving a pay raise. According to Wichlacz, Claimant did not answer the question, and instead demanded to know if it was true or not. Wichlacz testified that he was not willing to discuss Claimant's raise in light of Claimant's attitude and temper issues. Wichlacz asked the Claimant if he really wanted to "go down that road" meaning whether Claimant wanted to be angry and belligerent about something which he knew nothing about.

31. Wichlacz and Hassell both testified that Claimant stated he would contact his attorney and walked out of the meeting.

32. Claimant testified that he did not lose his temper or become upset during the meeting. He also testified that the main topic of the meeting was Employer's inability to continue meeting his restrictions. Claimant testified that Wichlacz advised that continuing to meet Claimant's restrictions was causing Employer difficulty and therefore Employer had to terminate Claimant. Claimant testified that he asked Wichlacz to bring

Cindy Serafin into the meeting at that point, and Wichlacz declined the request. Claimant testified that after he was terminated, Hassell escorted him from the building.

33. Wichlacz testified that the issue of Claimant's restrictions never came up during the meeting, and that Claimant never requested Cindy Serafin be part of the meeting.

34. Hassell confirmed Wichlacz's testimony in great part, testifying that Claimant was angry and agitated during the meeting. Also, Claimant's restrictions were never discussed during the meeting, nor did Claimant ever ask Cindy Serafin to attend the meeting.

35. After Claimant left the meeting, Hassell followed him out in an attempt to discuss the matter further with Claimant. Hassell asked Claimant if he was sure he wanted to leave like this. Claimant stated again that he would be contacting his attorney, and left the premises.

36. Later that same day, Claimant sent a text message to Hassell asking if he should return the keys to Employer's facility. In response, Hassell stated, "Yes please that would be good. Can you bring them to me today?" Claimant's response was, "I will bring my keys when I pick up my last check." Hassell responded by stating, "We would like to get the keys back and if you are willing would like to sit down and talk to you this afternoon." Claimant declined the meeting for Friday afternoon because he had sent his child care provider home already. The Claimant agreed to a meeting for Monday morning at 10:00 a.m.

37. At no time during the exchange of text messages on Friday did Claimant raise the issue of his restrictions or Employer's alleged inability to accommodate them.

38. On Saturday, June 28, 2014, in the afternoon, Claimant sent another series of text messages to Hassell. The first message stated "Tom when we last spoke you fired me because I was not willing to bend the rules due to my restrictions." Claimant then wrote to Hassell that he was "Sorry it had to end like this."

39. Hassell testified that he was astounded at Claimant's allegations and that he didn't know the basis for them. Both Wichlacz and Hassell testified that Claimant was not terminated for any reason, but that he had walked off the job.

40. Hassell further testified that based on Claimant's text messages he believed Claimant no longer wished to work for Employer and that he was abandoning his employment.

41. Claimant did not report for work on Monday, June 30, 2014. That same day, Employer sent Claimant a letter indicating that he was no longer employed by Employer due to his failure to finish his shift on Friday, June 27, 2014 and failure to report for work on Monday, June 30, 2014.

42. The ALJ finds that based on the credible evidence, the Claimant abandoned his job when he left the meeting with Hassell and Wichlacz on Friday, June 27, 2014 then failed to report for work on Monday, June 30, 2014. The ALJ is not persuaded by contrary evidence presented by the Claimant that the Employer terminated his employment due to the Claimant's work restrictions.

43. Claimant failed to present any credible evidence that Employer had any difficulty accommodating his restrictions. The undisputed evidence is that no other employee complained about having to perform some of Claimant's job duties and that accommodating Claimant's restrictions did not cause Employer any hardship or harm. Thus, Claimant's contention that he could no longer continue working for the Employer because the Employer refused to abide by his work restrictions also lacks credibility.

44. The tone of the email Claimant sent concerning his lack of a pay raise supports Wichlacz's testimony that Claimant often became upset and agitated when he believed he was being wronged, and that he would lash out as a result.

45. In addition, the text exchange between the Claimant and Hassell on Friday, June 27, 2014 suggests that Claimant's employment was not terminated. Hassell suggested that Claimant return to work on June 27 to return the building keys but also to talk. The ALJ infers that Hassell would not initiate a meeting to talk if he or Wichlacz had just terminated Claimant's employment. To the contrary, such an invitation would suggest that Claimant walked off the job, leaving in anger, as Hassell and Wichlacz testified.

46. The text messages sent by Claimant on June 28, 2014 are telling. Out of nowhere on a Saturday afternoon, the Claimant sent a text message to Hassell stating that Hassell had fired him for failing to work outside of his restrictions. The Claimant reiterated the alleged basis for his termination, and then advised the Employer to cease all communications with him and speak to his lawyer. These comments make no sense given that Hassell had invited the Claimant to talk about things on Monday, and Claimant had agreed to the meeting. The text messages from June 28 do not read as a natural continuation of the previous events, and thus lack credibility.

47. Based on the above findings of fact, Claimant was responsible for the termination of his employment. He voluntarily walked off the job on Friday, June 27, 2014, and failed to return on Monday. These actions are clearly volitional, and resulted in the loss of his employment.

48. Claimant's work restrictions changed on July 3, 2014. Dr. Webb imposed restrictions that included no repetitive lifting over 20 pounds, no pushing/pulling over 30 pounds of force, no bending more than five times per hour, no squatting, kneeling or climbing, and sit as needed. Claimant testified that his back had gotten worse around June 30.

49. Dr. Webb's July 3 note also states that Claimant has had "little change in his symptoms." The note did not indicate that Claimant reported an increase in his pain or

other symptoms. The note also does not appear to reflect any increase to his medications.

50. Based on the foregoing, the ALJ is not persuaded that the change in Claimant's work restrictions re-establishes a causal connection between Claimant's wage loss and his work injury, or that it represents a worsening of his condition. Claimant has failed to prove by a preponderance of the record evidence that he suffered a worsened condition following his termination from employment or that any such worsened condition, instead of his voluntary resignation, caused his wage loss.

## CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. 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*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-105(4)(a) states "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." A Claimant must act volitionally or exercise a degree of control over the circumstances of the termination in order to be found responsible for the termination. *Richards v. Winter Park Recreational Assoc.,* 919 P.2d 933 (Colo. App. 1996). Respondents shoulder the burden of proving by a preponderance of the evidence that claimant was responsible for his or her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000). An employee is "responsible" if the employee precipitated the employment termination by a volitional act, which an employee would reasonably expect to result in the loss of employment. *Patchek v.*

*Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995).

5. As found, the Claimant precipitated the loss of his employment. His actions in sending an insubordinate email to his supervisor and general manager, becoming agitated and raising his voice during the meeting with his supervisors, walking off the job prior to finishing his shift on Friday, June 27, 2014 and failing to return to work on Monday, June 30, 2014 were voluntary. Claimant's voluntary actions in terminating his employment are further supported by the fact that he agreed to return to work on June 30 to meet with Employer to discuss his raise and attitude, yet failed to attend the meeting.

6. Claimant's contention that he was terminated due to Employer's inability to continue accommodating his restrictions is not credible. Employer gave Claimant a positive work evaluation and a pay raise while providing Claimant with modified duty, actions it likely would not have taken if it was having difficulty accommodating Claimant's restrictions. Further, the unrebutted testimony of Hassell and Wichlacz established that Employer did not encounter any difficulty in accommodating Claimant's restrictions, and that no other employee complained about having to assist Claimant with his duties.

7. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004) held that section 8-42-105(4), C.R.S. was not a permanent bar to receipt of TTD benefits and such benefits could be awarded if claimant's worsened condition caused the wage loss. As found, Claimant has failed to prove by a preponderance of the record evidence that he suffered a worsened condition following his termination from employment or that such worsened condition, instead of his voluntary resignation, caused his wage loss. Consequently, Claimant's claim for TTD benefits commencing June 28, 2014 is barred.

## ORDER

It is therefore ordered that:

1. Claimant's claim for temporary 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: February 18, 2015

DIGITAL SIGNATURE:

L. Broniak

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

## ISSUE

- Claimant's Average Weekly Wage (AWW)

## FINDINGS OF FACT

1. Claimant began working for Employer in June of 2011 as an installer, installing and building large industrial freezer and cooler systems for businesses, industries, and the United States government.

2. On June 23, 2014 Claimant suffered an admitted work related injury.

3. Respondents filed a General Admission of Liability on July 22, 2014 admitting to an average weekly wage of $885.29, with a temporary total disability (TTD) rate of $590.19. *See* Exhibit C.

4. It is unclear how Respondents came to the calculation of $885.29.

5. On November 21, 2014, Respondents filed a Petition to Modify, Terminate, or Suspend Benefits and asserted that their prior admission of AWW was too high. Respondents sought to modify the AWW to $626.07, with a TTD rate of $417.38.

6. In the Petition to Modify, Terminate, or Suspend Benefits Respondents indicated that they had received updated wage information showing Claimant made gross wages of $32,555.42 during the period of 6/23/13 through 6/22/14, which is how they arrived at the AWW of $627.07 ($32,555.42/52 weeks = $626.07).

7. Based on submission of wage records, Respondents statement in the Petition to Modify, Terminate, or Suspend Benefits is incorrect. From June 23, 2013 through June 22, 2014 Claimant made **net** wages of $32,555.42, not gross wages as stated in the Petition. *See* Exhibit D.

8. Attached to the Petition are email messages between Kelly Huck, an employee of Employer and Trudy Spratta, Senior Claims Specialist for Liberty Mutual Insurance. In these emails, Ms. Huck indicated in error that Claimant's **gross** wages were $32,555.42. *See* Exhibit B.

9. The printout of wage records for Claimant clearly shows that Ms. Huck erred when stating that $32,555.42 was the amount for gross wages. Rather, this

amount is the amount of net wages Claimant earned in the four quarters prior to his injury.

10. Claimant's gross wages in the four quarters prior to his injury amounted to $42,251.62. *See* Exhibit D.

11. In the third quarter of 2013, Claimant made gross wages of $10,141.05. In the fourth quarter of 2013, Claimant made gross wages of $10,915.30. In the first quarter of 2014, Claimant made gross wages of 8,693.88. In the second quarter of 2014, Claimant made gross wages of $12,501.39. *See* Exhibit D.

12. The gross wages Claimant earned in the four quarters prior to his injury show a total of $42,251.62 earned in a period of 50 weeks. *See* Exhibit D.

13. $42,251.62 divided by 50 weeks is $845.03.

14. Claimant's work involved significant overtime that fluctuated depending on the type of job he was working on.

15. At the time of his injury, Claimant was working on a job assignment for American Pet Foods and was working as many hours of overtime as he could due to the customer's sense of urgency to complete the job.

16. In the second quarter of 2014 and in the twelve weeks prior to his injury, Claimant's gross wages were higher than they were for the prior three quarters due to working more overtime hours for the American Pet Foods job.

17. The job for American Pet Foods was expected to last for a total period of one year. Although Claimant was expected to maintain a significant amount of overtime hours while assigned to this job, the job assignment and hours were not guaranteed by Employer.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

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

### ***Average Weekly Wage***

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The ALJ concludes that the best way to reach a fair approximation of Claimant's wage loss in this matter is to use the discretionary authority granted by § 8-42-103(3), C.R.S. (2014) and to use the total gross wages earned by Claimant in the four quarters prior to his injury. Although at the time of injury, and in the quarter prior to injury, Claimant was making a higher salary than normal due to the urgency of the American Pet Foods job assignment, this job assignment was not permanent. Claimant's wages were not expected to continue at that high rate permanently nor would it provide a fair approximation of Claimant's diminished earning capacity by basing the AWW on this temporary job assignment. Although the testimony was that the job was expected to last one year, Claimant was not guaranteed wages by Employer at the high rate shown in the second quarter of 2014. The high wages earned in the second quarter of 2014 could have ended at any point and Claimant would then return to a more regular and normal work schedule. As shown by the year prior to Claimant's injury, his wages varied greatly based upon the number of overtime hours worked. As found above, in the first quarter of 2014 Claimant's earnings were overall less than average. Just as it would be an inaccurate approximation of his lost wages if the AWW were based on this quarter and the lull in Claimant's earnings, it would also be an inaccurate approximation

of Claimant's lost wages to base his AWW on the peak earnings period in the second quarter of 2014. With varied wage records, the ALJ concludes that the best way to come to a fair approximation is to use the four quarters preceding the injury (50 weeks available from submitted wage records).

As found above, Claimant's gross wages for the 50 weeks prior to his injury amount to $42,251.62. This makes his average weekly wage $845.03. Respondents filed a Petition to Modify, Terminate, or Suspend Benefits that was based on Claimant's net wages and not gross wages. This was clear error on Respondents part. When reviewing the wage records in Exhibit D, the amount calculated by Respondents in their Petition is based on Claimant's net wages. As this is clear error, their Petition to modify the Average Weekly Wage to $626.07 is not correct or persuasive. Although the Petition is in error, Average Weekly Wage was placed at issue at hearing and after reviewing all the evidence, the ALJ concludes that Claimant's Average Weekly Wage based on the records is $845.03. The Average Weekly Wage shall be modified from November 21, 2014 and ongoing to reflect this order.

## ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $845.03. The Average Weekly Wage previously admitted to shall be modified to reflect this wage starting November 21, 2014 and ongoing.

2. 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: February 24, 2015

/s/ Michelle E. Jones

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

## ISSUES

- Did the claimant prove by a preponderance of the evidence that he sustained an injury proximately caused by the performance of service arising out of and in the course of employment?
- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing June 21, 2014?
- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits?
- What is the claimant's average weekly wage?

## FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 8 were admitted into evidence. Respondents' Exhibits A through D and F through L were admitted into evidence.

2. The claimant testified as follows. On June 20, 2014 he had been working for the employer for approximately one and a half years. His main duty was to use the "Archer Tool" to tear down drill bit assemblies for servicing. He explained that the Archer is a 5 and ½ foot steering unit for drill bits. The Archer consists of sub-parts including a "steering sleeve" that weighs approximately 60 pounds and a "bit box" that connects the drill bit to the archer. At approximately 4:00 p.m. on Friday, June 20 he lifted a bit box off of a three foot high table and "twisted" to place it on a four foot high cart. He felt a "little sudden stab" in his back.

3. The claimant also testified as follows. He underwent safety training provided by the employer. The employer has a policy that requires a worker to report an injury right away no matter how minor. He did not report the injury to the employer until Sunday June 22, 2014. On June 22 he called his supervisor, Mr. Matt Wilson (Wilson), and told Wilson that he had hurt his back and needed to get checked by a doctor. The employer referred him to Concentra for medical treatment. However, he was not able to get hold of "workers comp" for several days and first sought treatment from David Doig, M.D., his family physician.

4. On July 11, 2014 the claimant gave a statement to American Claims Services, Inc. At that time the claimant reported that "he had been working hunched over a bench for some time, when he picked up a steering sleeve, and noted the onset

of low back pain." The claimant further reported that his "pain was so bad the next morning" that he could not move.

5. Wilson, the claimant's supervisor, testified as follows. He was at a National Guard meeting when he received a call from the claimant on June 22, 2014. Because he was in a meeting, he declined the call and texted the claimant that he couldn't talk. The claimant texted Wilson that his back was "messed up" and he needed to go to a doctor. Wilson sent a text to the claimant asking if the injury happened at work. The claimant texted back that he injured his back at work on Friday and had gotten worse and could not stand upright. Wilson asked how. The claimant texted back that the benches are low for him and he was hunched over and turned to do something and wrenched it. Wilson responded by texting an expletive and stated he would contact "HSE." Wilson stated that he used the expletive because on-the-job injuries are a headache and require a lot of paperwork.

6. Wilson further testified that he was unable to reach HSE and called the claimant to ask how he injured himself. Wilson recalled the claimant stated that he was working on the Archer bench, picked up a steering sleeve, turned to put the steering sleeve on a cart and wrenched his back.

7. However, Wilson later learned the claimant reported to "HSE" that he injured his back while lifting a "steering sleeve clamp" (also known as a "bit box"). For Wilson this raised a "red flag" because the steering sleeve and the steering sleeve clamp are removed from the Archer assembly at the "breakout machine" (Respondents' Exhibit F) before the Archer is taken to the Archer bench (Respondents' Exhibit J) for teardown. Also, when the steering sleeve clamp is removed from the Archer assembly it is immediately taken by cart to another area known as the inspection and wash bay area. Thus, in Wilson's opinion there would be no reason for a steering sleeve clamp to be at any bench including the Archer bench. Wilson also learned that the claimant told HSE that he lifted the steering sleeve clamp off of the bias bench (Respondents' Exhibit I) or the teardown bench (Respondents' Exhibit K). Thus, Wilson testified that the claimant's statement about where the injury occurred had changed over time and this raised another "red flag."

8. Wilson testified that all employees are trained to report injuries immediately no matter how minor they may be.

9. Mr. Raymond Mascarenas (Mascarenas) testified as follows. He is the claimant's co-worker. On June 20, 2014 he was filling in for Wilson who was away on National Guard duty. Mascarenas stated the steering sleeve and steering sleeve clamp are removed from the Archer assembly at the breakout machine and immediately transported by cart to the inspection area. The only exception is that the steering sleeve might be transported to a bench to measure the "wear plates." Therefore there is no need for steering sleeve clamps to be on benches.

10. Mascarenas testified that on June 20, 2014 the claimant was not working on the Archer bench but was refurbishing hand tools in the area of the benches shown

in Respondents' Exhibits H & K. Mascarenas noticed that Mr. Casey Hill (Hill) was working the Archer bench.

11. Mascarenas testified the claimant did not report any injury to him on June 20, 2014 and he did not notice the claimant was having any physical problems that day. Instead, near the end of the day the claimant asked Mascarenas if he needed help within anything.

12. Hill testified as follows. He is employed as a maintenance technician trainee and works on the Archer tool teardown and assembly. In this job he works on the breakout machine shown in Respondents' Exhibit F and the Archer bench shown in Respondents' Exhibit J. He explained that the steering sleeve and steering sleeve clamp are removed from the Archer assembly at the breakout machine and put on a cart for transport to the inspection/wash bay area. The Archer shaft is then moved by cart to be disassembled at the Archer bench. He explained there is no reason for the steering sleeve clamp to be at the Archer bench (Respondents' Exhibit J). On June 20, 2014 Hill recalled that he worked at the breakout machine early in the day and on the Archer bench in the afternoon where he tore down two Archer shafts. He does not recall the claimant working with him at the Archer bench. He does not recall seeing the claimant lift a steering sleeve clamp on to and off of the Archer bench and place the clamp on a cart. Hill knows of no reason why the claimant would have performed such a task. Hill recalls that on June 20 the claimant was refurbishing hand tools and assembling them into kits.

13. Following the testimony of the respondents' witnesses (Wilson, Mascarenas and Hill) the claimant was recalled in rebuttal. The claimant testified that on June 20, 2014 he performed a number of jobs including refurbishing parts and tools. He worked at the Archer bench (Respondents' Exhibit J) and the bias bench (Respondents' Exhibit I). The claimant further testified that on June 20 multiple steering sleeve clamps came out of the wash bay and the "threads" were cracked. The claimant stated that he helped Mascarenas ship these clamps to the machine shop for rethreading. The claimant stated that in order to complete this task he had to place the steering sleeve clamps on the Archer bench (Respondents' Exhibit J) so he could copy down the serial numbers and insert them into the employer's computerized parts tracking system. The claimant explained that it was during this course of this process that he lifted a steering sleeve clamp and injured his back.

14. Wilson testified in response to the claimant. Wilson stated that heard the claimant's rebuttal testimony and that the claimant's description of how the injury occurred was nothing like what the claimant told him. Wilson explained that when he talked to the claimant the claimant said he was refurbishing parts on the Archer bench, twisted to set one on a cart and injured his back. Wilson further testified that in his time working for the employer that he had seen only two cracked steering sleeve clamps. Further Wilson explained that once a steering sleeve clamp is cracked there is nothing to be done and it is "junk." Therefore, there would be no reason for the claimant to be performing the task he described on rebuttal.

15. The claimant was examined by Dr. Doing on June 23, 2014. He complained of low back pain since lifting a heavy metal object at work on "Friday." Dr. Doing noted tenderness to palpation in the paravertebral lumbar regions bilaterally and limited and range of motion "secondary to pain." Dr. Doing prescribed oxycodone and warned the claimant "regarding the possible addictive nature of narcotic medications and to use them sparingly and only when needed for pain."

16. On June 24, 2014 Darla Draper, M.D., examined the claimant at Concentra. The claimant reported bilateral low back pain rated 8 on a scale of 10 (8/10). The onset of pain was described as "sudden." The claimant gave a history that the injury began at work when he picked "up a 70 pound object from a low bench and moved it to a cart that was" 2 inches above the bench and located afoot or two from the bench. Dr. Draper assessed a lumbar strain. She continued oxycodone and referred the claimant for physical therapy 2 times per week.

17. On June 20, 2014 Dr. Draper completed a WC 164 and placed an "x" in a box indicating that her "objective finings" were consistent with history and/or work related mechanism of injury. Dr. Draper indicated the claimant was unable to work from June 24, 2012.

18. On July 3, 2014 it was noted the claimant was unable to tolerate any physical therapy exercise or soft tissue massage of the lumbar paraspinals.

19. On July 11, 2014 the claimant underwent a lumbar MRI. The radiologist's impression was multilevel disc degeneration of the lumbar spine greatest in severity at L5-S1. At L5-S1 the radiologist noted disc desiccation with loss of disc space height and mild diffuse posterior disc bulging and a very shallow disc protrusion. There were very small bilateral facet joint effusions and no central canal stenosis. There was mild bilateral foraminal stenosis.

20. On July 18, 2014 the claimant was examined by Yusuke Wakeshima, M.D. Dr. Wakeshima assessed "axial low back pain" and opined the claimant's history, examination and mechanism of alleged injury were "cost consistent with sacroiliac joint dysfunction." Dr. Wakeshima recommended SI joint injections.

21. On July 23, 2014 physical therapy was stopped by PA-C Casey McKinney because there had been "minimal improvement." Restrictions were changed to no lifting over 10 pounds and no pushing/pulling with over 10 pounds of force.

22. On July 31, 2014 the claimant underwent sacroiliac (SI) joint injections performed by Samuel Chan, M.D. On August 6, 2014 the claimant reported to Dr. Wakeshima that he did not experience any improvement from the bilateral SI joint injections and his pain had "become more profound." The claimant reported he was taking Percocet "5/325 three per day."

23. On August 18, 2014 Dr. Wakeshima noted the claimant was still reporting "profound axial low back pain." Dr. Wakeshima noted there was no improvement after the SI joint injections and that there were "minimal findings" on MRI of the lumbar spine.

Dr. Wakeshima stated the claimant's clinical history and examination were suggestive of a lumbar "strain/sprain/myofascial pain." Dr. Wakeshima also noted there were "significant discrepancies on urine toxicology study." Dr. Wakeshima noted that the last two toxicology studies "demonstrated no oxycodone and oxymorphone" were detected and stated that in light of these results another study was not indicated. Dr. Wakeshima wrote that the claimant informed him "that he last took oxycodone a day and a half before his last urine drug screen, which is contrary to what he informed me on our appointment on August 6, 2014 where he reported that he was taking Percocet 5/325 three per day." Dr. Wakeshima opined the claimants symptoms appeared out of proportion to his studies.

24. The claimant testified that he did not know why the prescribed medications were not detected during the urine tests because he was taking them

25. On October 25, 2014 the claimant was examined by Fredric Zimmerman, D.O. Dr. Zimmerman noted the claimant's evaluation was complicated by "unexpected results on urine drug screens." He noted the claimant underwent three drug tests that showed unexpectedly little or no oxycodone and oxymorphone in his system despite reportedly taking "oxycodone 10/325 up until one or two days before urine collection on each test." Dr. Zimmerman referred the claimant for testing to determine if the claimant was a rapid metablolizer of opioid medications which might explain the unexpected urine drug test results.

26. On October 30, 2014 the claimant was again seen by Dr. Zimmerman. He noted the claimant had drug results from October 30, 2014 which were a "combination of unexpected and expected findings." Unexpected findings included hydrocodone, hydromorphone, oxycodone, oxymorphone and tramadol. Dr. Zimmerman indicated the claimant is not a candidate for narcotic analgesics. Genetic testing showed the claimant was an essentially normal metabolizer. Dr. Zimmerman performed trigger point injections and the claimant reportedly experienced 40 % relief of his muscular pain. Dr. Zimmerman suggested for further diagnostic purposes that the claimant undergo L4-5 and L5-S1 medical branch blocks that might lead to radiofrequency neurotomy if there was a diagnostic response.

27. The claimant failed to prove it is more probably true than not that he sustained a low back injury proximately caused by the performance of service arising out of and in the course of his employment.

28. Combining the claimant's testimony on direct examination and on rebuttal, he stated that he injured his back when he lifted a bit box (also known as a steering sleeve clamp) off of the Archer bench to place it on a cart. On rebuttal the claimant explained the steering sleeve clamps were on the Archer bench because they were cracked and he was recording their serial numbers in preparation for transporting them to the machine shop for repair. However, the claimant's testimony is not credible and persuasive. The claimant's hearing testimony is contradicted by various other reports and statements which he has made since the alleged injury. Mr. Wilson credibly testified that when he spoke to the claimant on June 22, 2014 the claimant stated that

he injured himself when lifting a steering sleeve (not a steering sleeve clamp) off of the Archer bench. However, Wilson subsequently learned that the claimant reported to the employer's "HSE" that he injured his back while lifting a steering sleeve clamp off of the bias bench. Moreover, when the claimant made the July 11, 2014 report to American Claims Services, Inc. he reported that he injured his back picking up a "steering sleeve," not a steering sleeve clamp or "bit box."

29. The claimant's credibility is significantly contradicted and undermined by the credible testimony of Mascarenas, Hill and Wilson. These witnesses credibly testified that there was no reason for a steering sleeve clamp to be on the Archer bench since that part is removed at the breakout bench for transport to the inspection/wash bay before the Archer assembly is taken to the Archer bench. Mascarenas credibly testified that he was present on June 22, 2014 and the claimant was refurbishing hand tools and preparing kits, and it was Hill who was working on the Archer bench. Mascarenas did not state the claimant was asked to record serial numbers on cracked steering sleeve clamps in preparation for transporting them to the machine shop. Hill credibly testified that on the afternoon of June 22 he was working at the Archer bench disassembling two Archer units and the claimant was not there assisting him. Moreover, Hill credibly testified that he did not see the claimant lift any steering sleeve clamps off of the Archer bench on the afternoon of June 22. Wilson credibly testified that it is unusual for a steering sleeve clamp to crack, but if it does it is "junk." The ALJ infers from Wilson's testimony that it is improbable that the claimant lifted steering sleeve clamps onto the Archer bench in order to record their serial numbers prior to their movement to the machine shop for repair. Rather, the ALJ is persuaded that cracked steering sleeve clamps are irreparable and therefore constitute "junk" as testified by Wilson. The ALJ also considers it significant that there is no credible or persuasive evidence that the claimant ever told anyone before his rebuttal testimony that his injury resulted from lifting cracked steering sleeve clamps in preparation for transporting them to the machine shop.

30. The claimant's credibility is further undermined by the fact that he failed immediately to report his alleged back injury. The claimant was admittedly aware of the company policy requiring an immediate report of any injury no matter how minor. In this case he failed to report the injury until two days after it allegedly occurred. The claimant's credibility is also undermined by failure truthfully to inform his doctors about his use and failure to use prescribed narcotics. The claimant's untruthfulness is documented by multiple drug tests. The claimant was even tested to insure that he was not a "rapid metabolizer" of opioids. The claimant is a normal metabolizer and the drug test results cannot be explained by some biological abnormality.

31. Evidence and inferences contrary to or inconsistent with these findings are not credible and persuasive.

## CONCLUSIONS OF LAW

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

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

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

### COMPENSABILITY

The claimant alleges that a preponderance of the evidence establishes that he sustained a low back injury while lifting a "steering sleeve clamp" or bit box while performing his duties at work. The respondents contend the claimant's testimony is not credible. The ALJ agrees with the respondents and concludes the claim for benefits must be denied.

The claimant was 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).

As determined in Findings of Fact 27 through 30, the claimant failed to prove it is more probably true than not that on June 22, 2014 he sustained a low back injury proximately caused by the performance of service arising out of and in the course of his employment. As found the claimant's testimony that he sustained an injury while lifting a steering sleeve clamp from the Archer bench is contradicted by and inconsistent with various statements the claimant made to other employees and American Claims

Services, Inc. The claimant's credibility is also undermined by the credible testimony of Wilson, Mascarenas and Hill as set forth in Finding of Fact 29. Finally, the claimant's credibility is undermined by his failure timely to report the injury in accordance with company policy and his misstatements to physicians concerning his use and non-use of narcotic medications.

In light of these determinations the claim for benefits must be denied. The ALJ need not address the other issues raised by the parties.

## ORDER

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

1. The claim for workers' compensation benefits in WC 4-956-748 is denied and dismissed.

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

DATED: February 18, 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

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his cervical spine 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 Temporary Total Disability (TTD) benefits for the period December 20, 2012 until terminated by statute.

## FINDINGS OF FACT

1. Claimant is a 32 year old male who formerly worked for Employer as a Bus Driver. He began employment with Employer in June 2011. Claimant's job duties involved inspecting his designated bus before and after his shift and driving his assigned route. His duties were primarily sedentary in nature and involved sitting while operating the bus. Claimant was not responsible for any maintenance work or significant lifting.

2. On May 3, 2012 Claimant sought treatment for mild neck pain. Because Claimant was a student he obtained treatment at the Auraria Health Center. He did not report any specific neck trauma. The medical examination revealed minimal neck pain upon movement and no tenderness on palpation. Claimant was advised to report his injury to Employer if his symptoms were work-related.

3. On September 17, 2012 Claimant again sought medical treatment for his neck pain. By this time Claimant was only driving buses for Employer one day each week. He did not demonstrate any neck pain with movement and his cervical spine did not reveal any tenderness on palpation. Claimant was again instructed to report his neck concerns to Employer if his condition was work-related.

4. Claimant explained that on December 20, 2012 he reported his neck symptoms to Employer. He contended that he suffered neck pain as a result of performing his job duties as a Bus Driver.

5. On January 22, 2013 Claimant again sought medical treatment for his neck pain. Claimant exhibited full range of motion with no cervical spine pain. X-rays revealed the minor degenerative finding of mild disc height loss at C6-C7.

6. On February 6, 2013 Claimant sought chiropractic treatment for his continuing neck pain. He completed an intake form and noted that his condition was not related to his work for Employer.

7. Claimant subsequently underwent physical therapy, chiropractic treatment and injections for his continuing cervical symptoms. However, his neck pain persisted.

8. Claimant testified that his neck symptoms began approximately 8-10 months after beginning his job as a Bus Driver with Employer. He attributed his cervical symptoms to sitting in the bus and constantly checking the mirrors while driving. Claimant explained that he decreased his work hours to one day each week because of his persistent neck pain. Nevertheless, he acknowledged that he has never received any work restrictions from his physicians for his condition. Claimant ceased working for Employer in October 2014.

9. On December 29, 2014 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant reported that he began experiencing neck pain while working as a Bus Driver for Employer. He specifically explained that turning his head right, left and vertically in an upward direction to look in the rearview mirror while driving certain buses caused his neck symptoms. Claimant stated that he began suffering intermittent neck pain that resolved after he completed his work shift. However, the neck pain subsequently became constant. Claimant noted that he nevertheless continued to drive buses and did not miss work as a result of his neck symptoms. He commented that, although he ceased working for Employer in October 2014, he continued to receive injections for his ongoing neck pain.

10. Dr. Paz conducted a physical examination of Claimant, reviewed medical records, obtained Claimant's job description and considered the mechanism of injury. He concluded that Claimant suffered neither an acute trauma nor an occupational disease to his cervical spine during the course and scope of his employment with Employer. Dr. Paz maintained that Claimant's neck symptoms were likely consistent with early cervical degenerative disc disease and/or cervical degenerative joint disease. He determined there was no mechanism of injury that causally related Claimant's medical diagnosis and work-related exposure. Moreover, there was no work exposure that aggravated or accelerated Claimant's pre-existing cervical spine degenerative disc disease or joint disease. Dr. Paz explained that Claimant experienced pain while driving because of the degenerative condition but there was no cause and effect between the work activities and condition.

11. Dr. Paz testified at the hearing in this matter. He maintained that Claimant's job duties for Employer did not cause his cervical symptoms. Dr. Paz reiterated that Claimant suffered from cervical degenerative disc disease and/or cervical degenerative joint disease. He explained that it was not medically probable that Claimant's described mechanism of injury of turning his head left, right and upwards while driving a bus would have caused neck pain. Dr. Paz also determined that there was insufficient work exposure to have aggravated or accelerated Claimant's pre-existing cervical spine condition. He testified that, while the x-rays revealed some degenerative changes at the C6-7 level, the affected location of the neck from turning the head was at the C1-2 position. Dr. Paz thus concluded that Claimant's medical treatment for his neck was not reasonable, necessary or causally related to his work as a Bus Driver for Employer. Furthermore, Dr. Paz commented that, if Claimant's neck

pain was related to his job duties for Employer, his symptoms would not have persisted or worsened when he began working fewer hours and ultimately ceased employment. Finally, Dr. Paz explained that Claimant might experience cervical pain anytime he moves his neck because of his underlying degenerative condition. Claimant's symptoms constituted the natural progression of his underlying degenerative cervical condition.

12. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease to his cervical spine during the course and scope of his employment with Employer. Claimant testified that he began to suffer neck symptoms approximately 8-10 months after beginning his job as a Bus Driver with Employer. He attributed his cervical symptoms to sitting in the bus and constantly checking the mirrors while driving. Claimant specifically noted that turning his head right, left and vertically in an upward direction to look in the rearview mirror while driving certain buses caused his neck symptoms. Claimant initially sought treatment for his neck symptoms in May 2012 and reported his symptoms to Employer on December 20, 2012.

13. Dr. Paz performed an independent medical examination of Claimant and testified at the hearing in this matter. He concluded that Claimant suffered neither an acute trauma nor an occupational disease to his cervical spine during the course and scope of his employment with Employer. Dr. Paz maintained that Claimant's neck symptoms were likely consistent with early cervical degenerative disc disease and/or cervical degenerative joint disease. He explained that it was not medically probable that Claimant's described mechanism of injury of turning his head left, right and upwards while driving a bus would have caused neck pain. Dr. Paz also determined that there was insufficient work exposure to have aggravated or accelerated Claimant's pre-existing cervical spine condition. He testified that, while the x-rays revealed some degenerative changes at the C6-7 level, the affected location of the neck from turning the head was instead at the C1-2 position. Dr. Paz thus concluded that Claimant's medical treatment for his neck was not reasonable, necessary or causally related to his work as a Bus Driver for Employer. Dr. Paz explained that Claimant might experience cervical pain anytime he moves his neck because of his underlying degenerative condition. Claimant's symptoms constituted the natural progression of his underlying degenerative cervical condition. Based on the medical records and persuasive testimony of Dr. Paz, Claimant has failed to demonstrate that the hazards of his employment as a Bus Driver for Employer caused, intensified, or, to a reasonable degree, aggravated his cervical spine condition.

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

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease to his cervical spine during the course and scope of his employment with Employer. Claimant testified that he began to suffer neck symptoms approximately 8-10 months after beginning his job as a Bus Driver with Employer. He attributed his cervical symptoms to sitting in the bus and constantly checking the mirrors while driving. Claimant specifically noted that turning his head right, left and vertically in an upward direction to look in the rearview mirror while driving certain buses caused his neck symptoms. Claimant initially sought treatment for his neck symptoms in May 2012 and reported his symptoms to Employer on December 20, 2012.

8. As found, Dr. Paz performed an independent medical examination of Claimant and testified at the hearing in this matter. He concluded that Claimant suffered neither an acute trauma nor an occupational disease to his cervical spine during the course and scope of his employment with Employer. Dr. Paz maintained that Claimant's neck symptoms were likely consistent with early cervical degenerative disc disease and/or cervical degenerative joint disease. He explained that it was not medically probable that Claimant's described mechanism of injury of turning his head left, right and upwards while driving a bus would have caused neck pain. Dr. Paz also determined that there was insufficient work exposure to have aggravated or accelerated Claimant's pre-existing cervical spine condition. He testified that, while the x-rays revealed some degenerative changes at the C6-7 level, the affected location of the neck from turning the head was instead at the C1-2 position. Dr. Paz thus concluded that Claimant's medical treatment for his neck was not reasonable, necessary or causally related to his work as a Bus Driver for Employer. Dr. Paz explained that Claimant might experience cervical pain anytime he moves his neck because of his underlying degenerative condition. Claimant's symptoms constituted the natural progression of his underlying degenerative cervical condition. Based on the medical records and persuasive testimony of Dr. Paz, Claimant has failed to demonstrate that the hazards of his employment as a Bus Driver for Employer caused, intensified, or, to a reasonable degree, aggravated his cervical spine condition.

## 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: February 27, 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

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease in the form of Carpal Tunnel Syndrome (CTS) to his right hand and wrist during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right hand and wrist injury on July 26, 2014 during the course and scope of his employment with Employer.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment in the form of a right carpal tunnel release that is reasonable and necessary to cure or relieve the effects of a work-related injury.

4. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received at University of Colorado Hospital was authorized and Respondents are liable for payment of the treatment.

## FINDINGS OF FACT

1. On May 12, 2014 Employer hired Claimant to work as a Tank Engine Driver. Claimant has alleged either an occupational disease of right hand and wrist CTS or an acute injury to his right hand and wrist on July 26, 2014. The date of injury is approximately 10 weeks after Claimant began employment with Employer. For six of his ten weeks of employment Claimant underwent training.

2. Claimant's job as a Tank Wagon Driver consists of 14 hour shifts. Claimant would report to Employer's Wellington Yard in Wellington, CO to start his shift. He began working there at 4:00 p.m. on July 26, 2014. Claimant then drove to Greeley, CO to pick up co-worker Frac Tech Clayton Jones on July 26, 2014. Claimant and Mr. Jones then drove to the fracking site in Fort Lupton, CO. Claimant testified that driving took approximately 2.5 to 3 hours to complete.

3. After Claimant arrived at the fracking site in Fort Lupton he would receive a "pass on" from the prior crew. The crew informed Claimant of fuel levels in equipment and the number of gallons that the site was burning per hour. Claimant then typically conducted a safety meeting with Mr. Jones. After the safety meeting, Claimant would strap on to both trucks at the site and climb on them to check the fuel levels in order to verify the information from the prior crew. The process required Claimant to wear fall

equipment, gloves, and eye protection. He climbed a ladder and used a wooden measuring stick to check fuel levels.

4. To fill a piece of equipment or pump with fuel, Claimant drove the fuel truck into position. After checking fuel levels, Claimant and Mr. Jones prepared the hoses. The hoses are two inches in diameter. Mr. Jones would then carry the hose out to the equipment to fill it with fuel. Claimant would assist him by feeding out the hose from the truck. After the hose was out to the equipment approximately 150 to 200 feet away, Claimant then walked back to the truck and turned on the pump. Mr. Jones then filled up the piece of equipment with fuel. While Mr. Jones was filling up the equipment with fuel, Claimant recorded data and watched for fuel leaks.

5. After finishing a round of fueling Claimant would sit in his truck, complete paperwork and log all of the fuel information. He would not get a formal break but would eat his lunch while completing the paperwork. Claimant typically completed paperwork for 40 to 45 minutes before he and Mr. Jones would start another round of fueling. The paperwork was in addition to the documentation Claimant completed while each piece of equipment was being fueled. Claimant explained that no more than four rounds of fueling per shift could be completed at the Fort Lupton fracking site.

6. Claimant explained that on July 26, 2014 multiple machines on the fracking site required fueling. Claimant demonstrated the hand over hand motion to distribute and retract the approximately 150 to 200 foot fuel hose. Claimant remarked that he spent a significant portion of his day extending and retracting the fuel hose on July 26, 2014. Because Mr. Jones was a new employee he filled the equipment completely and thus caused the hose to click. Claimant noted that when the hose clicked it would "snap like a snake" in his hands. He commented that the jerking occurred multiple times while fueling equipment on July 26, 2014. Claimant explained that he suffered tingling in his right hand as a result of the jerking hose and reported his symptoms to Driver Manager Jason Martinez. Claimant did not immediately seek medical treatment but after he went home he called Mr. Martinez to tell him he was going to obtain medical treatment at an emergency room.

7. On July 26, 2014 Claimant sought medical treatment at the University of Colorado Hospital Emergency Room. Claimant reported a two-day history of numbness with sharp, shooting pains to his right fingers. The examining physician could not determine a mechanism of injury.

8. On August 18, 2014 Claimant visited Hope Edmonds, M.D. for an examination. Claimant reported numbness, tingling and shooting pain in his right hand. Dr. Edmonds noted "there was not acute injury or trauma." She diagnosed Claimant with right wrist flexor tenosynovitis and right CTS. Dr. Edmonds remarked that medical causation was not known at the time and ordered a job site analysis to evaluate causation. She recommended physical therapy and released Claimant to light duty.

9. On September 12, 2014 Claimant visited Bret Peterson, M.D. for an orthopedic consultation. Claimant reported right hand discomfort that he attributed to a

workplace injury. Dr. Peterson determined that Claimant had symptomatology consistent with a median compressive lesion that might represent CTS. Dr. Peterson recommended electrodiagnostic testing to determine if Claimant had CTS, cervical pathology or rotator cuff pathology due to shoulder weakness.

10. On September 25, 2014 Claimant underwent EMG/NCV testing. The testing revealed moderate to severe right median neuropathy at the wrist without denervation but no evidence of cervical radiculopathy or brachial plexopathy. Based on the EMG/NCV results Dr. Peterson diagnosed Claimant with moderate to severe right CTS.

11. On October 16, 2014 Vocational Case Manager William E. George conducted a job site analysis of Employer's Fort Lupton fracking site. He could not observe Claimant perform his duties as a Tank Wagon Driver because Claimant was still on modified duty. Nevertheless, he observed other employees in the position lifting, carrying and dragging hoses, lifting wheel chalks to block truck tires, lifting fire extinguishers, gripping and coupling hoses, placing gas nozzles into gas tanks, climbing ladders, driving trucks and completing paperwork. Mr. George noted that employees will sit for one hour after a round of fueling is completed and that an employee may sit for a total of 4 to 6 hours during one shift. He concluded that the job duties of a Tank Wagon Driver do not meet any of the Colorado risk criteria regarding lifting, using hand tools, wrist flexion and extension or vibration. Mr. George reviewed each of the risk factors enumerated in the *Medical Treatment Guidelines* (*Guidelines*) Rule 17, Exhibit 5 regarding cumulative trauma conditions. He concluded that none of Claimant's job duties met any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5.

12. On December 16, 2014 Mr. George testified through a post-hearing evidentiary deposition. Mr. George considered Claimant's hearing testimony about his job duties and maintained that the job duties did not meet any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5 of the *Guidelines*. Mr. George testified that when he calculated the amount of time an employee sits during a shift he included the time the employee was completing paperwork.

13. On October 29, 2014 Karl Larsen, M.D. conducted an independent medical examination of Claimant. He also testified through a post-hearing evidentiary deposition in this matter. Dr. Larsen explained that Claimant worked at four to five different sites for multiple hours and operated refueling hoses. Claimant specifically moved a heavy, stiff hose frequently because it often jumped and twisted. Based on Claimant's description of his job duties of "very heavy, forceful, repetitive gripping and pulling activities at work," Dr. Larsen concluded "I think this is very clearly related to his work activities and is a work-induced or exacerbated carpal tunnel syndrome. I say this because we do not know what any sort of baseline examination would have looked like, but he absolutely denies any problems before this work event." In reaching his opinion Dr. Larson did not review the EMG/NCV testing, job site analysis or Claimant's job description. Moreover, Dr. Larson did not consider W.C.R.P. Rule 17, Exhibit 5 regarding cumulative trauma conditions in rendering his opinion.

14. Dr. Edmonds reviewed the job site analysis performed by Mr. George and issued a letter on October 30, 2014. Dr. Edmonds concluded that Claimant's "carpal tunnel syndrome does NOT meet criteria for a cumulative trauma injury as defined by the Division of Workers' Compensation for the state of Colorado. Mr. George reports NO primary or secondary risk factors present."

15. On October 31, 2014 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Claimant reported right hand numbness, tingling and pain. Dr. Cebrian considered Claimant's job duties in great detail. He noted that on July 26, 2014 Claimant was completing paperwork approximately 8 to 10 hours into his shift after having finished three rounds of fueling when he began to experience pain and numbness in his right fingers. Dr. Cebrian explained that Claimant's job duties involved driving a fuel truck from Wellington to pick up a co-worker, then driving to Fort Lupton, staging a tank wagon, dispensing fuel and operating a fuel hose. Dr. Cebrian remarked that Claimant was required to complete a large amount of paperwork including a pre-trip check, a 705 equipment form and an asset tracker. The paperwork took Claimant 20 to 30 minutes to finish per round of fueling. A round of fueling lasted approximately two to three hours. He would complete the paperwork while sitting in his truck. Moreover, Claimant calculated the amount of fuel used during the fueling process while the frac tech was fueling equipment.

16. Dr. Cebrian explained that in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk factors. Dr. Cebrian concluded that Claimant had right CTS with EMG evidence of moderate to severe right median nerve compression.

17. Dr. Cebrian compared Claimant's job duties with the delineated primary risk factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that 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. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater. Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration. Dr. Cebrian noted that Claimant performed several different activities throughout the day and many of the activities do not meet the minimal force or time duration requirements.

18. Dr. Cebrian noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees, 6 hours of elbow flexion greater than 90 degrees, or 6 hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for

at least 50% of a task cycle. Additional Primary Risk Factors include computer work for more than 7 hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than 4 hours or use of a handheld vibratory power tool for 6 hours or more. Dr. Cebrian determined that Claimant's job duties did not meet any of the Primary Risk Factors. Moreover, Dr. Cebrian explained that Claimant's work activities did not meet the Secondary Risk Factors enumerated in the *Guidelines*

19. Dr. Cebrian remarked that the manifestation of symptoms while at work does not establish a causal relationship with job duties. He explained:

> Carpal tunnel syndrome is a disease process of the median nerve as it travels through the carpal tunnel in the wrist. This disease process occurs over several years. … [T]he majority of cases of carpal tunnel syndrome are in fact not caused by work. In assessing the possible work relatedness of carpal tunnel syndrome, it is imperative to utilize a scientific based methodology to determine if there is a work-related causal relationship. The Colorado Division of Workers' Compensation has utilized a scientific based methodology in assisting physicians in determining whether carpal tunnel syndrome is work-related or not. Four-hundred and sixty-nine medical articles were utilized in establishing Guidelines for Cumulative Trauma Conditions.

Dr. Cebrian thus concluded that Claimant's right CTS was not caused by his work activities for Employer.

20. On December 15, 2014 Dr. Cebrian testified through an evidentiary deposition in this matter. Dr. Cebrian discussed the Primary and Secondary Risk Factors enumerated in the *Guidelines*. He testified that the key to the *Guidelines* is that the tasks have to be a combination of the force, repetition and duration for a minimum time period. Different activities are not included in calculating the time period. Dr. Cebrian testified that Claimant's job duties do not meet the Primary Risk Factors because he does not get into a repetitive cycle of doing a forceful activity. He also testified that Claimant's job duties do not meet the Secondary Risk Factors because they do not involve continuous, repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Engine Driver failed to meet the causation requirements for CTS outlined in Rule 17, Exhibit 5 of the *Guidelines*.

21. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of right CTS during the course and scope of his employment with Employer. Although Claimant attributed his right hand and wrist symptoms to his work activities, a review of his job duties reflects that they lacked the requisite force or repetition to cause his CTS. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's tasks as a Tank Wagon Driver included driving a truck, completing a pre-trip inspection, checking tank levels, helping the frac tech stage hoses, fire watching, recording fuel levels, winding the hose and completing paperwork. Although Claimant's job duties

sometimes exceeded the minimum force requirements under the *Guidelines*, his job duties did not exceed the force requirements for the required repetition and time periods. Rule 17, Exhibit 5 of the *Guidelines* requires a combination of force, repetition and duration. However, Claimant's job duties fail to meet all of the criteria in the *Guidelines* for a cumulative trauma condition.

22. Relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Wagon Driver failed to meet the causational requirements for CTS. He persuasively explained that Claimant did not suffer CTS as a result of his work activities for Employer. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian testified that Claimant's job duties did not meet the Primary Risk Factors because he did not engage in a repetitive cycle activity with the requisite force. He also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Engine Driver failed to meet the causation requirements for CTS outlined in the Rule 17, Exhibit 5 of the *Guidelines.* Based on Claimant's job duties, Dr. Cebrian also determined that he would not be maintaining the types of postures for the requisite time periods as outlined in the *Guidelines*. He remarked that Claimant was simply not performing his job duties for a continuous repetitive cycle.

23. The job site analysis completed by Mr. George supports the opinion of Dr. Cebrian. Mr. George also concluded that the job duties of a Tank Wagon Driver do not meet any of the Colorado risk criteria regarding lifting, using hand tools, wrist flexion and extension or vibration. He reviewed each of the risk factors enumerated in Rule 17, Exhibit 5 of the *Guidelines* regarding cumulative trauma conditions. He concluded that none of Claimant's job duties met any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5. Mr. George also found that Claimant's job duties fail to the meet the requirement for force, repetition, and duration required by the *Guidelines.* He testified that even assuming that Claimant lifted and pulled hoses as frequently as he testified and that the hose jerked as often as Claimant asserted, his job duties still did not meet the requirements of the *Guidelines* for the Primary or Secondary Risk Factors.

24. In contrast, Dr. Larsen concluded that Claimant's work activities for Employer caused him to develop right CTS. However, in reaching his opinion Dr. Larson did not review the EMG/NCV testing, job site analysis or Claimant's job description. Moreover, Dr. Larson did not consider W.C.R.P. Rule 17, Exhibit 5 regarding cumulative trauma conditions in rendering his opinion. Accordingly, Claimant has failed to demonstrate that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated his right CTS. Claimant has failed to prove that his right CTS was directly or proximately caused by his employment or working conditions.

25. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right hand and wrist injury on July 26, 2014 during the

course and scope of his employment with Employer. The medical records are replete with evidence that Claimant did not suffer an acute injury while he was working as a Tank Engine Driver for Employer. On July 26, 2014 Claimant sought medical treatment at the University of Colorado Hospital Emergency Room. Claimant reported a two-day history of numbness with sharp, shooting pains to his right fingers. The examining physician could not determine a mechanism of injury. On August 18, 2014 Claimant visited Dr. Edmonds and reported numbness, tingling and shooting pain in his right hand. Dr. Edmonds noted "there was not acute injury or trauma." Although Claimant may have manifested right CTS symptoms while working for Employer on July 26, 2014, the record contains insufficient evidence to establish that his work activities caused an acute development of CTS.

## 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).

### *Occupational Disease*

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. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of right CTS during the course and scope of his employment with Employer. Although Claimant attributed his right hand and wrist symptoms to his work activities, a review of his job duties reflects that they lacked the requisite force or repetition to cause his CTS. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's tasks as a Tank Wagon Driver included driving a truck, completing a pre-trip inspection, checking tank levels, helping the frac tech stage hoses, fire watching, recording fuel levels, winding the hose and completing paperwork. Although Claimant's job duties sometimes exceeded the minimum force requirements under the *Guidelines*, his job duties did not exceed the force requirements for the required repetition and time periods. Rule 17, Exhibit 5 of the *Guidelines* requires a combination of force, repetition and duration. However, Claimant's job duties fail to meet all of the criteria in the *Guidelines* for a cumulative trauma condition.

9. As found, relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Wagon Driver failed to meet the causational requirements for CTS. He persuasively explained that Claimant did not suffer CTS as a result of his work activities for Employer. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian testified that Claimant's job duties did not meet the Primary Risk Factors because he did not engage in a repetitive cycle activity with the requisite force. He also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Engine Driver failed to meet the causation requirements for CTS outlined in the Rule 17, Exhibit 5 of the *Guidelines.* Based on Claimant's job duties, Dr. Cebrian also determined that he would not be maintaining the types of postures for the requisite time periods as outlined in the *Guidelines*. He remarked that Claimant was simply not performing his job duties for a continuous repetitive cycle.

10. As found, the job site analysis completed by Mr. George supports the opinion of Dr. Cebrian. Mr. George also concluded that the job duties of a Tank Wagon Driver do not meet any of the Colorado risk criteria regarding lifting, using hand tools, wrist flexion and extension or vibration. He reviewed each of the risk factors enumerated in Rule 17, Exhibit 5 of the *Guidelines* regarding cumulative trauma conditions. He concluded that none of Claimant's job duties met any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5. Mr. George also found that Claimant's job duties fail to the meet the requirement for force, repetition, and duration required by the *Guidelines.* He testified that even assuming that Claimant lifted and pulled hoses as frequently as he testified and that the hose jerked as often as Claimant asserted, his job duties still did not meet the requirements of the *Guidelines* for the Primary or Secondary Risk Factors.

11. As found, in contrast, Dr. Larsen concluded that Claimant's work activities for Employer caused him to develop right CTS. However, in reaching his opinion Dr.

Larson did not review the EMG/NCV testing, job site analysis or Claimant's job description. Moreover, Dr. Larson did not consider W.C.R.P. Rule 17, Exhibit 5 regarding cumulative trauma conditions in rendering his opinion. Accordingly, Claimant has failed to demonstrate that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated his right CTS. Claimant has failed to prove that his right CTS was directly or proximately caused by his employment or working conditions.

*Acute Injury*

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

13. 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).

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right hand and wrist injury on July 26, 2014 during the course and scope of his employment with Employer. The medical records are replete with evidence that Claimant did not suffer an acute injury while he was working as a Tank Engine Driver for Employer. On July 26, 2014 Claimant sought medical treatment at the University of Colorado Hospital Emergency Room. Claimant reported a two-day history of numbness with sharp, shooting pains to his right fingers. The examining physician could not determine a mechanism of injury. On August 18, 2014 Claimant visited Dr. Edmonds and reported numbness, tingling and shooting pain in his right hand. Dr. Edmonds noted "there was not acute injury or trauma." Although Claimant may have manifested right CTS symptoms while working for Employer on July 26, 2014, the record contains insufficient evidence to establish that his work activities caused an acute development of CTS.

## 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: February 12, 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 raised for the hearing included a determination of dependents of Claimant Jeffrey Stromberger and the amount of benefits to be paid pursuant to Sections 8-41-501 and 8-41-503, C.R.S.

## FINDINGS OF FACT

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

1. On August 29, 2014, Claimant was involved in a motor vehicle accident in the course and scope of his employment while employed by Employer. On August 29, 2014, at approximately 10:53 a.m., while southbound on highway 385 near mile post 206, Claimant was involved in a rollover accident causing his death.

2. Kristyn N. Stromberger filed a Dependent's Notice and Claim for Compensation for which a Notice of Contest was filed by Respondents on November 5, 2014. Respondents have agreed that the Notice of Contest is hereby withdrawn and have stipulated that Claimant's death did arise out of the course and scope of employment in the motor vehicle accident on August 29, 2014.

3. Respondents have obtained information through the Colorado State Patrol Accident Reports, mechanical investigation, autopsy report and confirming letters from Colorado State Patrol Trooper Seth Soukup regarding the cause of the accident. As a result of this investigation, and documents submitted, there was no safety rule violation that would have affected the outcome in regard to this accident.

4. Employer records have been obtained regarding wages earned by Claimant from January 1, 2014, through August 29, 2014. The parties have stipulated, and from the records it appears proper, that Claimant's wages for that period of time including any fringe benefits was $42,388.78. Based on the gross wages for that period of time, the average weekly wage is determined by taking the $42,388.l78, divided by 241 days, and multiplying by seven days per week which equals $1,231.21. As a result, the temporary total disability rate to determine dependent benefits would be two-thirds of that amount or $820.81 per week.

5. Based on the marriage certificate produced by Kristyn N. Stromberger, and her testimony, which the Court finds credible, the Court finds that Kristyn N. Stromberger is the widow of the decedent, Claimant Jeffrey Stromberger, and was living in the same household at the time of his death and therefore is entitled to dependent's benefits.

6. Based on the certificate of live birth for Pacyn K. Stromberger and the testimony of Kristyn N. Stromberger, which has been found credible, it is determined that Pacyn K. Stromberger is a minor child who relied on support of Claimant Jeffrey Stromberger entitled to dependent's benefits.

7. Kristyn N. Stromberger testified that she has had access to all financial accounts of Claimant Jeffrey Stromberger. She testified that she is aware of the content and that there has not been any payments made to, or for the benefit of, any other individual for the purpose of support. Additionally, she testified that she would be aware if Claimant Jeffrey Stromberger had any other children and there are no other children.

8. Kristyn N. Stromberger testified that Employer continued to pay full wage benefits through September 30, 2014. Additionally, she testified that the funeral benefit of $7,000 has already been paid.

9. The record shows that the Social Security Administration has awarded to Kristyn N. Stromberger, for her minor child, Pacyn K. Stromberger, an entitlement to a Social Security benefit in the amount of $1,464.40 per month.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following conclusions of law.

1. The injured worker has the burden of proof by a preponderance of evidence establishing entitlement to benefits. Sections 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). A "preponderance of evidence" is a 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, 2012]. Also *see Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001).

2. In deciding whether an injured worker has met the burden of proof the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002; *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of a witness. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000

3. Section 8-41-503(1), C.R.S entitled, "Dependency and Extent Determined-How" provides, that:

> (1)Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and right

to death benefits shall become fixed as of said date . . . . Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the Director may designate.

4. Section 8-41-501(1)(a), C.R.S. entitled "Persons Presumed Wholly Dependent," provides, "that the following described persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence) :

(a) Widow or widower, unless it is shown that he or she was voluntarily separated and living apart from the spouse at the time of injury or death or was not dependent in whole or in part on the deceased for support .

(b) Minor children of the deceased under the age of eighteen years, including posthumous or legally adopted children."

5. It is determined that decedent Claimant Jeffrey Stromberger died in the course and scope of his employment on August 29, 2014. As a result, Claimant Jeffrey Stromberger has two surviving dependents. They are his widow, Kristyn N. Stromberger, and his minor daughter whose date of birth is July 25, 2013. There are no other dependents.

6. At the time of Claimant Jeffrey Stromberger's death, his average weekly wage was $1,231.21 with a TTD benefit rate used for the dependents' benefit rate of $820.81 per week. It is the determination of this Court that 50% of the benefit shall go to Kristyn N. Stromberger and 50% to Pacyn K. Stromberger. In regard to the benefits owed to Pacyn K. Stromberger, her benefits shall be reduced pursuant to law by 50% for the Social Security offset. Taking the $1,464.40 Social Security benefit rate per month times 12 months, dividing that by 52 weeks, and taking 50%, the Court finds the weekly reduction shall be $168.97. This offset shall continue pursuant to law.

7. Based on the documents submitted and testimony in this case, the funeral benefits have been paid and it is believed there are no outstanding medical bills at this time. It is also found that Employer continued to pay Claimant's wages until September 30, 2014.

## ORDER

It is therefore ordered that:

1. Respondents shall pay to Kristyn N. Stromberger $410.41 per week until her death or until remarriage or otherwise pursuant to law.

2. It is determined that Pacyn K. Stromberger is entitled to $410.40 per week until she reaches the age of 18, or 21 as provided by statute, or otherwise terminated by law. This amount shall be reduced by $168.97 for the Social Security offset which

would provide a weekly benefit of $241.43 per week. This amount shall be paid to Kristyn N. Stromberger for the benefit of Pacyn K. Stromberger.

3. As a result of the continued payment of wages for Claimant Jeffrey Stromberger through September 30, 2014, the benefits due and payable to the dependents shall begin October 1, 2014, and continuing pursuant to 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: February 6, 2015_

DIGITAL SIGNATURE:

Margot W. Jones

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

## ISSUE

Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with Employer in August of 2014.

## FINDINGS OF FACT

1. Claimant works for Employer as an Eligibility Advocate with duties including assisting uninsured and underinsured patients secure healthcare benefits. In her position, Claimant interviews patients, makes phone calls, and inputs data. Claimant has been employed in this position for approximately four years.

2. In August of 2014, Claimant began experiencing pain and discomfort in her bilateral hands and wrists.

3. On August 14, 2014, Claimant informed Employer of the pain, indicating that she began experiencing pain in both wrists and hands one week prior on August 7, 2014. *See* Exhibit A.

4. Employer filled out an Employer's First Report of Injury and referred Claimant for treatment. *See* Exhibit A.

5. On September 3, 2014 Claimant saw John Stephen Gray, M.D. Claimant had bilateral hand and wrist pain. Claimant was convinced that her pain was caused by her work, but noted no specific accident or injury. Claimant indicated that data history and writing caused her hand pain. Claimant denied any prior problems with her hands. Claimant indicated no significant change in her job recently to explain the onset of her symptoms. *See* Exhibit F.

6. Claimant had a positive history for hypertension, hypothyroidism, asthma, vitamin D deficiency, and bilateral pedal edema. Claimant also had a positive family history of gout. *See* Exhibit F.

7. Claimant had very minimal swelling over the MCP joints of the third metacarpals bilaterally and tenderness over the CMC joints of the thumbs with a positive grind test bilaterally, right greater than left. *See* Exhibit F.

8. Dr. Gray diagnosed bilateral hand and wrist pain, work relatedness unclear. Dr. Gray opined that causation was at issue, that there was no clear-cut

mechanism of injury, and that Claimant did not seem to meet the criteria for high repetitions nor high force nor awkward positioning. *See* Exhibit F.

9. On September 17, 2014 Claimant again saw Dr. Gray. Dr. Gray reviewed the results of Claimant's laboratory tests with her. Claimant's tests showed a high uric acid level, an elevated sedimentation rate, and an elevated C-reactive protein level. *See* Exhibit F.

10. Dr. Gray diagnosed Claimant with bilateral hand and wrist pain, probably related to an inflammatory condition such as gout/hyperuricemia and opined that it was probably not work related. *See* Exhibit F.

11. Dr. Gray opined that causation was somewhat more clear at that time, and that it appeared that Claimant had an inflammatory condition that is probably related to her pain and is probably not work related. Dr. Gray advised Claimant to see her primary care physician and to get a referral to a rheumatologist for appropriate diagnosis and treatment. *See* Exhibit F.

12. On October 15, 2014 Claimant again saw Dr. Gray. Claimant had similar complatints of bilateral hand and wrist pain that she indicated was severe following her last visit. Claimant questioned whether the diuretic she was taking for her blood pressure might be affecting her uric acid levels. Claimant's examination showed essentially no changes. *See* Exhibit F.

13. Dr. Gray again diagnosed bilateral hand and wrist pain and opined that it was probably related to an inflammatory condition such as gout/hyperuricemia and opined that he doubted work relatedness. *See* Exhibit F.

14. On October 22, 2014 Respondents filed a Notice of Contest alleging the injury/illness was not work related. Claimant then filed an Application for Expedited Hearing on November 26, 2014. *See* Exhibits B, C.

15. Claimant appeared pro se at hearing and testified that she was still experiencing pain and discomfort in her bilateral hands and wrists, believed the pain to be related to her employment, and believed there was not enough information for a conclusion that her pain is not work related.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201,

C.R.S. (2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

### ***Compensability***

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained the burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two pronged requirement by a preponderance of the evidence. *See* § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). In the present case, Claimant has failed to establish that her bilateral hand and wrist pain occurred due to her work as an eligibility advocate. Rather, as found above, Dr. Gray diagnosed Claimant with bilateral hand and wrist pain, probably related to inflammatory condition such as gout/hyperuricemia and opined that it was probably not work related. Claimant's testing, as found above, showed a high uric acid level and an elevated sedimentation rate and c-reactive protein. Claimant also had a past history of hypertension, hypothyuroidism, asthma, vitamin D deficiency, bilateral pedal edema, and a family history positive for gout. Although Claimant testified that she believes the pain in her wrists and hands is due to her work and believes it was caused by her work, Claimant has failed to prove more probably than not, that the bilateral hand and wrist pain was due to her employment. Claimant did not present any evidence or testimony as to her daily activities, any repetitive motion, or any information to support a conclusion that an injury to her bilateral hands and wrists occurred as a result of her employment. Dr. Gray opined that Claimant's job duties did not appear to meet criteria for high repetition nor high force nor awkward positioning. Claimant's duties included interviewing patients over the first several hours of her work then intermittently inputting data and making phone calls. Claimant did not establish how these job duties that she has performed over the last four years suddenly caused an onset of pain in her bilateral wrists and hands.

The opinion of Dr. Gray that Claimant's bilateral wrist and hand pain is probably due to an inflammatory condition and that it was doubtful that it was work related is found persuasive. Claimant has numerous non-work related risk factors as shown by the medical records and she has failed to prove any causal relationship between her pain and her employment. In her testimony and case presentation, Claimant argued that she believed there was not enough information to conclude that the condition was not work related. Claimant appears to be misplacing the burden. It is not Respondents burden to prove the bilateral hand and wrist pain is not work related. Rather, it is Claimant's burden to prove that the bilateral hand and wrist pain is work related. The medical reports do not support such a conclusion and doubt the work relatedness of Claimant's pain. Claimant has not established or presented sufficient evidence or testimony to support her claim and to prove by preponderant evidence the compensability of her bilateral hand and wrist pain.

## ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show she suffered a compensable injury in August of 2014. The claim is denied and dismissed.

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

DATED: February 4, 2015

/s/ Michelle E. Jones

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

## 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. All notices to the Respondent were sent to its address on file with the DOWC and have not been returned as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ so finds.

2. Hearing in the above-captioned matter is presently scheduled for April 14, 2015, in Denver, Colorado.

3. On December 4, 2014, the Petitioner filed an Application for Hearing and Notice to Set pursuant to Office of Administrative Courts Rules of Procedure (OACRP), Rule 8, 1 CCR 104-1 and § 8-43-409 (1), C.R.S.

4. The Notice of Hearing was mailed to the Respondent at its last known address on file with the Division of Workers' Compensation (hereinafter "DOWC").

5. On January 12, 2015, the Petitioner filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist, pursuant to OACRP, Rule 17 and § 8-43-409, C.R.S. Pursuant to OACRP, Rule 17, the Respondent had 20 days after the filing of the Motion within which to file an objection and/or respond to the Motion. The Respondent failed to file a timely response to the Motion for Summary Judgment. Therefore, there are no genuine issues of disputed material fact for hearing.

### Findings

6. The Respondent employs employees for whom it must carry workers' compensation insurance under the provisions of the Act.

7. The Respondent does not have a policy of workers' compensation insurance in effect.

8. The Respondent continues to operate its business in the absence of workers' compensation insurance.

9. The Respondent received notice of the hearing set before the Office of Administrative Courts for April 14, 2015.

10. The Respondent is in default of its workers' compensation insurance obligations under the Act.

11. There is no genuine issue of disputed material fact with respect to Findings 1 through 9 herein above.

12. The Motion for Summary Judgment is supported by documents and affidavits.

13. The Respondent is currently operating its business without a policy of workers' compensation insurance in effect, and has been operating its business without workers' compensation insurance since at least January 1, 2007, thus, exposing its existing employees to real, immediate, sand irreparable harm from an on-the-job injury that would not be covered by insurance.

14. In an Order, dated February 13, 2012, the Director of the DOWC imposed a fine in the amount of $18,530.00 against the Respondent for failing to maintain workers' compensation insurance from at least January 1, 2007 through the date of the Order.

15. The Director's Order was recorded as a judgment in the Denver District Court on May 17, 2012 (Denver Dist. Ct. Case No. 12CV3004).

16. The Petitioner has demonstrated by a preponderance of the evidence that there is no genuine disputed issue of material fact and the Petitioner is entitled to summary judgment on the cease-and-desist issue.

## CONCLUSIONS OF LAW

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

### Notice

a. As found, all notices of to the Respondent, unreturned as undeliverable, establish a legal presumption of receipt, warranting a finding of receipt by the Employer. *See Olsen v. Davidson,* 142 Colo. 205, 350 P. 2d 338 (1960). *See also Campbell v. IBM Corp.,* 867 P. 2d 77 (Colo. App. 1993).

**Jurisdiction**

a. The ALJ has jurisdiction of the subject matter and over the parties to this action pursuant to the Workers' Compensation Act of Colorado.

**Summary Judgment**

b. OACP, Rule 17, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." The 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 and affidavits.

c. 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, the attachments and the Affidavit of Nikki Gwin establish that there is no genuine issue of disputed material fact with respect to the Findings herein above.

d. 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). As found, the Respondent did not file a timely response to the Motion. Therefore, the allegations in the Motion for purposes of summary judgment are deemed true and accurate.

**Cease-and-Desist**

d. As found, the Respondent failed to provide a written response with supporting documentation to the Petitioner's Motion for Entry of Summary Judgment. Accordingly, the facts set forth in the Petitioner's Motion and in the supporting affidavit attached to the Motion are undisputed. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1006 (Colo. App. 2004).

e. The Respondent is in violation of § 8-44-101 (1), C.R.S., by failing to maintain workers' compensation insurance for its covered employees, and is therefore subject to penalties under § 8-43-409.

f. Section 8-43-409 (1) (a), C.R.S., provides that an employer in default of its workers' compensation insurance obligations shall be ordered to cease and desist immediately from continuing its business operations during the period such default continues.

g. The issuance of an order requiring the Respondent to cease and desist business operations while in default of its workers' compensation insurance obligations is an appropriate penalty for failure to keep workers' compensation insurance in force.

**Burden of Proof**

h. 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 Petitioner has sustained its burden that employees of the Respondent will suffer immediate and irreparable harm in the event of an on-the-job injury unless the Respondent is ordered to cease-and-desist doing business, immediately and forthwith.

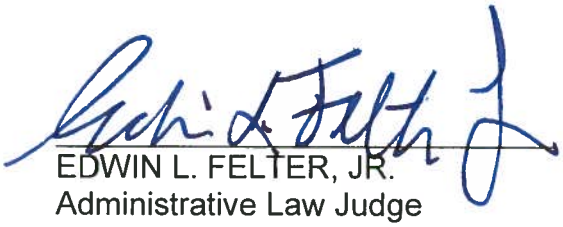
## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment is hereby granted and Respondent shall cease and desist , immediately, from continuing its business operations during the period it remains in default of its mandatory, legal obligation to carry workers' compensation insurance.

B. The scheduled hearing of April 14, 2015 is hereby vacated.

DATED this 9 day of February 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*.