ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant engaged in an injurious practice warranting the suspension or reduction of compensation as of February 28, 2014 and thereafter pursuant to § 8-43-404(3), C.R.S. ?

- Respondents withdrew the issue of offsets and credits.

FINDINGS OF FACT

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

1. Claimant suffered an admitted work injury on December 26, 2013 while employed as a cemetery worker for the Employer. He initially sought treatment from Arbor Occupational Medicine (Arbor). Claimant was diagnosed with a lumbar strain. Claimant failed to report any recent treatment for any portion of his back at this initial evaluation.

2. Dr. Lori Long and Dr. Sander Orent of Arbor became the authorized treating physicians. Claimant reported to Dr. Long that he had suffered episodes of sciatica 15 years prior, and suffered a cervicothoracic strain "about 18 months ago" that had "completely resolved." Claimant did not report any recent medical treatment for any portion of the back. Nor did Claimant discuss any of his hobbies or activities with Dr. Long.

3. Claimant had been receiving ongoing treatment for his back with chiropractor Marc Cahn as recently as the month prior to the December 26, 2013 work injury. On July 26, 2013, Dr. Cahn noted Claimant was experiencing an onset of lumbosacral pain with joint dysfunction and myofascitis. Claimant sought treatment for his lower back on October 31, 2013 from Cahn. Dr. Cahn indicated that Claimant was reporting "ongoing lumbosacral pain with joint dysfunction" as late as November 7, 2013.

4. During the course of litigation, Respondents served Claimant with interrogatories and specifically questioned him about injuries and medical treatment prior to the December 26, 2013 injury. Claimant failed to disclose to Respondents that he had been receiving chiropractic treatment for his back from Dr. Cahn. At deposition, Claimant confirmed through his testimony that he failed to provide Respondents with this information.

5. On February 28, 2014, Dr. Long imposed work restrictions limiting Claimant to lifting, carrying, pushing/pulling of no more than 5 pounds. He was restricted from using heavy equipment, ladders, and from bending and twisting at the waist. Claimant agreed these were his work restrictions as of February 28, 2014.

6. As part of his treatment, Claimant was referred to physical therapy at Alpha Rehabilitation, LLC. Claimant was asked to participate in various therapeutic exercises as part of his therapy and rehabilitation program. Claimant testified, among other things, that his therapist, Rob Rapier, had him lift and pull items that he thought weighed up to 40-50 pounds. He was asked to pick up a 25 pound kettle ball and curl an 18 pound bar while doing a squat during the course of therapy. Claimant admitted he never discussed his work restrictions with Mr. Rapier.

7. On cross examination, Claimant testified in his deposition that the physical therapy and rehabilitation was conducted in a clinic setting. While he was performing the therapeutic exercises, he was supervised by the staff at Alpha Rehabilitation.

8. Claimant played a bass guitar player and sang in a musical group named the Drifter Band after February 28, 2014 when Dr. Long imposed work restrictions. Claimant would play “gigs” at church services about once per month. The band also played other events including at Larry’s Guitars, Bitter Sweet, the Laughing Goat Coffee House, and Hampden Hall. Claimant played in the band throughout 2014 and 2015.

9. Claimant exceeded the work restrictions imposed by Dr. Long while participating as a performer with the Drifter Band. On March 15, 2014, surveillance video shows Claimant carrying a music stand in one hand and a mandolin in the other. Claimant was carrying the items to put in the back of his automobile to attend a church event for the band. Claimant admitted that the mandolin weighed more than 5 pounds.

10. By October 3, 2014, Dr. Long decreased Claimant’s work restrictions to allow for lifting, carrying, pushing, and pulling up to 10 pounds. Sitting was limited to 15 minutes and walking and standing limited to 45 minutes per hour.

11. Claimant admitted that he exceeded his October 3, 2014 work restrictions. Claimant weighed multiple items used for the band and testified that many of the items he lifted and carried as part of his band duties exceeded his work restrictions. Claimant listed these items in an email to his attorney and the email was admitted as exhibit Y. The items included a Gibson acoustic guitar in a hard case (17 lbs), Fender bass instrument in a hard case (24 lbs), Fender electric guitar in hard case (22 lbs), accordion in a case (20 lbs), Genz Benz amplifier (35 lbs), Ampeg speaker cabinet (29 lbs), church PA speaker cabinet (33 lbs), and fully loaded suitcase with microphones (18 lbs).

12. Surveillance video shows Claimant violating his October 3, 2014 work restrictions. On October 10, 2014, Claimant was shown setting up a pop-up tent or canopy to be used for a band event at Larry's Guitars. The video shows Claimant lifting, pushing, and pulling the tent in order to open it and set it up. Claimant testified the tent weighed more than 10 pounds.

13. Surveillance video showed Claimant performing at Hampden Hall on December 12, 2014. The video shows Claimant carrying an acoustic guitar in a Fender bass case, an Ampeg cabinet, and a suitcase. The video showed Claimant moving rhythmically, twisting, and bending throughout the night while singing and playing guitar. The event lasted approximately four hours.

14. Dr. A.C. Lotman, an expert in orthopedic surgery, performed an independent medical evaluation (IME) of Claimant at Respondents' request of on April 3, 2014. Claimant told Dr. Lotman at that time he was no longer able to walk his dog, ski, or perform work in his garden. Dr. Lotman concluded that Claimant was not a maximum medical improvement (MMI) at that time.

15. Dr. Lotman subsequently reviewed the surveillance video. Dr. Lotman concluded that Claimant "clearly has not followed those restrictions." Dr. Lotman subsequently concluded that Claimant reached MMI as of June 26, 2014.

16. Dr. Lotman testified at hearing on May 5, 2015 that Claimant violated the work restrictions imposed by Dr. Long multiple times. Dr. Lotman testified that the purpose of work restrictions is to affect a cure by allowing the body to heal and by limiting incidental activity from causing additional harm. Dr. Lotman persuasively testified that by performing activities outside of Dr. Long's work restrictions, Claimant delayed achieving maximum medical improvement, delayed his recovery, and delayed the healing process. The end result was not as satisfactory as if the work restrictions had been followed.

17. Dr. Orent also reviewed the surveillance videos admitted into as evidence Respondents' exhibits T and U. At the time hearing commenced on May 5, 2015, Dr. Orent had not yet placed Claimant at MMI. According to a report subsequently received by the parties, Dr. Orent reviewed the surveillance videos. In a letter dated May 6, 2015, Dr. Orent indicated that Claimant's activities depicted on the videos were not consistent with his reported subjective complaints. Dr. Orent noted he never became aware that Claimant was receiving treatment for his back prior to the December 26, 2013 date of injury. Dr. Orent concluded that he agreed with Dr. Lotman and that Claimant reached MMI as of June 26, 2014. Dr. Orent added, "I must admit to being frankly disturbed by this disconnect between what I see on the video and the history he has given us." Dr. Orent did not believe an impairment rating was warranted because "we do not know the status of his previous spine issues and I also agree that there is clear evidence of symptom magnification…"

18. On May 20, 2015, Dr. Orent issued a report indicating he had discussed the surveillance video with Claimant. Dr. Orent related a conversation with the

Claimant wherein Claimant admitted he performed the activities shown in the video. Significantly, Dr. Orent noted "[t]his does not change of course the fact that he was operating outside his work restrictions and he admitted that this was absolutely true."

19. Because Claimant was determined to be at MMI, Respondents filed a Final Admission of Liability on May 26, 2015. Claimant objected and pursued the Division IME (DIME) process. Dr. Clarence Henke was selected as the DIME examiner. Dr. Henke concluded that Claimant was not at MMI because he needed a neuro-surgical consultation. In his report, he did not discuss any surveillance video or the findings in Dr. Lotman's report.

20. On November 19, 2015, Respondents deposed Dr. Henke, an expert in occupational medicine among other things. Dr. Henke insisted that the only way to determine Claimant's true functional abilities was to perform a functional capacity evaluation. He did not find the surveillance video persuasive. Dr. Henke testified that the purpose of imposing work restrictions is to limit continued damage, to avoid any type of fall or other type of injury because of lack of mobility, and would prevent any injuries to other people who would be working with him. Dr. Henke agreed that a patient has a responsibility to follow restriction provided by the physician. Dr. Henke thought that Claimant was following his work restrictions based on the reports of Claimant's treating physicians. Claimant testified at his deposition that he never discussed his daily activities with Dr. Henke during the DIME.

21. On this issue of whether Claimant violated his work restrictions, the ALJ finds the opinions of Drs. Lotman and Orent to be more credible and persuasive than the opinion of Dr. Henke.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. However, "an injured work[er] has the obligation to act reasonably in minimizing the consequences of his injury and liability of his employer." *State Compensation Insurance Fund v. Luna*, 397 P.2d 231, 234 (Colo. 1964).

If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee. § 8-43-404(3), C.R.S.

Before sanctions under § 8-43-404(3) can be invoked to reduce or suspend benefits, Respondents must show that the treatment at issue is calculated to effect a cure, *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001, 1006 (Colo.

App. 2002), or that "such medical or surgical treatment … is reasonably essential to promote recovery." §8-43-404(3), C.R.S.

Respondents have shown by a preponderance of the evidence that compensation, in this case temporary benefits, should be suspended or reduced as of March 15, 2014 after Dr. Long released Claimant to work and imposed work restrictions following the industrial injury. The imposition of work restrictions is a common and important component of almost every workers' compensation claim, they often determine when disability benefits will be paid to a claimant, and they are taken very seriously not only by treating physicians, but by the courts when determining whether a claimant should be entitled to benefits. In this case, Claimant occasionally disregarded the restrictions that were imposed on him by his treating physicians throughout the course of his claim, and in doing so, engaged in an "injurious practice" that imperiled and retarded his recovery.

The evidence shows that Claimant played in a band occasionally during the course of his recovery following the December 26, 2013 admitted work injury to his lumbar spine. Some of his band related activities violated the work restrictions imposed by his treating physicians at Arbor. For example, surveillance video shows Claimant carrying a mandolin on March 15, 2014. Claimant admitted the mandolin weighed more than 5 pounds.

Claimant continued occasionally to violate work restrictions when the restrictions were reduced. By October 3, 2014, Dr. Long decreased Claimant's work restrictions to allow for lifting, carrying, pushing, and pulling up to 10 pounds. Sitting was limited to 15 minutes and walking and standing limited to 45 minutes per hour. Claimant violated those work restrictions during some of his band related activities.

Claimant weighed multiple items used for the band and testified that many of the items he lifted and carried exceeded his lifting restrictions. Such items included a Gibson acoustic guitar in a hard case (17 lbs), Fender bass instrument in a hard case (24 lbs), Fender electric guitar in hard case (22 lbs), accordion in a case (20 lbs), Genz Benz amplifier (35 lbs), Ampeg speaker cabinet (29 lbs), church PA speaker cabinet (33 lbs), and full loaded suitcase with microphones (18 lbs). Claimant admitted at his deposition and eventually to his treating physician, Dr. Orent, that he violated his work restrictions.

The surveillance videos admitted into evidence as exhibits T and U show Claimant engaging in various activities from March 15, 2014 through December 12, 2014. The videos show Claimant engaging in some band activities: carrying items to his car, setting up a tent, and playing a "gig" over a four hour span of time on December 12, 2014. Claimant admitted he disregarded the specific work restrictions imposed on him by his treating physicians and engaged in activities that imperiled and retarded the recovery process.

Claimant engaged in activities that imperiled and retarded his recovery. His own treating physician (Dr. Orent), Respondents' IME physician (Dr. Lotman), and even the

DIME physician (Dr. Henke) all essentially opined that the purpose of imposing work restrictions in a workers' compensation claim is to treat pain, to allow tissue damage to heal, and to limit any further damage. Dr. Orent was particularly disturbed that Claimant exceeded his work restrictions without disclosing that information to him during the course of treatment. Dr. Lotman testified that in his expert opinion, Claimant's activities not only violated the work restrictions that were essential to promoting recovery, but did in fact imperil and retard recovery.

Claimant contends that he reasonably exceeded his work restrictions, because he was routinely asked to exceed those restrictions during the course of his physical therapy treatment. The ALJ is not persuaded.

First, there is no bad faith or intent requirement that must be proven under § 8-43-404(3) before benefits may be suspended or reduced. That Claimant engaged in activity that imperiled and retarded his recovery is sufficient to trigger the sanctions in the statute. Even if there were an intent requirement, the evidence shows that Claimant was aware of his work restrictions and proceeded to engage in band activities that violated his work restrictions.

Second, the physical therapy exercises Claimant was asked to perform by the therapists at Alpha Rehabilitation, LLC were all done under staff supervision (as Claimant concedes) with the specific intent of helping Claimant to heal and recover. Participating in therapy exercises designed and supervised by trained therapy personnel is not equivalent to playing in a band even if Claimant is exceeding his work restrictions in both instances. There is no evidence that any therapist encouraged or told Claimant to exceed his work restrictions imposed by Dr. Long, nor any evidence that engaging in his band activities promoted recovery.

Further, the ALJ finds and concludes that Claimant is not a reliable historian. For example,

- Claimant failed to provide Dr. Orent with essential information that was needed in order for treatment.
- Claimant failed to disclose to Dr. Orent or Dr. Long that he was receiving treatment for his lumbar spine from Dr. Cahn up until a month prior to the work injury.
- He also failed to disclose this relevant information to Respondents in sworn discovery responses.
- Claimant posted on Facebook that he was employed by Insurer.
- Claimant failed to disclose to Dr. Long or Dr. Orent that he played in a band.

- He told Dr. Lotman that he was no longer able to walk his dog, ski, or perform work in his garden—giving the wrong impression as to his daily activities.

This lack of candor disturbed Dr. Orent to the point that he released Claimant to MMI immediately upon learning this information and assigned no impairment.

In conclusion, Claimant had an obligation to abide by his work restrictions that were imposed for the purpose of "affecting a cure" and essential for promoting recovery. Claimant conceded he violated these restrictions on multiple occasions and surveillance video demonstrates same. The evidence shows it to be more likely than not that Claimant engaged in these activities occasionally during the course of treatment, and therefore, engaged in an injurious practice that imperiled and retarded his recovery as of March 15, 2014.

ORDER

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

1. Respondents have proven by a preponderance of the evidence that Claimant occasionally engaged in an injurious practice that impeded and retarded recovery pursuant to § 8-43-404(3) as of March 15, 2014.

2. The Court finds in its discretion that the appropriate remedy is this case is the reduction by 5% of Claimant's temporary benefits effective March 15, 2014 and continuing until temporary benefits would otherwise be terminated by statute.

3. Any amount of temporary benefits previously paid by Respondents to Claimant during such period of reduced compensation shall be deemed an overpayment, and recoverable as permitted by law.

4. Any issue not resolved herein is 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 29, 2016

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

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that the proposed medical treatment recommended by Dr. Bender, including the referral for a neurosurgical evaluation and low back injections, is reasonable medical treatment necessary to maintain claimant at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of his employment with respondent employer on May 10, 2007 when he injured his back while lifting two and a half inch tubing while working in the oil fields in the course and scope of his employment with employer.

2. Claimant was referred for medical treatment and eventually underwent with Dr. Mack consisting of an L4-L5 lateral microsurgical discectomy for a foraminal disc herniation causing an L4 radiculopathy.

3. Claimant was eventually placed at MMI by Dr. Mack and was referred to Dr. Watson for a permanent impairment rating on January 6, 2010. Dr. Watson provided claimant with a permanent impairment rating of 10% whole person pursuant to Table 53.

4. Respondents filed a final admission of liability ("FAL") based upon the impairment rating provided by Dr. Watson on March 10, 2010. Respondents also admitted for ongoing maintenance medical benefits in the FAL.

5. Claimant was re-evaluated by Dr. Bender on July 16, 2010 who noted claimant was much improved since his last visit on January 7, 2010. Dr. Bender noted claimant had chronic low back pain. Dr. Bender noted claimant complained of pain radiating to the buttocks, hips and thighs occasionally when he overdoes it. Dr. Bender cautioned claimant about lifting significant amounts of weight, especially with a twisting location.

6. Claimant returned to Dr. Bender on April 8, 2011. Dr. Bender noted claimant was seeking to get updated work restrictions so he could understand what job he would qualify or apply for. Claimant noted that his back pain was moderate (at worst), after activity and work such as gathering firewood. Dr. Bender provided claimant with work restrictions and discussed the necessity to continue safe and consistently paced physical activities, as well as continuing to follow the body mechanics and lifting mechanics taught in past physical therapy courses. Dr. Bender noted claimant was invited to follow-up as soon as possible if any occurrence of symptoms.

7. Claimant next returned to Dr. Bender almost four years later, on January 8, 2015. Dr. Bender noted that on the weekend of November 30, 2014, claimant had an acute onset (while fixing his truck) of severe lumbar back pain (8/10 severity, sharp, aching, constant) associated with pain (burning, stabbing, constant) and numbness that radiates to the left buttock, lateral groin, posterior and lateral thigh, as well as posterior lateral lower leg to the ankle. Dr. Bender noted claimant's acute exacerbation of pain occurred 6-7 weeks ago and had gradually worsened. Dr. Bender recommended a repeat magnetic resonance image ("MRI") scan of his low back and provided claimant with prescription medications for Lyrica.

8. Claimant testified at hearing that he attempted to return to Dr. Bender before January 8, 2015 but was told by insurer that his claim was closed. The record, however, is devoid of any credible evidence that would support claimant's testimony at hearing, such as a follow up letter from claimant to insurer seeking a follow up appointment. In fact, the records from Dr. Bender dated January 8, 2015 indicate claimant did not follow up after his last visit as the chronic residual pain and associated symptoms were intermittent and tolerable.

9. Based on the records entered into evidence at hearing, the ALJ finds claimant's testimony that he attempted to schedule follow up appointments with Dr. Bender only to be turned down the insurer to be not credible.

10. Claimant testified at hearing that the incident in which he was working on his truck on November 30, 2014 involved simply replacing a valve stem on his truck and did not involve significant lifting.

11. Claimant underwent the repeat MRI scan on February 8, 2015. The MRI showed a recurrent or residual moderate to large size inferiorly projecting disc extrusion of the left paracentral and foraminal location, which severely effaces the left lateral recess and abuts and displaces the transiting L5 nerve root at the lateral recess. The MRI scan also showed a moderately sized central disc protrusion at the L5-S1 level that was noted to be similar in size and appearance as the prior study.

12. Claimant returned to Dr. Bender on February 10, 2015. Dr. Bender noted the results of claimant's MRI scan and recommended claimant return to Dr. Mack for neurosurgical consultation.

13. The neurosurgical consultation recommendation was denied by respondents.

14. Dr. Bender subsequently recommended claimant be referred to Dr. Heyman for a left L5-S1 and L4-5 transforaminal epidural steroid injection to reduce any reversible swelling and inflammation and therefore decrease pain. The transforaminal epidural steroid injection was likewise denied by respondents.

15. Respondents had Dr. Hattem review the claimant's medical records. Dr. Hattem indicated in his report that he did not believe that any of claimant's current

recommendations for medical treatment were related to his work injury. Dr. Hattem noted claimant had gone several years without medical treatment and sought medical treatment only after he experienced back pain on November 30, 2014 while working on his truck.

16. The ALJ credits the opinions expressed by Dr. Hattem and finds that claimant has failed to establish that it is more probable than not that the current need for medical treatment is causally related to his May 10, 2007 work injury. The ALJ credits the medical records from Dr. Bender that document an acute onset of symptoms after working on his truck on November 30, 2014 as the cause of his current symptoms. Therefore, claimant's request for medical treatment recommended by Dr. Bender consisting of the neurosurgical consultation and transforaminal injections is hereby denied.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

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

authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that the recommended medical treatment is related to his May 10, 2007 work injury. Due to the fact that claimant has failed to establish his burden of proof, his request for an Order requiring respondents to pay for the medical treatment is hereby denied.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied.

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, 2016

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

ISSUES

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

I. Whether Claimant's claim should be reopened based on an alleged worsening of condition related to Claimant's original 2009 industrial injury; and if so,

II. Whether Claimant's need for right MP and CMC joint surgery as performed by Dr. Philip Marin was reasonable, necessary and related to Claimant's 2009 industrial injury.

FINDINGS OF FACT

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

1. Claimant is employed as a working supervisor for Respondent-Employer. She works in the custodial department of the University and has been employed with Respondent- Employer for approximately 10 years and 4 months.

2. On or about June 5, 2009, Claimant injured her right thumb while donning a back-pack vacuum cleaner. Claimant experienced immediate pain in her right thumb, hand and wrist. She reported her injury and was seen by Respondent-Employer's designated workers' compensation provider who referred her to Dr. Philip Marin.

3. Dr. Marin obtained x-rays of the right carpometacarpal (CMC) joint which revealed joint subluxation and bone on bone osteoarthritis of the CMC joint which Dr. Marin opined had been aggravated by Claimant's 2009 injury.

4. Liability for the injury was admitted and conservative care undertaken. Despite conservative care, including steroid injections, Claimant's condition failed to improve. Consequently, Dr. Marin recommended and Claimant underwent a right CMC arthroplasty with ligament reconstruction and tendon interposition using the flexor carpi radialis (FCR) tendon on August 4, 2009.

5. Claimant recovered slowly following surgery. She was placed at maximum medical improvement (MMI) on January 18, 2010 by Dr. Marin. She subsequently followed up with her authorized treating physician (ATP) under the claim, Dr. Richard Nanes approximately one week later. Dr. Nanes released Claimant from care without

impairment. He also returned Claimant to full unrestricted work and recommended maintenance care in the form of use of a thumb splint to wear as needed.

6. Claimant worked between her release date and 2014 wearing her thumb splint. Careful review of the medical records between her date of MMI and 2014 fails to reveal that she sought specific treatment for her right wrist/thumb during this time frame. Rather the records submitted reflect the following:

- January 25, 2010 (MMI Date of original acute injury): Per Dr. Marin, "[e]verything has healed up very nicely. She is using her hand a work and has minimal discomfort." (Ex. 4 pg. 93)[1]

- Although Claimant reported moderate pain at the base of her right thumb 50% of the time, "she has full range of motion of the right thumb and of the right wrist and these movements are without pain." (Dr. Nanes, Ex 1 pg. 44)

- July 28, 2010: Claimant was seen by Dr. Nanes for a non-thumb related issue, and reported no right thumb pain in the diagram or in the report at all. (Ex. D pg. 23-26)

- July 2, 2012: Claimant sees her primary care physician at Kaiser, Rebecca Nickell, M.D., for systemic joint pain and swelling, and the report includes discussion of other issues such as toenails – yet other than generalized "tenderness" in both hands, there is no report regarding her right thumb being tired or otherwise affected. (Ex. B pg. 1-3)

- January 24, 2013: Claimant went back to Dr. Nickell for her general joint pain / arthritis, which now included complaints of her hands "tingling" and being "tight" in the mornings. (*Id.* pg. 6) However, the note did not mention the right thumb whatsoever. (*Id.*) Claimant testified that her joint pain "definitely" included her hands in 2013. (Transcript 23:19-25)

7. On February 1, 2014 Claimant testified that she spent all day on her computer preparing tax returns. According to Claimant's hearing testimony, she prepared her return, her son's return and her boyfriend's return on this date. She started around noon after she woke up, and kept going till the evening. Per Claimant, as she hit the print function on her computer with her right thumb to print the returns, she heard and felt a sudden "pop" followed by immediate and debilitating pain. According to Claimant her pain was so severe it precluded use of the right thumb. She could not put any pressure on the thumb or move it. According to Claimant's testimony, her right hand was "tired" because of her work duties as a custodian.

[1] Notably, Claimant's original thumb injury was viewed as an acute injury. (Ex. C pg. 21.)

8. Rather than follow up with her workers' compensation physician, Claimant sought treatment with her personal care physician (PCP) and later with Dr. Marin for her right hand/thumb symptoms.

9. On February 6, 2014, Claimant was evaluated by Dr. Nickell, and, for the first time since 2010, the medical record from this date of visit reflects that Claimant was complaining of right thumb problems. (Ex. B pg. 8)[2]

10. On February 8, 2014, Dr. Alfred D. Airline at Kaiser reported that Claimant told him that "the *only provocative issue"* which would explain her symptoms was *"approximately a week ago"* while she was typing to "*fill out her taxes.*" (*Id.* at pg. 10)(emphasis added). Although Dr. Airline noted that Claimant was a custodian, absent from his report is any comment/report from Claimant stating that her work duties were making her hands tired – instead, his report states: "[h]as no recent trauma" when discussing her employment. (*Id.*) Dr. Airline's report also notes that X-rays obtained on this date of visit were "consistent with arthritic changes." (*Id.*)

11. On February 24, 2014, Claimant reported to Dr. Marin that she "is *now getting* some pain and subluxation in the joint." (Ex 4, pg. 89)(emphasis added) She also stated her pain "*started* approximately two to three weeks ago… she was otherwise *doing quite well prior to this*." (*Id.*)(emphasis added)

12. Claimant also told John Gard, OTR, on this date, that "around 02/01/2014, she *began* to get significant symptoms in the area again… she was doing a lot of computer work and data entry while *doing her taxes* over the weekend." (Ex 4 pg. 91)(emphasis added).

13. On March 20, 2014, Claimant was evaluated by Dr. Nickell. During this encounter, Claimant reported that her hands and feet were painful and stiff in the morning. Dr. Nickell documented the presence of more nodules on Claimant's hands.

14. On March 31, 2014, Dr. Marin recommended revision right CMC surgery for what he described later was a failed prior surgery secondary to Claimant's "lack of flexion stabilization of the MP joint. Consequently, on April 11, 2014, Dr. Marin performed what is described in his surgical report as a fusion of the right thumb MP joint with Acutrak mini screw, 28 mm, right thumb CMC arthroplasty.

15. On June 16, 2014, Claimant presented to Dr. Marin's office in follow-up for her right CMC and MP fusion. According to Dr. Marin's note from this date of visit, Claimant was "using her hand as tolerated" and she was "very pleased." Claimant was taken out of her thumb splint and instructed to begin "gentle use as tolerated." The ALJ infers from this note that although Claimant was using her right hand to complete activities, her right thumb had been splinted and she was unable to use it. Claimant's medications were reviewed and she was to return in one month for additional follow-up.

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[2] Note that Claimant testified that she told the truth to her doctors generally and specifically regarding Dr. Nickell. (Transcript 21:21-22:2.)

Nonetheless, there are no recorded visits by Claimant to Dr. Marin between June 16, 2014 and January 21, 2015.[3]

16. On September 23, 2014, Claimant returned to Dr. Nickell with continued complaints of "arthritis pain." She reported that her joints felt like they were "on fire." This included her "low back, hands, knees etc." According to this note, Claimant also complained that her "[r]ight hand [was] still numb despite carpal tunnel surgery." Careful review of the records reveals that Claimant has a history of right sided carpal tunnel syndrome dating back to 2007. Claimant underwent a right carpal tunnel release procedure, performed by Dr. Marin on June 25, 2007.

17. On Claimant returned to Dr. Marin's office on January 21, 2015. During this encounter, Claimant complained of pain in both the MP and CMC joint regions of the right thumb. Dr. Marin noted that Claimant's MP fusion appeared to be solid and that the CMC joint was in "excellent alignment." Claimant was provided with additional cortisone injections, was given topical anti-inflammatory gel and instructed to follow-up in five to six weeks for re-evaluation.

18. Claimant was seen by Dr. Jan Dunn on January 22, 2015. During this visit, Claimant reported that the medication regime that Dr. Nickell had prescribed for her arthritis was not working. Dr. Dunn noted that Claimant's arthritis had been "progressively worsening since [Claimant's] 50s and is interfering with her function. Dr. Dunn documented "slight enlargement of MCPs with generalized redness of [the] skin of all fingers and knuckle (sic)." Dr. Dunn suspected that Claimant had premature, generalized OA (osteoarthritis), but because of a "fairly strong" family history of rheumatoid arthritis, felt that a repeat rheumatologic lab panel and referral to rheumatology was appropriate.

19. On March 2, 2015, Claimant returned to Dr. Marin's office with complaints of numbness in both the "palmer and dorsal side of the middle, ring, and small finger involving the entire digits that has been going on for approximately 3 months causing night awakening, numbness, and dropping objects." Claimant was assessed by Dr. Marin as having "generalized neuritis."

20. On March 18, 2015, Claimant was evaluated by Dr. Nanes who noted that Claimant was "undergoing a rheumatology workup which is not work-related and this will not happen until late next month."

21. Claimant underwent an EMG study on March 24, 2015 which study revealed findings consistent with severe right carpal tunnel syndrome as well as right superficial radial sensory neuropathy at the wrist.

22. On April 7, 2015, Claimant returned to Dr. Marin's office for follow-up regarding

[3] Although there are no records indicating that Claimant was seen between June 16, 2014 and January 21, 2015 in the exhibits submitted to the ALJ, the report generated by Dr. Marin following Claimant's January 21, 2015 visit reflects that Claimant had right thumb injections performed on November 19, 2014.

her EMG results. Based upon the EMG findings, Dr. Marin recommended an open carpal tunnel release, noting that Claimant had undergone a prior endoscopic release in 2007.

23. On April 28, 2015, Claimant was evaluated by Dr. Patrick Timms for the rheumatologic evaluation recommended by Dr. Dunn and referenced by Dr. Nanes on March 18, 2015. Laboratory work-up was completed during this visit which according to a June 2, 2015 report from Dr. Timms was "unremarkable . . . for inflammatory disease. Consequently, Dr. Timms recommended an enhanced NMRI of the left (sic) hand.

24. On May 5, 2015, Dr. Marin performed a "right open carpal tunnel release, with synovectomy of all 9 flexor tendons of the forearm and wrist."

25. On July 17, 2015, a diagnosis/symptom specific MRI of the right wrist extending through the proximal interphalangeal joints of the right hand, as recommended by Dr. Timms was performed which revealed "active inflammatory synovitis with associated erosions of metacarpophalangeal joint (second, third, and fifth)" and "synovitis and small erosions of first carpometacarpal joint and scaphotrapeziotrapezoid joint, with superimposed degenerative osteoarthritis."

26. Claimant returned to Dr. Timms on July 23, 2015 for follow-up regarding the results of her enhanced MRI. Based upon Claimant's MRI findings, Dr. Timms definitively diagnosed her with "[e]rosive rheumatoid arthritis- seronegative." Claimant was started on methotrexate and folic acid.

27. On September 14, 2015, Dr. Sollender conducted an independent medical examination (IME) of Claimant at Respondent's request. Dr. Sollender was asked to evaluate Claimant and comment upon whether she had any worsening or aggravation of a work related medical condition and whether Claimant's right carpal tunnel syndrome (CTS) was causally related to her 2009 industrial injury.

28. Dr. Sollender couched the controversy surrounding Claimant's suggestion that her 2009 claim should be re-opened on the basis of a worsening of condition, secondary to an aggravation of her degenerative osteoarthritis and CTS as follows:

> Claimant told me that her gripe with this relates to Dr. Marin's apparent concern that she had been released to work back in 2009 by Dr. Nanes too early for Dr. Marin's liking. She feels that workers compensation should be responsible for her condition worsening in 2014, even though I confronted her that no clinic notes between 2009 and 2014 demonstrated any ongoing complaints of worsening right hand problems. . . . When I read her release note from Dr. Marin in early 2010 documenting that she could return to work without restrictions and follow-up as needed, she said that Dr. Marin had some notes (not supplied) saying that he had wanted her to be protected for another month or so to allow her thumb to heal. I saw no notes reflecting this concern of Dr. Marin or other providers.

29. Following his physical examination and records review, Dr. Sollender opined that Claimant had not suffered a worsening or aggravation of her underlying degenerative arthritis. Rather, Dr. Sollender opined that Claimant had sustained a new non-work related injury on February 1, 2014 while she was preparing tax returns for herself, her son and her boyfriend. According to Dr. Sollender, Claimant's report of hearing and feeling a pop was consistent with rupture of a tendon which is not unheard of in the face of osteoarthritis. Citing the Colorado Workers' Compensation Medical Treatment Guidelines (MTGs), specifically Rule 17, Exhibit 5, Dr. Sollender noted that in order to properly address whether a medical condition is work related or not requires treating providers to carefully analyze the alleged offending activity before making a determination as to likelihood that the activity caused the medical condition in question. Per Dr. Sollender, the activity alleged to have caused the medical condition needs to be analyzed for "significant force, repetition, awkward posture, computer work, mousing, vibration and cold exposure. Dr. Sollender opined, based upon the history Claimant provided concerning her work activities and his records review, that "nothing in what [Claimant] reports . . . from 2010 onward seems to fit within these guidelines such that she would meet the exposure times for such potential risks factors." Moreover, Dr. Sollender opined that the "ongoing challenges [Claimant] has had from 2014 onward is not from work exposures, but from the ongoing degenerative process of osteoarthritis, for which her work has no contributory effect."

30. Citing the same MTG, Dr. Sollender also opined that the only way Claimant's CTS would be considered an occupationally related condition is if her job exposed her to occupational risk factors defined in the MTGs. Consequently, Dr. Sollender opined that a job site analysis would be useful in determining if Claimant's position as a working custodial supervisor exposed her to risk factors for the development of CTS. Nonetheless, Dr. Sollender noted that "with the lack of any described worsening of her carpal tunnel syndrome from 2010 to 2014, that [Claimant's] work did not expose her to any of the necessary risk factors for this condition to be occupationally related."

31. At Hearing, Dr. Sollender testified that on February 1, 2014, Claimant suffered an acute injury to the thumb as a consequence of her underlying osteoarthritis (OA) and rheumatoid arthritis (RA). According to Dr. Sollender, Claimant's injury was likely the consequence of the wearing down of the structures of the CMC joint secondary to the progressive nature of her arthritis.

32. Based upon the evidence presented, including Dr. Timms diagnosis of erosive rheumatoid arthritis and the degree of both OA and RA found on MRI of the right hand and wrist, the ALJ finds Dr. Sollender's opinions credible, persuasive and supported by the medical records submitted into evidence.

33. Dr. Sollender testified that because Claimant suffered a discrete injury at home while preparing tax returns, it was unnecessary to consider a workplace analysis to consider whether her work related duties as a working custodial supervisor were contributory to an aggravation of her underlying degenerative OA. In this regard, Dr.

Sollender testified that if the case presented as a question of whether Claimant had an occupational disease, then such job site analysis would be appropriate. Based upon the evidence as presented, the ALJ credits the testimony of Dr. Sollender to find that Claimant suffered an acute non-work related injury to her right thumb while preparing tax returns at home.

34. Originally, Dr. Nanes professed that he did not know the cause of Claimant's new symptoms when he evaluated Claimant on December 31, 2014, almost a year after Claimant's new injury in February of 2014. (*Id.* pg. 19.) Dr. Sollender testified that Dr. Nanes' one sentence statement on causality did not appear until March of 2015 (well after he started seeing Claimant again) and that it was without any basis for such a statement as there was no analysis and no details to understand what logic he used to change his opinion. (Transcript pg. 34:13-21.) As a result, there is no evidence showing whether Dr. Nanes was basing his opinion on an acute injury or upon an occupational disease.

35. As noted above, Dr. Marin issued one report which could be interpreted as his opinion regarding the cause of Claimant's right thumb injury, which was that her previous surgery had "failed due to her lack of flexion stabilization of the MP joint." Dr. Sollender testified there is nothing within a reasonable degree of medical probability relating that explanation to Claimant's work. (Transcript, pg. 31:15-17.) Further, he noted that there was "nothing supporting that the thumb was getting worse from the work that she was doing." (*Id.* at 30:14-16.) Therefore, Dr. Marin's records provide no support for a finding of an occupational disease. Consequently, the ALJ finds Dr. Sollender's opinions more persuasive than the contrary opinions expressed by Dr. Marin and/or Dr. Nanes.

36. The ALJ finds from the evidence presented, that Claimant's February 1, 2014 right thumb injury was, more probably than not, caused by the natural and probable progression of her underlying OA which Claimant failed to establish was aggravated by her Claimant's work duties between 2010 and 2014.

37. Regarding the question of whether the Claimant's original 2010 surgery was one that would naturally fail over time, Dr. Sollender stated that: "The ongoing pain that she developed starting on February 1st, 2014 was ongoing degenerative changes that essentially was the straw that broke the camel's back rather than an occupational condition." (Transcript pg. 44:18-45:1; *see also* at 39:9-16 ("In somebody with known osteoarthritis and now with known rheumatoid arthritis I would not expect that surgery to last a lifetime."

38. Based upon the evidence presented, the ALJ finds that Claimant's need for revision surgery of the MP and CMC joints of the right thumb was, more probably than not, caused by the natural progression of Claimant's underlying pre-existing degenerative arthritis. Based upon the evidence presented, the ALJ is convinced that Claimant's degenerative osteoarthritis advanced naturally without contribution from her work duties between 2010 and 2014 when, secondary to that natural degenerative

progression, Claimant suffered a new acute, non-work related injury while completing several tax returns from home. Consequently, the ALJ rejects, as unpursuasive, Claimant's suggestion that her 2014 injury and subsequent need for revision CMC and MP surgery is causally related to her original 2009 injury simply because the original surgery failed and but for the original surgery her condition would not have worsened.

39. Claimant has failed to prove, by a preponderance of the evidence, that the worsening of her arthritis is causally related to her original 2009 work injury. Moreover, Claimant failed to prove, by a preponderance of the evidence, that the condition of her thumb and wrist would not have worsened but for her original 2010 surgery. Consequently, Claimant failed to prove that her 2014 injury and her need for revision MP and CMC joint surgery are proximately related to her June 5, 2009 work injury. Accordingly, Respondent's are not obligated to provide this treatment.

40. While addressed in Dr. Sollender's IME, Claimant made it clear at the outset of hearing that she was not seeking a determination concerning the relatedness of her need for right CTS surgery to her 2009 industrial injury. Consequently, this order does not address this issue other than to fully set out the timeline of Claimant's treatment with Dr. Marin as provided in the findings of fact noted above.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. 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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Reopening

D. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a change of condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the Claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to §8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted).

E. The question of whether the Claimant has proven a change in condition of the original compensable injury or a change in physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Based upon the evidence presented, Claimant has failed to prove that the worsening of her arthritis is causally related to her original 2009 work injury. Moreover, Claimant failed to prove, by a preponderance of the evidence, that the condition of her thumb and wrist would not have worsened but for her original 2010 surgery. Consequently, Claimant failed to prove that her 2014 injury and her need for revision MP and CMC joint surgery are proximately related to her June 5, 2009 work injury. Accordingly, Respondent's are not obligated to provide this treatment. The key facts, based upon the evidence presented, supporting this conclusion include the following:

- After four years without treatment, there was an intervening event between the original injury in 2009 and Claimant's need for treatment to her right thumb in 2014: Claimant had an acute non-work related injury while doing her taxes and typing all day at home.

- The underlying causes of Claimant's right thumb injury were her arthritic conditions. Claimant's underlying arthritic conditions were not affected by Claimant's work or any life activities, but were progressing with time and age. They were not aggravated or in

any way affected by her work and therefore her work did not contribute to the cause of Claimant's February 1, 2014 right thumb injury at home;

- There is insufficient evidence to establish that Claimant has a cumulative trauma diagnosis;

- Even if there was cumulative trauma diagnosis, there is not enough information in the record to make a finding that any of WCRP 17 Ex. 5s risk-factors for the development of any such condition existed at Claimant's job. Instead any risk factor activities were intermittent and did not, according to Dr. Sollender's persuasive opinion, satisfy the MTGs time requirements for the development of such a condition;

F. As found above, the ALJ concludes that Claimant failed to meet her burden to prove that her osteoarthritis was aggravated or accelerated by her work duties after being placed at MMI in 2010, that her condition would not have worsened but for her original CMC surgery or that her February 1, 2014 injury was caused by or related to a worsening of her June 5, 2009. Consequently, her request for reopening based upon a change of condition is denied and dismissed. Because Claimant failed to causally relate her need for MP and CMC surgery to her June 5, 2009 work injury, her request for additional medical benefits, including the MP and CMC revision surgery and all costs attendant thereto must similarly be denied and dismissed.

ORDER

It is therefore ordered that:

1. The claimant's request for re-opening of her June 5, 2009 claim is denied and dismissed.

2. Claimant's request for medical benefits, including the costs associated with Dr. Marin's revision MP and CMC joint surgery is denied and dismissed as Claimant failed to prove a causal connection between her need for that surgery and her June 5, 2009 work injury. Consequently, Respondent's are not liable for the costs associated with Claimant's revision MP and CMC joint surgery performed by Dr. Marin on April 11, 2014.

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 9, 2016

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the recommendation for left ulnar nerve revision (cubital tunnel) surgery is reasonable and necessary.

II. Whether Claimant established by a preponderance of the evidence that his bilateral carpal tunnel syndrome symptoms and consequently his need for a left carpal tunnel release procedure relate to his April 30, 2010 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. Sachar, Larsen and Castrejon, the ALJ enters the following findings of fact:

1. Claimant was employed as an Automotive and Diesel Vehicle Technician for Employer for approximately 24 years. His job duties included working on and maintaining over-the-road delivery trucks and local delivery trucks. Claimant sustained admitted injuries to his bilateral upper extremities on April 30, 2010 while performing maintenance work on a vehicle called a "Sprinter."

2. Claimant's injuries lead to a protracted course of treatment involving both conservative measures and surgical intervention. Throughout the course of this claim, Claimant has undergone the following surgical procedures:

- 12/9/10: right shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left elbow ulnar neurolysis/elbow debridement
- 3/6/12: right elbow ulnar neurolysis
- 3/6/12: right carpal tunnel release
- 2/7/14: right elbow epicondylar debridement/ulnar nerve revision

3. Initially Claimant presented to presented to Concentra on April 30, 2010, complaining of shoulder symptoms. Claimant described pain in both shoulders attributable to his job duties which included repetitive lifting, use of upper extremities, and overhead work. Along with pain in the shoulders, Claimant described pain in his bilateral elbows. He described the pain level as 6/10. Dr. Suzanne Malis assessed Claimant with shoulder impingement and bilateral epicondylitis. Claimant suggested during his testimony that he complained of wrist symptoms during his treatment at Concentra, but Dr. Malis elected to take a "top down" approach to his care focusing her

attention on Claimant's shoulder symptoms. Nevertheless, no documented complaints of wrist symptoms appear in Dr. Malis' initial report. (Resp. Ex., pp. 27-28.)

4. On May 11, 2010, Claimant returned to Concentra and presented to Dr. Wiley Jinkins. Claimant described increased bilateral shoulder symptoms associated with overhead work activity. Dr. Jinkins recommended a steroid injection in the right shoulder. Claimant did not complaint of wrist symptoms. (Resp. Ex., pp. 34-35.)

5. On May 19, 2010, Claimant returned to Dr. Malis. He described greater pain in the right shoulder than the left shoulder. On a pain diagram for that date, Claimant did not note any pain to either the left or right wrist. (Resp. Ex., pp. 37-42.) According to Claimant, his pain diagrams were not sufficiently detailed, given the providers focus of treatment on his shoulders, until his care was transferred to Dr. Michael Dallenbach.

6. Claimant stopped working in any capacity for Employer on July 15, 2010 and has not returned to any type of work since.

7. Over the next few months, Claimant continued to treat with Dr. David Weinstein (orthopedic surgeon) and Dr. Dallenbach, who assumed care from Dr. Malis. Claimant testified that he informed Dr. Dallenbach of wrist symptoms in 2010. Although the medical records from Dr. Dallenbach's office for 2010 reflect that Claimant reported symptoms associated with bilateral lateral epicondylitis, which in the case of the left elbow was made worse with repetitive motion of the left wrist, the records do not reflect specific documentation concerning wrist symptoms. On December 9, 2010, Claimant underwent shoulder surgery performed by Dr. David Weinstein. Specifically, Claimant underwent a right arthroscopic subacromial decompression, right arthroscopic distal clavicle resection, left shoulder subacromial injection with cortisone and left elbow lateral epicondylar cortisone injection. (Resp. Ex., p. 88.)

8. On March 28, 2011, Claimant underwent an independent medical examination (IME) with Dr. Jutta Worwag. Dr. Worwag concluded that Claimant's work activities met the criteria for the development of cumulative trauma with regards to the bilateral shoulder and bilateral epicondyle conditions. Dr. Worwag concluded that Claimant reached maximum medical improvement with respect to the right shoulder and bilateral elbows. She opined "there is no reasonable expectation that any surgical intervention with respect to the elbows would lead to any meaningful lasting functional gains." Additionally, Dr. Worwag advised that to the extent Claimant was considering a left shoulder subacromial decompression, Dr. Weinstein should fully discuss with Claimant potential outcomes which could and could not be achieved with surgical intervention. (Resp. Ex. O.)

9. On April 19, 2011, Claimant underwent bilateral EMG and nerve conduction studies of the upper extremities. The studies showed evidence of bilateral moderately severe cubital tunnel syndromes, evidence of a mild right carpal tunnel syndrome, but no evidence of left carpal tunnel syndrome or right/left cervical radiculopathy. The reviewing physician, Dr. William Griffis, recommended cubital tunnel injections. If the

symptoms persisted, he recommended that Claimant consider a cubital tunnel release. (Resp. Ex. Q.)

10. On May 23, 2011, Claimant presented to Dr. Karl Larsen. Dr. Larsen noted that Claimant has experienced possibly two to three years worth of bilateral elbow pain. Dr. Larsen assessed Claimant with bilateral cubital tunnel syndrome and bilateral tennis elbow (epicondylitis) syndrome. Dr. Larsen advised that Claimant undergo a left lateral tennis elbow debridement and left ulnar release at the elbow. Dr. Larsen counseled Claimant that while surgery would be an option for the lateral epicondylitis, it is "not a guaranteed success, and the recovery from this [could] be lengthy and incomplete." Concerning the right elbow, Dr. Larsen noted that Claimant should proceed with the cubital tunnel decompression so that it did not progress to something more chronic. Additionally, Dr. Larsen recommended that Claimant undergo a right carpal tunnel release at that same time, given the electrodiagnostic evidence of mild right carpal tunnel syndrome. (Resp. Ex. S.)

11. Claimant testified that he told Dr. Larsen about his wrist symptoms in 2011. Based on the content of the May 23, 2011 note, the ALJ finds that Claimant, more probably than not, informed Dr. Larsen that he was having symptoms associated right sided CTS. Consequently, the ALJ finds record support for Claimant's testimony that he discussed right sided wrist symptoms with Dr. Larsen in 2011 as he testified. However, there is no documentation in the record that Claimant ever raised left sided wrist symptoms and the April 19, 2011 EMG study does not reveal evidence consistent with left sided CTS.

12. Based upon the evidence presented, the ALJ finds that May 23, 2011 is probably the earliest date that Claimant discussed, with Dr. Larsen, symptoms associated with a wrist condition and then the discussion was likely limited to his right wrist only. There is no record support for any date prior to this; nor is there any indication in any medical record that Claimant expressed concern about his left wrist. Indeed since the April 19, 2011 EMG was devoid of any finding suggestive of left CTS, the ALJ finds it unlikely that Claimant would have had any complaints about symptoms in the left wrist consistent with CTS. The ALJ finds that any discussion regarding right sided CTS symptoms on May 23, 2011 was likely driven by the positive EMG findings from April 19, 2011 documenting evidence of mild right CTS.

13. On July 7, 2011, Claimant underwent left shoulder arthroscopic subacromial decompression and left arthroscopic distal clavicle resection performed by Dr. Weinstein. During the same surgery, Dr. Larsen performed a left elbow cubital tunnel release and left elbow lateral epicondyle debridement. (Resp. Ex. U.)

14. On December 19, 2011, Claimant returned to Dr. Larsen. Claimant described complete relief as a result of the left ulnar surgery. However, Claimant continued to complain of occasional pain over the left lateral elbow with gripping and grasping activities. Dr. Larsen described the left lateral epicondyle repair as "imperfect." Regarding his right sided CTS, the note from this encounter reflects that Claimant "still

needs to consider cubital and carpal tunnel releases on the right side but is not quite ready to do so from a recovery perspective on the left side." Physical examination of the right upper extremity revealed "abnormal tenderness over the ulnar nerve with a positive Tinel's sign. Dr. Larsen also documented that Claimant had a positive Tinel's sign over the carpal tunnel, although it was characterized as "very mild." Dr. Larsen recommended that Claimant return in six weeks for purposes of addressing the right carpal and cubital tunnel releases on the right side. (Resp. Ex. p. 142).

15. Six weeks later on January 30, 2012, Claimant returned to Dr. Larsen. Dr. Larsen noted that Claimant was recovering "relatively well" on the left side. This is in stark contrast of Dr. Larsen's previous note. Nonetheless, Dr. Larsen noted that Claimant had "known carpal tunnel and cubital tunnel syndrome on the right side" and that he (Dr. Larsen) felt Claimant was "ready to proceed with carpal tunnel release and ulnar neurolysis at the elbow." (Resp. Ex. p. 143).

16. Claimant underwent right carpal tunnel and right in-situ ulnar neurolysis at the elbow procedures performed by Dr. Larsen on March 6, 2012.

17. On May 10, 2012, Dr. Worwag performed a second IME. On that day's visit, Claimant rated his pain as 7/10. His described medical problems included: "both shoulders pain, both elbows post-op pain, right hand post-op pain." Dr. Worwag continued to conclude that Claimant's bilateral shoulder and bilateral elbow symptoms are related to the work activity at Federal Express. She concluded the carpal tunnel symptoms were not work related because Claimant had "no symptoms in either hand or on his pain diagram well over one year ago when he first saw me." As Claimant was not working at the time of his first IME, Dr. Worwag opined that the "subsequent development of carpal tunnel syndrome symptoms cannot reasonably be causally related to the work injury as the patient reports last working in July 2010." Dr. Worwag noted that despite numerous surgical interventions, Claimant had not experienced any significant change in his functional status. (Resp. Ex. DD).

18. On June 25, 2012, Dr. Dallenbach placed Claimant at MMI. Claimant described his condition as stable. There is no notation from Dr. Dallenbach that Claimant disagreed with being placed at MMI. (Resp. Ex. EE).

19. On December 5, 2012, after approximately an eight month hiatus, Claimant returned to Dr. Larsen. Claimant described persistent right lateral tennis elbow pain, similar to those pains on the left side for which he had surgery. Claimant described difficulty with gripping and grasping activities. Dr. Larsen noted that Claimant had not done well with nonsurgical treatment, including two cortisone steroid injections. As Claimant's persistent symptoms were unacceptable to him, Dr. Larsen noted that he could proceed with additional surgery for his right elbow pain and he would be scheduled for the same upon authorization. Dr. Larsen's report does not address how Claimant's functional limitations would otherwise improve from surgery. For example, Dr. Larsen noted that Claimant had a "successful" result on the left side, but his report does not provide a definition of what he deemed to be "successful." As noted above,

Claimant has not worked since July 2010. Of note, Dr. Larsen also reported that, "… [Claimant] does feel like he may be developing some numbness and tingling in the radial digits of the left hand, but we are not evaluating that today…" (Resp. Ex. GG.) The ALJ finds that Claimant's complaints of left hand numbness and tingling from this date comprise the first indication that Claimant may be experiencing symptoms consistent with left sided CTS since the inception of the claim. Moreover, the ALJ finds that more than two years past from the date Claimant first presented to Dr. Malis on April 2010 and the first suggestion that he was having symptoms consistent with CTS in the left wrist. Again, it is noted that Claimant stopped working in any capacity in excess of two years before the onset of any left wrist symptoms.

20. On December 20, 2012, Dr. Worwag completed a record review with regards to Dr. Larsen's request for right lateral epicondyle surgery. Dr. Worwag cited the Colorado Treatment Guidelines, and explained that when evaluating surgical candidacy for right lateral tennis debridement/repair, the surgeon and the patient should clearly define expected functional gains from the procedure. Dr. Worwag noted that Dr. Larsen failed to delineate such functional gains. Dr. Worwag noted that notwithstanding numerous surgical procedures, Claimant had not returned to employment. As documented above, the medical records fail to show improved function as a result of the left lateral tennis elbow repair. Additionally, Dr. Worwag noted that Claimant advised that his left elbow had not improved significantly. Dr. Worwag concluded, "Given his continued and unimproved complaints despite numerous prior surgeries – including the same type surgery now proposed for the right elbow previously done on the left elbow – positive patient response cannot be expected." Dr. Worwag pointed out that Claimant had not reported improved activities of daily living with the prior left lateral tennis elbow surgery. She believed there is little reason to expect any improvement with regards to the right tennis elbow surgery. (Resp. Ex. FF.)

21. On January 14, 2013, Dr. Thomas Higginbotham issued the DIME report, concluding that Claimant had not reached MMI. The DIME physician noted that Claimant should undergo the surgery recommended by Dr. Larsen. (Claimant's. Ex. 4.)

22. Notably, in discussing Claimant's history and the mechanism of injury, Dr. Higginbotham observed that; "…He relates of progressive pain and weakness of his upper extremities and neck beginning around 2008. He transferred to this facility from a Federal Express facility in California. He states that he had been losing his grip strength and experiencing sharp shooting pains about the forearms into both hands. He relates zapping, electrical-like feelings into his hands. He would have difficulty working overhead and relates of dropping items. He relates once of dropping a transmission valve body. He states that on this particular day, he experienced a sharp pain from him shoulders into his hands while trying to remove an oil filter from a vehicle. It required a wide grip with forceful twisting. He couldn't do it with the right hand and tried it with the left hand and incurred a similar sharp shooting pain there as well…" (Claimant's Exs. pg. 211).

23. On June 19, 2013, Claimant underwent an IME with Dr. Kavi Sachar, an

orthopedic surgeon at Hand Surgery Associates. Dr. Sachar opined that Dr. Larsen's recommendation for surgery was not reasonable or necessary. Based upon his review of the records and examination of the Claimant, Dr. Sachar concluded "I do not believe the patient would benefit from right lateral epicondyle release." The Claimant advised Dr. Sachar that his right arm had not improved as a result of the medial epicondyle release and right cubital tunnel release. He described his medial epicondyle pain as 7-10/10. With regards to his right lateral epicondyle, the pain was only 5-7/10. Additionally, the Claimant described the left upper extremity where he had undergone the previous lateral epicondyle surgery as still painful, 3-4/10. Accordingly, Dr. Sachar concluded that the potential for Claimant regaining significant function and significant pain relief from the recommended surgery is "extremely guarded." He declined to recommend further surgery with regards to Claimant's right elbow. (Resp. Ex. II.)

24. The matter proceeded to hearing on Respondent's request to overcome the DIME physician's opinion. The ALJ determined that Respondent did not overcome the DIME physician's opinion and that the right elbow surgery proposed by Dr. Larsen was reasonable, necessary, and related to the industrial injury. (Claimant's Ex. 9)

25. On February 11, 2014, Claimant underwent a right revision of the ulnar nerve at the elbow, a right sub muscular ulnar nerve transposition, and a right lateral tennis elbow debridement, performed by Dr. Larsen. (Resp. Ex., p. 189)

26. On March 21, 2014, Claimant returned to Dr. Larsen complaining "of some left volar radial wrist discomfort." Dr. Larsen documented that Claimant "had no clunking about the wrist and no new injuries." Physical examination revealed no tenderness over the first or second dorsal compartments of the wrist. X-rays revealed early developing arthritis in the left wrist. (Resp. Ex., p. 193)

27. On May 5, 2014, Claimant returned to Dr. Larsen. The record from this date of visit does not reflect that Claimant had complaints of left elbow or carpal tunnel symptoms. (Resp. Ex., p. 194)

28. On September 15, 2014, Claimant returned to Dr. Larsen. Dr. Larsen noted, "Unfortunately he has developed recurrent lateral epicondylar pain on the left side. He feels like he has developed a recurrent numbness in the ring and small finger with small discomfort at the medial elbow." Dr. Larsen recommended that Claimant undergo a repeat electrodiagnostic testing to determine if Claimant developed a recurrent cubital tunnel syndrome.

29. On November 11, 2014, underwent the recommended electrodiagnostic testing conducted by Dr. Griffis. The testing revealed mild left cubital tunnel syndrome, moderate right cubital tunnel syndrome, bilateral mild carpal tunnel syndrome and no electrodiagnostic evidence of right or left cervical radiculopathy. (Resp. Ex. MM.)

30. On December 1, 2014, Claimant returned to Dr. Larsen. Dr. Larsen concluded

that the electrodiagnostic testing returned "generally better" than the earlier studies. He went onto write, "[w]ith regards to his lateral epicondyle, he is aware there is really not much for me to do. I think just continue maintenance with occasional corticosteroid injections in time are all that is needed. Similarly, with respect to his neuropathy symptoms, his areas where he had surgery have findings I consider fairly typical for post-surgery, and I do not know really represent new comprehensive lesions. I certainly would not advocate for a revision of the left side unless he got far worse. With regard to his left carpal tunnel syndrome, he has had symptoms here for some time. They have always been mild and I think conservative measures are appropriate here also." After discussing Claimant's treatment options, Dr. Larsen injected Claimant's right lateral epicondyle and his left carpal tunnel. Dr. Larsen added that; "…It is possible he would come to carpal tunnel release in the future, but I do not see that happening in the near term unless things worsen. He is in agreement with that plan…" (Resp. Ex., p. 200.) Based upon the evidence presented, the ALJ finds that this date of visit represents the first indication from a physician that Claimant had left sided CTS.

31. On January 5, 2015, Dr. Miguel Castrejon completed an IME at Respondent's request. Claimant described pain located at both posterior elbows and a separate area of pain to both wrists. Claimant graded his level of bilateral elbow pain as ranging between 6 and 7/10. He noted his wrist pain as approximately 4/10. Dr. Castrejon performed an extensive medical record review. Dr. Castrejon noted that Claimant admitted treatment to the right wrist 3-4 years prior to the date of injury. Dr. Castrejon observed that the medical records contained no mention of wrist symptoms by any examiner or therapist until July 14, 2011. He concluded, "Based upon a review of the medical file it is clear the diagnosis of right carpal tunnel syndrome (and more recently left carpal tunnel syndrome) were never specifically addressed. There is no documentation in the medical file as to when these symptoms specifically arose. It is clear that no formal documentation was made of the diagnosis until April 19, 2011 when Dr. Griffis performed electrodiagnostic testing primarily to evaluate for ulnar entrapment at the elbow. The finding of a right carpal tunnel syndrome appeared to have been an unexpected electrical finding with no documentation of symptoms or clinical findings on the part of the patient, and his treating physicians, up to and even after the electrodiagnostic study of April 19, 2011." Dr. Castrejon concluded that Claimant's carpal tunnel symptoms do not relate to the industrial injury. (Resp. Ex. A.)

32. On January 26, 2015, Claimant returned to Dr. Larsen. Dr. Larsen did not address Claimant's left elbow complaints during this visit. However, regarding Claimant's left wrist, Dr. Larsen reported, "…His left side carpal tunnel syndrome is very mild and I don't think warrants any surgery at this point. That could become an issue in the future if it worsens. He does have symptoms of thenar fatigue…As a symptom alone; I don't think there is anything specific to do for it. He can follow up with me if it worsens, otherwise I don't have a lot left to offer and he can follow up with me if he has any other issues…" (Resp. Ex., p. 202.)

33. On March 19, 2015, Dr. Larsen opined that Claimant had reached maximum

medical improvement. Respondent had provided Dr. Larsen with Dr. Castrejon's report, and he agreed with Dr. Castrejon with regards to MMI. Dr. Larsen did not disagree with Dr. Castrejon's opinion that the carpal tunnel syndrome did not relate to the industrial injury. (Resp. Ex. pp.204-05.)

34. On April 20, 2015, Claimant returned to Dr. Larsen complaining of worsening left upper extremity symptoms. Specifically, Claimant described tenderness along the course of his ulnar nerve, in addition to pain and numbness in the ring and small fingers when he rested on the area, i.e. the left forearm. Regarding the carpal tunnel, Dr. Larsen noted: "[h]e also feels like he is getting worse numbness and tingling in the radial digits of the left hand. He has known carpal tunnel syndrome on that side that has been electrodiagnostically graded as mild, and I had initially recommended just conservative measures. However, he feels like his symptoms have worsened to the point that he would like to pursue more treatment." (Claimant's Exbts. pg. 4). On examination, Dr. Larsen noted; "…He has a painfully positive Tinel's sign at the left wrist with a positive carpal tunnel compression test." Dr. Larsen concluded that; "…Bryan has persistent symptoms in his left arm. Most of this seems to be consistent with ulnar nerve irritation or ulnar neuritis at the left elbow and some median neuritis associated with his carpal tunnel syndrome. I had a frank discussion with him that I do not have a lot of non-surgical measures left for his elbow and his options are to live with it or consider a revision. He has been through the revision surgery on his right arm and feels like his symptoms are bad enough that he wants to pursue left side treatment. He says if his right elbow was a 10 by the time we came to surgery, his left elbow [is] already a 7 or an 8. Similarly, he feels like he is having significant discomfort at the wrist and he has considered this and would like me to go ahead and proceed with a carpal tunnel release. Further, Dr. Larsen noted, "I discussed with him that I had recommended he be placed at MMI in March, as I do not reasonably have the expectation that people go on to require revision ulnar nerve surgery, let alone require it bilaterally." (Resp. Ex. pp. 206-207.)

35. On April 24, 2015, Dr. Larsen submitted a request for authorization of left carpal tunnel surgery and left elbow revision surgery. (Claimant's Exbts. pg. 3). Respondents denied the request and filed an Application for Hearing challenging the reasonableness and necessity, of the surgical procedures, in addition to the relatedness of Claimant's bilateral carpal tunnel syndrome to his April 30, 2010 work injury.

36. Dr. Larsen addressed the denial on May 3, 2015 as follows "…I would like to point out that Mr. Holcombe has presented with worsening neuropathic symptoms and complaints in his left arm. I have provided care for him in the past under his workers' compensation claim; specifically his left elbow surgery was performed under his workers' compensation claim. As his condition appears to be worsening and requiring revision as a result of his original surgery, it would appear that his left elbow would certainly be related to his workers comp claim as part of ongoing treatment for that problem. Similarly, he has had carpal tunnel syndrome recognized for a long period of time that we have tried not to perform surgery to treat; however, it is worsening. He has had similar nerve compression on the contralateral side that has been treated under his

workers' compensation claim, and it only makes sense that this is part of the ongoing problem…" (Claimant's Exbts. pg. 2).

37. On July 6, 2015, Claimant underwent an IME with Dr. Kavi Sachar. Claimant advised Dr. Sachar that his left hand numbness and tingling worsened over the past one year to 18 months. Claimant advised Dr. Sachar this happened after the surgery on the right side when he had to do increased activities with the left side because he was recovering with regards to the right. Physical examination revealed no evidence of subluxation of the ulnar nerve on the left. Rather, Dr. Sachar noted that the nerve was in an anterior transposed position. Following a physical examination, Dr. Sachar noted that Claimant had a negative median nerve compression, Tinel's and Phalen's signs although he did complain of tenderness with palpation of the carpal tunnel. Claimant also reported "subjective numbness in the ring and small finger." In concluding that the surgery recommended by Dr. Larsen was not reasonable, necessary, or related to the industrial injury, Dr. Sachar noted:

> The patient had a left cubital tunnel release done previously. There is very little mention of his symptoms and there is no reason to believe that his left cubital tunnel became acutely worse because he had surgery on the right arm. The patient has not been employed for 5 years. There are no significant activities of daily living that would take a previously transposed ulnar nerve and make it symptomatic to the point that it would need recurrent surgery. His EMG only shows mild left cubital tunnel. Interestingly, the EMG on the right side, which has had previous revision surgery, actually had worse findings than on the one currently involved left side. His left carpal tunnel is mild on the EMG. The patient at no point today indicated signs or symptoms of carpal tunnel. At no point did he indicate numbness and tingling in the thumb, index, and middle finger with range of motion and activities.

38. Dr. Sachar went on to note that while Claimant reported weakness and fatigue in his hand, these are not symptoms consistent with carpal tunnel. Overall, the physical examination was inconsistent with carpal tunnel syndrome according to Dr. Sachar. Dr. Sachar concluded that Claimant's carpal tunnel syndrome did not relate to Claimant's April 30, 2010 industrial injury. He explained that while Claimant had an EMG finding of electrical abnormality in the median nerve distribution, he did not demonstrate the clinical findings consistent with a diagnosis of left carpal tunnel syndrome. (Resp. Ex. B.)

39. Dr. Larsen testified as an expert in the fields of orthopedic surgery and surgery of the upper extremity on October 7, 2015. He explained that the proposed left elbow ulnar nerve revision surgery is "identical" to that which he previously performed on the right elbow. (Dr. Larsen depo. tr. pg. 25, l. 25 – pg. 26, l. 8). Dr. Larsen noted Claimant had a positive outcome from the previous revision surgery on the right side. (Id. at pg. 26, ll. 9-12). He testified about it as well, noting: "…At this point, because he did improve so significantly with the right side revision surgery, in some respects it sort of

drives pursuing the left side surgery because he has done so well with it on the right side." (Dr. Larsen depo. tr. pg. 62, ll. 11-15).

40. Dr. Larsen testified regarding the worsening of Claimant's carpal tunnel and elbow symptoms as follows:

> Q: What do you believe accounts for the worsening of symptoms?
>
> A: It's hard to know. There is (sic) two aspects to this. One is the carpal tunnel syndrome. This is a virgin carpal tunnel on the left side, so he has worsening carpal tunnel on that side. That's sort of the typical course for people that get carpal tunnel syndrome and go on to surgery. He failed a period of nonsurgical matters. Clinically the syndrome is worsening.
>
> With regards to the ulnar nerve, he has had a previous surgery There. Reasons I would entertain for him to have a recurrence or worsening symptoms would either be progressive instability of the nerve, where it shifts around because it's no longer restrained where I released it and becomes irritated and symptomatic from that. Scar formation around the nerve, the scar is contractile sometimes over time and it can produce a new site of compression or adherence where it sticks the nerve down. Sometimes those are obvious if the nerve is unstable and it's popping back and forth over the epicondyle. It's something you can see across the room. Other times it's more subtle and we are left guessing a little bit as to why it's so bothersome.

(Dr. Larsen depo. tr. pg. 27, l. 1 – pg. 28, l. 3).

41. Dr. Larsen also testified regarding the objective evidence of Claimant's carpal tunnel syndrome based upon his physical examination. According to Dr. Larsen's testimony, Claimant had complaints of numbness in the affected digits, the radial digits. He had a positive Tinel's sign and a positive carpal tunnel compression test at that point I examined him. (Dr. Larsen depo. tr. pg. 33, ll. 15-23).

42. Regarding Dr. Sachar's opinion that Claimant's CTS was not causally related to Claimant's work injury because Claimant had not worked for a lengthy period of time, Dr. Larsen noted: "I agree he hasn't worked for a long time. He's had carpal tunnel symptoms that were - - or nerve compression symptoms that have been present since his initial work complaint. So this has been more of an ongoing treatment since the time of initial contact." (Dr. Larsen depo. tr. pg. 33, l. 24 – pg. 34, l. 9). Consequently, Dr. Larsen testified:

> Q: Do you believe the carpal tunnel symptoms are a result of Mr. Holcombe's work injury?

A: I do, because all of his nerve symptoms that he has had up to this point seem to stem from his original work complaint. I have treated every other nerve he has in his arms that I would treat surgically under that. It makes sense as part of the continuum of developing nerve compression.

Q: What about the left elbow?

A: His left elbow was a surgery performed directly under his work comp claim, and that surgery is now failing. I view that as a failure of his previous surgery, which was a work comp claim. Redoing that to try to make it better seems related to that.

(Dr. Larsen depo. tr. pg. 34, l. 19 – pg. 35, l. 9). Based upon the record evidence as presented, the ALJ is unable to find support for Dr. Larsen's suggestion that Claimant's CTS symptoms have been "present since his initial work complaint." Rather, the ALJ finds that the record evidence supports a finding that Claimant's CTS symptoms on the right side did not manifest until May 23, 2011 following an April 19, 2011 EMG study. Furthermore, as noted above, the record evidence supports a finding that Claimant's left CTS symptoms did not manifest, at the earliest, until December 5, 2012.

43. Dr. Larsen also offered an opinion that Claimant's left carpal tunnel symptoms may have resulted from his left shoulder surgery. However, Dr. Larsen was unable to detail any medical literature supporting this suggestion.

44. Dr. Sachar testified by deposition on October 13, 2015. Dr. Sachar testified that Claimant's physical examination was inconsistent with carpal tunnel syndrome. (Depo. of Dr. Sachar, p. 5-6.) Dr. Sachar explained that the median nerve compression test, the Tinel's sign and Phalen's test all returned negative. (Depo. of Dr. Sachar, p. 6.) Dr. Sachar further explained that Claimant did not describe typical symptoms or conditions which he would expect to see with regards to carpal tunnel syndrome. (Depo. of Dr. Sachar, p. 9.) Dr. Sachar addressed Dr. Larsen's assertion in his evidentiary deposition that Claimant's carpal tunnel syndrome may have resulted from the left shoulder surgery. Dr. Sachar noted that Claimant's left shoulder surgery took place in July 2011, but Claimant's symptoms did not commence until April 2012. He explained that this timeframe was too long for Claimant's CTS to be related to his left shoulder surgery. Ultimately, Dr. Sachar testified, "I can't relate those two." (Depo. of Dr. Sachar, pp. 10-11.) Dr. Sachar noted that if massive swelling occurred after an operative procedure, it is possible carpal tunnel could develop, but it would develop almost immediately, not months later. (Depo. of Dr. Sachar, p. 11.) Based upon the evidence presented, particularly the testimony of Dr. Castrejon and Dr. Sachar, the ALJ finds the suggestion that Claimant's CTS developed as a consequence of his shoulder surgery improbable and unconvincing.

45. Regarding the left elbow surgery, Dr. Sachar concluded as follows: "In this

patient, I think there is a far greater chance that he will not improve, but get worse, and, in fact, lose function in the nerve, because the dissection of the nerve compromises its blood flow. His EMG did not show significant findings. If he had very severe findings on the EMG, I would consider it, but with mild EMG findings in someone who previously had a - - what appears to be a well transposition (sic) nerve, I don't see any indication for redoing it. I don't think he would get better." (Depo. of Dr. Sachar, p. 15.) Dr. Sachar concluded that if Claimant did undergo the recommended procedure, Claimant would likely not reach MMI for approximately 11 months. (Depo. of Dr. Sachar, p. 35.)

46. Dr. Castrejon testified by deposition on December 10, 2015. Dr. Castrejon testified that following his IME with the Claimant, he received additional medical records, including the depositions of Dr. Larsen and Dr. Sachar. When providing his opinion with regards to the reasonableness and necessity of the left ulnar revision, Dr. Castrejon answered by recounting Claimant's medical history. Dr. Castrejon explained that the recommended cubital tunnel ulnar nerve revision surgery is a "big procedure"[1] which, based on the literature, was unlikely to provide significant relief in the form of functional gains. (Depo. of Dr. Castrejon, pp. 22-23.) Dr. Castrejon further observed that Claimant still continues to experience difficulty performing relatively simple tasks even after the prior surgeries. (Depo. of Dr. Castrejon, p. 24.) He explained that the mere fact Claimant's right upper extremity revision resulted in decreased pain is not sufficient. Ultimately, Dr. Castrejon testified that the cubital tunnel revision is not reasonable and necessary.

47. Claimant testified regarding the functional improvement he has experienced since his right sided ulnar nerve revision surgery. According to Claimant he can now shift the manual transmission of his car and open jars with his right hand. In addition, he can vacuum and stir a wok/soup with his right arm in addition to using it to assist in making a bed. Claimant explained that he has not tested his right arm/hand in a work like way and could not fully quantify the increased functional abilities in the right arm/hand because his left arm/hand remains very problematic. Nonetheless, the evidence presented persuades the ALJ that in the approximately 22 months since his right ulnar nerve revision surgery, Claimant's functional use of the right arm remains limited to rudimentary activities of daily living. Consequently, Claimant's testimony regarding his current functional abilities cannot be reconciled with Dr. Larsen's testimony that Claimant "improved significantly" following his right sided ulnar nerve revision surgery.

48. Based on the evidence presented, the expert opinions of Dr. Castrejon and Dr. Sachar regarding the reasonableness and necessity of revision cubital tunnel surgery are credible and persuasive. As predicted by Dr. Sachar following his initial independent medical examination in 2013, the right ulnar nerve revision surgery did not result in noteworthy functional gains. As found above, the medical records and

[1] A fact which Dr. Larsen apparently agrees with based upon the content of his August 7, 2013 medical report wherein the subject of revision of the right ulnar nerve was being contemplated. According to this report, Dr. Larsen advised the Claimant that "revision ulnar nerve surgery is a very big surgery compared to what [Claimant had] undergone before."

Claimant's own testimony support a finding that the previous right sided ulnar nerve revision surgery failed to result in functional gain. Expecting a different surgical outcome regarding the left ulnar nerve in the face of overwhelming evidence that the right ulnar nerve revision surgery failed to produce consequential functional improvement is folly.

49. The ALJ finds that the course of Claimant's recovery following his right ulnar nerve revision surgery supports Dr. Sachar's opinion that the chances Claimant will not improve following any left sided ulnar nerve revision surgery are far greater than the chances that he will improve functionally with said surgery. Combining the convincing prospect that Claimant will not improve, and possibly worsen with additional surgery with the fact that the November 11, 2014, EMG revealed only mild left sided cubital tunnel syndrome, persuades the ALJ that the recommended left ulnar nerve revision surgery is not reasonable or necessary. While the EMG itself is not definitive, Dr. Sachar noted that Claimant's physical examination did not reveal a basis to pursue proposed surgery.

50. With regards to the carpal tunnel symptoms, Dr. Castrejon, during his deposition, reaffirmed his report conclusions that neither Claimant's right or left carpal tunnel syndromes were related to his April 30, 2010 industrial injury. Based upon the medical records and the evidence presented as a whole, the ALJ rejects Claimant's assertion that his left carpal tunnel syndrome is related to his April 30, 2010 industrial injury. As detailed by Drs. Worwag and Castrejon, Claimant treated for approximately a year without any complaint of carpal tunnel symptoms until he had an EMG on April 19, 2011 which revealed evidence of mild right CTS. As found above, this finding likely lead to Claimant discussing right wrist symptoms with Dr. Larsen on May 23, 2011. Nonetheless, there was no evidence of left CTS until Claimant complained of some numbness and tingling in the radial digits of the left hand on December 5, 2012, greater than two (2) years from the date of his original injury and more than a year after he stopped performing work activity for Employer. Consequently, the ALJ is persuaded that the etiology of Claimant's carpal tunnel symptoms do not reasonably relate to his April 30, 2010 injury or any work activities performed thereafter.

51. Based on the foregoing, it is hereby found that Claimant has failed to prove by a preponderance of the evidence that the left cubital tunnel surgery recommended by Dr. Larsen reasonable and necessary. Further, it is found that the bilateral carpal tunnel symptoms do not relate to the industrial injury. Consequently, Respondents are not obligated to pay for the additional treatment Claimant seeks.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Dr. Worwag, Dr. Sachar and Dr. Castrejon's opinions are credible and supported by the totality of the record evidence submitted for consideration. Conversely, the testimony of Dr. Larsen, especially his testimony that Claimant "improved significantly" following his right sided ulnar nerve revision surgery, is contradicted by Claimant's ongoing complaints of pain and reports of limited effectiveness of his prior surgeries.[2] Consequently, the ALJ concludes that the opinions expressed by Drs. Worwag, Sachar and Castrejon are more persuasive than the opinions of Dr. Larsen.

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

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[2] See Dr. Castrejon's deposition transcript wherein Claimant disclosed to Dr. Malstrom that "all of [the previous surgeries] have had limited effectiveness." (Depo of Dr. Castrejon, Ex 3, p.5.)

Medical Benefits

D. 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).

E. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant retains the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). 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).

F. As found here, the left cubital tunnel revision recommended by Dr. Larsen is not reasonable and necessary. Drs. Sachar and Castrejon persuasively opined that pursuing this surgery would not result in additional functional gains and Claimant's recovery from his right ulnar nerve revision surgery supports this opinion. Both physicians relied upon the previous medical records which have detailed that while Claimant has not worked since 2010 and has undergone numerous surgeries, none of the procedures have resulted in meaningful functional gain. Additionally, as the ALJ previously found that Claimant failed to establish at hearing that the need for surgery would impact or otherwise improve his functional capabilities. Accordingly, Claimant failed to demonstrate, by a preponderance of the evidence, that the proposed left ulnar nerve revision surgery is reasonable and necessary.

G. Additionally, Claimant has failed to demonstrate, by a preponderance of the evidence, that his need for a left carpal tunnel release as proposed by Dr. Larsen is related to this April 30, 2010 industrial injury. To sustain his burden of proof, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial*

Claim Appeals Office, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §8-41-301(I)(c), C.R.S.

H. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

I. As found in this case, Claimant treated for approximately a year without any complaint of carpal tunnel symptoms until he had an EMG on April 19, 2011 which revealed evidence of mild right CTS. While this finding likely lead to Claimant discussing right wrist symptoms with Dr. Larsen on May 23, 2011, it does not support a conclusion that Claimant's right CTS is causally related to the April 30, 2010 work injury. Furthermore, there was no evidence of left CTS until Claimant complained of some numbness and tingling in the radial digits of the left hand on December 5, 2012, greater than two (2) years from the date of his original injury and more than a year after he stopped performing work activity for Employer. Accordingly, Dr. Larsen's opinion that Claimant had carpal tunnel symptoms that were - - or nerve compression symptoms that have been present since his initial work complaint is not supported by the record evidence and as such, is not convincing. Furthermore, the evidence presented persuades the ALJ that Claimant's bilateral CTS was is not a consequence of shoulder surgery as suggested by Dr. Larsen. Here, Dr. Sachar adequately explained that such a circumstance is rare and would only occur within a day or two following surgery, not months later as Claimant now asserts. Based upon the evidence presented, the ALJ credits the testimony of Dr. Sachar and Dr. Castrejon to conclude that the etiology of Claimant's carpal tunnel symptoms do not reasonably relate to his April 30, 2010 injury or any work activities performed thereafter. Consequently, Claimant has failed to establish that his CTS "arose out of" and "in the course of" occurred in the course and scope of his employment. Because Claimant failed establish a sufficient "nexus" or causal relationship between his employment, his need for CTS surgery and his April 30, 2010 injury his claim for medical benefits must be dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for a left ulnar nerve (cubital tunnel) revision procedure is denied and dismissed as the need for this surgery is not reasonable or necessary.

2. Claimant's request for a left carpal tunnel release procedure is denied and dismissed as the need for this surgery is not causally related to claimant's April 30, 2010 industrial injury.

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 3, 2016

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-830-409-07

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 26, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 1/26/16, Courtroom 4, beginning at 1:30 PM, and ending at 2:40 PM).

Respondent's Exhibits A through G were admitted into evidence, without objection, with the exception of Claimant's Exhibit G, wherein Claimants' objections were sustained and the Exhibit was rejected as inadmissible hearsay.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement for the preparation of a written decision, which is hereby issued.

PROCEDURAL BACKGROUND

This matter involves a claim for the payment of medical expenses associated with a Stipulation Regarding Benefits (Respondent's Exhibit D), concerning post-maximum medical improvement (MMI) medical expenses, entered into as a result of an admitted low back injury of June 17, 2010. The specific issue to be determined by this decision concerns whether the Respondent is liable for the payment of other medical expenses associated with the prescription of Cymbalta, or its generic equivalent. The Stipulation provided, in paragraph 4.e. thereof that the Claimant waived post-MMI medical benefits "except for Cymbalta (or its generic equivalent) for neuropathic pain so

long as this medication is **reasonable necessary, and related to the relief of neuropathic pain caused by this work injury."** The Claimant moved to Arizona and came under the care of Arizona Dr. Maxwell.

ISSUE

The sole issue to be determined by this decision concerns authorization of doctor visits to Dr. Maxwell in Arizona, as well as oversight of his Cymbalta prescription. The Respondent's position is that the terms of the Stipulation Regarding Benefits do not provide for Claimant's post-maximum medical improvement (MMI) doctor visits in Arizona.

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:

1. The Claimant is a retired detective with the Denver Police Department, who suffered a work-related low-back injury on June 17, 2010.

2. The Respondent admitted liability and provided medical benefits and salary continuation benefits.

3. The Claimant and the Respondent entered into a Stipulation Regarding Benefits on November 12, 2012. In accordance with the Stipulation, the Claimant underwent surgery for L4-5 artificial disc replacement and L5-S1 and anterior interbody fusion on December 14, 2012.

4. In the Stipulation, the Claimant agreed to waive post-MMI medical benefits connected with the work injury and back surgery except for a Cymbalta prescription, its generic equivalent, or other medication to replace Cymbalta. The ALJ takes administrative notice and finds that Cymbalta, or its equivalent, may not be obtained over-the-counter but must be prescribed by an authorized physician.

5. The parties agreed in the Stipulation Regarding Benefits that the Claimant waived post-MMI medical benefits connected with the work injury and back surgery except for Cymbalta, its generic equivalent, or another medication to replace Cymbalta for neuropathic pain as long as the medication was reasonable, necessary, and related to the relief of neuropathic pain caused by the work injury.

6. The Claimant moved to Arizona and wants the Respondent to pay for visits to his personal physician, Dr. Maxwell, who is in charge of his Cymbalta prescription.

6. The Respondent argues that the Claimant is not entitled to payments for visits to a personal physician claiming that recurring payments for that purpose constitute post-MMI medical benefits that were not included in the Stipulation.

DISCUSSION

A Cymbalta prescription in Arizona or Colorado needs to be monitored by a licensed physician. As concluded herein below, Arizona law provides that the definition of "unprofessional conduct" includes, "Prescribing, dispensing, or furnishing a prescription medication or a prescription-only device to a person if the licensee has not conducted a physical or mental health status examination of that person or has not previously established a physician-patient relationship. The physical or mental health status examination may be conducted during a real-time telemedicine encounter with audio and video capability if the telemedicine audio and video capability meets the elements required by the Centers for Medicare and Medicaid services. . ." Ariz. Rev. Stat. (A.R.S.) § 32-1854(48). Cymbalta is only available with a doctor's prescription. Respondent argues that the Stipulation Regarding Benefits should be interpreted as providing that Dr. Maxwell should not monitor the Claimant's Cymbalta prescription. However, this interpretation would amount to a violation of Arizona law as unprofessional conduct. Indeed, a physician needs to monitor a patient taking a prescription drug such as Cymbalta to determine, among other things, if there would be adverse reactions to other substances. If the Stipulation is interpreted to prohibit Dr. Maxwell from complying with Arizona law regarding the monitoring of the Claimant's Cymbalta prescription, then the Stipulation provision regarding Cymbalta is meaningless and incapable of performance.

If the Cymbalta provision is legally incapable of performance, then, the consideration for the Stipulation is lacking. As concluded herein below, however, such an interpretation would be **void**. Of course, the Respondent could choose to have an authorized workers' compensation doctor in Colorado monitor the Claimant's Cymbalta prescription, according to the Colorado Medical Practice Act. *See* § 12-36-117 (1) (g), C.R.S., AND § 18-18-102 *et seq.* In such case, the Repondent would be liable for the Claimant's reasonable transportation costs, plus a per diem allowance, to and from Denver for such monitoring.

However, the determination that the Stipulation Regarding Benefits must allow for the monitoring of the Cymbalta prescription to be valid does not mean the Claimant is entitled to any post-MMI medical care by Dr. Maxwell. Principles of statutory construction offer guidance in the interpretation of contractual provisions, *i.e.,* if the wording is plain and clear, the provision must be applied as written. *See Catholic Health Initiatives Colorado v. City of Pueblo,* 207 P.3d 812 (Colo. 2009). The Stipulation plainly and clearly relinquishes the Respondent's responsibility for compensation of post-MMI medical benefits unrelated to the prescribing, monitoring, or refilling of Cymbalta.

CONCLUSIONS OF LAW

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

Stipulation Regarding Benefits (Respondent's Exhibit D)

a. As found, the parties agreed in the Stipulation Regarding Benefits that the Claimant waived post-MMI medical benefits connected with the work injury and back surgery except for Cymbalta, its generic equivalent, or another medication to replace Cymbalta for neuropathic pain as long as the medication was reasonable, necessary, and related to the relief of neuropathic pain caused by the work injury.

b. A Stipulation is interpreted as a contract. *Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.*, 247 P.3d 567, 573 (Colo. 2011). The ALJ, therefore, concludes that contract law applies to the issue herein.

c. In the Stipulation, the Claimant unambiguously waives his entitlement to post-MMI medical benefits except for Cymbalta in exchange for the Respondent providing compensation for back surgery, post-surgical care, and temporary disability benefits. Principles of statutory construction offer guidance in the interpretation of contractual provisions, *i.e.,* if the wording is plain and clear, the provision must be applied as written. *See Catholic Health Initiatives Colorado v. City of Pueblo,* 207 P.3d 812 (Colo. 2009).

Payment for Medical Consultation

d. Arizona law provides that the definition of "unprofessional conduct" includes, "Prescribing, dispensing, or furnishing a prescription medication or a prescription-only device to a person if the licensee has not conducted a physical or mental health status examination of that person or has not previously established a physician-patient relationship. The physical or mental health status examination may be conducted during a real-time telemedicine encounter with audio and video capability if the telemedicine audio and video capability meets the elements required by the Centers for Medicare and Medicaid services. . ." Ariz. Rev. Stat. (A.R.S.) § 32-1854(48). The ALJ concludes that it is necessary for Arizona Dr. Maxwell to establish a physician-patient relationship with the Claimant and monitor, as determined by his best medical judgment, the Cymbalta prescription (or generic equivalent) to avoid unprofessional conduct in violation of Arizona law and to periodically determine the causal relatedness and reasonable necessity of the Cymbalta prescription.

g. Under Arizona law, "telemedicine" means, "(a) [T]he interactive use of audio, video, or other electronic media for the purpose of diagnosis, consultation or treatment. (b) [Telemedicine] does not include the sole use of an audio-only telephone,

a video-only system, a facsimile machine, instant messages, or electronic mail." A.R.S. § 20-1406.05(E) (3).

h. The U.S. Food and Drug Administration (FDA) identifies the marketing status of drug products. The "marketing status" indicates how a drug product is sold. The FDA has identified four types of marketing status: (1) prescription, (2) over the counter, (3) discontinued, and (4) none. *Drugs@FDA Glossary of Terms*, U.S. Food and Drug Administration (Feb. 2, 2012) http://www.fda.gov/Drugs/InformationOnDrugs/ucm079436.htm#prescription_drug.

i. "Prescription drug" means, "A prescription drug product requires a doctor's authorization to purchase." *Drugs@FDA Glossary of Terms*. The FDA has classified Cymbalta's marketing status as "prescription." *Drugs@FDA Cymbalta Overview*, U.S. Food and Drug Administration, http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm?fuseaction=Search.Overview&#totable.

h. Dr. Maxwell, or any other licensed medical professional in the State of Arizona, should be given medical control over the Claimant's prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, in order to avoid the unprofessional conduct under A.R.S. § 32-1854(48).

i. Dr. Maxwell, or any other licensed medical professional in the State of Arizona, should be given the authority under A.R.S. § 32-1854(48) to determine whether he or she conducts the physical or mental health examination of Claimant in-person or via telemedicine.

j. In order to avoid the unprofessional practice of medicine under A.R.S. § 32-1854(48), Dr. Maxwell, or any other licensed medical professional in the State of Arizona, should have medical control to determine the frequency of physical or mental health examinations conducted either in-person or via telemedicine for the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent.

k. An interpretation of contractual provisions that are contrary to law or public policy, are void *ab initio. Russell v. Courier Printing and Publishing Co.*, 43 Colo. 321, 95 P. 936 (1908). As found and concluded, Cymbalta is a prescription medication and a physician who does not monitor such a prescription, in person or through the modality of telemedicine as defined by Arizona law, would be committing unprofessional conduct. Also, the physician would have to monitor the prescription in person, or by telemedicine, to determine the continued causal relatedness and reasonable necessity of the medication.

l. The Respondent should be liable for all payments associated with physical or mental health examinations conducted either in-person or via telemedicine for the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, to the Claimant.

m. The Respondent should not be liable for any other costs associated with medical visits to Dr. Maxwell or any other medical professional licensed in the State of Arizona for reasons other than the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, because those costs constitute post-MMI medical benefits to which the Claimant waived his right under the Stipulation Regarding Benefits..

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all the costs of ancillary medical expenses of Arizona Dr. Maxwell, associated with the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, according to Dr. Maxwell's independent medical judgment, in order to satisfy the agreement outlined in the Stipulation Regarding Benefits. Claimant's counsel shall send Dr. Maxwell information that the Respondent should be billed for medical services associated solely with the prescribing, monitoring, and refilling of Cymbalta.

B. In the alternative, the Respondent shall pay the costs of a Colorado authorized treating physician in the Claimant's workers' compensation case, associated with monitoring the Cymbalta prescription in compliance with the Colorado Medical Practice Act, including reasonable transportation and lodging costs of the Claimant between Arizona and Denver, Colorado, plus a reasonable per diem allowance.

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

DATED this_____day of February 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2016, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord#2

ISSUES

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

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

FINDINGS OF FACT

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

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

3. Claimant was initially seen at the Windsor Family Clinic by D. McGuire, PA-C on December 23, 2010, two days after the collision. At that time, Claimant complained of neck pain and stiffness, as well as describing numbness in the 3rd, 4th and 5th fingers in his left hand. The finger numbness had resolved. Claimant was diagnosed with a cervical strain, provided with pain medication and told to use alternating ice and heat on his neck.

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

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

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

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

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

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

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

10. On April 20, 2012, Claimant was examined by William Basow, M.D. to whom he was referred by his attorney. Claimant's course of treatment was reviewed, including nine (9) PT sessions which he reported did not relieve his symptoms. Claimant was having intermittent symptoms in the forearm and fingers, as well as pain in the left neck and trapezius. Claimant had normal strength and sensation upon examination, with no neurological abnormalities noted. Dr. Basow's assessment was chronic neck pain without radicular symptoms. Claimant was to begin PT and chiropractic treatments. Claimant had no work restrictions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. Claimant returned to Dr. Donner on May 21, 2014, who reviewed the results of his MRI. Dr. Donner noted he had very limited neck movement. Claimant was noted to be smoking cigarettes. Dr. Donner's assessment was progressive severe neck pain with radiculopathy at C5-6 and C6-7, where there were degenerative changes, stenosis and herniated discs. Dr. Donner recommended and noted Claimant wanted to proceed with a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs.

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

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

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

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

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

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

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

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

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

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

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

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

38. On examination, Dr. Reiss noted Claimant was not in any apparent distress. He had 0 degrees of neck extension, with full flexion, right rotation 70% of normal and left rotation 50% of normal. Dr. Reiss noted Claimant's symptoms were primarily axial neck pain and opined that Claimant's symptoms were a continuation from his original injury. Dr. Reiss did not recommend a 2 level disc replacement procedure for Claimant's pain complaints. The ALJ credited the opinions of Dr. Reiss, particularly with regard to his conclusion that this procedure was not likely to help Claimant's symptoms.

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

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

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

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

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

44. Dr. Donner was asked about conservative treatment to maintain MMI, but returned to his opinion that surgery was more "realistic and cost effective" for Claimant.

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

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

46. The ALJ notes that although Claimant has been evaluated on several occasions since he reached MMI, he has not received active treatment since that time. The ALJ finds Claimant should be reevaluated regarding his need for additional treatment.

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

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

CONCLUSIONS OF LAW

Generally

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

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

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

Reopening

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

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

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

As a starting point, the record was unclear whether a Petition to Reopen was required in the case at bench. Respondents provided medical benefits pursuant to the GAL filed on 4/9/12. Respondents FAL specifically admitted for *Grover* medical benefits to maintain MMI. It was not clear and there was no evidence before the ALJ when the last medical benefit was due and payable under 8-43-303(2)(b), C.R.S.

Assuming, *arguendo* that it has been longer than two (2) years since Respondents provided the last medical benefit, Claimant has made the requisite showing of a worsening of condition. As found, Claimant's degenerative condition in his cervical spine was asymptomatic before 12/21/10 and then developed symptoms as a direct result of the MVA. Claimant adduced evidence that his level of functioning was worse and he had increased pain, as shown by the Oswestry cervical spine index survey he completed in 2014. The ALJ drew the reasonable inference that Claimant's increased pain in his cervical spine required additional treatment. Accordingly, the ALJ was persuaded that Claimant's condition has worsened and his claim should be reopened.

In addition, Claimant has not been in active treatment since March, 2013 and has not completed several modalities of conservative treatment. Such treatment could improve his symptoms. Based upon the totality of the evidence, the ALJ has determined Claimant requires additional treatment to maintain MMI. However, the additional treatment referenced above, can be provided as *Grover* medical benefits pursuant to the FAL.

Medical Benefits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Involves the insertion of a prosthetic device into the cervical intervertebral space with the goal of maintaining physiologic motion at the treated cervical segment. The use of artificial discs in motion-preserving technology is based on the surgeons preference and training" …[citing two reviews]…"There is strong evidence that in patients with single level radiculopathy or myelopathy cervical artificial disc produces 2 year success rates at least equal to those of anterior discetomy and fusion (ACDF) with allograft interbody fusion and an anterior plate…"

"**a. Description**

…

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

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

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

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

2) **All of the following:**

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

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

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

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

"**d. Contraindications**:

…

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

…

- Multiple-level degenerative disc disease.

- Spondylolisthesis greater than 3mm."

In this case, at least one physician (Dr. Primack) was of the opinion that Claimant's symptoms were originally facetogenic in nature. Dr. Donner opined that Claimant's pain was discogenic, related to the facts and nerve compression. As found, the source of Claimant's pain should be clarified. Also, Claimant had pain on extension and lateral bending. There is also a question whether Claimant has neurological compromise and symptoms that warrant surgery, as noted by Dr. Feldman. Further exploration of these issues is warranted before an invasive surgical procedure is performed. Moreover, Claimant has degenerative changes in his cervical spine, including spinal stenosis on multiple levels in the cervical spine, as shown on MRI. In addition, the 2014 MRI revealed at least one disc herniation which was greater than 3mm. Surgery is contraindicated under these circumstances.

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

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

Third and finally, the ALJ found that there was a question whether the proposed medical treatment would address the symptoms from the spondylitic changes in Claimant's cervical spine and reduce his symptoms. Dr. Castor questioned whether the proposed surgery would ameliorate Claimant's symptoms. Dr. Reiss' opinion was also persuasive on this subject. Dr. Donner's testimony did not refute this or establish that

the benefits were outweighed by some of the contraindications of surgery. The ALJ was not persuaded that is reasonable and necessary at this time. For these reasons, Claimant failed to prove that the surgery proposed by Dr. Donner was reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is GRANTED. Respondents shall provide *Grover* medical benefits to Claimant.

2. Claimant's request for authorization of a two-level cervical discectomy, nerve root decompression and disc replacement 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 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, 2016

Digital signature

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

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Tyler's Division IME opinion that Claimant reached MMI on April 20, 2015.

FINDINGS OF FACT

Based upon the evidence presented, including Dr. Tyler's deposition testimony, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted work injury to his bilateral upper extremities on February 29, 2012. (Exhibit (Ex.) A at 1.)

2. On August 11, 2014, claimant was placed at maximum medical improvement by Dr. Miguel Castrejon with a scheduled 10% impairment to the left upper extremity and 7% schedule impairment to the right upper extremity. (Ex. A at 1; Ex. G at 13, 15-16.)

3. On October 21, 2014, Respondents filed a Final Admission of Liability (FAL). The FAL admitted claimant reached MMI on August 11, 2014. The FAL further admitted for permanent partial disability (PPD) benefits based on 10% scheduled left upper extremity and 7% scheduled right upper extremity. (Ex. A at 1.)

4. On November 12, 2014, claimant objected to the FAL and filed an Application for a Division Independent Medical Examination (DIME). (Ex. B and C.)

5. A DIME was held with John Tyler, M.D. on January 13, 2015. Dr. Tyler opined that claimant had not yet reached MMI. Dr. Tyler wrote that claimant should be evaluated by an orthopedic hands surgeon to determine whether there are any surgical procedures that could improve claimant's bilateral upper extremity functioning. (Ex. H at 26-27.) After this evaluation, and if no surgical treatment is warranted, Dr. Tyler's report provides, "*then on that date and at that time, I feel the patient will have reached a point of maximum medical improvement*." (Emphasis added.) (Ex. H at 27.)

6. On April 20, 2015, claimant was evaluated by Dr. Timothy Hart of Premier Orthopedics. Dr. Hart wrote, "I do not feel that I have any type of surgery that can improve Mr. Roper's current situation…. I do not feel that I have a surgery that can further benefit Mr. Roper." (Ex. I at 28.) Careful review of Dr. Hart's report suggests that he had seen Claimant previously, i.e. before the referral by Dr. Tyler and that his opinion regarding surgery had not changed and further, that Dr. Hart had "exhausted [his] surgical skills" as of the April 20, 2015 visit. Consequently, Dr. Hart elected to

discharge Claimant from his care "again".

7. On August 7, 2015, Dr. Tyler completed a follow-up DIME report. Dr. Tyler reviewed Dr. Hart's April 20, 2015 report, and determined that claimant reached maximum medical improvement on April 20, 2015. (Ex. J at 30.)

8. On October 21, 2015, an Order was issued by Prehearing Administrative Law Judge (PALJ) Thomas DeMarino, permitting the parties to schedule and conduct a deposition of Dr. Tyler. (Ex. F at 11.)

9. Dr. Tyler testified by deposition on December 3, 2015. During direct examination, Dr. Tyler agreed with Respondents' definition of MMI, chiefly that MMI occurs at "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further medical treatment is reasonably expected to improve the condition." *Id.* at 36, depo. page 7, lines 18-23.

10. Respondents' counsel asked Dr. Tyler to elaborate as to why he felt Claimant was not at MMI on January 13, 2015, the date of the original DIME. Dr. Tyler stated, "I felt that he required further assessment by a surgeon to see if there was an explanation if this was a pathology that could be assisted by further surgery. And that's why I said he wasn't at MMI at that date." *Id* at 38, depo. page 16, lines 12-16.

11. Dr. Tyler testified that his second DIME report had an incorrect date of MMI. Dr. Tyler testified that his second DIME incorrectly stated that Claimant reached MMI on April 20, 2015. Dr. Tyler further testified that Claimant reached MMI on August 11, 2014, the date that Dr. Castrejon placed claimant at MMI. (Ex. K at 39, Tyler Dep.18:2 - 18:10.) When asked to explain the comments in his original report that he would place Claimant at MMI on the date and time that a hand surgeon stated Claimant's work injury could not be repaired surgically, i.e., April 20, 2015, Dr. Tyler testified:

> ". . . that is poor writing on my part and I would like to state at this time that it should have stated instead of 'on that date and at that time,' I should have stated that the date of MMI would return to the previous date of MMI for the same reasons that we just previously talked about, that the patient had reached a point of MMI at the time that Dr. Castrejon stated he had reached MMI, because there was no change in his treatment based upon further review of his status by someone with greater expertise in the area . . . and that was Dr. Hart".

12. Dr. Tyler explained that he did not accept that portion of Dr. Hart's report that a third surgical opinion with Dr. Zinis was necessary before placing Claimant at MMI because, in trusted Dr. Hart's opinion as a physician known to him, that a third opinion was not what he (Dr. Tyler) had requested and that despite a "curbside" evaluation, there was no report to backup Claimant's suggestion that Dr. Zinis had opined that Claimant was an appropriate surgical candidate.

13. Based upon the evidence presented, the ALJ finds that a conflict exists between the content of Dr. Tyler's DIME reports and his testimony concerning MMI. While his report indicates that he would place Claimant at MMI on the date and time that a hand surgeon stated Claimant's work injury could not be repaired surgically, his testimony clearly explains that, based upon Claimant's course of treatment and progress, MMI would be considered to be August 11, 2014 given the definition of MMI as provided and accepted at his deposition. After carefully considering Dr. Tyler's DIME report in its totality, the ALJ credits his testimony to find that Dr. Tyler erred in preparing his second Division IME report on August 7, 2015, when he wrote that claimant reached MMI on April 20, 2015. The ALJ finds that further, that Dr. Tyler credibly acknowledged his error and testified persuasively as to his reasoning behind his decision to change Claimant's MMI date to August 11, 2014.

14. Respondents have demonstrated, by clear and convincing evidence, that Dr. Tyler's notation that Claimant reached MMI on April 20, 2015 was highly probably incorrect. Accordingly, Respondents have overcome Dr. Tyler's April 20, 2015 MMI determination. Based upon the evidence presented, the ALJ finds that Claimant likely reached MMI on August 11, 2014.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Dr. Tyler clearly admits that he erred in opining that Claimant

Overcoming the DIME

Generally

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

Overcoming the DIME Regarding MMI

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

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

E. In this case, the opinions of Dr. Tyler concerning MMI, as expressed in his DIME report and subsequently through his testimony are inconsistent. Consequently, a threshold determination of what constituted the actual opinion of Dr. Tyler regarding MMI must be resolved before the question of whether Respondents overcame his opinions can be addressed. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo. App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006)

(not selected for publication). In this case, a conflict exists between Dr. Tyler's DIME report and his oral testimony. Nonetheless, the ALJ concludes after careful review of the DIME reports that Dr. Tyler determined, as a matter of fact, that Claimant was at MMI as of April 20, 2015 following Dr. Hart's surgical evaluation. Accordingly, Respondents, who contested that opinion, carried the burden to overcome Dr. Tyler's original MMI determination by clear and convincing evidence.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). In concluding that Respondents have carried their burden to establish that Dr. Tyler's opinion regarding MMI, as expressed in his August 7, 2015 DIME report was highly probably incorrect, the ALJ finds the opinion expressed in *Andrade* v. *Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005) instructive. In *Andrade* the Colorado Court of Appeals held that a DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. Thus the court held that an ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video. Similarly, in *Jarosinski* v. *Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002) it was proper for the ALJ to consider a DIME physician's retraction of her original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported. *See also*, *Williams v. Canon City & Royal Gorge Railroad*, W.C. 4-775-399 (ICAO May 12, 2010).

G. Claimant argues that the above referenced cases are distinguishable from the instant case because Dr. Tyler's change in opinion was not prompted by new evidence. The ALJ is not persuaded. Following the logic of the above cited case law, the ALJ finds that the record clearly establishes that Dr. Tyler did not believe Claimant to be at MMI at the time of the original DIME examination because additional opinions regarding his surgical candidacy were necessary. To that extent that the referral to Dr. Hart generated an updated report regarding the stability of Claimant's condition, the ALJ finds the report constituted "new" medical evidence which Dr. Tyler was free to consider when he reached his ultimate opinion concerning MMI. Once this "new" medical opinion was received by Dr. Tyler it became clear to him that Claimant's condition was stable and no further treatment was reasonably expected to improve the condition as of the date Dr. Castrejon placed Claimant at MMI. Consequently, Dr. Tyler changed his opinion regarding MMI from April 20, 2015 to August 11, 2014. As found, Dr. Tyler recognized and credibly acknowledged his error in placing Claimant at MMI on April 20, 2015. His testimony regarding the basis for his change of opinion is persuasive and supported by the totality of the record evidence. Accordingly, the ALJ is persuaded that

Dr. Tyler's original opinion that Claimant reached MMI on April 20, 2015 was highly probably incorrect and has been overcome.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Tyler's opinion that Claimant reached MMI on April 20, 2015, as expressed in his August 7, 2015 DIME report is GRANTED. Claimant reached MMI on August 11, 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 22, 2016

/s/ Richard M. Lamphere

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

ISSUES

1. Whether the 24-month Division Independent Medical Examination (DIME) performed by Brian Beatty, D.O. on October 20, 2014 should be stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S.

2. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment in the amount of $97,641.12.

FINDINGS OF FACT

1. On May 9, 2012 Claimant suffered admitted industrial injuries during the course and scope of her employment with Employer.

2. On August 14, 2012 Respondents filed a General Admission of Liability (GAL). The GAL specified that Claimant was entitled to receive Temporary Total Disability (TTD) benefits beginning on July 16, 2012 in the amount of $732.57 per week.

3. On July 24, 2014 Respondents filed a Notice and Proposal to Select a Division Independent Medical Examiner. However, on July 28, 2014 Respondents filed a Notice of Failed IME Negotiation.

4. On July 28, 2014 Respondents filed an Application for a 24-Month Division Independent Medical Examinaion (DIME). The Application specified Claimant's left shoulder as the body part to be addressed. Respondents listed Maximum Medical Improvement (MMI) and impairment rating as issues for the DIME.

5. On October 20, 2014 Claimant underwent a 24-month DIME with Brian Beatty, D.O. Dr. Beatty determined that Claimant had reached MMI on June 15, 2012 for her left shoulder and cervical spine injuries. He assigned a 16% whole person impairment rating.

6. Dr. Beatty subsequently reviewed extensive video surveillance and medical records. On January 27, 2015 he issued a supplemental report concluding that Claimant reached MMI on June 15, 2012 with a 0% whole person impairment rating.

7. On February 13, 2015 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Beatty's MMI date of June 15, 2012 and 0% whole person impairment rating. Because the date of MMI preceded the first TTD payment, Respondents asserted an overpayment of all TTD benefits paid from July 16, 2012 and continuing for a total of $97,641.12.

8. On March 11, 2015 Claimant filed an Application for Hearing and Notice to Set. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)."

9. The 24-month DIME performed by Dr. Beatty on October 20, 2014 is stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S. Claimant acknowledges that Respondents' overpayment calculation is correct, but asserts that the 24-month DIME was invalid. She specifically contends that Respondents violated §8-42-107(8)(b)(II)(B), C.R.S. by failing to request that an Authorized Treating Physician (ATP) address MMI in writing prior to the 24-month DIME. Claimant maintains that, if the 24-month DIME is invalid, there has been no MMI determination and she is not responsible for the $97,641.12 overpayment.

10. A 24-Month DIME is statutorily authorized in §8-42-107(8)(b)(II)(A)-(D), C.R.S. The plain language of §8-42-107(8)(b)(2)(B), C.R.S. requires the moving party to inquire in writing from an ATP whether a claimant has reached MMI. Inquiring of an ATP in writing is a condition precedent to obtaining a 24-Month DIME. However, the record is devoid of evidence that an ATP addressed in writing whether Claimant had reached MMI prior to the 24-month DIME. The 24-month DIME by Dr. Beatty conducted on October 20, 2014 was thus invalid. Moreover, Dr. Beatty lacked authority pursuant to statute to address Claimant's impairment rating. Finally, Dr. Beatty's determination was not final because an ATP was required to assign a permanent impairment rating.

11. Claimant did not waive her right to challenge the propriety of the 24-month DIME process because she filed an Application for Hearing and Notice to Set on March 11, 2015. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)." She thus properly challenged the validity of the 24-month DIME performed by Dr. Beatty.

12. Because the 24-month DIME was invalid, there have been no MMI or impairment determinations for Claimant's May 9, 2012 industrial injuries. Respondents February 13, 2015 FAL was improperly filed. It is thus premature for Respondents to recover an overpayment. Accordingly, Respondents' request to recover an overpayment in the amount of $97,641.12 is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

4. 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. In contrast, §8-42-107(8)(b)(II), C.R.S. outlines the procedure for selecting an independent medical examiner if an ATP has not determined whether an employee has reached MMI. The statute provides that at least 24 months must have passed since the date of injury before a party may seek an independent medical examination. §8-42-107(8)(b)(II)(A), C.R.S. The statute also requires a party "to request in writing that an ATP determine whether the employee has reached MMI. §8-42-107(8)(b)(II)(B), C.R.S.

7. The statute authorizing the 24-month DIME does not refer to permanent impairment but only contemplates MMI. §8-42-107(8)(b)(II), C.R.S. The 24-month DIME physician is thus not statutorily authorized to address impairment. *Meza v. Industrial Claims Appeals Office,* 303 P.3d 158, 162 (Colo. App. 2013). The opinion of a 24-month DIME physician carries presumptive, binding weight only concerning MMI. *Meza,* 303 P.3d at 162. Because a 24-month DIME physician's opinion carries no presumptive weight concerning permanent impairment, his impairment opinion is "advisory only, and neither party [is] required to object to or seek a hearing on causation issues related to impairment within the time limits specified" in §§8-42-107.2, C.R.S. & 8-43-203(2)(b)(II)(A), C.R.S.; *Meza,* 303 P.3d at 163.

8. As found, the 24-month DIME performed by Dr. Beatty on October 20, 2014 is stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S. Claimant acknowledges that Respondents' overpayment calculation is correct, but asserts that the 24-month DIME was invalid. She specifically contends that Respondents violated §8-42-107(8)(b)(II)(B), C.R.S. by failing to request that an Authorized Treating Physician (ATP) address MMI in writing prior to the 24-month DIME. Claimant maintains that, if the 24-month DIME is invalid, there has been no MMI determination and she is not responsible for the $97,641.12 overpayment.

9. As found, a 24-Month DIME is statutorily authorized in §8-42-107(8)(b)(II)(A)-(D), C.R.S. The plain language of §8-42-107(8)(b)(2)(B), C.R.S. requires the moving party to inquire in writing from an ATP whether a claimant has reached MMI. Inquiring of an ATP in writing is a condition precedent to obtaining a 24-Month DIME. However, the record is devoid of evidence that an ATP addressed in writing whether Claimant had reached MMI prior to the 24-month DIME. The 24-month DIME by Dr. Beatty conducted on October 20, 2014 was thus invalid. Moreover, Dr. Beatty lacked authority pursuant to statute to address Claimant's impairment rating. Finally, Dr. Beatty's determination was not final because an ATP was required to assign a permanent impairment rating.

10. As found, Claimant did not waive her right to challenge the propriety of the 24-month DIME process because she filed an Application for Hearing and Notice to Set on March 11, 2015. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)." She thus properly challenged the validity of the 24-month DIME performed by Dr. Beatty.

11. As found, because the 24-month DIME was invalid, there have been no MMI or impairment determinations for Claimant's May 9, 2012 industrial injuries. Respondents February 13, 2015 FAL was improperly filed. It is thus premature for Respondents to recover an overpayment. Accordingly, Respondents' request to recover an overpayment in the amount of $97,641.12 is denied and dismissed.

ORDER

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

1. The 24-month DIME performed by Dr. Beatty on October 20, 2014 is stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S.

2. Respondents' request to recover an overpayment in the amount of $97,641.12 is denied and dismissed.

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

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

DATED: February 11, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Whether Claimant is entitled to penalties for late temporary total disability payments between September 1, 2015 and November 6, 2015.

STIPULATION

At the commencement of hearing, the parties stipulated that allegedly delayed TTD payments were a total of 25 days late. Specifically, the parties agreed that the September 25, 2015 check was 10 days late and the November 6, 2015 check was 15 days late. The ALJ accepts and approves the parties' stipulation.

FINDINGS OF FACT

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

1. Claimant suffered an admitted injury on December 1, 2011. Claimant subsequently developed chronic regional pain syndrome (CRPS) as a consequence of surgery she had in connection with her industrial injury. Following her diagnosis of CRPS, Respondents re-opened the claim by filing a General Admission of Liability (GAL) on May 21, 2015, which re-instated temporary total disability (TTD) benefits in the amount of $419.74 per week or $59.96 per day retroactively to February 13, 2015. Temporary total disability checks were issued every two weeks in the amount of $839.48.

2. Although Claimant did not always receive her checks in the mail every fourteen days,[1] Respondents issued temporary total disability checks consistent with the May 21, 2015 GAL in a timely fashion through September 1, 2015.

3. Claimant testified that beginning in September 2015, her TTD check did not arrive on time. Specifically, Claimant testified that she recalled the check being a week late.

4. The indemnity payment history submitted into evidence establishes the following payment issue dates for Claimant's biweekly TTD checks: September 1, 2015; September 25, 2015; October 8, 2015; and November 6, 2015.

[1] Claimant testified that at times her checks were 1-2 days late and that on these occasions she would let the matter "slide."

5. On September 22, 2015, counsel for Claimant notified counsel for Respondents that Claimant had not yet received her disability check. (Claimant's Ex.9). Based upon the payment schedule, this check should have been issued on September 15, 2015. On September 25, 2015, Counsel for Claimant followed-up with Respondents' counsel on regarding the status of Claimant's September TTD check. In an e-mail message to Respondents' counsel, Claimant's counsel wrote: "No response on her late TTD check—what have you found out please?"

6. According to Respondents' payment records Claimant's first September TTD check was issued September 25, 2015. (Respondents' Exhibit A, p. 4). This check was therefore 10 days late.

7. Respondents issued Claimant's next payment on October 8, 2015. Although this check was mailed fourteen days after the September 25, 2015 payment, the ALJ finds this check was also not timely, as it carried on the late payment scheduled created by Respondents late payment of Claimant's first September TTD check, which was delayed 10 days as found above. On October 2, 2015, Claimant's counsel wrote to Respondents counsel regarding payment of Claimant's TTD check which was due October 1, 2015 had Respondents actually paid the September TTD check timely. In her e-mail, Claimant's counsel wrote: "Michelle, Marla has not received her last TTD check, period ending 10/1, nor her last mileage check. This is happening too often--please get after the adjuster."

8. On October 6, 2015 counsel for Respondents responded as follows: "I have checked with the adjuster. She has a reserve issue with respect to the TTD checks and is working to get this matter resolved as quickly as possible." Based upon this exchange, the ALJ finds that Respondents were aware that Claimant's TTD checks were not being issued in a timely manner.

9. Despite having knowledge that Claimant's TTD checks were not being issued timely and Claimant's repeated requests to address the problem with the adjuster, Claimant's next TTD payment was not issued until November 6, 2015 or 25 days after the October 8, 2015 check. However, the November 6, 2015 check paid Claimant for several weeks and caught up on all back TTD payments.

10. Claimant testified that as a result of the late receipt of her TTD payments, she had to "pull" money from her savings account in order to avoid falling behind on household bills. Claimant testified that Respondents failure to timely issue her TTD checks created additional stress above and beyond that caused by the nature of her medical condition because she relies on her TTD checks to meet monthly expenses. According to Claimant, she is part of a two check household raising a dependent daughter. Based upon the evidence presented, the ALJ credits Claimant's testimony to find that Respondents failure to timely issue Claimant's TTD checks eventually created an actual financial hardship for Claimant, which she tried, without success, to prevent by having her representative e-mail the adjuster with requests to rectify the situation.

11. Sara Oberle, testified at the hearing in lieu of the adjuster, Beverly Copsey. The

ALJ summarizes the pertinent testimony of Ms. Oberle as follows:

- that Ms. Copsey had been on "severe" lost time claims adjusting since being promoted in April of 2015, although she had been an adjuster for Zurich American for eight years, where she adjusted both medical and lost time claims;

- that the adjusters receive training in the laws of the states for which they adjust claims, which in Ms. Copsey's case was two, including Colorado;

- that the claimant's checks fell off of the carrier's "repetitive pay" (rep pay) system;

- that the reserves had run out and had to be increased;

- that they had been set by the prior adjuster;

- that this file required a consultation with the insured before the insurance company could increase reserves, which sometimes took a couple of weeks to accomplish, when it was required;

- that Ms. Copsey did not update the "rep pay" correctly. In explaining Ms. Copsey's actions in this regard, Ms. Oberle explained that Ms. Copsey had recently been promoted to her current position handling claims involving long term "rep pay" and that she had provided Ms. Copsey with additional training in setting up and updating "rep pay" on her files after the errors that occurred in this claim.

- that she did not know of any inquiries about the late checks, despite the inquiries from Claimant's counsel concerning the same;

- that the TTD checks in question could be written manually in such a situation, even before the consult with the insured was completed, but that this was not done;

- that the late check(s) could have been sent by overnight delivery with a manager's approval, but was not;

- that she did not know why interest was not paid;

- that she does not know if emails sent to the prior adjuster about reserves running out were forwarded to Ms. Copsey;

- that Ms. Copsey erred in not getting the checks out on time;

- that Ms. Copsey is familiar with Colorado law requiring payment of temporary total disability every fourteen days;

- that she understood that claimants frequently rely on their indemnity checks for food and other necessities of life; and,

- that it is the adjuster's responsibility to check the status of the reserves and the rep pay.

12. Based upon the evidence presented, the ALJ finds Respondents actions in failing to issue Claimant's TTD checks in conformity with C.R.S. §8-42-105(2)(a) and WCRP 5-6(B) unreasonable. In considering the totality of the evidence presented as to why Claimant's TTD checks were not issued timely, the lack of a reasonable explanation for the insurer's conduct is overwhelming. The sum total of the evidence presented, persuades the ALJ that Ms. Oberle's testimony provided nothing but post violation excuses for the carrier's failure to issue Claimant's TTD checks timely, namely the Insurer's internal procedural issues, i.e. problems with Claimant falling off of the "rep pay" system, improper reserving practice, including the requirement to complete a consultation with the insured and the adjusters alleged lack of knowledge in adjusting the type of claim represented in this matter. The ALJ finds the actions of the Insurer, after receiving notice of the second late check, unreasonable and particularly egregious in light of Ms. Oberle's testimony that multiple checks could have been issued manually, despite Claimant falling off of "rep pay" and Claimant's repeated efforts to have the situation concerning the timely issuance of her TTD checks rectified. Despite assurances by Respondents on October 6, 2015 that the adjuster was working to resolve the problem "as quickly as possible", Claimant's check for the period extending from October 2 to October 29 was not issued until November 6, 2015. The ALJ also finds, as an aggravating factor, the fact that Insurer did nothing, at any time after the concern was brought the adjuster's attention to ameliorate the situation, such a mailing the checks overnight and/or including interest on the amount of benefits not paid when due.

13. Based upon the evidence presented, the ALJ finds that Claimant, as the moving party, has proven that despite the clear mandate of §8-42-105(2)(a), C.R.S. and WCRP 5-6(B), that Insurer failed, without reasonable explanation, to issue her TTD checks in a timely fashion on two occasions. Moreover, the Insurer failed to take an action that a reasonable Insurer would have taken after knowledge of the violation in an effort to mitigate its impact on Claimant. Accordingly, Claimant has proven that Respondent-Insurer is liable for a penalty, pursuant to §8-43-304(1), C.R.S. and §8-43-305, C.R.S. for failing to issue TTD checks on a timely basis as mandated by §8-42-105(2)(a), C.R.S. and WCRP 5-6(B).

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)*; *see Specialty Rests. Corp. v. Nelson,* 231 P.3d 393, 398 (Colo.2010).

B. 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 her testimony is both persuasive and consistent with the evidentiary record submitted in this case.

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

Penalties

D. In this case, Claimant seeks a penalty pursuant to section 8-43-304(1), C.R.S. due to respondents' alleged violations of section 8-42-105(2)(a), C.R.S. and WCRP 5-6(B). Section 8-43-304(1), C.R.S. provides in pertinent part for penalties of up to $1,000.00 per day if respondent "violates any provision of 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 . . ."

E. Moreover, § 8-43-305 provides that "[e]very day during which any . . . insurer . . . fails to perform any duty imposed by articles 40-47 of this title shall constitute a separate and distinct violation thereof." The purpose of section 8-43-305 is to address "ongoing conduct." *Spracklin v. Indus. Claim Appeals Office,* 66 P.3d 176, 178 (Colo.App.2002). When conduct is ongoing, imposition of a daily penalty is required. *Pueblo Sch. Dist. No. 70 v. Toth,* 924 P.2d 1094, 1097, 1100 (Colo.App.1996) (delay in paying bill for 645 days resulted in "645 separate offenses," and pursuant to predecessor statute to section 8-43-305, imposition of the penalty at a "daily rate" is "mandated").

F. The imposition of penalties under §8-43-304(1) requires a two-step analysis. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). First, it must be determined whether a party has violated the Act in some manner, or failed to carry out a lawfully enjoined action, or violated an order. Both §8-42-105(a), C.R.S. and WCRP 5-

6 require that indemnity benefits be paid at least once every fourteen (14) days. Respondents' own indemnity payment records demonstrate that at least two TTD checks issued between September 1, 2015 and November 6, 2015 were issued more than 14 days apart. Consequently, the ALJ concludes that Insurer violated §8-42-105(2)(a), C.R.S. and WCRP 5-6(B) in this case. Accordingly, analysis of the penalty allegations under §8-43-304(1) and §8-43-305 is appropriate in this case.

G. Nonetheless, penalties may be imposed, under the second prong of the two step test, only if respondent's actions were not reasonable under an objective standard. *Pueblo Sch. Dist. No. 70 v. Toth*, *supra*. Contrary to Respondents assertion, the Claimant need not demonstrate that the reasonableness of the violator's actions were predicated on a rational argument based on law or fact. *See Pioneers Hospital of Rio Blanco County v. ICAO,* 114 P.3d 97 (Colo. App. 2005)(ALJ not required to determine whether the hospital's conduct was "based on a rational argument anchored in law or fact.", but rather, to decide only whether the conduct was merely unreasonable). Furthermore, the standard does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676, (Colo. App. 1995).

H. In concluding that Respondent-Insurer is liable for penalties, the ALJ finds the case of *Higuera v. Industrial Claim Appeals Office*, W.C. 4-683-101(September 22, 2009) instructive. In Higuera, the ALJ imposed a penalty of $1,125 for violation of § 8-42-105(2)(a) C.R.S. 2009 and Workers' Compensation Rule of Procedure Rule 5-6(B), 7 Code. Colo. Reg. 1101-3 (2009). On appeal, respondents argued that the TTD checks were, in part late, due to internal procedural issues, including a "computer error" which resulted in indemnity checks being sent to a wrong address. In affirming the imposition of penalties, the Industrial Claims Appeals Panel (ICAP) concluded that the evidentiary record supported that the "TTD payment was issued late because it fell off the insurer repetitive pay system for some reason"; that the "claims adjuster testified that although she had tried to figure out how that happened she had not been able to do so"; that the "claims adjuster also testified that a second TTD check was late because the prior payment had fallen off"; and that the claims adjuster "agreed that the insurer had the responsibility to pay TTD benefits every two weeks."

I. The similarities between the facts presented in *Higuera* and the instant case are inescapable. Here, Respondent-Insurer asserts that the checks were not issued timely because a mistake had occurred regarding claim reserves, which subsequently ran out, resulting in the checks falling off of the "rep-pay" system. A "mistake" (computer or otherwise) is not a reasonable action by the insurer. *Halbritter v. Colorado Professional Counseling Services, P.C.*, W.C. No. 4-160-869 (Industrial Claim Appeals Office, August 3, 1995). While a "mistake" may have occurred in this case, the evidentiary record supports a conclusion that, despite knowledge of the reserve and computer problem, the Insurer did not issue checks prusuant to statute and rule on two separate occasions, although they knew that TTD was mandated to be paid every 14 days and had the

ability to override the system and pay the benefits timely. The ALJ is also not persuaded by the Insurer's suggestion that their decision not to pay the due and owing TTD was reasonable because a consultation with the insured was necessary before a check could be issued. The ALJ concludes the assertion unpursuasive as it is severely undermined by the fact that Insured was aware of the need to consult with the insured during the entire pendency of the case and was aware of the problem concerning reserves as early as October 6, 2015; yet they did not issue a check until November 6, 2015. Consequently, Claimant has proven that Insurer failed, without reasonable explanation, to issue her TTD checks in a timely fashion on two occasions making the imposition of penalties appropriate in this case.

J. Although the amount of penalties is within the sound discretion of the Administrative Law Judge, once an unreasonable violation is proven, a penalty of at least one cent is mandatory. *Marple v. Saint Joseph Hospital*, W.C. No. 3-966-344 (Industrial Claim Appeals Office, September 15, 1995)(decided under predecessor section 8-53-116). Furthermore, any penalty to be imposed should consider the degree of culpability on the part of the adjuster and the relationship between the penalty to any harm suffered by Claimant. *McOmber v. Associated Business Products*, W.C. No. 4-257-682 (October 25, 2004). As found, Insured's unreasonable delay in issuing Claimant's TTD checks resulted in an actual financial hardship for her. Respondents' suggestion that the late payments constituted "more of a financial inconvenience" because the late payments did not result in Claimant actually missing any bill payments is unconvincing. In this case, Claimant's testimony that and she and her husband combine their resources to meet their financial obligations is credible and persuasive. Here, the evidence presented supports a conclusion that but for the existence of a savings account, Respondent-Insurer's failure to timely pay Claimant TTD, more probably than not, would have resulted in Claimant missing a bill payment or payments. The ALJ concludes the fact that Claimant had to access her savings account under the circumstances she was facing constitutes a financial hardship in and of itself. Due to the Insured's unreasonable delay, they virtually guaranteed that Claimant would have to access her saving account to avoid further financial complications. The ALJ infers and concludes, from the evidence presented, that having to access her savings account caused the additional stress Claimant alluded to during her testimony. The fact that Claimant had a savings account to access does not act as a mitigating factor for Respondent-Insurer or shield it from exposure to penalties.

K. Nevertheless, the violations that occurred in this case resulted from a specific set of circumstances and the ALJ is convinced that corrective actions have already been taken by the Insurer to prevent a repeat of the same violations which occurred in this case. Consequently, the ALJ is not convinced that a penalty of $100.00/day is necessary to "deter" future conduct as suggested by Claimant. However, careful deliberation regarding the nature of the penalty, the Insured's actions/conduct and the relationship between the penalty to the harm suffered by Claimant also convinces the ALJ that imposition of a nominal penalty is insufficient in this case. Based on the record evidence presented, the ALJ concludes that the carrier's conduct and their explanations and delays in addressing the problem regarding timely payment of Claimant's fail to

pass scrutiny, were in fact unreasonable and should be penalized in an amount of $50.00/day for the 25 day time period stipulated to by the parties. The ALJ concludes that this penalty appropriately accounts for the nature of the violations, the adjuster's actions/conduct and the relationship of the penalty to the harm suffered by the Claimant.

ORDER

It is therefore ordered that:

1. Respondents shall pay a penalty of $50.00/day for 25 days ($1,250.00); said penalty to be apportioned between Claimant, as the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7)(a) as follows:

    a. 75% to Claimant;

    b. 25% to the workers' compensation cash fund.

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 24, 2016

/s/ Richard M. Lamphere

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

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that Dr. Bhatti's proposed cervical fusion is reasonable and necessary to cure and relieve the Claimant from the effects of the admitted industrial injury;

2. Whether Dr. Olson's prescription for Cialis for the claimant's sexual dysfunction is reasonable, necessary and related to the claimant's industrial injury; and,

3. Whether the claimant is entitled to temporary total disability benefits from September 25, 2012 and ongoing until terminated by operation of law.

FINDINGS OF FACT

1. The claimant suffered a compensable, admitted industrial injury on or about September 25, 2012 while employed with the respondent-employer. The claimant reported that he was pushing a cart when he suffered an injury to his abdomen, lower back, cervical spine, and left shoulder.

2. The claimant received treatment for his shoulder injury and hernia condition. He underwent a lipoma excision and a shoulder surgery.

3. The claimant continues to have pain in his cervical and lumbar spine. He has had pain on the right side of his neck and in his lower back. He also reported numbness in his extremities that is essentially constant. He emphasized that the numbness in his hands was particularly debilitating. He reported little to no improvement with previous interventional therapies, including injections, rhizotomies, and pain medications. The claimant continues to use opiate medication for his pain relief, along with "5-6" other medications depending on the day.

4. The claimant underwent an MRI with Open MRI of Pueblo on January 16, 2013 for his lumbar spine and cervical spine. Dr. Jayson Lord, M.D. interpreted the imaging. Dr. Lord determined that the claimant had an L5-S1 disc bulge with facet hypertrophy without stenosis, slight scoliotic curvature of the spine, and an L4-5 disc bulge without canal or foraminal stenosis. Regarding the cervical spine, the only disc

herniation not determinate for age was at the C5-C6 level, which showed a disc bulge with mild to moderate canal stenosis.

5. Dr. Olson, the claimant's authorized treating physician, referred the claimant to Dr. Michael Sparr, M.D. The claimant saw Dr. Sparr on March 21, 2013. Dr. Sparr completed an EMG of the claimant's bilateral lower extremities, which was normal. Dr. Sparr ordered an EMG study of the claimant's cervical spine.

6. The claimant saw Dr. Sparr again on April 26, 2013 for the bilateral upper extremity EMG. The EMG was normal. Dr. Sparr found no objective evidence of the claimant's subjectively reported radicular symptoms or bilateral parathesias.

7. The claimant followed up with Dr. Sparr on August 12, 2013. Dr. Sparr noted "vague and diffuse" subjective pain complaints in the claimant's lower back, cervical spine, and bilateral lower and upper extremities. He could not explain these symptoms with the imaging studies available, which again were all normal. He also noted positive Waddell's testing, which demonstrated symptom magnification and a possible psychological overlay. That, combined with the claimant's subjective reporting of "0%" improvement, caused Dr. Sparr to recommend no further intervention with the claimant.

8. The claimant saw Dr. James Sceats, M.D. regarding possible surgical interventions on January 28, 2014. Dr. Sceats reviewed the cervical spine MRI and Dr. Sparr's EMG study. Dr. Sceats concluded that the claimant's cervical MRI was "not particularly remarkable" and did not show either a large herniated disc or canal or foraminal stenosis. Dr. Sparr's EMG study was also essentially normal. Dr. Sceats concluded that the claimant's pain complaints were the result of myofascial pain and that he would not recommend surgery.

9. The respondent-insurer obtained an Independent Medical Evaluation from Dr. William Watson, M.D. Dr. Watson evaluated the claimant in person on May 6, 2014. Dr. Watson noted that the claimant had marked pain behavior throughout the examination, including diffuse tenderness and pain throughout the cervical spine. However, distracted palpitation was negative for pain. The Spurling's test revealed pain but no evidence of radicular symptoms. Regarding the lumbar spine, Dr. Watson noted on his physical evaluation that the claimant had "intense" pain on both light touch and deep palpitation. Dr. Watson noted that the claimant gave way on all muscle testing and that the claimant's symptoms seemed to change throughout the examination.

10. Dr. Watson opined that the claimant showed positive Waddell's testing throughout the examination for both the cervical and lumbar spine. After reviewing the imaging studies, Dr. Watson found no objective basis for the claimant's extreme pain complaints and subjectively reported symptoms. Thus, he felt that all active care should be terminated, that the claimant should be encouraged to do his home exercise program, and that no further surgical intervention was appropriate.

11. The claimant saw Dr. Sceats again on July 10, 2015 for another surgical evaluation. Dr. Sceats noted that the claimant had received cervical epidural steroid injections and lumbar epidural steroid injections without benefit. The claimant had also had cervical spine rhizotomies but did not get significant relief from the procedures. Absent objective evidence of spinal pathology, Dr. Sceats concluded that the claimant's pain was primarily myofascial in origin, and once again did not recommend any further surgical intervention. However, because the claimant "really wishes something done", Dr. Sceats referred the claimant to his partner, Dr. Sanna Bhatti, M.D. for another surgical opinion.

12. The claimant underwent a surgical evaluation with Dr. Sana U. Bhatti, M.D. on July 27, 2015. Dr. Bhatti evaluated the claimant, and ordered repeat cervical MRI and bilateral upper extremity EMG studies of the claimant.

13. The claimant underwent a follow up bilateral upper extremity EMG with Dr. Dwight Caughfield on June 9, 2015. Dr. Caughfield noted that the claimant's study showed evidence of left cervical radiculopathy, but did not find evidence of right sided radiculopathy.

14. The claimant then underwent a repeat cervical spine MRI at St. Mary Corwin medical center on August 4, 2015. Once again, the MRI showed "mild degenerative disc disease" with minimal levels of spinal stenosis at the C5-C6 level. There was no note of a disc herniation at the C5-C6 level.

15. The claimant deposed Dr. William Griffis regarding his 24 month DIME opinion. Dr. Griffis opined that he did not feel that the claimant was at MMI and that he would defer to the treatment proposed by Dr. Olson. However, on cross examination Dr. Griffis agreed with Dr. Sceats that the claimant's pain symptoms were myofascial in origin. Dr. Griffis further opined that surgery was not reasonable or necessary to treat a myofascial pain disorder. Dr. Griffis did not agree with sending the claimant to see a second surgical opinion because there was no clear pain generator identified in any MRI. He specifically stated, "unless we have really objective findings on the MRI that

indicate that there's a pain generator, such as -- such as a disc herniation pressing on nerves."

16. Dr. Griffis did not recommend further intervention in the cervical spine stating, "I think it's a mistake to pursue additional diagnostic tests and then possibly put him through a cervical surgery."

17. The claimant took the post-hearing evidentiary deposition of Dr. Sanna Bhatti, M.D. Dr. Bhatti opined that the claimant's MRI showed a right sided disc herniation at the C5-C6 level of the cervical spine, along with foraminal stenosis at various levels in both MRI studies, which "may or may not" be significant depending on the physical examination He also stated that he personally reviewed the MRI. Regarding the EMG studies, he noted that the latest EMG study showed a mild left C6 radiculopathy. Dr. Bhatti felt that because the claimant's disc herniation was on the right side, but the radiculopathy was only present on the left, that the "left C6 radiculopathy may not be meaningful."

18. Dr. Bhatti examined the claimant one time, on July 27, 2015. In that exam, the claimant subjectively complained of severe pain in his cervical spine and right arm. The claimant also complained of numbness and paresthesias. However, Dr. Bhatti further explained that the disc herniation would not explain the left sided numbness, and that he did not have an explanation for the left sided numbness.

19. Despite a lack of an objective basis for the claimant's subjective complains of paresthesias and numbness, Dr. Bhatti recommended proceeding with a C5-C6 anterior discectomy. The objective was to help with the claimant's severe subjective pain complaints in his neck and right arm. However, Dr. Bhatti stressed that the discectomy would not help the claimant's parasthesias because there was no objective physical basis for that pain. However, he wanted to proceed with the surgery because there was "nothing short of surgery has helped [the claimant]." However, Dr. Bhatti also stated that, "What I'm saying in this case what I'm saying is that the surgery at C5-6 may be able to help him, but I'm not totally sure. If I was totally sure, I would have reported that I expect surgery at C5-6 to relieve his symptoms."

20. The ALJ finds that the opinions of Dr. Griffis, Dr. Sparr, Dr. Watson, and Dr. Sceats are more credible and more persuasive than the opinion of Dr. Bhatti regarding the proposed C5-C6 surgery.

21. The claimant recently reported symptoms of numbness during sexual intercourse to Dr. Olson. Dr. Olson prescribed Cialis as a potential remedy for the

claimant's newly reported sexual dysfunction. At hearing, the claimant testified that he had always experienced numbness in his penis, but did not report the problem due to embarrassment. Dr. Olson ordered a lower back MRI in order to determine the potential cause of the claimant's subjective numbness complaints.

22. The claimant underwent the MRI on September 25, 2015. The radiologist, Dr. Eric Lyders, reviewed the imaging, and concluded in his narrative report that, "Essentially normal MRI of the lumbar spine. No focal disc protrusion or significant stenosis."

23. Dr. Olson then saw the claimant on October 9, 2015. The claimant reported a subjective pain level of 7-8 in his lower back. Dr. Olson reviewed the MRI and commented that "[The claimant] continues to complain of lower back pain but the most recent MRI scan was basically negative. It certainly did not explain the numbness he has during sexual intercourse."

24. Dr. Olson's narrative report and the September 25, 2015 MRI show that there is no physiological basis for the claimant's penile numbness. The claimant's medical record packet does not contain any further explanation of Dr. Olson's Cialis recommendation. The claimant has not provided objective evidence to support his subjective complaint of penile numbness.

25. The respondent-insurer filed for a 24-month Division IME based on Dr. Watson's IME report. However, neither the respondents nor the claimant's counsel listed the claimant's spine in the Application for DIME. Dr. Griffis, the selected 24 month DIME physician, authored a report finding that the claimant was at MMI for his shoulder and hernia condition. However, Dr. Griffis later testified that he did not rate or examine the claimant's spine because it was not listed on the application. Therefore, Dr. Griffis' recommendation that the claimant was at MMI was in error.

26. The ALJ finds that it is more likely than not that the DIME is a nullity and is void since the DIME did not address an admitted portion of the claimant's injury, and the DIME subsequently agreed that the claimant was not at MMI as to one of those conditions.

27. Regarding temporary total disability benefits, the claimant persuasively testified that he has not returned to work. No treating physician has returned the claimant to full duty.

28. The ALJ finds that it is more likely than not that the claimant is not at MMI until his ATP determines an MMI date, and the attendant procedural provisions have run their course.

29. The ALJ finds that it is more likely than not that the claimant is entitled to TTD from September 25, 2012 and ongoing until terminated by operation of law.

30. The ALJ finds that the claimant has failed to establish that it is more likely than not that the proposed surgery by Dr. Bhatti is reasonable or necessary to cure or relieve him from the effects of his injury.

31. The ALJ finds that the claimant has failed to establish that it is more likely than not that the prescription for Cialis is reasonable, necessary, or related to his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. § 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 the respondents. § 8-43-201.5.

2. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ has not addressed every piece of evidence or every inference that might lead to 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).

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

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

4. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, the claimant has failed to meet his burden of proof to show that the C5-6 discectomy procedure proposed by Dr. Bhatti is reasonable and necessary. Dr. Bhatti identified a mild disc herniation at the C5-6 level from an MRI in 2013, but admitted that his proposed surgery was based upon the claimant's subjective complaints.

6. Balanced against Dr. Bhatti's recommendation are opinions from four different physicians of various specialties. All four physicians, Dr. Griffis, Dr. Sceats, Dr. Sparr, and Dr. Watson, recommended against surgical intervention. All four physicians noted that the objective medical evidence did not suggest pathology that would require surgical intervention. Dr. Sceats, Dr. Bhatti's own partner at his practice, diagnosed myofascial pain disorder as the likely cause of the claimant's subjective pain complaints. No physician was able to diagnose or even identify the cause of the claimant's parasthesias. While weight of numbers alone is not sufficient to overcome Dr. Bhatti's opinion, the uniformity of examinations and opinions between the four doctors suggests that Dr. Bhatti's recommendation is not reasonable or necessary. Therefore, the claimant has failed to prove by a preponderance of the evidence that the C5-6 discectomy procedure is reasonable and necessary.

7. The claimant has failed to present sufficient credible evidence suggesting that Dr. Olson's erectile dysfunction medication is reasonable and necessary. Specifically, Dr. Olson states that the claimant's recent lumbar MRI does not support the numbness that the claimant subjectively reports in his penis. Thus, the claimant has failed to meet his burden of proof that the erectile dysfunction medication is reasonable, necessary, or related to his work injury.

8. 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).

9. 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).

10. As found, Dr. Griffis testified that he had made a mistake based on an erroneous Application for DIME, and that he did not think that the claimant was at MMI. No treating physician has stated that the claimant was at MMI. Therefore, the respondents' Final Admission of Liability of March 16, 2015 is invalid.

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

12. As found, the claimant has been off work since his date of injury, September 25, 2012. He is still off work. As the respondents' Final Admission is invalid, the claimant is entitled to temporary total disability benefits ongoing.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The DIME procedure conducted by Dr. Griffis is null and void.

2. The FAL filed pursuant to the DIME is null and void.

3. The claimant's request for surgery as recommended by Dr. Bhatti is denied and dismissed.

4. The claimant's request for the prescription of Cialis is denied and dismissed.

5. The respondent-insurer shall pay the claimant temporary total disability benefits commencing on September 25, 2012 and continuing until terminated by operation of law.

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

7. All matters not determined herein, 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 10, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that her claim should be reopened based on a worsened condition.

2. If Claimant proved her claim should be reopened for a worsened condition, whether Claimant proved by a preponderance of the evidence that low back surgery is reasonably necessary and related to her work injury.

3. If Claimant proved her claim should be reopened for a worsened condition, whether Claimant proved by a preponderance of the evidence her entitlement to temporary total disability benefits (TTD) benefits from May 27, 2014, and ongoing.

4. Whether Claimant proved the low back surgery is a reasonably necessary and related post-maximum medical improvement (MMI) maintenance medical benefit.

5. Whether Claimant proved by a preponderance of the evidence that she is entitled to a change of authorized physician to Dr. George Frey, M.D.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work injury on October 5, 2012. On that date, Claimant bent over cleaning and dusting. As she twisted to come back up, Claimant felt the acute onset of low back pain with radiation into the right leg. Claimant initially treated with Concentra. Claimant's complaints were pain in the low back and down her right leg. An MRI was ordered for the lumbar spine. The MRI revealed a central-right disc protrusion at L5-SI and a right paracentral disc protrusion at L4-5. Concentra referred Claimant to John T. Sacha, M.D. on October 15, 2012. Claimant has continued to treat with Dr. Sacha and his referral to the present day.

2. Dr. Sacha initially examined Claimant on October 24, 2012, 19 days after the injury. Claimant noted she had bilateral low back pain with radiation to the right leg. Dr. Sacha performed an examination of Claimant and took a history from her of the mechanism that caused her symptoms. Dr. Sacha reviewed the MRI taken of Claimant's low back. Dr. Sacha scheduled Claimant for a

transforaminal epidural/spinal nerve block for therapeutic and diagnostic purposes. He prescribed medication, including Lyrica and tramadol for her pain and radicular symptoms.

3. Dr. Sacha indicated he would reassess Claimant's condition and need for treatment after the injection. On November 8, 2012, Dr. Sacha performed the epidural injections/spinal nerve blocks on the right side of the spine at the L5 nerve root and the SI nerve roots. Claimant initially reported 100% relief following the injections/blocks.

4. Dr. Sacha's care for Claimant was comprehensive. Claimant reported a history of urinary tract infections to Dr. Sacha, which the doctor treated. Claimant also reported a skin rash and lesions to Dr. Sacha. Dr. Sacha's approach showed professionalism as Claimant's treating physician. Claimant testified Dr. Sacha did not listen to her and was uncaring about her symptoms but contemporaneous medical records generated by Dr. Sacha reflecting 30 visits do not correlate with Claimant's account.

5. Dr. Sacha has treated Claimant for more than three years. Medical records reflect that in that period of time he explored the potential causes of Claimant's complaints over those years. Claimant underwent multiple MRI's. Claimant had several sets of diagnostic and therapeutic injections. Claimant was referred to a spinal surgeon and underwent surgery on her lumbar spine. Dr. Sacha secured EMG's to identify with particularity the source of Claimant's pain complaints. When Claimant had psychological manifestations during her course of treatment with Dr. Sacha, he referred Claimant to a Spanish-speaking psychologist for care. Claimant was provided with pain medications, medications to treat nerve symptoms, anti-spasm medications, and anti-inflammatory medications to treat her condition. He explored the recommendations of other physicians in an attempt to help Claimant.

6. Claimant requests a change of physician to Dr. George Frey, an orthopedic surgeon, who Claimant contends "inspired trust," was "very thorough" and who took a "good look" at her and her condition. Claimant's opinion is contrary to the evidence.

7. Dr. Frey admitted in testimony that during the two visits he had with Claimant he did not learn how Claimant injured her back. Dr. Frey only reviewed records of a pre-operative MRI during the course of his contact with Claimant. Dr. Frey testified that he did not need to review Claimant's medical records in order to make treatment recommendations. Dr. Frey stated a "good outcome," as defined by the patient, is what he tries to achieve.

8. Dr. Frey was unaware of Claimant's psychological condition and the treatment of it. Dr. Frey had little knowledge of the medical treatment Claimant received from Dr. Sacha, Dr. Esparza, Dr. Castro and the other providers who provided Claimant with treatment and support. Dr. Frey was unaware that Claimant had

been evaluated for additional surgery before Dr. Frey's involvement. Dr. Castro, the physician who performed her surgery, found there was no further reasonable surgical treatment for her low back pain.

9. Prior to Dr. Castro's surgery, Dr. Sacha provided Claimant with injections to which Claimant had a diagnostic response but experienced only modest relief. Claimant underwent an EMG test on December 28, 2012, which was normal. Dr. Sacha had Claimant evaluated by Dr. Castro, for a surgical opinion. Dr. Castro took a history from Claimant. Based on the imaging studies and Claimant's good response to injections by Dr. Sacha, Dr. Castro recommended surgery.

10. Dr. Sacha saw Claimant the day before her surgery in February of 2013, providing her with pain medicine for after the surgery. On February 7, 2013, Dr. Castro performed surgery, a partial laminectomy at L5-SI on the right side, an undercutting facetectomy and foraminotomy at the same level, and a microdiskectomy on the right at L5-SI.

11. Dr. Frey admitted he did not know what procedures Dr. Castro performed. Yet, it was his opinion that the "wrong surgery was done for the wrong problem" by Dr. Castro. Dr. Frey shared opinions with Claimant which inspired Claimant's confidence when Dr. Frey had little knowledge of her condition.

12. Dr. Castro's surgical report from February 7, 2013, reflects that Claimant had a "full decompression" of the spinal cord and nerve roots. Yet, Dr. Frey without reviewing the operative report, testified that he would perform a "more complete decompression" at the old surgical site.

13. After Dr. Castro's surgery, Dr. Castro opined that, overall, Claimant had improved. Yet, Dr. Frey took a history from Claimant of "no improvement" after surgery. Medical records, unseen by Dr. Frey, showed Claimant experienced relief from symptoms following Dr. Castro's surgery. On March 11, 2013, Dr. Sacha documented one month out from the surgery, that Claimant had back pain and noted that Claimant exhibited "mild pain behaviors" but had little in the way of leg pain, numbness or tingling.

14. On April 22, 2013, Claimant reported to Dr. Sacha she was having significant leg symptoms. Dr. Sacha ordered a repeat EMG and a repeat MRI to determine if there was an objective explanation for her complaints. The second EMG was normal. Dr. Castro found no further surgical treatment was warranted. There was "no recurrent disc protrusion" on MRI.

15. In his May 13, 2013, report, Dr. Sacha documented positive Waddell's signs in two of the five areas of testing and moderate pain behavior. Claimant was placed at MMI on June 17, 2013, exhibiting positive Waddell testing positive in three out of the five areas of testing, and Claimant exhibited pain behaviors. Dr. Sacha noted Claimant has a "progressively nonphysiologic presentation."

Dr. Sacha delayed the impairment rating because Claimant's range of motion testing was invalid on June 17 and he saw Claimant again on July 3, 2013, for completion of the impairment rating.

16. At MMI, Claimant had a 12% whole person impairment for the low back as a result of the injury. She was given permanent work restrictions of no lifting over 10 pounds and only occasional bending and twisting at the waist. Dr. Sacha provided Claimant with maintenance medical benefits, including medications, a gym and pool pass, and follow ups with her treaters.

17. On July 18, 2013, Respondents filed a Final Admission consistent with Dr. Sacha's MMI and impairment determination. Respondents admitted for post-MMI medical benefits. Claimant did not file an objection to the Final Admission and did not request a Division independent medical examination (IME). On August 17, 2013, Claimant's claim closed.

18. Dr. Sacha, and other authorized providers, continued to treat Claimant after MMI. On August 12, 2013, after examination, Dr. Castro reiterated that Claimant was not a candidate for further surgery and noted Claimant was "dramatically improved" from her pre-operative state. On August 14, 2013, Dr. Sacha noted Claimant was doing fairly well and he continued her medications. In September of 2013, Claimant ran out of Lyrica and had an increase in leg symptoms. Dr. Sacha attributed these symptoms to the permanent impairment she had at MMI and Claimant's failure to take her medications.

19. Claimant had flare-ups and treated with Dr. Sacha for them. On October 22, 2013, Claimant had a flare up that subsequently calmed down. Dr. Sacha provided Claimant with medications and recommended follow-up. On October 29, 2013, Dr. Sacha noted there was a seroma on the MRI prior to MMI. He performed an ultrasound and ordered another MRI of the lumbar spine. The MRI was performed on November 6, 2013. Dr. Sacha provided Claimant with injections as maintenance care. On November 26, 2013, Claimant reported the injection provided 100% relief of her pain. But Dr. Sacha noted the finding was somewhat unusual, since the injection showed "excellent foraminal flow" that is indicative of no significant narrowing that would cause complaints. Dr. Sacha suspected the impingement prior to the surgery probably left Claimant with some residual damage that was causing pain. At the December 31, 2013 appointment, Dr. Sacha noted Claimant does have pain behaviors. Dr. Sacha opined there was nothing else to do from an active standpoint.

20. On March 17, 2014, Claimant had another flare of pain, this time reporting left leg pain, which was a "new complaint" according to Dr. Sacha. On April 28, 2014, Claimant did not receive Lyrica medication and had increased pain. Dr. Sacha attributed the medication problem to a mail order pharmacy, so the doctor stopped Claimant's use of the mail order prescriptions in the future.

21. Claimant alleges her worsening occurred on May 27, 2014. She alleges she was no longer at MMI on that date. Claimant alleges she is entitled to temporary disability benefits from that date forward. And, she wants surgery by Dr. Frey for her low back as a result of the worsening she alleges. However, Dr. Frey opined in his deposition that he is not recommending surgery at this time. There are no surgical requests from any of Claimant's treaters.

22. On May 13, 2014, two weeks before the alleged worsening, Dr. Sacha examined Claimant and reported that she was doing "quite well." Claimant was exercising and her symptoms were better. On May 13, 2014, Claimant turned down Dr. Sacha's offer of injections because of her improvement.

23. On May 27, 2014, the date of the alleged worsening, Claimant returned to Dr. Sacha and reported another flare up of pain. Claimant requested the injection that had been offered to her prior to this alleged worsening. Dr. Sacha found the request reasonable and performed the injections. Claimant again, as she had in March of 2014, noted complaints down both legs. Dr. Sacha injected her spine and noted there was no evidence of impingement or narrowing with the injections.

24. Dr. Sacha's May 27, 2014, report warns that Claimant has a history of a non-physiologic presentation and a somatic presentation. Claimant's restrictions were not changed. Claimant was not taken off of MMI. Dr. Sacha assessed that there is no objective evidence of worsening, just the waxing and waning of symptoms.

25. On June 19, 2014, Dr. Sacha performed the fourth set of injections. Claimant's pain was consistent with a left L5 distribution, as it had been in the past. Dr. Sacha could not assess Claimant's short-term relief because Claimant had some post-procedure needle track pain.

26. On July 1, 2014, the next time Dr. Sacha evaluated Claimant, she was better. Dr. Sacha characterized the injections he performed as "maintenance," did not remove the MMI designation, and did not increase Claimant's work restrictions. Claimant leg symptoms were intermittent and unchanged. Dr. Sacha recommended additional physical therapy. Claimant had better range of motion in her low back and, overall, she was improved.

27. On July 15, 2014, Claimant's symptoms increased again. Claimant had increased low back pain and right leg pain. Claimant reported she was depressed. Dr. Sacha referred her for psychological counseling. Again, MMI was not removed nor were work restrictions increased.

28. By July 24, 2014, Claimant was improved after a course of oral steroids prescribed by Dr. Sacha. Claimant refused injections at that time and indicated she wanted no surgical intervention. Claimant was in a good mood as noted by Dr. Sacha. Claimant's pain behaviors were minimal. Dr. Sacha did not

recommend further care other than medication management and home exercise. Claimant continued with her psychological visits and did well. By September 17, 2014, the psychological visits were improving Claimant's ability to avoid her pain focus and improving her functionality. Dr. Sacha noted Claimant was stable and coping better.

29. Shortly before being seen by Dr. Frey, Claimant visited with Dr. Esparza, her psychologist. In his September 10, 2014, Dr. Esparza noted Claimant's pain was decreasing, she was coping better and more active in her life.

30. On October 20, 2014, Claimant saw Dr. Frey who was unaware of the progress Claimant had made. After seeing Dr. Frey, Claimant's mood shifted according to Dr. Esparza. Dr. Frey gave Claimant hope that surgery would cure her. But he did so without knowledge of her treatment with Dr. Sacha, Dr. Esparza and Dr. Castro.

31. Dr. Sacha opined, after years of treating her, that Claimant should not be put on a more aggressive treatment plan. Nonetheless, he considered Dr. Frey's treatment recommendations that Claimant should be considered for surgery. Dr. Sacha performed the diagnostic blockade as suggested by Dr. Frey. Claimant was somatic in her presentation with the injections.

32. On November 13, 2014, Dr. Sacha disagreed that there was a need for further surgical intervention. Dr. Frey did not see Claimant for a year after his initial October 20, 2014, report. Dr. Sacha worked with Claimant regularly during that time and recorded her symptoms. Dr. Esparza noted her preoccupation with surgery.

33. Claimant had two IME's regarding ongoing treatment. On December 11, 2014, Dr. Sharma reviewed the records and provided his opinion regarding ongoing treatment. Dr. Sharma agreed Claimant attained MMI on July 17, 2013, and remained at MMI. Dr. Sharma opined that Claimant's maintenance care is complete. Dr. Sharma noted Claimant was functioning well prior to Dr. Frey's involvement.

34. Dr. Sacha concluded in his January 22, 2015, special report that surgical intervention was not reasonable or necessary. He opined surgery is unwarranted and would cause a disservice to Claimant. Claimant's condition waxed and waned.

35. Anant Kumar, MD, evaluated Claimant at the request of Respondents for an IME on June 5, 2015. Dr. Kumar concluded further surgery was not reasonable or necessary. Dr. Kumar found no new or recurrent herniation. He recommended no further maintenance care, no surgery and no injections.

36. Following Drs. Kumar and Sharma's opinions of no additional treatment, Dr. Sacha continued to treat Claimant. On September 8, 2015, Dr. Sacha ordered a repeat MRI as a reasonable maintenance medical benefit. The MRI was

unchanged from her last MRI and Claimant's condition did not warrant further care or attention.

37. Dr. Frey saw Claimant on October 25, 2015, for the second time. He still had not reviewed her medical records. He did take a history from Claimant, but he did not compare that history to the medical records. He has not reviewed the reports of Drs. Kumar and Sharma.

38. It is found that there is no credible or persuasive evidence of any worsening that removed Claimant from MMI. The credible and persuasive evidence demonstrates surgery is not a reasonable and necessary curative treatment or maintenance medical benefit that should be ordered.

39. It is further found that Dr. Sacha has performed competently and professionally as Claimant's treating physician. There are insufficient grounds for a change of physician to Dr. Frey.

40. Claimant is not entitled to TTD. She remains at MMI. She has not had a worsening of her condition that would warrant a reopening. Her petition to reopen must be denied and dismissed, as the credible and persuasive evidence does not support a reopening for worsening.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

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

REOPENING BASED ON WORSENED CONDITION

2. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that

can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

3. The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

4. A change in condition, for purposes of the reopening statute, refers to a worsening of the Claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether the claimant has suffered any deterioration in her work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra.* The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

5. In this case, Claimant has failed to meet her burden to reopen his claim and has not shown that she suffers from a worsened condition. The credible and persuasive evidence presented at hearing established that Claimant continued to have radiculopathy and ongoing symptoms following her surgery and at the time she was placed at MMI. At the time of MMI on July 3, 2013, Dr. Sacha found Claimant had a whole person impairment rating of 12% for impairment based on Claimant's surgery and continued symptomatology. It is clear from Dr. Sacha's impairment assessment, and Claimant's medical records before and after MMI, that Claimant was expected to have symptomatology. Dr. Sacha performed multiple diagnostic tests, including MRI, EMG and injections, after MMI. None demonstrated a credible or persuasive presence of a worsened condition in Claimant's low back. Medical treatment subsequent to MMI was for the same symptomatology that was present at MMI. The evidence established that Claimant's symptoms waxed and waned, but Claimant failed to establish by a preponderance of the evidence that there was a worsening of condition that required more curative treatment or that caused increased disability. Claimant was not placed on any additional work restrictions during this period of alleged worsening. Dr. Sacha did not retract his opinion of Claimant's MMI date. Dr. Sacha's opinions are supported by the IME's of Drs. Sharma and Kumar.

6. In deposition testimony, Dr. Frey recanted any suggestion of a current need for surgery. Dr. Frey admitted he never reviewed the medical records to determine what the discrepancies were and how they might be resolved. His opinions are not credible or persuasive.

7. Claimant's testimony regarding the history of her injury is not found credible or persuasive. The evidence established there are significant discrepancies between Claimant's reports to Dr. Frey, her IME, and the medical records of treaters. The MRI's show no new or recurrent herniation. The credible evidence established that Claimant remains with symptoms at the level where surgery was performed. Dr. Sacha credibly opined that those symptoms are relatively permanent and have not changed since MMI.

MEDICAL BENEFITS

8. 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 a preponderance of the 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).

9. 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).

10. In this case, Claimant has failed to prove surgery is a reasonably necessary and related medical benefit that should be provided as part of this claim. Whether curative or as maintenance, the overwhelming preponderance of evidence demonstrates surgery is not reasonable or necessary. Claimant failed to prove by a preponderance that the surgery is reasonable and necessary to maintain Claimant's work related condition or to relieve her ongoing symptoms. Diagnostics, including MRI, EMG and injections, show little or no evidence to support a recommendation for surgical care.

11. In their final admission of liability in this matter filed on July 18, 2013, Respondents admitted for ongoing post-MMI medical benefits as outlined by Dr. Sacha's MMI report. They have continued to provide those benefits. The medical treatment admitted to in the final admission of liability is not being challenged by Respondents and is ongoing pursuant to the final admission of liability. Claimant failed to meet her burden of proof to show the surgery suggested by Dr. Frey is reasonably necessary to relieve the effects of her work-related injury or to prevent deterioration of her work-related condition.

TTD

12. Since Claimant failed to establish that she suffered a worsening of her condition, there is no basis to award Claimant TTD. Rather, the persuasive evidence demonstrates the medical restrictions that existed at the time of MMI are the same as those provided by Dr. Sacha at MMI. There is no credible and persuasive evidence suggesting that the Claimant's earning capacity has diminished since MMI as a result of increased physical limitations.

CHANGE OF PHYSICIAN

13. Claimant failed to make a proper showing that a change of physician to Dr. Frey is warranted. If a claimant wants to change physicians, there is a statutory obligation to follow the prescribed procedures in Section 8-43-404(5)(a), C.R.S. *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). However, a claimant may seek a change of physician upon a "proper showing" to the division.Section8-43-404(5)(a)(VI),C.R.S.

14. The credible and persuasive evidence demonstrates Dr. Sacha has provided proactive and professional medical care for Claimant. Claimant proposes Dr. Frey as a new provider of medical treatment. Dr. Frey's testimony demonstrates he is largely unfamiliar with the care provided to Claimant by Dr. Sacha and other treaters and his opinions and recommendations are without merit. Claimant failed to carry her burden of proof for a change of physician.

ORDER

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

1. Claimant's petition to reopen is denied and dismissed.

2. Claimant's claim for medical benefits denied and dismissed.

3. Claimant's claim for TTD from May 27, 2014, and continuing is denied and dismissed.

4. Claimant's request for a change of physician to Dr. Frey is denied and dismissed.

5. 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, 2016

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones
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 4-906-476-01

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he has suffered a worsening of condition to his low back and/or right ankle related to the December 24, 2012 work injury to allow a reopening of WC Claim 4-906-476.

- Whether Claimant is entitled to additional medical benefits.

FINDINGS OF FACT

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

Claimant is a 22 year old former employee of Employer. On December 24, 2012, Claimant was assisting with the placement of prefabricated walls when a wall fell and struck him in the head, back, and right ankle.

2. Paramedics were dispatched to the site. The paramedics noted Claimant felt the wall "scrape" the back of his helmet and "brush" his lower back before landing on his ankle. Claimant denied loss of consciousness, neck pain, or back pain. On exam, Claimant denied back pain on palpation, and it was noted he had abrasions on his lower back which he described as feeling "like a carpet burn or Charlie horse." He had minor swelling of his ankle with "minor discomfort."

3. X-rays were taken of Claimant's right ankle and low back at Presbyterian / St. Luke's. The back x-rays were normal, and the ankle x-ray showed only a small ankle joint effusion. *Id.* Claimant denied loss of consciousness. Claimant relayed that he had "jumped out of the way" of the falling wall, causing the wall to scrape down his back, and he was noted to have a "superficial abrasion" to his left low back. Claimant had full back range of motion with mild soft tissue tenderness in the left lower lumbar paraspinous region.

4. On December 26, 2012, Claimant was evaluated by Steve Bratman, M.D. at HealthOne. Claimant again denied a loss of consciousness. He complained of pain in his left lower back and in his right ankle. Dr. Bratman assessed an ankle sprain, back contusion, and minimal head contusion.

5. On January 2, 2013, Dr. Bratman noted Claimant's ankle was "markedly improved." Claimant had no swelling, and he had 2/10 ankle discomfort. Regarding his back, he also reported it was "much improved," with some stiffness in the morning which improved as the day progressed. He had full range of motion without discomfort. Dr. Bratman did not elicit tenderness to his back on palpation. *Id.*

6. On January 9, 2013, Dr. Bratman noted Claimant wanted to close his case. He denied any significant discomfort to his right ankle, and on exam he had full range of motion in all planes without tenderness to palpation. Regarding his low back, he stated he was minimally stiff in the morning but the feeling "rapidly recovers." He also had full range of motion in his back. Dr. Bratman noted Claimant's injuries had resolved, he placed Claimant at MMI without impairment.

7. On January 11, 2013, Insurer filed a Final Admission of Liability. The next medical record in time is from August 19, 2014 from HealthOne, where Claimant was administered a post-offer physical exam for beginning employment with Western States Fire Protection. Claimant was noted to have range of motion within functional limits ("WFL") in all aspects for his lumbar spine. He also was noted to pass lifting tests, including lifting 75 lbs. from the floor to waist level, turning 90 degrees and placing on a 30" surface 4 times on each side, push/pull 80 lbs. for 25', and safely lifting 50 lbs. from floor to waist and carry for 10 feet.

8. On August 20, 2014, the day following his physical exam at HealthOne, Claimant was evaluated by Paul Geersen, D.C. On the intake form of that date, it was noted Claimant's low back symptoms appeared "2 months ago." Handwritten notes in the records from that date discuss "2 yr [rest unintelligible] . . . bruises LB, FX AK . . . went away . . . 2-3 mo ago [rest unintelligible]."

9. On February 19, 2015, Claimant was evaluated by Pamela Knight, M.D. at Denver-Vail Orthopedics. She recorded that Claimant was originally hit in the back, "this was not x-rayed at that time he did lose consciousness." She also noted he stated he had a "lower extremity fracture." He stated his back symptoms had been present for one year. Dr. Knight took lumbar x-rays and noted he had a congenital fusion unilaterally on the left at the lowest level with some degeneration/disc space narrowing at that level. She referred Claimant for a lumbar MRI. The MRI occurred on February 24, 2015 and showed a L4-5 disc bulge with at least abutment of the left L5 nerve. *Resps.*

10. On March 2, 2015, Dr. Knight noted that Claimant had a prior workers' compensation case which was closed, and "they did not look into his lumbar cervical spine." She felt the injury was responsible for his complaints.

11. John Hughes, M.D. was retained by Claimant to perform an independent medical evaluation ("IME") of Claimant on August 20, 2015. Dr. Hughes documented that Claimant advised he lost consciousness during the work injury. Claimant informed Dr. Hughes that he "began developing symptoms that included right ankle pain and lumbar spine pain." However, Dr. Hughes nowhere documents when the symptoms began after MMI or if they were a continuation. Claimant alleged he "began developing a sense of "overworking myself or something." Claimant alleged symptoms of left low back pain of 3/10, but he denied any right ankle symptoms at that time. Dr. Hughes noted right ankle crepitation and a positive right anterior drawer test on exam, and he also noted reduced lumbar range of motion. Dr. Hughes stated that he felt Claimant suffered a worsening of his lumbar and right ankle injuries. He recommended a MRI

and orthopedic consultation for Claimant's ankle. Regarding Claimant's back, he stated "I feel he has sustained left lower lumbar spine facet joint arthropathy," and he recommended facet joint injections. *Id.* He stated he did not believe Dr. Bratman appreciated residual symptoms at the time of discharge.

12. Allison Fall, M.D. was retained by Respondents to perform an IME of Claimant on December 4, 2015. She recorded that Claimant told her three walls fell on him, and he "blacked out." He stated his ankle swelled up "like a baseball" and "He did not tell them about his low back." Regarding his work history, he stated he stopped working for the Employer in February 2014, worked for his uncle moving boxes and furniture, and then got back into construction again. Dr. Fall recorded he told her "it was not until he started doing that [construction] again that he developed a lot of pain." Dr. Fall noted asking him about the timeframe of his symptoms, and that he responded from the time he was working for his uncle until his pain returned he "does not remember his back; therefore, it was not bad."

13. Dr. Fall noted in her report that Claimant's post-accident records show excellent prognosis and quick healing for both body parts, and at the time of MMI he had no objective findings. She also noted the interim records indicated that his pain actually went away and then came back one year prior to seeing Dr. Knight which would separate the pain from the initial injury. Dr. Fall stated that she felt the most likely etiology for his current back findings was the congenital fusion noted by Dr. Knight, which was leading to degeneration at the level of his disc bulge.

14. Dr. Fall noted Dr. Hughes did not indicate when Claimant's symptoms allegedly arose. She did not agree Claimant suffered a worsening of his injuries over time, as she felt it was inconsistent with the medical records which indicated his symptoms had resolved, and there was not return for additional treatment until August 2014. She also disagreed with Dr. Hughes' conclusion that a facet joint arthropathy would be related to his original injury, as the mechanism of injury involved a scraping motion not causative of an arthropathy. On exam, Claimant had tenderness in his low back and some limitations on range of motion. Dr. Fall noted his right ankle exam was normal without swelling, crepitus, instability, or other abnormalities. She diagnosed myofascial back complaints and had no diagnosis for his right ankle, which was symptom free. Dr. Fall stated Claimant did not suffer a worsening of condition, but if he had, it would have been related to the construction work he began in the spring or summer of 2014, as he specifically told her it was when he returned to working construction that his pain got worse.

15. Claimant testified at hearing that one or more walls hit him in the back of his head and collapsed him underneath. He testified he was knocked out. He testified he downplayed his injuries, and he did not tell his physicians he lost consciousness, because he was afraid of making the injury a large issue with his employer.

16. Claimant testified when he returned to construction work, he worked for BAM Construction as a wood framer and carpenter standing walls, laying decking and subflooring, and other construction activities. Claimant testified that he started to feel

pain in his low back every morning and when he returned from work after starting working for BAM Construction. Claimant testified he then changed jobs to work for Heggem Lundquist, where he was hanging drywall and doing framing work. He testified during his time working for Heggem Lundquist his back pain was getting much worse. He testified at that point he sought treatment for his back with a chiropractor, Dr. Geersen. He testified he was taking time off work to obtain treatment. He testified he has never felt 100% since the injury. Claimant testified he had continuous back pain from when he was released from care.

17. On cross-examination, Claimant testified he only remembered pieces of his treatment with Dr. Bratman at HealthOne, he did not remember his treatment at Presbyterian/St. Lukes, and he did not remember what he told the paramedics that day. The ALJ notes Claimant's testimony is inconsistent that he recalled consciously lying about the extent of his injuries on the day of the injury but also testifying he did not remember his treatment at all at Presbyterian St. Luke's on that day.

18. Claimant was asked about the notations in Dr. Geersen's and Dr. Knight's records that stated Claimant had suffered an ankle fracture with the original injury. Claimant testified he had a past left ankle fracture not related to this claim she may have recorded. Respondents' counsel then read Dr. Knight's record to him referencing that she recorded he suffered a "lower extremity fracture when a very heavy wall fell on him. . ." Claimant then admitted he did not suffer an ankle fracture during the work injury. Claimant was also asked about Dr. Knight's February 19, 2015 reference that his back had not been x-rayed. He testified only that he told Dr. Knight he did not remember a lot about his original injury.

19. Claimant was asked whether he told Dr. Bratman that he had back pain, because Dr. Knight's records reference that they did "not look into" his lumbar spine. Claimant testified "it wasn't focused" on my back. Claimant was then asked about Dr. Fall's report which recorded that Claimant told her that he "did not tell them [his treating physicians] about his low back." Claimant was asked about that not being correct and that he had informed Dr. Bratman of his back pain. Claimant responded he only remembered his treatment being directed to his ankle. When referenced that medical records with Dr. Bratman discuss his levels of back pain and examinations of his back, Claimant testified he had no memory of that treatment. Claimant was asked how he could remember that he downplayed the injuries if he has no memory of any back exams or treatment. Claimant responded generally that he remembered being afraid of reporting the injury.

20. Claimant was asked about Dr. Geersen's records which reference his pain had appeared two months prior to August 2014. Claimant testified that referenced when his pain became worse. He was then asked about Dr. Geersen's notes which reference "went away" – "2-3 mo. ago." Claimant responded that what is referenced is correct, but when he told Dr. Geersen it "came back" referenced when it worsened to a level he could not handle.

21. Claimant confirmed his pain levels were stable from being released at MMI through the time period he was working for his uncle. Claimant was asked about the course of his pain with respect to his various employments. He confirmed on cross-examination his pain initially increased once he began working for BAM Construction in July 2013. He specifically testified and agreed that the work he was doing for BAM Construction was causing the increase in his pain. Claimant testified around August 2014 he was hurting "pretty bad."

22. The ALJ notes that Claimant did not testify at all regarding the condition of his right ankle at the time of MMI or thereafter with respect to any allegations of worsening.

23. Dr. Fall testified at hearing as an expert in the field of physical medicine and rehabilitation. She testified Claimant suffered a worsening of condition which would be related to the workers' compensation claim. She testified that Claimant provided her a history which was inconsistent with the medical records. Specifically, she noted the discrepancy in the references to him losing consciousness, and the medical records reference minor symptoms and findings not consistent with his description of the degree of injury, including the documentation of superficial abrasions to his back. She testified Claimant's report that his low back was not initially addressed was not correct.

24. Dr. Fall testified the initial diagnosis for the back appeared to be a lumbar abrasion without much bruising, consistent with the reference to superficial abrasions in the Presbyterian/St. Luke's records which indicated a mechanism of injury of the wall scraping down along the edge of his back. She also noted the paramedics' notes reference to a "carpet burn" was consistent with a scraping injury. She testified the course of recovery would not be consistent with any other type of injury other than a minor abrasion and/or bruise to his back.

25. Dr. Fall discussed Dr. Knight's reference to a unilateral congenital fusion identified during x-rays taken at Dr. Knight's office. Dr. Fall explained a unilateral congenital fusion of this type is a development abnormality, from birth, where there is a partial fusion of the sacrum and L5. She noted that in conjunction with degenerative conditions at those same levels, those conditions predispose an individual for low back pain at that level because it mechanically predisposes someone for advanced degeneration due to the lack of normal movement at that level. Dr. Fall testified this condition, a unilateral condition where one side of the spine is fixed but the other side attempts to move, is called Bertolotti's Syndrome. She further clarified it predisposed Claimant to left sided back pain since the fusion was on the left side. She also testified that someone with that condition who was working in a heavy duty field would be more prone to be symptomatic earlier than someone with a sedentary life. She testified people with this condition usually do not become symptomatic until their late 20's or early 30's, because they have not had such wear and tear.

26. Dr. Fall commented that she disagreed with Dr. Hughes' diagnosis of a lumbar facet joint arthropathy. She testified a scraping / abrasion mechanism of injury does not create arthritis of the underlying joint unless there is movement of the joint or

tearing of the cartilage, which would have been a much more painful injury and which would have required long term care. She testified a contusion does not lead to the underlying development of arthropathy, which is degeneration of the facet joint.

27. Dr. Fall further testified that at the time Claimant was released from care by Dr. Bratman, there were no documented objective findings, as he had full range of motion and it was noted his contusion had resolved. Regarding Claimant's testimony he downplayed his condition at the time of MMI, Dr. Fall testified that if Claimant had remaining back pain of significance, that condition should be apparent upon exam with range of motion exercises or by elicitation of spasm or trigger point upon palpation.

28. Dr. Fall testified that Claimant told her specifically that his increase in pain was associated with his return to construction work for subsequent employers. She testified that if Claimant had experienced a worsening of back pain, she would attribute that worsening to his heavy work in construction, in conjunction with his congenital fusion abnormality, which he was performing after he was released from care. She testified any such worsening would not be causally related back to his original injury.

29. Dr. Fall testified the results shown in the August 19, 2014 HealthOne post-offer screening record, that his range of motion was "within functional limits," was not consistent with Claimant's testimony regarding his condition at that time. Dr. Fall testified Claimant's ankle recovery was consistent with a mild sprain. She noted that if it was a worse ankle sprain, it would be hard to fake improvement where it can be difficult to bear weight and there is associated swelling and bruising. She noted there were no objective findings of a continuing ankle injury at the time of MMI. She testified Claimant was properly placed at MMI.

30. The ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a worsening of his condition to his low back or right ankle which is related to the original work injury. The ALJ credits Dr. Fall's testimony that any worsening of condition which may have occurred in Claimant's low back would be causally related to his work in construction for other employers and/or his pre-existing and unrelated unilateral congenital fusion. The ALJ notes that Dr. Hughes and Dr. Knight do not appear to have been provided an accurate medical history, and Dr. Hughes does not address in his analysis any role the subsequent employment activities with separate employers may play in a causation analysis of to what any worsening would be attributed. The ALJ also notes that no evidence was presented of an actual worsened condition in Claimant's right ankle.

CONCLUSIONS OF LAW

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the 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. ICAO*, 183 P.3d 684 (Colo. App. 2008).

Reopening and Change of Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in his work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra.*

Claimant has failed to establish by a preponderance of the evidence that he suffered a worsening of condition to his left low back or right ankle. Moreover, even if Claimant suffered an overall worsened condition to either body part, he has not proven any such worsening is causally related to the work injury.

Relevant to a consideration of whether Claimant suffered a work-related worsening of condition is an examination of Claimant's argument that he downplayed his level of symptoms at the time of his release at MMI. Claimant's description of the severity of his original injury is not supported by the medical records. Rather, the

medical records document minimal injuries which evolved into benign physical exams at MMI. The medical records document the falling wall scraped his back, as opposed to a more serious direct impact injury. Claimant was documented at Presbyterian/St. Lukes to have "superficial abrasion" from jumping "out of the way" of the wall. That finding is consistent with Claimant's own report to the paramedics that he had a "carpet burn." The objective findings on exam therefore matched his story at the time, not his contrary testimony at hearing. As noted by Dr. Fall, Claimant's minimal complaints at the time were consistent with such a scraping mechanism of injury.

As of January 2, 2013, Dr. Bratman recorded Claimant had full range of motion in his back and ankle without discomfort, and he specifically noted that there were no findings upon palpation. Dr. Fall noted that if there was any remaining injury of significance to his back, Claimant would either have presented with some limitation on range or motion or Dr. Bratman would have elicited spasms or trigger points upon palpation. Dr. Fall also testified credibly that it is difficult to "fake" improvement of an ankle sprain, because a more severe ankle sprain would have had remaining swelling, and discomfort upon weight bearing would be apparent and difficult to hide. Dr. Bratman placed Claimant at MMI on January 9, 2013, at which point he documented Claimant had benign physical exams to his low back and right ankle. Dr. Bratman's documentation of full ranges of motion without pain or other signs of injury are not consistent with Claimant's testimony. The weight of the evidence establishes that Claimant suffered a minor injury which resolved consistent with its severity.

Moreover, Claimant's testimony and recollection of events appeared to be selective at hearing. This selective emphasis on certain, at times incorrect, facts also appears to have been communicated by Claimant to his physicians. For example, Dr. Knight recorded that Claimant told her that his back was not treated during the course of the claim, which is obviously not correct upon review of the records. Dr. Fall also noted that Claimant told her he did not inform his treating physicians about his back pain at all. This is clearly contradicted by the medical records which show Claimant's back was consistently examined, and both his complaints and objective findings from those exams were documented. Dr. Knight's stated opinion that Claimant's complaints were related to his original injury cannot be endorsed by this ALJ because she was clearly misinformed in the course of forming that opinion regarding the nature and severity of Claimant's original injury, as well as the medical treatment he received for same.

Similarly, Dr. Hughes noted that Claimant's history provided to him, which was consistent with Claimant's testimony at hearing, was consistent with the medical records, but this is not the case for the various reasons discussed herein. Dr. Hughes' report lacks any discussion of Claimant's pain levels after MMI, and whether they dissipated completely or remained. His report also lacks discussion or consideration of the role Claimant's subsequent employment may play in determining whether any complaints of worsening are causally related to the original injury. For these reasons, the ALJ endorses Dr. Fall's testimony over the written opinions of Dr. Hughes.

When presented with contrary evidence to his assertions at hearing, Claimant testified that he only remembered the portions of his examinations pertaining to his

ankle. Claimant was examined by responding paramedics, the ER physician, and Dr. Bratman on three occasions after his injury. Records from those five examinations document examinations of both his back and ankle, as well as discussions with Claimant about his level of symptoms in both body parts. The ALJ does not find it credible that Claimant remembered his ankle exams during each of those visits while lacking any recollection of examinations or discussions pertaining to his back. Also, Dr. Knight's and Dr. Fall's records do not document that Claimant told them he did not remember portions of his treatment, but that specifically he either did not tell his physicians about his back or that they did not examine his back.

Claimant has also alleged that his symptoms never dissipated and were constantly present after MMI, only to worsen at some point. However, all post-MMI medical records indicate a complete resolution of his pain. Both Dr. Knight and Dr. Geersen documented an onset of pain, not a worsening of pain, in the first half of 2014. Dr. Geersen specifically documented Claimant's condition "went away" and "came back." Dr. Fall noted that Claimant informed her he could not remember any back pain while working for his uncle after being released from care, and Dr. Hughes' report contained no analysis of whether the pain ever resolved. Claimant's testimony at hearing that his pain never went away, and references such as "came back" refer to when his pain worsened, are not credible in light of the weight of the totality of the evidence. The weight of the evidence establishes Claimant suffered a minor injury, which resolved completely. Therefore, it is less likely any worsening or reappearance of the pain could be causally traced back to the original injury.

The ALJ also notes that Claimant testified that by August 2014, his continuous back pain since MMI had become bad and was causing him to miss work to seek treatment. However, the August 19, 2014 HealthOne post-offer physical documents that Claimant had functional limits of lumbar range of motion, there is no discussion of any limitations or pain complaints, and Claimant was able to lift various heavy work category weights without documented limitation. Claimant then sought chiropractic care the very next day from Dr. Geersen, at which time he informed Dr. Geersen his pain had previously gone away but had recently come back. The circumstances of these records and complaints are contrary to Claimant's assertions at hearing regarding continuous symptoms and the level of symptoms from which he was suffering at that time.

The ALJ must rely upon Claimant's testimony in order to find that he has suffered a worsened condition at all to his back or right ankle. However, as documented herein, Claimant's subject reports are too unreliable, contradictory, or lack plausible inferences to find that Claimant has suffered a worsened condition over time.

Perhaps most important in the analysis of Claimant's reopening request is whether any worsening would be causally related to the original work injury. It is axiomatic in the workers' compensation system that an employer takes an employee as they find them and is responsible for aggravations of pre-existing conditions, even if those pre-existing conditions were caused while employed for a prior employer. Conversely, an employer responsible for a prior workers' compensation injury will not be

held liable in perpetuity for aggravations or a worsening of a pre-existing condition if such worsening arises from a workers' duties performed for a subsequent employer.

Here, Claimant directly testified at hearing that he began feeling increased pain in his low back when he began working for another construction company, BAM Construction, and that he felt his work at that company led to the increase in his symptoms. He further testified the pain increased even more over the course of working for Heggem Lunquist, doing the same type of construction labor work, to the extent he began missing work and sought treatment from Dr. Geersen. His testimony was consistent with his report to Dr. Hughes that he began to feel as if he was overworking himself when his pain returned or got worse. Dr. Fall also noted in her report and testified at hearing that Claimant specifically informed her that his pain started when he started working in construction again.

The evidence, including Claimant's own testimony, establishes that Claimant had reached a stable level with respect to his back and ankle symptoms at and after MMI, regardless of whether his symptoms had completely resolved at MMI or were minimal. His symptoms thereafter subjectively worsened as a direct result of his employment with a subsequent employer. Therefore, if there was any true worsening of condition, such worsening would not be causally related to the original injury, but rather would be causally related to Claimant's work for subsequent employers. Any new claim for benefits for an aggravation of a preexisting condition should be directed to those employers accordingly.

The ALJ also credits the testimony of Dr. Fall that Claimant's congenital left sided fusion, in conjunction with heavy category physical labor, would predispose Claimant to left sided low back pain at a young age independent of the original work injury. Dr. Fall's testimony that Claimant had Bertolotti's syndrome involving a lack of normal movement on the left side of Claimant's low back was persuasive on this point. Also persuasive was her testimony that it was not unusual for Claimant to feel these symptoms at his age, as people with this condition who are not subject to such wear and tear will become symptomatic themselves in their late 20's or early 30's. While Claimant may still be theoretically subject to a worsening of condition in his back relatable to the original work injury, Claimant has not proven as much where the evidence shows a resolution or near complete resolution of symptoms, onset of symptoms again while working for a subsequent employer, in conjunction with a congenital defect that has no relation to the original work injury.

The ALJ also notes that, specifically with respect to Claimant's right ankle, Claimant did not offer any testimony at hearing in support of an argument that his right ankle had worsened. Although he testified generally his symptoms at MMI were worse than he informed his treating providers, his testimony concerning an alleged worsening thereafter only pertained to his back. Even Claimant's own IME physician, Dr. Hughes documented that Claimant denied any ankle pain during his examination. While Dr. Hughes recommended Claimant receive additional care for his ankle, he expressly stated the basis for his recommendation was his belief that Dr. Bratman did not appreciate residual symptoms in the ankle upon physical exam, such as crepitation. His

opinion as not based upon complaints of worsened pain. Even so, Dr. Hughes' opinion is countered by Dr. Fall, who documented a benign ankle exam without pain, crepitation, or other signs of an injury at all, let alone a worsened condition.

Claimant must prove a worsened condition to reopen his claim, and it is not sufficient to argue the claim should be reopened to examine symptoms which were present at MMI but not treated, which was recommended by Dr. Hughes. The Act and D.O.W.C.R.P. have promulgated rules and procedures relating to a Division IME review and ability to challenge a MMI determination in such circumstances. Claimant chose not to pursue those avenues, his claim was closed, and he has not established by a preponderance of the evidence that he suffered a worsened condition of his right ankle.

ORDER

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

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

1. Claimant's claims for reopening regarding both his low back and right ankle are denied and dismissed. Claimant's claim for additional medical benefits is denied.

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 26, 2016

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the shoulder surgery recommended by Dr. Copeland is reasonable and necessary to cure and relieve claimant from the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant was employed with employer as a warehouseman. Claimant testified he was injured on January 13, 2013 when he a rail car (referred to as a "rail king") he was standing in collided with 3 parked rail cars after the rail king malfunctioned. Claimant testified he was thrown into the window and the control box during the collision. Claimant testified the rail king was traveling approximately 30-35 miles per hour.

2. Claimant sought treatment for the injury with Work Partners, the physician designated by employer to treat the injury, on January 14, 2013. Claimant reported to Mr. Esser, the physician's assistant for Dr. Gustafson, that at the point of impact, he hit the right side of his hip/buttocks area on a metal box and then slammed his right shoulder and head into the window. Claimant reported involuntary jerking of his left leg since the previous evening. Mr. Esser noted that he believed the right shoulder had just been contused and potentially irritated the bursa resulting in some bursitis. Claimant was referred for soft tissue manipulation with Dr. Angello and advised to take over the counter anti-inflammatories.

3. Claimant testified at hearing that he downplayed his right shoulder pain in his follow up appointments because he wanted to continue to work for employer performing his normal job. Claimant's follow up treatment generally appears to have focused on his leg spasms as opposed to his shoulder condition.

4. Claimant was examined by Dr. Dean on February 4, 2013. Dr. Dean noted claimant's problems included localized epilepsy and epileptic syndromes with simple partial seizures along with cervical spondylosis with myelopathy and a concussion. The records also note that after the accident, claimant reported pain in the right hip and gluteal region, pain in the shoulder and some headache. Dr. Dean recommended an EEG to evaluate for possible myoclonic epilepsy and noted that amazingly, claimant continued to work despite his ongoing problems.

5. Claimant returned to Mr. Esser on February 11, 2013. With regard to clamiant's right shoulder, Mr. Esser noted claimant was mildly tener to palpation over the acromioclavicular ("AC") joint and noted claimant was complaining that his shoulder was bothering him near the AC joint. Mr. Esser noted claimant could have a potential

first degree acromioclavicular joint separation. Mr. Esser referred claimant for an x-ray of his right shoulder to confirm there was no fracture.

6. Claimant continued to follow up for treatment of his left sided leg jerks which included an EEG, and multiple computed tomography ("CT") tests.

7. On March 12, 2013 claimant was evaluated by Dr. Gustafson who noted that claimant's right shoulder was still painful. Dr. Gustafson advised claimant that this would take some time to heal and noted that the x-ray did not show any significant damage. Claimant returned to Dr. Gustafson on April 4, 2013 and was noted to have mild tenderness on exam of the right AC joint with tightness of the trapezius muscle. Dr. Gustafson noted on April 23, 2013 that claimant's right shoulder AC separation was "resolved".

8. On June 25, 2013, Dr. Gustafson places claimant at MMI and noted that claimant had tremendous improvement since his last visit. Claimant testified at hearing, however, that he was not improved, but was affected by the death of his mother-in-law and reported to Dr. Gustafson that he was improved in an attempt to move on past his workers' compensation injury.

9. Claimant continued to treat after being placed at MMI for his ongoing left sided leg myoclonus jerking, including psychiatric treatment with Dr. Kareus.

10. Claimant eventually returned to Dr. Holmes and was evaluated by nurse practitioner Haraway on January 2, 2015. Claimant reported to Mr. Haraway that he continued to experience pain in his right shoulder. Mr. Haraway provided claimant with range of motion exercises and referred claimant to orthopedics for evaluation and treatment.

11. Claimant was seen by Dr. Stagg on April 28, 2015. Dr. Stagg took over claimant's care after claimant was discharged from care at Work Partners. Dr. Stagg noted claimant's symptoms included pain in the right shoulder. Dr. Stagg referred claimant for a magnetic resonance image ("MRI") of the right shoulder. Dr. Stagg noted claimant reported persistent pain in his right shoulder following the work injury.

12. Claimant underwent the MRI of the right shoulder on May 11, 2015. The MRI showed partial thickness tearing of the supraspinatus and findings suggestive of labral tearing.

13. Claimant was examined by Dr. Copeland on May 20, 2015. Dr. Copeland noted claimant reported symptoms in his right shoulder following the work injury. Dr. Copeland performed a physical examination and reviewed the results of the MRI and diagnosed a partial tear of the right rotator cuff. Dr. Copeland noted that claimant had symptoms that were likely due to his labral tear, but noted no frank instability and recommended formal physical therapy.

14. Claimant returned to Dr. Copeland on June 23, 2015. Dr. Copeland at this point recommended claimant undergo right shoulder arthroscopy with repair of the

superior labrum; biceps tenotomy; debridement of the rotator cuff versus repair and a subacromial decompression. Respondents denied the request for authorization from Dr. Copeland and referred claimant to Dr. O'Brien for an independent medical examination ("IME").

15. Claimant underwent the IME with Dr. O'Brien on September 22, 2015. Dr. O'Brien reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. O'Brien noted that claimant reported to his medical providers that his right shoulder contusion had resolved as early as January 18, 2013 when Mr. Esser noted that claimant's right hip and shoulder were both just find and no longer causing pain. Dr. O'Brien opined that claimant's MRI exam was normal for age relative to claimant's shoulder. Dr. O'Brien opined that the findings that were suggestive of a labral tear were not indicative of a labral tear, especially considering claimant's history of smoking. Dr. O'Brien opined that claimant sustained an injury to his right shoulder on January 13, 2013, but that it had healed on or before January 18, 2013.

16. Dr. O'Brien testified by deposition in this case consistent with his IME report. Dr. O'Brien opined that claimant's ongoing complaints of pain in his right shoulder after January 18, 2013 were a manifestation of claimant's personal health and were not related to the work injury of January 13, 2013.

17. Dr. Copeland likewise testified by deposition in this matter. Dr. Copeland opined that claimant reported pain in his shoulder after his work injury on January 13, 2013 and opined that claimant's work injury either caused or exacerbated a pre-existing degenerative condition involving claimant's shoulder pathology.

18. Claimant testified at hearing that despite what he reported to his physicians, his right shoulder symptoms never fully resolved after the injury. Claimant testified he reported to Dr. Gustafson that his condition had significantly improved because of issues with his personal life and his concern with regard to supporting his family. Claimant's testimony in this regard is found to be credible.

19. The ALJ notes that claimant's testimony in this regard makes sense as Dr. Gustafson had likewise noted the claimant's condition had unexpectedly and dramatically improved in June 2013. The ALJ finds claimant's explanation for this dramatic improvement to be credible and determines that claimant has established that it is more probable than not that he continued to experience symptoms in his right shoulder as he testified to at hearing.

20. The ALJ further credits the opinions expressed by Dr. Copeland as being more credible and persuasive than the contrary opinions expressed by Dr. O'Brien. The ALJ notes that Dr. O'Brien's opinion relies on the medical records documenting claimant reporting a recovery of his symptoms by January 18, 2013. The ALJ credits claimant's testimony at hearing that his condition involving his right shoulder did not fully resolve following the injury and credits Dr. Copeland's opinions involving causation over the contrary opinions of Dr. O'Brien.

21. The ALJ concludes that claimant has established based on the evidence that it is more probable than not that the treatment for his right shoulder recommended by Dr. Copeland, including the proposed surgery, is reasonable and necessary medical treatment causally related to claimant's January 13, 2013 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. 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. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Copeland is reasonable and necessary to

cure and relieve claimant from the effects of his work injury. As found, the opinions of Dr. Copeland in this regard are determined to be more credible and persuasive than the contrary opinions expressed by Dr. O'Brien.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment recommended by Dr. Copeland, including the recommended right shoulder surgery, pursuant to the Colorado Medical Fee Schedule.

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 8, 2016

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

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Bloch's Division IME opinion that Claimant is not at maximum medical improvement.

II. If the answer to issue I is yes, what is the appropriate permanent impairment rating for Claimant's injury.

FINDINGS OF FACT

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

1. Claimant was injured on April 6, 2013, when he fell at work and struck his head on a railing.

2. Claimant was first treated for his injury in the Platte County Memorial Hospital emergency department (ED). A CT of the head without contrast was done. The radiologist's conclusion was "negative noncontrast head CT." (Exhibit 4, Bates p. 19) The ED record from this date is difficult to read, but it indicates that Claimant had a Glasgow Coma Scale score of 15 and that while Claimant had some memory loss for "details" after his injury, he was able to recall the injury itself and coming to the hospital for treatment. Claimant testified inconsistently with this report indicating that he had no memory for anything and that his first recollection after his fall was waking up in the hospital. The ED record provides a clinical impression of "concussion w/o LOC", i.e. concussion without loss of consciousness.

3. Claimant was seen at Centura Centers for Occupational Medicine (CCOM) on April 15, 2013, by Bernice Barnes, NP-C. Ms. Barnes documented Claimant's complaints of headaches, sleepiness, stuttering, and episodes of gasping for air at night. She specifically noted that his short-term memory and recall were intact and he had no obvious neural deficits with examination. (Exhibit 5, Bates p. 28)

4. Claimant had a second noncontrast CT of the brain on April 16, 2013. The radiologist's impression was "unimpressive CT brain with no acute intracranial process currently suggested." (Exhibit 6, Bates p. 78)

5. On April 22, 2013, Claimant was seen by Kenneth Ginsburg, PA-C, at CCOM. Mr. Ginsburg noted that Claimant said some of his friends had stated he was stuttering, but he had not noticed this. His girlfriend had noticed him occasionally

gasping for breath at night, but he had not felt any more than his usual shortness of breath. Claimant stated that other than the mild headaches, he had no other symptoms that would keep him from returning to work and he would like to return to full duty work without restrictions. On examination, Mr. Ginsburg noted no speech or language deficits or difficulties with memory. He noted "higher mental functions grossly intact." Claimant was released to full-duty work without restrictions and told that if he had difficulties performing normal work duties he should call the clinic for follow-up. (Exhibit 5, Bates pp. 35–36)

6. Dr. Olsen initially placed Claimant at maximum medical improvement (MMI) on May 9, 2013 without permanent impairment. (Exhibit 5, 39) In his narrative report of that date, Dr. Olson noted that Claimant still got occasional headaches but had not really complained of any dizziness, blurred vision or double vision. Dr. Olson specifically noted that Claimant really had not had any noticeable memory loss except for one incident. (Exhibit 5, Bates p. 40).

7. Claimant returned to Dr. Olson on August 2, 2013, almost 3 months later, complaining of continuing headaches and some memory problems. Dr. Olson's assessment was history of concussion with continued post-concussive symptoms. He referred Mr. Claimant to Dr. Rawat for neurologic consult. (Exhibit 5, Bates pp. 41–42)

8. Claimant was seen by Sumant Rawat, M.D., on September 12, 2013. He complained of headaches; an inability to use familiar tools at work; left-sided numbness involving his face, arm, and leg; and sensitivity to light and sound. Dr. Rawat's impressions were posttraumatic/postconcussion headaches without significant improvement with his current regimen of nortriptyline; mild cognitive impairment question attention deficit disorder that is not uncommon with concussion; and sleep disorder. (Exhibit 7, Bates p. 83)

9. Claimant was seen by Bradley W. Patterson, PhD, for neuropsychological evaluation on January 23, 2014. In his summary of the test results, Dr. Patterson stated, "In summary, the current test findings reveal a mild isolated deficit in some aspects of new learning and memory, word finding, and executive cognitive functions. There were no pronounced focal or lateralizing CNS signs or any unequivocal pathognomonic indications, and the rest of his neural behavioral test performances were grossly within normal limits." Dr. Patterson's diagnostic impressions were listed as cognitive disorder NOS (mild but clinically significant deficits in verbal new learning and memory, word finding, and executive cognitive functions associated with the history of concussion on 04/06/2013, prior concussions, a long-standing history of polysubstance abuse, low O2 saturations, normal hypoxemia, use of sedating medications, white matter lesions on the MRI, and mild, agitated depression. Dr. Patterson also diagnosed adjustment disorder with mixed anxiety and depressed mood, primarily secondary to the cognitive disorder diagnosis; a history of polysubstance abuse, reportedly in remission for the last seven years; personality disorder NOS with antisocial features, provisional; a history of auditory acuity deficit with multiple concussions, reported back injury, nocturnal

hypoxemia; and vocational problem associated with all of the above. (Exhibit 9, Bates pages 97–99)

10. Claimant was seen by Dr. Rawat through October 27, 2014. On that date, Dr. Rawat's impressions were chronic posttraumatic headaches with definite improvement with increased dose of Inderal and posttraumatic syndrome with questionable cognitive impairment and sleep disorder, though for the most part the patient seems to be doing better in this regard. (Exhibit 10, Bates p. 104)

11. Claimant was seen for an IME by Eric O. Ridings, M.D., on October 28, 2014. Dr. Ridings noted that the natural history of traumatic brain injury is for the patient to have maximum symptoms just after the injury, with ongoing improvement in symptoms over the next 18 to 24 months. He opined that it was quite medically improbable that with Claimant's history a patient would begin having cognitive difficulties of any sort subsequently, giving his benign course to the point of MMI. (Exhibit B, Bates p. 18) Dr. Ridings stated that the new symptoms described in Dr. Rawat's September 12, 2013 note were entirely unexpected based upon Claimant's course to that point. Numbness throughout the left side of one's body would be expected to be due to a significant abnormality of the brain such as a stroke, partial complex seizures, or a migraine variant. None of the symptoms would be expected as a result of a mild traumatic brain injury that was asymptomatic except for headaches for weeks in the absence of a structural finding on cross-sectional imaging. Stuttering is not associated with traumatic brain injury. Inability to use familiar tools would not be expected even shortly after a traumatic brain injury unless the injury were severe, which based on the medical records Claimant's injury clearly was not. (Exhibit B, Bates p. 19) Dr. Ridings concluded that the only symptoms he could attribute to Claimant's April 6, 2013 injury were his ongoing headaches. He opined, within a reasonable degree of medical probability, that Claimant's cognitive complaints, which were first documented on the follow-up evaluation with Dr. Olson on August 2, 2013, were not related to this work injury. Dr. Ridings stated that Claimant's reports regarding his current cognitive loss of function were not consistent with his neuropsychological test results. He discussed the alternate explanations for the mild deficits seen on Claimant's neuropsychological testing. Dr. Ridings opined that Claimant remained at MMI since he was originally placed there on May 9, 2013, and did not require any work restrictions. Dr. Ridings agreed with Dr. Olson's original rating of 0% impairment. (Exhibit B, Bates pp. 25–26)

12. On November 25, 2014, Dr. Olson opined that Claimant was probably stable and at maximum medical improvement for his headaches, and that therefore he would probably assign an impairment rating for the headaches. (Exhibit A, Bates pp. 6–8) On December 10, 2014, Dr. Olson issued his Maximum Medical Improvement and Impairment Report. He stated the date of MMI was November 25, 2014. He outlined Claimant's treatment for his injury and noted that the results of the neuropsych testing were inconclusive as to the actual cause of the problem as Claimant had prior head injuries and substance abuse. Dr. Olson noted that although he had previously placed Claimant at MMI with 0% impairment, he now felt that since Claimant was still requiring medications for his headaches he would qualify for impairment for his headaches. In

arriving at the impairment rating, he referred to the AMA Guides, third edition revised, Chapter 4, Table 1 and assigned 5% for episodic neurologic disorders which represent his headaches. Dr. Olson felt that the cognitive findings were multifactorial and not necessarily related to the injury and therefore the headaches were what he felt required an impairment rating. (Exhibit A, Bates pp. 1–5)

13. Claimant was seen for a second IME with Dr. Ridings on June 3, 2015. He agreed with Dr. Olson that Claimant was at MMI on November 25, 2014. He also agreed with Dr. Olson's assigned impairment rating of 5% from Table 1 of Chapter 4 for episodic neurological disorders regarding his headaches. He noted that while Claimant did have some cognitive deficits, it was not clear from the medical records that these were worsened by his most recent head injury on April 6, 2013. He noted Claimant had been able to return to the workforce, working full time when he was able to find such employment without restrictions. (Exhibit B, Bates p. 14)

14. Claimant was seen for a Division IME by Jonathan Bloch, D.O., on April 3, 2015. Claimant reported to Dr. Bloch that he was still having significant memory and concentration problems that included forgetting how to use tools, forgetting job duties, leaving the water running at home, etc. Claimant also complained of emotional outbursts as well as the ongoing headaches. Dr. Bloch diagnosed Claimant with post concussive symptoms of headache, decreased mentation, and anxiety. *Id.* at 128. In his Division IME Examiner's Summary Sheet, Dr. Bloch checked "No, the Claimant is not at MMI" and added "TBD via testing recommended." In his narrative report, Dr. Bloch listed diagnoses of postconcussive symptoms of headache, decreased mentation and anxiety; mild or greater OSA, not work-related; possible restless leg syndrome, not work-related; and tobacco abuse, not work-related. Regarding MMI, Dr. Block noted: "Stable currently, and I appreciate no significant decline over the majority of this claim, and MMI status is rather comparable to today's encounter." (Claimant's Ex. 13, p. 128). Despite indicating that Claimant's condition was stable, Dr. Bloch suggested that Claimant undergo a pulmonary function test (PFT) and oxygen desaturation testing to determine whether Claimant's ongoing symptoms are a result of smoking as opposed to the head injury from April 6, 2013. *Id.* If either of these tests indicated lung disease, Dr. Bloch opined it was more probable Claimant's cognitive symptoms were from smoking and not the head injury of April 2013 and he was at MMI from the original MMI date without impairment. If neither test showed decreased lung capacity attributable to smoking, Dr. Bloch's opined that it was reasonable to set the MMI date with impairment rating to December 10, 2014.

15. Dr. Bloch also opined that an impairment rating for Class 2 disturbances of cerebral function was appropriate based upon Claimant's cognitive complaints. Class 2 disturbances of cerebral function gave Claimant a 20% whole person impairment rating. (Exhibit C, Bates p. 27–34)

16. Dr. Ridings issued a report of his analysis of Dr. Bloch's DIME report on June 15, 2015. Although he agreed with Dr. Bloch's opinion that Claimant had other possible explanations for his current cognitive deficits, he disagreed with Dr. Bloch's

suggestion that the decision on whether these complaints were pre-existing or related to the current injury would depend on the amount of Claimant's cigarette smoking rather than the history of drug abuse or the quite severe pre-existing closed head injury. Dr. Ridings pointed out the error in Dr. Bloch's report in which he stated Claimant was not at MMI pending the recommended pulmonary testing, but then indicated that in the event Claimant had findings of pulmonary disease he was at MMI on May 9, 2013, but if no pulmonary disease was found he was at MMI on November 25, 2014. Dr. Ridings opined that Dr. Bloch's request for pulmonary workup for issues unrelated to the work injury simply to determine which of two dates of MMI were most appropriate was not supported by the workers' compensation statute or medical treatment guidelines. Dr. Ridings also disagreed with Dr. Bloch's provisional 20% whole person impairment rating as not supported by the AMA guides. (Exhibit B, Bates pp. 10–11; see also hearing transcript page 13, line 7 to page 15, line 12)

17. Claimant was seen for an IME by Timothy O. Hall, M.D., on July 9, 2015. Dr. Hall disagreed with Dr. Ridings' conclusion regarding the timing of Claimant's cognitive symptoms, opining that it was not unusual from a cognitive perspective for symptoms to show up some months after an initial injury. Nonetheless, Dr. Hall also questioned Dr. Bloch's request for pulmonary function tests to determine a date of MMI. Dr. Hall argued that Claimant has permanent sequelae from his April 3, 2013 injury and "deserves" the impairment rating assigned by Dr. Bloch of 20% whole person without apportionment. (Exhibit 14, Bates p. 135)

18. Based upon the evidence presented, the ALJ finds that a conflict exists between the explanations given in Dr. Bloch's DIME report versus what his DIME summary sheet indicates concerning MMI. While Dr. Bloch explains in his report that Claimant would be at MMI on either December 10, 2014 or on April 7, 2013, his summary sheet clearly indicates that MMI is to be determined after additional testing is completed. After carefully considering Dr. Bloch's DIME report in its totality, the ALJ finds that Dr. Bloch's determination concerning MMI was contingent upon Claimant receiving additional medical testing to determine if smoking was the cause of Claimant's current cognitive deficits. Consequently, the ALJ finds that Dr. Bloch determined that Claimant was not at MMI until such testing was done; whether he ultimately decided to set MMI as of December 10, 2014 or April 7, 2013 date or some other date entirely. Claimant's suggestion that Dr. Bloch had determined that he was at MMI because all of his statements and recommendations indicate that Claimant's condition was stable and not likely to change and that the requests for further treatment were to help clarify the impairment rating are unpursuasive when the DIME report is considered in its entirety.

19. Dr. Ridings testified to his opinion that Claimant was at maximum medical improvement for his April 7 (sic), 2013 injury the time he was first placed at MMI by Dr. Olson on May 9, 2013. When Claimant was seen at CCOM nine days after his injury, at the next visit, and at the third visit by Dr. Olson on May 9, 2013, there was no documentation of any problems with cognition. CCOM did a good job of documenting cognition at each visit. (Hearing transcript page 16, line 1 to page 17, line 23) Dr. Ridings testified that there are two major explanations that are more medically probable

for Claimant's reduced cognitive findings documented by Dr. Patterson then the incident at work. One is the pre-existing head injury in which he reported to multiple examiners that he had fallen 25 feet, landing on his head with a loss of consciousness for 45 minutes at the time. According to the medical record, it took approximately three years to recover from this injury. Claimant also reported to multiple evaluators that he had abused alcohol and hard drugs for 30 years, although not for the sometime prior to his April 6, 2013 fall and injury. Dr. Ridings also noted Claimant's previous history of altercations and fights. (Hearing transcript page 19, line 22 page 21, line 16) Based upon the evidence presented, the ALJ finds that Dr. Ridings agrees with Dr. Olson and Dr. Patterson that Claimant's cognitive dysfunction is, more probably than not, multifactorial in nature. The ALJ also finds that Dr. Ridings agrees with Dr. Olson that Claimant was properly rated under a different category for brain under Chapter 4.1a of the AMA Guides, namely episodic neurological disorders as the impairing nature of Claimant's injury was his residual headaches and not cognitive deficits.

20. Dr. Ridings explained that if cognitive issues are going to arise from a head injury unless there is a subdural or epidural hematoma, which Claimant did not have, the most severe cognitive deficits are expected immediately afterwards. Problems with things like memory, orientation, multitasking, and sequencing are most severe initially after the injury to the head and gradually improve over time for up to two years. So it's not expected or in conformance with the medical literature for someone to repeatedly say they have no problems with cognition and then 2 1/2 months after their last physician visit to say I'm beginning to have cognitive symptoms and have those related to the previous injury. Dr. Ridings explained it is also not reasonable, medically, for those cognitive symptoms to progressively worsen after that point. (Hearing transcript page 19, line 24 to page 23, line 1) Dr. Ridings also testified that it is a very rare occurrence for someone to have difficulty with basic cognitive function, which Claimant is currently alleging, and have them not report that to the physician with whom they are treating with when they are specifically asked if they have cognitive symptoms.

21. According to Dr. Ridings, the degree of severity of Claimant's reported symptoms in later treatment records, such as not being able to use tools that he's used in carpentry throughout his career, suggests a severe cognitive deficit that would not have been unapparent early on, because the most severe cognitive symptoms manifest earlier and gradually improve over time, not the opposite. Dr. Ridings testified that Dr. Hall's statement to the contrary is medically unfounded. (Hearing transcript page 21, line 22 to page 24, line 21)

22. As noted above, Dr. Ridings explained that he agreed with Dr. Olson's 5% impairment rating for episodic neurologic disorders attributable to Claimant's post-concussive headaches. He explained the medical records supported the fact that Claimant is having ongoing headache problems, which had been getting better with appropriate treatment but still cause him some difficulties. (Hearing transcript page 28 lines 14 to page 29, line 1) Dr. Ridings disagreed with Dr. Bloch's 20% impairment rating using the charts on page 105 of the AMA Guides for disturbances of cerebral function. Dr. Ridings explained that Dr. Bloch was entirely in error in assigning a class 2,

disturbance of cerebral function, impairment because class 2 refers to someone who "needs some supervision" with daily activities. He explained that "needs some supervision" means the person can't go about their daily activities without someone being there to make sure they don't do something dangerous to themselves or others. According to Dr. Ridings', Claimant's ability to work several jobs after his first date of MMI without apparent problems for weeks and months is inconsistent with the suggestion that Claimant requires "some supervision" attributable to cognitive dysfunction. There is, according to Dr. Ridings, no corroborative evidence in the medical record that would support a finding that Claimant needs some supervision qualifying him for a Class 2 impairment rating as found by Dr. Bloch. As explained by Dr. Ridings the medical record evidence fails to support a finding that Claimant sustained an injury in the April 2013 fall that would justify a rating for disturbance of cerebral function. (Hearing transcript page 24, line 22 to page 28, line 13)

23. Claimant testified that in addition to his headaches, he has significant memory loss, including word finding difficulty while talking, wandering off when he's supposed to be working, and forgetting how to put tools back together at work. Nonetheless, Claimant was able to follow the proceeding and appropriately answer the questions posed to him during his testimony. He did not appear to be confused at hearing and was able to provide sufficient detail surrounding the events of his injury, his treatment, his ongoing symptoms and his work history. Based upon Claimant's presentation during his testimony, the ALJ is not persuaded that he was experiencing the effects of cognitive impairment at hearing.

24. During cross examination, Claimant admitted that he applied for and got unemployment beginning April 2013. He applied for and got work June 2013 and worked through June 2014. He applied for and received unemployment beginning July 2014. He got work in September 2014 and worked to January 2015. In January 2015, he applied again for and got unemployment benefits. (Hearing transcript page 49, lines 1–25) During these times, Claimant worked in a variety of positions including loading trains where he also guided a forklift driver and in carpentry where Claimant built stage sets for performance art productions. He was able to get along with co-workers and had no fights on the job. He also admitted that he has a current driver's license and drove to his IME in Colorado Springs with Dr. Hall by himself. While Claimant described an incident following his IME with Dr. Hall, where he was found wondering around a parking lot because he didn't know why he was there, Claimant presented no corroboration concerning this event. Based upon the evidence presented, the ALJ finds Claimant's testimony attributing his current cognitive symptoms to his April 6, 2013 injury cannot be reconciled with the documentary evidence which supports a finding that he did not report any memory, attention, word finding and/or problems with work processes to his treating providers from the date of injury until August 2, 2013, nearly 5 months after his injury and 3 months after he was first placed at MMI on May 9, 2013. Consequently, the ALJ finds Claimant's testimony concerning his current cognitive dysfunction and his need for supervision grossly overstated and unconvincing.

25. Patricia Quintrell testified that she is Claimant's live in girlfriend. She and Claimant have lived together for the past nine (9) years. According to Ms. Quintrell she never observed Claimant to suffer from headaches prior to his April 6, 2013 head injury. Now Claimant, per Ms. Quintrell, suffers from daily headaches. The ALJ finds this portion of Ms. Quintrell's testimony supported by the record evidence, including Claimant's persistent complaints of headaches early on and throughout the course of his recovery.

26. Ms. Quintrell explained that since Claimant's April 6, 2013 injury she has taken to following him around the house to make sure he has turned things off. According to Ms. Quintrell, Claimant will often leave the oven or stove burners on and/or the water running in the sink. (Tr. 60:18-25). She further explained that she has taken over the payment of all bills in their home since April of 2013 because Claimant had forgotten to pay bills in the past to the point of having their electricity shut off. (Tr. 63:23-64:9)

27. The ALJ credits Dr. Ridings' testimony to find that Dr. Bloch's request for pulmonary workup for issues unrelated to the work injury is not supported by the Colorado Workers' Compensation Act or the Medical Treatment Guidelines simply to determine which of two dates of MMI were most appropriate. The ALJ further credits the opinions of Dr. Olson and Dr. Ridings to find that Dr. Bloch erred in concluding that Claimant was not at MMI as stated on his DIME summary sheet. Respondents have demonstrated, by clear and convincing evidence, that Dr. Bloch's opinion that Claimant has not reached MMI highly probably incorrect. Accordingly, Respondents have overcome Dr. Bloch's finding that Claimant has not reached maximum medical improvement. Based upon the evidence presented, the ALJ finds that Claimant likely reached MMI on November 25, 2014.

28. The ALJ finds Dr. Bloch's Class 2 impairment for disturbance of cerebral function unsupported by the record. Class 2 refers to someone who "needs some supervision" with daily activities. Claimant worked at several jobs after his first date of MMI, apparently without problems for weeks and months, which clearly does not fall into the category of "needs some supervision." Little persuasive evidence to corroborate Claimant's assertions that he "needs some supervision" because he forgets to turn the water and stove off and/or pay his bills was presented at hearing. Rather in an effort to bolster Claimant's claims of needing supervision, he presented the testimony of his live in girlfriend, Ms. Quintrell. This case involves a question regarding the degree of impairment which impacts the money benefit Claimant is entitled to under the Workers Compensation Act. Consequently, questions regarding Ms. Quintrell's bias and interest in the outcome of the case are inescapable. Because the unbiased medical records fail to support a finding that Claimant sustained an injury in the April 2013 fall that would justify a rating for disturbance of cerebral function and Claimant delayed the reporting of cognitive deficits and otherwise acted inconsistently with someone who needed "some supervision" for weeks and months after this injury, the ALJ finds Ms. Quintrell's testimony no more persuasive than Claimant's. Indeed, Ms Quintrell simply parrots the same "forgetfulness" as Claimant did for his claim that he "needs some supervision." As

found above, the weight of the remaining evidence dispels the ALJ of the idea. Consequently, Respondents have also demonstrated, by clear and convincing evidence, that Dr. Bloch erred in providing a rating based upon a degree of impairment of complex integrated cerebral functions such that Claimant required "some supervision and/or direction" to complete daily activities. Consequently, Respondents have demonstrated that Dr. Bloch's 20% impairment rating is highly probably incorrect. Accordingly, Respondents have overcome Dr. Bloch's 20% impairment rating. The ALJ credits the opinions of Dr. Olson and Dr. Ridings to find that Claimant has 5% whole-person impairment as a direct consequence of his April 6, 2013 industrial injury.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Dr. Olson's and Dr. Ridings' opinions are credible and supported by the totality of the record evidence submitted for consideration. Conversely, the opinions expressed by Dr. Bloch in his DIME report are not supported by the Colorado Workers' Compensation Act, the AMA Guidelines and the record as a whole. Accordingly, the ALJ concludes that the opinions of Drs. Olson and Ridings are more persuasive than those of Drs. Bloch and Hall. As found, the testimony of Claimant and Ms. Quintrell is largely contradicted the medical record and is otherwise unreliable secondary to bias and interest in the outcome of the case. Accordingly, Claimant's testimony along with that of Ms. Quintrell is rejected as unconvincing.

Overcoming the DIME

Generally

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

Overcoming the DIME Regarding MMI

D. In this case, Claimant asserts that the opinions of Dr. Bloch concerning MMI are ambiguous and that a threshold determination of what constituted the actual opinion of Dr. Bloch regarding MMI and impairment must be resolved before the question of whether Respondents overcame his opinions can be addressed. Based upon the evidence presented, the ALJ agrees with Claimant. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo. App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In this case, a conflict exists between the explanations given in Dr. Bloch's DIME report versus what his DIME summary sheet indicates concerning MMI. However, as found, the ALJ concludes that Dr. Bloch's determination concerning MMI was contingent upon Claimant receiving additional medical testing to determine if smoking was the cause of Claimant's current cognitive deficits. Consequently, the ALJ concludes after careful review of the DIME report that Dr. Bloch determined, as a matter of fact, that Claimant was not at MMI until such testing was done; whether he ultimately decided to set MMI as of December 10, 2014 or April 7, 2013 date or some other date entirely. Claimant's contrary suggestion that Dr. Bloch actually determined that Claimant was at MMI is unconvincing when the DIME report is viewed in its entirety. Thus, while Claimant agrees that he is at MMI, albeit, because Dr. Bloch actually concluded that MMI would be assigned on a particular date after the requested testing was done, the ALJ concludes that Respondents actually

had the burden to overcome Dr. Bloch's opinion that Claimant was not at MMI, by clear and convincing evidence.

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, the issue of whether Claimant is at MMI involves a complex medico-legal question regarding Claimant's ongoing cognitive symptoms, specifically whether they are a result of smoking as opposed to the head injury from April 6, 2013. After considering the totality of the evidence presented, the ALJ concludes that Respondents have produced unmistakable evidence establishing that the DIME physician's determination regarding MMI is highly probably incorrect. As found, the ALJ is persuaded that the record evidence supports a conclusion that Dr. Bloch's request for pulmonary workup for issues unrelated to the work injury is not supported by the Colorado Workers' Compensation Act or the AMA Guidelines simply to determine which of two dates of MMI were most appropriate. Thus the ALJ concludes that Respondents have proven that it is highly probable that Dr. Bloch was incorrect when he found Claimant had not reached MMI. Accordingly, the ALJ concludes that Dr. Bloch's DIME opinions regarding MMI have been overcome by clear and convincing evidence.

Overcoming the DIME Regarding Permanent Impairment

F. In this case, Respondents argue that if Dr. Bloch's opinion as to MMI is overcome it is Claimant's burden, by a preponderance of the evidence, to prove the correct impairment rating. In support of their position, Respondents cite *Paredes v. ABM Industries*, W.C. No. 4-862-312 (ICAO Nov. 13, 2014), for the proposition that it would be error for the ALJ to require Respondents to also overcome the DIME physician's impairment rating by clear and convincing evidence if the ALJ determined that the DIME opinion regarding MMI had been overcome. In *Paredes*, the Industrial Claim Appeals Office held that once the ALJ determined the DIME physician's calculation of impairment was in error, the ALJ erred in requiring the respondents to overcome the DIME physician's opinion on causation by clear and convincing evidence. Following the decision handed down in *Paredes*, Respondents contend that it would be error for the ALJ to require them to also overcome the DIME physician's impairment rating by clear and convincing evidence if there is a conclusion that the "not at MMI" component of the DIME physician's opinion had been overcome. Simply put, Respondents contend that once any part of the DIME physician's opinion has been overcome, the burden is then on Claimant to establish the correct rating. The ALJ is not persuaded that the burden shifts and/or changes regarding overcoming a DIME physician's impairment rating if the physician's MMI determination has been overcome. *See Lee v. J. Garlin Commercial Furnishings,* W.C. No. 4-421-442 (December 17, 2001); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001); *McNulty*

v. Eastman Kodak Co., W.C. No. 4-432-104 (September 16, 2002); *DeLeon v. Whole Foods Market Inc.,* W.C. No. 4-600-477 (November 16, 2006); *Ortiz v. Service Experts Inc.,* W.C. No. 4-657-974 (January 22, 2009); *Sawyer v. Life Quality Options of Colorado, Inc.,* W.C. No. 4-764-408 (May 10, 2010).

G. Review of the above cited case law persuades the ALJ that the burden of proof changes after a portion of the impairment rating has been overcome. As stated: "Following *Garlets* we have ruled that once an ALJ determines that the DIME physician's **rating** has been overcome, an ALJ is not required to reject every other component of a DIME physician's rating." *DeLeon* at *3 (emphasis added). Thus, where an ALJ determines that the DIME physician's **rating** has been overcome, the ALJ may independently determine the correct rating. *McNulty* at *2 *citing Garlin (*emphasis added). The decision in *DeLeon* provides an explanation for the court's reasoning that once part of an impairment rating has been overcome, the challenging party does not have to prove the rest of the impairment rating to be incorrect. As stated:

> As we read the ALJ's order, after he found the DIME physician's rating had been overcome on the range of motion component of the claimant's impairment he concluded that he was then compelled to independently assess each remaining component of the claimant's impairment to determine whether it had been overcome by clear and convincing evidence. Hence, the ALJ determined whether the rating based upon the range of motion deficits was overcome by clear and convincing evidence and then separately determined whether the rating based upon Table 53 of the *AMA Guides* was similarly overcome by the same burden of proof. In our view it was error for the ALJ to apply the clear and convincing burden to his evaluation of the rating based on Table 53, since at that point he had determined that the DIME's impairment rating had been overcome by clear and convincing evidence. In this regard, we note that § 8-42-107(8)(c), C.R.S. 2006 sets forth the procedures for obtaining a DIME to challenge the authorized treating physician's impairment rating. The statute states that the "finding of such independent medical examiner shall be overcome only by clear and convincing evidence." § 8-42-107(8)(c), C.R.S. 2006. In our view the DIME's "finding" is generally the impairment rating and it is that rating that must be overcome.

DeLeon at *2. The ALJ concludes the reasoning in this paragraph to hold that it does not make sense for a party challenging a DIME opinion on impairment to have to overcome each part of that impairment rating, by clear and convincing evidence, once a portion of the rating has been overcome. It becomes highly probable once a portion of the rating has been overcome that the rest of the rating is flawed. Thus, as stated: "[O]nce the ALJ determines that the DIME's **rating** has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon a preponderance of the evidence. *DeLeon* at *3 *citing Garlets* (emphasis added).

H. Respondents' contention that overcoming a DIME as to MMI triggers the

impairment rating to then be proven by the Claimant is inconsistent with the above cited case law and the undersigned ALJ finds no support for Respondents proposition. Rather a review of the case law supports Claimant's argument that this switching of the burden *only* applies to the question regarding the burden of proof necessary to overcome the rest of an impairment rating when a portion of the rating has been overcome. The cases, including those cited by Respondents, do not stand for the proposition that the burden of challenging an impairment rating shifts to Claimant or changes in character, i.e. to a preponderance standard changes once an MMI determination has been overcome. For these reasons, the ALJ concludes that the burden remains on Respondents to overcome Dr. Bloch's impairment rating opinion by clear and convincing evidence, regardless of the determination concerning MMI.

I. As found, Dr. Bloch's rating Claimant's impairment as a Class 2 disturbances of cerebral function is not supported by the record. Class 2 refers to someone who "needs some supervision" with daily activities. Claimant worked at several jobs after his first date of MMI, apparently without problems for weeks and months, and was able to apply for and obtain unemployment benefits, which clearly does not fall into the category of "needs some supervision." There is no corroborative evidence in the medical records that would support a finding that Claimant sustained an injury the April 2013 fall that would justify a rating for disturbance of cerebral function. Moreover, the testimony of Claimant is largely contradicted by the medical records and his actions post injury are inconsistent with someone who rewires "some supervision/ direction" to carry out daily activities. Considering all the evidence, the ALJ concludes that the appropriate impairment rating is Dr. Olson's 5% whole-person rating.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the DIME opinion of Dr. Bloch regarding maximum medical improvement is GRANTED. The correct date of MMI is November 25, 2014.

2. Respondents' request to set aside the DIME opinion of Dr. Bloch that Claimant has a whole person impairment of 20% whole person impairment is GRANTED. The appropriate permanent impairment rating for Claimant's injury is the 5% whole person rating assigned by the ATP, Dr. Olson.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

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

DATED: February 19, 2016

/s/ Richard M. Lamphere

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

ISSUES

1. Whether the respondents have overcome the Division IME by clear and convincing evidence as to whether the claimant is at Maximum Medical Improvement (MMI);

2. If the respondents have proven that the claimant is at MMI, whether they have proven by clear and convincing evidence that the DIME erred in his impairment rating determination; and,

3. If the respondents have proven that the claimant is at MMI, whether the claimant has proven by a preponderance of evidence that he is entitled to post-MMI medical treatment that is reasonable, necessary and causally related?

Based upon the findings and conclusions below that the respondents have failed to overcome the DIME opinion concerning MMI, the ALJ does not reach a decision on the remaining matters.

FINDINGS OF FACT

1. The claimant is a 42 year old male. He was 39 years old on April 10, 2013 when he was involved in a motor vehicle accident in the course and arising out of his employment with the respondent-employer. The claimant was the passenger in a pick-up truck that went into a ditch and rolled over. The claimant was initially diagnosed with a myriad of injuries including a cervical strain.

2. The claimant's cervical condition continued to worsen. As of June 17, 2013, the claimant reported to Dr. Randall Jones that he was now having episodes of left arm paresthesia into the left hand.

3. An MRI was performed on July 23, 2013 due to the claimant's ongoing neck pain and radiculopathy. The MRI showed a significant increase in size of a left posterolateral disc extrusion at the C6-7 as compared to a previous cervical MRI from March 2, 2011. The disc now "indents the left anterolateral aspects of the cervical spinal cord and results in severe left foraminal entrance zone stenosis."

4. The claimant was sent for further evaluation with Dr. Michael Rauzzino, a neurosurgeon, on October 29, 2013. Dr. Rauzzino documented that the claimant continued to have left arm paresthesias with numbness into the index and middle fingers in the C7 distribution. Dr. Rauzzino explained, “This is a man with a large C6-C7 herniated disc” that was likely pressing on the nerve root.

5. The claimant’s symptoms had not improved by December 23, 2013 and Dr. Rauzzino recommended a C6-C7 disc arthroplasty due to the claimant’s failure to improve with conservative therapies. The claimant underwent the disc replacement surgery on February 28, 2014.

6. The claimant’s left upper extremity symptoms had markedly improved initially after the surgery, though he was still complaining of some numbness and tingling in the fingers. By May 27, 2014, the residual numbness persisted in the claimant’s fingers. Dr. Rauzzino explained that it could just take up to a year to fully recover from the February 28, 2014 surgery. Anticipating the claimant’s condition to improve, Dr. Rauzzino released the claimant back to Dr. Albert Hattem for an MMI determination.

7. Dr. Hattem performed his impairment rating evaluation of the claimant at the time of MMI, September 16, 2014. At this time, the claimant continued to experience left arm symptoms as well as neck pain rating at up to a 5 out of 10 pain. Dr. Hattem determined that the claimant had a 10% impairment for abnormal cervical range of motion and a 9% impairment based on Table 53 section II-E of the AMA Guides, Third Edition Revised. These combined to yield an 18% whole person rating.

8. The respondents filed a Notice and Proposal to select an independent medical examiner. Prior to the DIME taking place, the claimant underwent an IME at the request of the respondent-insurer with Dr. Frank Polanco on February 11, 2015. At the time of the IME, the claimant continued to complain of left neck pain and left second and third finger numbness along with twitching of the left upper arm. Dr. Polanco agreed with Dr. Hattem’s placement of the claimant at MMI on September 16, 2014.

9. Dr. Polanco found the claimant to have an 11% impairment due to cervical range of motion loss and a 9% impairment based on Table 53 II-E. However, he apportioned the rating by 6% for a pre-existing unoperated disc lesion and therefore assigned a final rating of 13% whole person.

10. Dr. Yusuke Wakeshima performed the Division IME on July 20, 2015. At the time of this exam, the claimant complained of neck pain, numbness in the second

and third digits of the left hand along with weakness of the left hand. The neck pain was at a level 7 out of 10 on this date.

11. Due to the claimant's ongoing, persistent, C6-7 symptoms, he opined that the claimant was not at MMI. He noted that the claimant was now approaching 17 months post-surgery, 5 months past the one year time frame that Dr. Rauzzino had contemplated when he released the claimant. It was his opinion that the claimant's increased neck pain could be directly related to facet arthrosis at the disc replacement level. Dr. Wakeshima thought it reasonable for the claimant to undergo further evaluation with Dr. Rauzzino due to the persistent symptoms 17 months post surgery.

12. Dr. Wakeshima provided a provisional impairment rating of 20% whole person. 12% for cervical range of motion loss and 9% based on Table 53 II-E. Dr. Wakeshima provided a detailed and articulate discussion regarding his disagreement with Dr. Polanco's apportionment that he proposed in his IME report. Dr. Wakeshima explained that Rule 12-3(B) states, for injuries occurring after July 1, 2008, apportionment is improper unless the following three conditions are met: 1.) There is sufficient medical information available which establishes an identified and treated prior injury to the same body part; 2.) The prior injury meets the criteria for permanent impairment; and 3.) Prior impairment was independently disabling at the time of the injury.

13. Dr. Wakeshima explained that the rule states a "disability" is expected to adversely affect the claimant's ability to perform his job. Dr. Wakeshima stated that the claimant had no permanent restrictions from any previous injury, nor did any previous injury affect his ability to perform his job, and therefore determined apportionment to be inappropriate based on the rules.

14. Dr. Timothy Hall performed an IME of the claimant on November 17, 2015. Again, the claimant reported neck pain and upper extremity radicular symptoms. The claimant explained that the neck surgery did help, but he remains significantly symptomatic. "Considering these ongoing symptoms and the fact that there has not been improvement (as the surgeon opined with time), it would be appropriate for [the claimant] to have a re-evaluation and consideration for further intervention for ongoing neck and upper extremity symptoms." Dr. Hall agreed with Dr. Wakeshima's determination on MMI and impairment rating.

15. Dr. Polanco's evidentiary deposition was taken on December 21, 2015. He testified that he believed the claimant was at MMI as of September 16, 2014 based on his opinion that the claimant's condition had stabilized and required no further treatment

or evaluation. Dr. Polanco also felt that Dr. Wakeshima's recommendations for further treatment were inconsistent with the medical treatment guidelines.

16. The claimant testified at hearing that he has not seen either Dr. Rauzzino or Dr. Hattem since being released at MMI back in 2014. There are no medical records in evidence from Dr. Rauzzino or Dr. Hattem subsequent to September 16, 2014.

17. The claimant testified that his cervical spine symptoms and the radicular symptoms down his left arm continue to worsen, and have worsened since being examined by Dr. Polanco in February of 2015. He continues to experience significant numbness and tingling in the fingers of his left hand. The grip strength in his left hand is significantly weakened as compared to his right. It has affected his ability to perform certain tasks and has prevented him from exercising like he is used to. The claimant testified regarding his previous neck injury from 2011 and explained that after his third injection for the previous neck injury, he was essentially cured. The claimant had no residual symptoms from the C6-7 leading up to the April 10, 2013 rollover accident.

18. The claimant did sustain a soft tissue injury to his left upper back on January 7, 2013, four months prior to the April 10, 2013 accident. This was diagnosed as a cervical and upper thoracic strain, but there was no arm symptoms, parasthesias, or weakness. The claimant explained at hearing that this injury was completely different than the 2011 and April 2013 cervical injuries to the C6-7 levels because it was nothing more than a soft tissue injury. The medical records document that the claimant's "neck was doing much better" prior to the April 10, 2013 MVA.

19. The ALJ finds the claimant to be credible.

20. The ALJ finds Dr. Wakeshima's medical analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

21. The ALJ finds that Dr. Polanco's analyses and opinions do not establish any clear error on the part of Dr. Wakeshima but amounts only to a difference of opinion.

22. The ALJ finds that the respondents have failed to establish that Dr. Wakeshima clearly erred in determining that the claimant was not at MMI.

CONCLUSIONS OF LAW

1. 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). 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).

2. The ALJ concludes that the claimant is not at MMI based upon the respondents' failure to establish by clear and convincing evidence that the DIME physician, Dr. Wakeshima, was clearly wrong in his finding that the claimant was not at MMI.

3. The ALJ concludes that Dr. Wakeshima's July 20, 2015 report reveals a thorough and detailed examination with resulting persuasive opinions. Dr. Wakeshima noted in his report that the claimant's surgeon, Dr. Rauzzino, anticipated the claimant's condition improving and resolving, but that it would take up to a year from the February 28, 2014 surgery for that to occur. Dr. Wakeshima specifically noted in his report that the claimant's symptoms have not improved, that they have only worsened since being placed at MMI, despite the fact that 17 months time had passed since the surgery.

4. The ALJ concludes that Dr. Wakeshima's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

5. The ALJ concludes that the respondents have failed to establish by clear and convincing evidence that Dr. Wakeshima erred in determining that the claimant is not at MMI.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to have the DIME overturned as to the finding that the claimant is not at MMI is denied and dismissed.

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

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

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

DATE: February 1, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by clear and convincing evidence that the DIME physician erred in finding that Claimant reached maximum medical improvement on February 25, 2014?
- Did Claimant prove by a preponderance of the evidence that the industrial knee injury rendered him permanently and totally disabled?
- Did Claimant prove by a preponderance of the evidence that he suffered functional impairment beyond the leg at the hip so as to warrant conversion of his scheduled impairment rating to a whole person rating?
- If conversion to a whole person impairment rating is not warranted what is the Claimant's scheduled impairment rating?
- Did Claimant prove by a preponderance of the evidence that he sustained disfigurement to parts of his body normally exposed to public view so as to justify an award of disfigurement benefits?
- Did Respondents prove by a preponderance of the evidence that they are entitled to recover alleged overpayments of temporary total and permanent partial disability benefits?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of ongoing medical benefits after maximum medical improvement?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 4 were admitted in evidence. At hearing Respondents' Exhibits A through S were admitted into evidence. Exhibit R was subsequently admitted because Claimant did not register an objection to the exhibit within 7 days of the hearing. Respondents' Exhibit T (transcript of hearing held on April 16, 2014) was admitted with the agreement of the parties that the ALJ's consideration of the transcript would be limited to the testimony of Dr. Larson and Dr. Yamamoto.

CLAIMANT'S TESTIMONY CONCERNING INJURY

2. Claimant testified as follows. On April 10, 2013 he was employed as an "assistant to the manager" of the Employer's food delivery service. He had been in this

position for about 6 months. The assistant to the manager job required Claimant to work in the Employer's warehouse facility answering calls from delivery drivers having problems such as incorrect orders or finding locations. Claimant also put driver logs into files and was required to perform delivery jobs when needed. Before becoming an assistant to the manager Claimant worked for the Employer as a delivery driver, meat grinder and warehouse worker.

3. Claimant testified that on April 10, 2013 he was assisting a co-worker to make deliveries in downtown Denver. Claimant loaded four boxes of potatoes on a dolly and wheeled them down the truck ramp. At the bottom of the ramp snow covered up ice on the ground. Claimant slipped and "extended" his left knee and then fell and struck the left knee on the ground.

4. Claimant testified that prior to April 10, 2013 he had no problems with his left knee.

5. Claimant has not returned to work of any kind since April 10, 2013.

MEDICAL AND RELATED EVIDENCE

6. Employer referred claimant to Concentra Medical Centers (Concentra). On April 10, 2013 Physician's Assistant Katherine E. Peterson examined Claimant at Concentra. Claimant gave a history that he twisted his knee when he was walking down a ramp and slipped on ice. On physical examination (PE) PA Peterson found no evidence of swelling, deformity, or discoloration of the left knee. Claimant was tender over the lateral and medial joint lines. PA Peterson diagnosed a left knee strain with possible internal derangement. PA Peterson placed claimant in a hinged knee brace, prescribed ibuprofen and referred him for physical therapy (PT). PA Peterson released claimant to modified duty work with restrictions of no prolonged standing or walking, no squatting or kneeling and no climbing stairs or ladders.

7. On April 15, 2013 PA Peterson referred Claimant for an MRI of the left knee.

8. On April 22, 2013 Claimant underwent an MRI of the left knee. The radiologist assessed the following: (1) Thin horizontal tear of the body of the medial meniscus; (2) Fraying of the anterior root of the lateral meniscus plus possible accompanying horizontal tear through its anterior junctional zone; (3) Mild ACL sprain but no partial/full thickness ACL tear. There was also "focal chondromalacia of the central weightbearing surface of the femoral condyles" with a "small knee joint effusion."

9. On April 25, 2013 Concentra physician Felix Meza, M.D., referred Claimant to Cornerstone Orthopedics (Cornerstone) for an orthopedic evaluation.

10. On April 29, 2013 Claimant was evaluated at Cornerstone by Joseph Hsin, M.D. Dr. Hsin reviewed the MRI and noted a torn medial meniscus and possibly a torn lateral meniscus. Dr. Hsin recommended surgery described as arthroscopy and meniscectomy.

11. On May 16, 2013 Dr. Hsin performed surgery described as a left knee arthroscopy with partial medial and lateral meniscectomies. Dr. Hsin also performed a left knee arthroscopic chondroplasty of the medial femoral condyle. Dr. Hsin's surgical report reflects that on examination of the medial compartment of the knee he observed grade 3 chondromalacia of the medial femoral condyle. Dr. Hsin also observed a complex posterior horn tear of the medial meniscus and a small lateral meniscus tear.

12. On June 7, 2013 Concentra physician Kirk Nelson, D.O., examined Claimant. Claimant reported knee pain of 9 on a scale of 10 (9/10) and that he could not bend his knee since he kneeled to get into bed. Claimant was still on crutches and taking Percocet for pain. Dr. Nelson documented that claimant exhibited "marked pain behaviors" upon examination of the knee. Dr. Nelson also noted Claimant initially appeared to be unable to flex the knee. However, upon "distraction" Claimant demonstrated flexion of 90 degrees.

13. Dr. Hsin examined Claimant on July 10, 2013. At that time Claimant reported his post-operative status was worsening. Dr. Hsin noted that Claimant had poor ROM and "extreme pain in the knee." Dr. Hsin opined Claimant was making "very poor progress" and had "pain out of proportion to exam." Dr. Hsin also wrote that Claimant had "non-organic findings on clinical exam." Dr. Hsin injected the knee with lidocaine but "this did not help."

14. On July 16, 2013 Dr. Nelson again examined Claimant. Claimant reported 9/10 pain and advised that he received no relief from Dr. Hsin's injection or from Lidoderm patches. Dr. Nelson recorded the claimant was moaning, cursing, and mumbling while sitting in a chair in the examination room. On PE Dr. Nelson noted there was no edema or effusion of the left knee. Dr. Nelson stated that examination was difficult because claimant was guarding. He opined that Claimant's pain was "out of proportion to physical findings." Dr. Nelson noted that he discussed Claimant's case with Dr. Hsin and Dr. Hsin did not want to perform an exploratory arthroscopy. Dr. Hsin and Dr. Nelson agreed Claimant should be referred for a pain psychology evaluation and to a physiatrist.

15. Claimant returned to Dr. Nelson for examination on July 30, 2013. Claimant reported 7/10 pain. On PE Dr. Nelson observed no edema or effusion and no ligament laxity. Dr. Nelson wrote that Claimant displayed increased pain behaviors and complained of pain out of proportion to physical findings. Dr. Nelson also noted that Claimant appeared "to actively resist flexion and extension" and continued to use crutches despite instructions to stop using them. Dr. Nelson opined that Claimant's inactivity was "not playing well with his recovery."

16. On August 13, 2013, Physical Therapist Martin Swiderski noted that Claimant ambulated with a markedly antalgic gait while "using an odd set cane." PT Swiderski also reported that on examination of the left knee Claimant was guarding and resisting passive ROM and was self-limited by effort and "pain behavior" with active ROM. PT Swiderski noted that Claimant complained of pain on meniscal testing despite the lack of objective findings. PT Swiderski also noted that when distracted with

conversation Claimant was able to achieve full left knee extension and flexion passively without exhibiting pain behaviors.

17. On August 14, 2013 John Sacha, M.D., examined Claimant. Dr. Sacha noted that Claimant exhibited "marked pain behaviors," walked with an antalgic gait and was using a cane. Dr. Sacha opined that Claimant had made very poor progress since surgery and it was "unclear why." Dr. Sacha recommended a repeat MRI of the left knee.

18. On August 20, 2013 Ron Carbaugh, Psy.D., performed a pain psychology evaluation of Claimant. The evaluation included a review of records, a clinical interview and the administration of 2 psychological tests. Dr. Carbaugh noted that Claimant reported no benefit from the surgery or conservative medical care. Dr. Carbaugh observed that when discussing his injury claimant displayed moderately high pain behavior. Dr. Carbaugh administered the Millon Behavioral Medicine Diagnostic (MBMD) test which is designed to appraise the role of psychiatric and psychosomatic factors in a patient's disease and treatment. The results of the MBMD indicate that Claimant has limited psychological awareness, may be vague and inaccurate when describing symptoms and is at increased risk for having an exaggerated negative reaction to stressful or invasive medical procedures. Dr. Carbaugh also administered the Pain Patient Profile (P-3) designed to identify patients experiencing emotional distress that may be affecting their symptoms and response to treatment. Claimant exhibited a high score on the "validity index" of the P-3 suggesting "response magnification." Dr. Carbaugh assessed "psychological factors affecting medical condition." Dr. Carbaugh also noted that claimant clearly believed there was a structural problem with his knee and noted that an MRI was pending. Dr. Carbaugh opined that Claimant's particular personality and coping style likely impact his symptom perception and response to treatment. Dr. Carbaugh cautioned claimant's physicians about performing additional surgery and recommended counseling if surgery was performed. In the event additional surgery was not performed Dr. Carbaugh recommended the immediate implementation of 6 sessions of "pain and adjustment counseling" to provide pain management strategies.

19. On August 15, 2013 PT Swiderski discharged Claimant from PT because of lack of progress. PT Swiderski reported that claimant had plateaued in therapy in part due to his self-limited effort.

20. On August 24, 2013 Claimant underwent a repeat MRI of the left knee. The radiologist compared this study to the prior MRI of April 22, 2013. The radiologist's impressions included the following: (1) Horizontal tear through the medial meniscal body; (2) Horizontal tear through the anterior horn of the lateral meniscus; (3) Moderate-severe articular cartilage thinning in the medial femoral condyle includes a small full-thickness articular cartilage defect with mild underlying subchondral marrow edema; (4) Thinning and partial tears of the medial patellar retinaculum; (5) Mild-moderate chondromalacia patella. The horizontal meniscal tears were reportedly "more pronounced" than seen on the April 22, 2013 MRI.

21. On August 28, 2013, Claimant followed-up with Dr. Hsin to review the results of the recent MRI. Dr. Hsin felt that MRI report of medial and lateral meniscus tears likely represented postoperative changes rather than new injuries. Dr. Hsin noted Claimant demonstrated non-organic findings and displayed pain out of proportion to the examination. Dr. Hsin recommended against further surgical intervention and opined that visco supplementation was Claimant's only option.

22. Claimant returned to Dr. Sacha on September 9, 2013. Dr. Sacha compared the April 2013 MRI to the August 2013 MRI and opined that the "only new finding" was some increase in size of the lateral meniscal tear. According to Dr. Sacha everything else was the same including fairly severe chondral damage to the medial femoral condyle and significant multi-compartment degenerative changes. Dr. Sacha noted mild to moderate pain behavior and a slightly antalgic gait. Dr. Sacha's impression was a "chondral injury with ongoing symptoms and significant osteoarthritis." Dr. Sacha recommended a Synvisc injection and opined Claimant would be at MMI after the injection was completed.

23. Dr. Sacha again examined Claimant on October 7, 2013. Dr. Sacha noted that Claimant had not undergone the Synvisc injection but was instead requesting a total knee arthroplasty (TKA) under the auspices of the "work comp claim." Dr. Sacha advised Claimant that he thought there was a "significant causality issue" because there were not any changes in the "MRI from prior to this injury to post-injury." Further, Claimant had a history of performing activities that would call causality into question. Dr. Sacha noted Claimant exhibited moderate pain behaviors and a significant antalgic gait.

24. Claimant returned to Dr. Hsin for follow-up on October 23, 2013. Claimant wanted to discuss a TKA. Dr. Hsin advised claimant against knee replacement surgery but referred him to his colleague Thomas Eickmann, M.D., to "discuss the procedure."

25. Dr. Eickmann evaluated claimant on November 7, 2013. Dr. Eickmann reviewed x-rays that reportedly showed "severe osteoarthritis" of the left knee. Claimant reported it was difficult for him to ascend/descend stairs, to complete cooking activities, to don/doff shoes and socks, to drive, to get in and out of the bathtub, to get in and out of a vehicle, to sleep on the affected side, to stand from a seated position, and to walk. Dr. Eickmann reported that claimant wanted to proceed with a left TKA and would seek insurance authorization.

26. David W. Yamamoto, M.D., examined Claimant on December 9, 2013. Dr. Yamamoto noted that he was to see Claimant for left knee pain under a "Rule 8 transfer." Claimant gave a history that on April 10, 2013 he slipped on ice while moving a dolly down a ramp and experienced hyperextension of the knee. Claimant advised that after the slip he had "acute swelling." Claimant told Dr. Yamamoto that prior to the injury he was very active and had no problems working, lifting, bending, riding bikes and hiking. However, at the time of the examination Claimant could not work more than 10 minutes "on the level." Dr. Yamamoto was aware Dr. Eickmann had recommended a

TKA. Dr. Yamamoto assessed osteoarthrosis not designated as generalized or localized and a current tear of the medial cartilage or meniscus of the knee. Dr. Yamamoto opined within a "reasonable degree of medical probably [sic], this injury is work related." He opined Claimant will "likely need a total knee replacement."

27. Insurer requested that Gwendolyn C. Henke, M.D., perform a records review for the purpose of determining whether the TKA was reasonable, necessary and causally related to the April 10, 2013 injury. Dr. Henke is board certified in orthopedic surgery and level II accredited. Dr. Henke reviewed Claimant's medical records from April 10, 2013 through December 2, 2013, including the 2 MRI's taken in 2013.

28. Dr. Henke issued a written report dated December 16, 2013. Dr. Henke opined to "a reasonable degree of medical certainty" that there was a "causal relationship" between Claimant's April 10, 2013 injury and his "current complaints." Dr. Henke explained that the April 10 injury "resulted in [Claimant's] underlying knee osteoarthritis becoming symptomatic due to an exacerbation of a preexisting condition." However, Dr. Henke also opined that a TKA would not be related to the April 10 injury because there was "no significant knee trauma identified" because of the fall, "just an exacerbation of [Claimant's] preexisting left knee osteoarthritis." Dr. Henke further opined that a TKA would not be reasonable and necessary treatment because Claimant's "reported pain behavior and psychological profile" made him a poor candidate "for any elective procedure at this time."

29. On December 27, 2013 Dr. Yamamoto authored a note stating that he was of the opinion that Claimant needed a TKA. Because Claimant was "asymptomatic prior the" April 10, 2013 industrial injury Dr. Yamamoto was "strongly of the opinion that the total knee replacement should be done under workers' compensation." Dr. Yamamoto also wrote that Claimant's osteoarthrosis was "aggravated" by the April 10, 2013 injury.

30. On January 8, 2014 Dr. Yamamoto authored a letter to Claimant's attorney. Dr. Yamamoto wrote that he reviewed Dr. Henke's report and disagreed with her opinion. Dr. Yamamoto noted that Dr. Hsin reported Claimant's pain complaints were out of proportion to the examination findings. However, Dr. Yamamoto opined the Claimant had severe degenerative disease in the left knee and this diagnosis was confirmed by Dr. Eickmann. Dr. Yamamoto reported he took measurements of both thighs and there was atrophy of the left thigh. Dr. Yamamoto disputed Dr. Henke's implicit finding that the April 10, 2013 injury caused a mere "exacerbation" of preexisting arthritis and the Claimant subsequently returned to baseline. Dr. Yamamoto opined that Claimant suffered an "aggravation" of the preexisting arthritis and needed further treatment in the form of a TKA.

31. On February 25, 2014 Wallace K. Larson, M.D., performed an independent medical examination (IME). Dr. Larson is board certified in orthopedic surgery and is level II accredited. In connection with the IME Dr. Larson took a history from Claimant, performed a PE and reviewed medical records.

32. Dr. Larson noted Claimant gave a history that on April 10, 2013 he slipped on snow covered ice and the knee hit the ground in the area of the patella. On PE Dr. Larson observed claimant had greater ROM in his knee on causal observation than on directed examination. Dr. Larson noted no effusion or muscle wasting. He wrote that Claimant appeared to have a "relative varus deformity" of the knee. Dr. Larson observed that Claimant exhibited a "great deal of pain behavior" and was hyper-reactive during the PE. Dr. Larson opined Claimant had "pre-existing osteoarthritis of his left knee" that by history was aggravated by the April 10, 2013 fall. Dr. Larson stated that on arthroscopic examination of the knee Claimant was shown to have "degenerative tears of the medial and lateral meniscus [sic] which were treated arthroscopically." Dr. Larson opined that Claimant's symptoms are not of a type likely to be caused by osteoarthritis and would likely worsen rather than improve if a TKA were performed. Dr. Larson opined Claimant had reached MMI and assessed 10% impairment of the left lower extremity "secondary to the meniscectomy." He added that the 10% rating would ordinarily be combined with impairment based on ROM testing but Claimant was not "cooperative enough" with testing to produce a valid evaluation.

33. Respondents' denied authorization for the proposed TKA surgery and on April 16, 2014 the issue proceeded to hearing before ALJ Michael Harr.

34. Dr. Yamamoto testified at the hearing before ALJ Harr. Dr. Yamamoto is board certified in family medicine, was qualified as an expert in family and occupational medicine and is level II accredited. Dr. Yamamoto opined that Claimant has osteoarthritis of the left knee, a degenerative joint condition that pre-dated the April 2013 injury. However, because Claimant reported that he had no symptoms prior to the injury and was "very symptomatic" afterwards, Dr. Yamamoto opined that the injury caused the tears of the lateral and medial menisci, aggravated the osteoarthritis and caused a defect in the cartilage of the medial femoral condyle.

35. Dr. Yamamoto testified that throughout his treatment of Claimant he did not observe any "significant non-physiologic findings" or "symptom exaggeration." Dr. Yamamoto explained that non-physiologic findings could include global tenderness of the knee and increased ROM in the joint when the patient is distracted. Dr. Yamamoto testified that on PE Claimant's pain was focal to the medial part of the knee and that measurement showed atrophy of the left quadriceps muscle.

36. Dr. Yamamoto opined that a TKA constituted reasonable and necessary treatment for Claimant's osteoarthritis and chondral defect. Dr. Yamamoto admitted that horizontal tears of a meniscus and "complex tears" of a meniscus are ordinarily caused by degenerative changes rather than trauma. Dr. Yamamoto opined that Claimant had not reached MMI at the time of the hearing.

37. Dr. Larson testified at the hearing before ALJ Harr. Dr. Larson opined that in retrospect he does not believe the April 10, 2013 caused any "internal derangement" of Claimant's left knee. Dr. Larson explained that if the April 10 incident had caused injury to the chondral surface of the medial femoral condyle he would expect swelling of the knee. Similarly, Dr. Larson opined that if the Claimant had torn the medial and

lateral menisci he would have expected swelling. Dr. Larson further opined that the MRI findings of complex horizontal tears of the menisci are more consistent with degenerative tears than traumatic tears. Dr. Larson opined that Dr. Hsin's operative report described a "relatively limited area of grade 3 chondromalacia on the medial femoral condyle" but nothing about "traumatic injury or cartilage that was knocked off traumatically." In light of Dr. Hsin's operative report Dr. Larson explained that the August 2013 MRI finding of a full thickness cartilage defect was an "artifact."

38. Dr. Larson testified that on PE of Claimant he noted "non-organic findings." The non-organic findings included very widespread tenderness in the knee that can't be explained by osteoarthritis or any other structural problem. Dr. Larson also noted that Claimant's ROM was greater on casual observation than it was during direct examination of the knee. In light of these non-organic findings Dr. Larson opined that it is hard to know what is causing Claimant's persistent pain complaints. Dr. Larson also opined that Claimant's pain complaints do not correlate with the actual pathology seen on the MRI's and during Dr. Hsin's arthroscopic evaluation.

39. Dr. Larson opined that in these circumstances it was not reasonable and necessary to perform a TKA to treat Claimant's knee.

40. In Findings of Fact, Conclusions of Law, and Order dated July 18, 2014 ALJ Harr denied Claimant's request for an order requiring Respondents to pay for a TKA. ALJ Harr found that Claimant failed to prove that a TKA is reasonable and necessary to cure and relieve the effects of the April 10, 2013 injury. In so doing ALJ Harr credited Dr. Larson's opinion that a TKA is not reasonable and necessary to treat the degree of osteoarthritis evidenced by the MRI's and Dr. Hsin's arthroscopic evaluation of the knee. ALJ Harr also credited Dr. Larson's opinion that Dr. Hsin's arthroscopic examination did not reveal "any acute or traumatic changes to the underlying osteoarthritis pathology in" Claimant's left knee. ALJ also credited Dr. Larson's opinion that Claimant's reports of left knee symptoms were "unreliable." ALJ Harr found that the record was "replete with treating physicians finding claimant complaining of pain unsupported by physical findings." ALJ Harr found Dr. Yamamoto's opinions were unpersuasive because they overly relied on Claimant's subjective history and symptoms.

41. From February 19, 2014 through July 2, 2014 Dr. Yamamoto examined and treated Claimant on 5 occasions. Throughout this period Dr. Yamamoto continued to opine that Claimant needed to undergo a TKA. Dr. Yamamoto also prescribed meloxicam, the topical cream Terocin and Trazodone for sleep.

42. On August 5, 2014 Dr. Yamamoto again examined Claimant. Dr. Yamamoto noted that the TKA had been denied and stated he would place Claimant "at MMI in three weeks." Dr. Yamamoto continued to prescribe meloxicam and Terocin.

43. On September 17, 2014 Dr. Yamamoto examined Claimant. Dr. Yamamoto assessed a left knee injury on April 10, 2013 "status post medial lateral meniscectomies." Dr. Yamamoto also assessed "severe osteoarthritis that was

aggravated" by the April 10 injury. Claimant's medications were listed a Lisinopril, Trazodone, Terocin and meloxicam. Dr. Yamamoto added a prescription for Norco "for pain control." Dr. Yamamoto placed Claimant at MMI. Dr. Yamamoto imposed permanent restrictions of seated work only, no repetitive lifting, no lifting in excess of 5 pounds and occasional lifting of 2 pounds. Dr. Yamamoto also opined Claimant needs a cane to ambulate. Dr. Yamamoto recommended Claimant receive ongoing treatment of "medication maintenance for up to 6 months."

44. On September 17, 2014 Dr. Yamamoto determined an impairment rating. Using the AMA Guides to the Evaluation of Permanent Impairment, *Third Edition (Revised)* (AMA Guides) Dr. Yamamoto assessed 10% lower extremity impairment for the bilateral partial meniscal tears requiring surgery. He assessed 20% lower extremity impairment for "severe left knee osteoarthritis" and 24% impairment for reduced ROM. Combining these impairments Dr. Yamamoto assessed 45% impairment of the left lower extremity. Dr. Yamamoto stated that this rating would, if applicable, convert to 18% whole person impairment.

45. Claimant sought treatment with Dr. Yamamoto on four occasions from November 18, 2014 through April 20, 2015. On November 18, 2014 Dr. Yamamoto prescribed a topical cream and Norco. After November 18 Dr. Yamamoto prescribed only topical creams.

46. At hearing Claimant testified that the topical cream prescribed by Dr. Yamamoto provides "short time" pain relief. Claimant stated he has not been back to Dr. Yamamoto since April 15, 2015.

47. On February 23, 2015 Kevin Nagamani, M.D., performed a Division-sponsored independent medical examination (DIME). Claimant reported that his pain was primarily located in the medial aspect of the left knee. He rated the pain as 6/10 "at its best" and 7-/10 "at its worst." Dr. Nagamani reviewed Claimant's medical records. On PE Dr. Nagamani observed that Claimant walked with a severe limp and noted "significant pain behaviors." Range of motion (ROM) was limited to 90 degrees on the left with full ROM on the right. There was no patholaxity, no effusion and no gross atrophy of the quadriceps. Dr. Nagamani opined that the examination was "very difficult secondary to severe guarding with every examination maneuver."

48. Dr. Nagamani's impressions included "left knee medial and lateral meniscus tears caused by work injury in the setting of preexisting arthritis." Dr. Nagamani agreed with Dr. Larson that Claimant reached maximum medical improvement (MMI) on February 25, 2014. Dr. Nagamani explained that he did not believe any further intervention would "substantially alter" Claimant's condition and opined that any further surgery would have a "poor prognosis" given Claimant's pain behaviors. Dr. Nagamani opined claimant's presentation and symptomatology were not reasonable for pain related to osteoarthritis of the knee.

49. Dr. Nagamani assigned a 33% lower extremity impairment rating. The rating was arrived at by combining 15% lower extremity impairment for a "Table 40

diagnosis for the meniscectomies" with 21% impairment for abnormal range of motion measured at 90 degrees of flexion. Dr. Nagamani explained that Claimant had some preexisting arthritis and there was some "possible worsening" of this condition shown on the "followup MRI scan." However, Dr. Nagamani opined that the progression of the arthritis "cannot be solely attributed to the work-related injury." Dr. Nagamani opined that "no specific maintenance care is necessary as nothing has been effective thus far." He also opined it would be difficult to ascertain work restrictions because an objective examination of Claimant is very difficult.

50. On August 6, 2015 Allison Fall, M.D., performed an IME of Claimant. Dr. Fall is board certified in physical medicine and is level II accredited. In connection with the IME Dr. Fall took a history from Claimant, performed a PE and reviewed medical records.

51. On PE Dr. Fall noted Claimant exhibited "significant pain behaviors" including moaning and groaning. Dr. Fall also opined that Claimant engaged in "significant guarding" while the left knee was examined. Dr. Fall noted that there was no crepitus or muscular wasting. Claimant stood with the left knee "slightly flexed" but was able to achieve full extension while lying supine. Knee flexion appeared self-limited but Claimant eventually attained 120 degrees of flexion.

52. Dr. Fall opined Claimant reached MMI on February 25, 2014 when he saw Dr. Larson. Dr. Fall explained that at that time there was no expectation that "additional medical treatment would lead to any significant improvement based upon the pain behaviors and inconsistencies." Dr. Fall agreed with Dr. Nagamani that Claimant did not need any maintenance medical care because "no treatment to date has led to any reported functional benefit."

53. Dr. Fall opined that the work restrictions imposed by Dr. Yamamoto were "inappropriate." Dr. Fall stated there is no reason Claimant should be restricted to sitting for eight hours per day and walking with a cane. Dr. Fall explained there is no instability of Claimant's knee and Claimant should be encouraged to walk without a cane. Dr. Fall further stated that considering the surgical procedure and the "benign physical examination" the only appropriate work restrictions are no kneeling on the left knee and avoidance of "high-impact activities." Dr. Fall wrote that there is "no reason to limit lifting, sitting, standing, or walking."

54. Dr. Fall assessed 15% impairment of Claimant's left lower extremity. Specifically Dr. Fall assessed 10% impairment for the meniscectomies. She also assessed 5% for reduced ROM. Dr. Fall explained that she measured Claimant's ROM in the *right* lower extremity that accounted for "6% lower extremity impairment at the baseline." She then subtracted 6% from Claimant's 11% left lower extremity impairment to arrive at 5% for reduced ROM. Dr. Fall also commented that the DIME physician's impairment rating "appeared to have been done correctly according to the AMA Guides."

55. Dr. Fall testified at the hearing. Her testimony was generally consistent with her written report although she elaborated on the bases for some of her opinions. Dr. Fall opined that the "amount of pain complaints" expressed by Claimant was not consistent with the type of surgery performed by Dr. Hsin.

56. Dr. Fall testified it is not necessary for Claimant to walk with a cane. She explained that Claimant's injury and surgery did not result in any instability or neurological damage that would create a medical indication for use of a cane.

57. Dr. Fall noted that at hearing the undersigned ALJ observed swelling in Claimant's left lower extremity. Dr. Fall opined that this swelling would not be unusual under the circumstances. She explained that Claimant's relative inactivity would cause "pooling" of fluid in the left lower extremity. She also noted that Claimant had wrapped his knee with an Ace bandage so as to impede venous flow and lymph flow back to the heart.

58. Dr. Fall opined the restrictions imposed on Claimant by Dr. Yamamoto are not medically indicated. Dr. Fall testified that unless there is a very severe knee injury with instability, there is no reason to impose lifting restrictions. She explained that typically a knee arthroscopy would not affect person's use of his arms, back, and body. Therefore, there is no indication for restrictions on lifting, pushing and pulling. Dr. Fall opined that not only is there no basis to limit walking or standing, but Claimant can walk and ambulate and should be encouraged to do so. Dr. Fall opined there is no medical reason that Claimant can't sit, stand, or walk for 8 hours per day and perform work. Dr. Fall opined that Dr. Yamamoto based his restrictions on the Claimant's subjective complaints rather than the medical indications. Dr. Fall opined that in "cases like this" a physician should not impose restrictions based solely on subjective complaints but must consider the nature of the injury, the surgical findings and absence of post-surgical complications and what patients are typically able to do after surgery.

59. Dr. Fall also reiterated the opinion that maintenance care is not medically necessary. She explained Claimant has not reported any benefit from treatment, including surgery, and most people do not need maintenance care after they type of surgery performed on Claimant. Dr. Fall further stated that when a pattern develops where no treatment alleviates ongoing pain complaints it is appropriate to consider that psychological issues may be playing a role. Dr. Fall also testified there were no findings on the August 2013 MRI that would indicate the need for additional surgery. She noted that Dr. Hsin, who performed the surgery in May 2013, considered the August 2013 MRI and found no basis for additional surgery.

60. Dr. Fall testified that when performing her impairment rating she measured Claimant's right knee ROM to use as a "baseline." Dr. Fall stated that the AMA Guides treat 150 degrees of flexion as normal and equal to no impairment. However, Claimant's uninjured right knee exhibited only 135 degrees of flexion, which is equivalent to 6% impairment. Dr. Fall found that Claimant's left-sided flexion was 120 degrees which is equivalent to 11% impairment. Consequently, Dr. Fall deducted 6% from 11% to arrive at 5% impairment for left knee ROM. Dr. Fall also assigned 10%

impairment under Table 40 for the partial meniscectomies. Dr. Fall opined that claimant had a 15% lower extremity impairment rating.

61. On cross-examination Dr. Fall admitted that the Dr. Nagamani tested Claimant's right-sided ROM and reported the results as normal. Dr. Fall also recognized that Dr. Nagamani recorded only 90 degrees of flexion on the left side.

62. On cross-examination Dr. Fall admitted that to her knowledge Claimant had never undergone the six sessions of counseling recommended by Dr. Carbaugh.

63. On cross-examination Dr. Fall testified that she made handwritten notes during her examination of the Claimant. However, her office destroyed the notes after she dictated her report. Dr. Fall credibly testified that this is her standard operating procedure. Claimant's arguments notwithstanding, the ALJ declines to draw any adverse inference concerning Dr. Fall's credibility based on the fact that her handwritten notes were converted to a narrative report and subsequently destroyed as part of her standard procedure.

64. Dr. Fall opined that the back problems Claimant reported in May 2015 are not related to the April 10, 2013 injury. Dr. Fall noted that Claimant reported the back problems occurred when he turned and felt a pop.

VOCATIONAL EVIDENCE

65. On June 4, 2015 Ms. Gail Pickett (Pickett), a vocational expert, issued a written report concerning a vocational evaluation of the Claimant. This evaluation was performed at the request of Claimant's counsel. In connection with the evaluation Pickett interviewed Claimant, reviewed medical records and determined Claimant's transferable skills.

66. Pickett noted Claimant was 56 years of age at the time of the evaluation, had completed 11 years of education and earned a GED in the military. Claimant reported that he had served in the military as a paratrooper from 1970 to 1993 and had a vocational history of performing truck driving jobs since 1993. Claimant advised that when working for Employer as a truck driver his duties included loading and unloading 35 to 100 pound boxes, completing a log book and operating a palette jack. Claimant also reported that "when his supervisor left the business and the new person didn't know the Denver area well enough" Claimant performed "routing" on a computer. Claimant stated that he had help operating the computer Pickett noted that Dr. Yamamoto had imposed work restrictions of lifting a maximum of 8 pounds [sic], lifting 2 pounds occasionally, carrying 0 pounds, pushing or pulling up to 10 pounds, no walking or standing, no kneeling, no crawling, no squatting and no climbing.

67. Pickett opined that considering her research and the medical reports Claimant "will be unable to return to the workforce."

68. Ms. Katie Montoya (Montoya), an expert in vocational evaluation, evaluated the Claimant at Respondents' request, issued a written report and testified as an expert

at the hearing. In connection with the evaluation Ms. Montoya interviewed Claimant, reviewed medical records, evaluated Claimant's transferable skills and performed labor market research.

69. Claimant told Montoya that he attended school through the 11th grade, completed a GED and performed military service from 1970 through 1993. Claimant advised that he principally worked as a driver from 1993 until he commenced work with the Employer in 2000. Claimant worked for the Employer as a delivery driver, a job that required him to drive trucks and operate a "two-wheeler" carrying up to 200 pounds. Claimant advised that approximately 6 months prior to his knee injury the Employer transferred him into the warehouse to learn the job of "assistant to the manager." During this 6 month period Claimant reported that he answered phones, answered, dispatched trucks and tracked the routing system on the computer. Claimant also "put in" pre-trips, did driver's logs and checked service logs. Claimant was seated during this work. Claimant stated that he considered the assistant to the manager job to be a promotion and believed he was doing a good job getting drivers to "where they were supposed to be." Claimant advised Montoya that he felt he could perform the assistant to the manager job except for the requirement that he "back-up" other drivers and make occasional deliveries.

70. Claimant told Montoya that he started looking for work in late May 2015. Claimant reported that when he applies for jobs he indicates he must sit for 8 hours, cannot lift over 5 pounds and must use a cane. Claimant also advised that he began receiving unemployment benefits in June 2015 and is required to make 3 job contacts per week.

71. Montoya recognized there is a significant difference between the medical restrictions imposed by Dr. Yamamoto and Dr. Fall. Ms. Montoya opined that based on her market research Claimant can obtain employment even if Dr. Yamamoto's restrictions are considered valid. Montoya identified positions as an entry gate attendant, "hot stamp machine operator" and "vehicle transporter." Montoya wrote that the "limitations provided by Dr. Yamamoto do not allow for many alternatives."

72. Montoya wrote that if Dr. Fall's restrictions are considered valid there "would be quite an increase" in Claimant's employment alternatives. Montoya identified a cutlery assembly position, a cleaning position, a "feeder/folder" position and "additional driving alternatives." Montoya added that if Dr. Fall's restrictions are adopted the Claimant "would not be eliminated from most of his past relevant work."

73. Montoya testified that if Claimant is released to "light" duty then jobs would be available to him. Montoya explained that "light" duty as defined by the Department of Labor includes the ability to lift up to 20 pounds and stand and walk for the majority of the shift. According to Montoya most dispatch jobs fall in the light duty category.

74. Montoya testified that if Claimant were released to "sedentary" duty then jobs would be available to him. Montoya explained that "sedentary" duty is defined as no lifting over 10 pounds and "predominantly seated activities." According to Montoya

jobs in the sedentary category would include some dispatch jobs, some driving jobs, some security jobs and some production jobs.

75. Pickett testified at the hearing. Pickett opined that the reason the Claimant has not been returned to work by the Employer is that "they don't think he is capable of it." Pickett further opined that it would be easier for Claimant to return to work with an Employer who was familiar with him than to obtain a job with another employer.

76. Pickett opined Claimant would not be able to perform the gatekeeper job identified by Montoya because gate attendants are required to "walk to the gate in all weather conditions" and there is some standing, walking, pushing and pulling. Pickett opined Claimant is unable to perform driving jobs. She explained that Claimant keeps his leg elevated on a pillow when driving and is unable to operate a clutch. Pickett also testified that she never found a "driving job where you just sit." Rather, in her experience a driver generally has to drive somewhere to pick up something or drop something off. In the case of auto auctions a driver must be able to walk and stand. Pickett opined that Claimant is not able to do production jobs because some require standing throughout the day, some require lifting beyond his capacity and some require computer skills beyond his ability.

77. Pickett testified that in formulating her opinion she relied on the restrictions imposed by Dr. Yamamoto as well as Claimant's education, work history and skill set. Pickett stated that many driving jobs fall within the "light" classification established by the Department of Labor. She stated that security jobs are generally in the light to medium category. Pickett opined Claimant could "possibly" return to work if his limitations place him in the "light" duty category.

78. Claimant testified that his date of birth is April 26, 1959. He completed the 11th grade and earned a GED while serving in the military. Claimant was on active duty as a paratrooper for 9 years and served 10 years in the reserves.

79. Claimant testified that he has not returned to work for the Employer and does not know why the Employer has not returned him to work since the injury. Claimant spoke to "Liz" in human resources but was not given any reason why he has not been returned to work. Claimant received a COBRA notice dated September 15, 2015. Claimant does not know if he is still employed by the Employer but has not received any termination notice.

80. Claimant testified that he began looking for alternative employment after April 28, 2015. Claimant explained that when he applies for a job he tells the potential Employer that he has the restrictions imposed by Dr. Yamamoto.

81. Claimant testified that he is unable to watch an entire movie because his knee begins to throb and he must stand up and walk "a little bit." Claimant stated that he cannot watch an entire television program or sit through a religious service because he keeps his knee elevated and it becomes "numb." Consequently Claimant must stand

and stretch. Claimant explained that he has difficulty lifting and carrying any weight because he uses a cane and because he experiences pain in his knee.

FINDINGS OF FACT CONCERNING MMI

82. Claimant failed to prove it is highly probable and free from serious doubt that the DIME physician, Dr. Nagamani, incorrectly found Claimant to have reached MMI on February 25, 2014.

83. Dr. Nagamani specifically and credibly opined that as of February 25, 2014 no further medical intervention would "substantially alter" Claimant's medical condition. Dr. Nagamani correctly noted that by the time of his examination in February 2015 no treatment had effectively altered Claimant's continuing symptoms. Indeed, Dr. Nagamani noted that in February 2015 Claimant was still reporting 7/10 pain and was exhibiting significant "pain behaviors" and "severe guarding with every examination maneuver."

84. Dr. Nagamani's opinion that no further treatment was likely to alter Claimant's medical condition is corroborated by the persuasive opinions of Dr. Larson and Dr. Fall. In February 2014 Dr. Larson noted that Claimant was exhibiting a great deal of pain behavior and that a TKA would likely worsen these symptoms. Under the circumstances Dr. Larson found Claimant had reached MMI. In August 2015 Dr. Fall opined that Claimant reached MMI on February 25, 2014. Dr. Fall credibly opined that after February 25 there was no expectation that additional treatment would improve Claimant's condition considering his documented pain behaviors.

85. The opinions of doctors Nagamani, Larson and Fall are further corroborated by examination of the effects of Claimant's medical treatment prior to February 25, 2014. By February 25, 2014 Claimant had undergone various conservative treatments including the use of medications and PT. He had also undergone arthroscopic repair of the meniscal tears and chondroplasty. Despite conservative and invasive treatment Claimant continued to report high pain levels after surgery. As found above, numerous physicians and providers that examined Claimant after surgery reported that he exhibited pain behaviors out of proportion to examination findings, excessive guarding and/or "non-organic findings."

86. Dr. Yamamoto's opinion that Claimant did not reach MMI until September 17, 2014 is not sufficiently persuasive to overcome the DIME physician's opinion that Claimant reached MMI on February 25, 2014. Dr. Yamamoto's opinion that Claimant needed additional treatment (after February 25, 2014) to cure and relieve the effects of the injury appears to be largely based on Dr. Yamamoto's belief that Claimant needed a TKA to treat the industrial knee injury. As Dr. Yamamoto himself admitted, his belief that Claimant needed the TKA was predicated on the history that Claimant had no knee symptoms before April 10, 2013 but experienced severe symptoms thereafter. (See Finding of Fact 34 through 46). Indeed, Dr. Yamamoto testified that he did not record "non-physiologic findings" or observe "symptom exaggeration" when he examined Claimant.

87. However, the great weight of the credible and persuasive medical evidence establishes that after Claimant underwent arthroscopic surgery numerous medical providers, including Dr. Nelson, Dr. Hsin, Dr. Sacha, PA Swiderski, Dr. Larson, Dr. Nagamani and Dr. Fall observed pain behaviors, non-organic findings and pain in excess of what could be expected based on examination. The ALJ is persuaded that Claimant's reported symptoms are not reliable indicators of his true condition and such reports do not justify Dr. Yamamoto's conclusion that Claimant did not reach MMI until September 17, 2014.

88. Dr. Yamamoto's opinion that Claimant did not reach MMI until September 17, 2014 is also unpersuasive because it is largely unexplained. From February 2014 until August 5, 2014 Dr. Yamamoto took the position that Claimant needed a TKA and continued treating Claimant's symptoms with medication. On August 5, 2014 Dr. Yamamoto learned the request for a TKA was denied by ALJ Harr. Nevertheless, Dr. Yamamoto continued treating Claimant with medications. On August 5 Dr. Yamamoto stated that he expected Claimant to be at MMI in "three weeks." Dr. Yamamoto offered no credible or persuasive explanation for his implicit conclusion that medication alone could reasonably be expected to improve Claimant's condition between February 2014 and September 17, 2014.

FINDINGS OF FACT CONCERNING PERMANENT TOTAL DISABILITY

89. Claimant failed to prove it is more probably true than not the industrial injury has rendered him unable to earn any wages.

90. Dr. Fall credibly opined that the permanent work restrictions imposed by Dr. Yamamoto were "inappropriate" and that the Claimant's only permanent restrictions are no kneeling on the left knee and avoidance of "high-impact activities." Dr. Fall persuasively opined that Dr. Yamamoto improperly based his restrictions on the Claimant's subjective pain reports rather than the nature of the injury, the surgical findings and absence of complications after surgery and what patients are typically able to do after surgery.

91. Dr. Fall credibly explained that there is no medical reason for Claimant to be restricted from standing and walking. Dr. Fall credibly opined that Claimant's knee is stable and does not evidence neurological damage that might impair balance and warrant restrictions on walking, standing and lifting. Dr. Fall credibly opined that there is no reason Claimant can't sit, stand or walk for 8 hours per day and perform work.

92. As determined in Findings of Fact 86 and 87, Claimant's subjective pain reports after the May 2013 surgery are not reliable because numerous medical providers, with the exception of Dr. Yamamoto, have observed that Claimant exhibits "pain behaviors," symptoms in excess of findings on PE and "non-organic" findings. Despite the observations and findings of these other physicians, Dr. Yamamoto largely formulated his opinions based on Claimant's untrustworthy reports of symptoms.

93. Dr. Yamamoto testified that his PE of Claimant revealed atrophy of the left quadriceps. However, in February 2014 Dr. Larson reported that he did not observe any "muscle wasting." When Dr. Nagamani examined Claimant in February 2015 he observed there was no "gross atrophy of the quadriceps." When Dr. Fall examined Claimant in August 2015 she reported there was no "muscular wasting." The ALJ finds that the preponderance of the credible evidence establishes that Claimant does not exhibit any significant wasting of the left quadriceps muscle.

94. Vocational expert Montoya credibly and persuasively opined, based on her vocational evaluation of Claimant and labor market research, that Claimant is employable in numerous occupations if Dr. Fall's restrictions are found to be accurate. Similarly, Montoya credibly testified that if Claimant's restrictions place him in the light duty category (lifting up to 20 pounds and able to walk and stand for majority of shift) he would qualify for most dispatch jobs. Dr. Fall did not restrict Claimant from performing work in the "light duty" category. Therefore Claimant is eligible for most dispatch jobs. Montoya also credibly opined that if Dr. Fall's restrictions are considered valid then Claimant is not prohibited from performing most of his past work. (The ALJ recognizes that Claimant is prohibited from returning to his job of paratrooper because this is a "high-impact" occupation.)

95. Vocational expert Pickett's opinion that Claimant cannot return to work is not credible and persuasive. Pickett admittedly relied on Dr. Yamamoto's restrictions as one of the primary bases for her opinion. As found, the restrictions imposed by Dr. Yamamoto are not credible and persuasive. Moreover, Pickett opined Claimant could "possibly" find employment if Dr. Fall's restrictions are found credible.

FINDINGS OF FACT CONCERNING CONVERSION OF SCHEDULED IMPAIMRMENT RATING TO WHOLE PERSON IMPAIRMENT RATING

96. Claimant failed to prove it is more probably true than not that he sustained "functional impairment" beyond the leg at the hip so as to warrant conversion of his lower extremity impairment rating to a whole person impairment rating.

97. Claimant failed to prove it is more probably true than not that the injury to his knee has functionally impaired any part of his body beyond the leg at the hip. Claimant has not produced any credible or persuasive evidence that the admitted left knee injury has caused damage to any tissues located beyond the leg at the hip. Not even Dr. Yamamoto has opined that the injury to Claimant's knee caused injury to tissues beyond the leg at the hip. Rather, Dr. Yamamoto opined the injury resulted in tears of the lateral and medial menisci of the left knee, aggravated preexisting osteoarthritis of the left knee and caused a defect in the cartilage of the left medial femoral condyle.

98. There is no credible or persuasive evidence that the knee injury has caused pain, and hence dysfunction, in any part of the body beyond the leg at the hip. Although Claimant sought emergency treatment for back pain on May 6, 2015, he did not attribute the back pain to his knee injury. Rather, Claimant reported that he

experienced the onset of back pain 2 days previously when he "twisted while walking." Dr. Fall persuasively opined that the back problems Claimant reported in May 2015 are not related to the April 10, 2013 knee injury.

99. No physician has credibly or persuasively opined that the April 10, 2013 knee injury caused functional impairment beyond the leg at the hip. Not even Dr. Yamamoto has opined that his scheduled rating should be converted to a whole person because Claimant sustained functional impairment beyond the leg at the hip. Rather, Dr. Yamamoto reported that Claimant's pain was "focal" and located on the medial aspect of the knee.

FINDINGS OF FACT CONCERNING SCHEDULED IMPAIRMENT RATING

100. A preponderance of the credible and persuasive evidence proves that Claimant sustained impairment of 33% of the left lower extremity.

101. Dr. Nagamani credibly and persuasively opined that that Claimant sustained scheduled impairment of 33% of the lower extremity. Dr. Nagamani assessed impairment based on a rating for reduced ROM and a "Table 40 diagnosis for the meniscectomies." Dr. Nagamani's rating was partially corroborated by Dr. Fall who opined that it "appeared to have been done correctly according to the AMA Guides."

102. Dr. Nagamani's impairment rating of 21% for reduced ROM is more persuasive than the ROM rating issued by Dr. Fall. Dr. Fall's ROM impairment rating was based on her determination that measurement of the contralateral and uninjured right leg afforded an accurate "baseline" for measuring the reduced ROM in the injured left knee. While Dr. Fall's methodology for calculating the ROM impairment may be permissible under the Division of Workers' Compensation (DOWC) "Impairment Rating Tips", Dr. Fall's testimony and report did not offer any detailed and persuasive explanation of why she exercised her discretion to calculate ROM in this manner. Dr. Fall also admitted that Dr. Nagamani measured Claimant's right leg ROM and the results were "normal." Neither Dr. Nagamani nor Dr. Yamamoto elected to use measurements of the contralateral leg when calculating ROM impairment. Indeed, their ratings for reduced ROM were very similar.

103. The ALJ is not persuaded by Dr. Yamamoto's opinion that Claimant suffered a ratable impairment for "aggravation" of preexisting osteoarthritis. As determined in Finding of Fact 34, Dr. Yamamoto's opinion that Claimant's diagnoses of "aggravated osteoarthritis" and damage to the cartilage of the femoral condyle are admittedly based, at least in part, on Claimant's report that he was asymptomatic prior to the April 10, 2013 injury and "very symptomatic" afterwards. However, for the reasons stated in Finding of Fact 87 Claimant's reporting of symptoms is not reliable and does not serve as a persuasive basis for Dr. Yamamoto's opinion.

104. Dr. Yamamoto's opinion that Claimant has ratable osteoarthritis is contradicted by the credible opinions of Dr. Fall and Dr. Nagamani. Neither Dr. Fall nor Dr. Nagamani found there is any permanent ratable impairment based on aggravation

of preexisting osteoarthritis. Dr. Larson credibly opined that Claimant's ongoing and diffuse pain complaints are not of a type likely to be caused osteoarthritis. Dr. Larson's opinion concerning the nature of Claimant's reported symptoms was corroborated by Dr. Nagamani. Dr. Larson credibly opined that Dr. Hsin's operative report detailed a limited area of chondromalacia on the medial femoral condyle but but nothing about traumatic injury to cartilage. Dr. Hsin, the original surgeon, credibly opined that the differences between the April 2013 MRI and the August 2013 MRI likely represent "postoperative changes" rather than "new injuries." Dr. Larson credibly opined that Dr. Hsin's operative report demonstrates that the "full thickness cartilage defect" reported on the August 2013 MRI is probably "artifact."

105. The ALJ takes administrative Notice of Table 40 of the AMA Guides. Table 40 provides for impairment ratings based on various lower extremity disorders including a torn meniscus, a meniscectomy and a partial meniscectomy. Table 40 indicates that a physician has the discretion to rate from 0 to 10% for one torn meniscus and from 0 to 25% for "both menisci." Here, the evidence establishes Claimant has 2 torn menisci (lateral and medial). Therefore, the ALJ is persuaded by Dr. Nagamani's 15% based on two partial meniscectomies (medial and lateral) performed on May 16, 2013.

FINDINGS CONCERNING DISFIGUREMENT

106. Claimant demonstrated that he has two one-half inch scars. One scar is located on the outside of the knee and one is located on the inside of the left knee. These scars are the result of the arthroscopic surgery performed in May 2013.

107. At hearing Claimant appeared to walk with a noticeable limp. However, the ALJ finds that the limp exhibited by Claimant is not a credible and reliable indicator of his actual disfigurement, if any. A limp can be demonstrated as a matter of choice. As found above, numerous physicians and medical providers have observed that Claimant exhibits non-organic symptoms and pain behaviors inconsistent with PE. The non-organic findings include observations that Claimant has demonstrated greater knee ROM when distracted than when he is directly examined. In these circumstances the limp observed by the ALJ is not found to represent a valid indicator of Claimant's actual appearance and disfigurement. The ALJ also credits Dr. Fall's testimony that there is no medical indication for Claimant's use of a cane because his knee is stable and neurologically intact. The ALJ further credits Dr. Fall's testimony that the swelling which the ALJ observed in Claimant's left lower extremity is probably the result of inactivity and wrapping of the knee with an Ace bandage.

FINDINGS OF FACT CONCERNING OVERPAYMENT

108. Respondents failed to prove it is more probably true than not that Claimant received an overpayment of permanent partial disability (PPD) benefits. Respondents' argument is predicated on the assertion that they admitted liability for PPD benefits based on Dr. Nagamani's 33% lower extremity impairment rating, but Claimant is actually entitled to PPD benefits on Dr. Fall's lesser rating. However, the ALJ has found that Claimant is entitled to PPD benefits based on Dr. Nagamani's 33% lower extremity

impairment rating. The ALJ has also found Dr. Fall's rating to be less persuasive than Dr. Nagamani's rating. In these circumstances Respondents' May 11, 2015 FAL correctly admitted liability for PPD benefits in the amount of $18,325.51.

109. Respondents proved it is more probably true than not that Claimant received an overpayment of temporary total disability (TTD) benefits in the amount of $12,919.12.

110. As determined in Findings of Fact 82 through 88, Claimant reached MMI on February 25, 2014. Respondents' May 11, 2015 FAL establishes that they admitted liability for payment of $20,876.14 in TTD benefits between the date of injury and the date of MMI. The Respondents' "payment log" (Respondents' Exhibit R) reflects that Insurer continued to pay TTD benefits after the date of MMI. The payment log demonstrates Respondents paid a total of $52,120.77 in TTD benefits.

111. The Claimant was overpaid TTD benefits in the amount of $31,244.63 ($52,120.77 - $20,876.14). However, the FAL reflects Respondents reduced the amount of the overpayment by crediting Claimant with the $18,325.51 in admitted PPD benefits. Thus, Respondents correctly argue that the outstanding overpayment was reduced to $12,919.12 ($31,244.63 - $18,325.51).

112. Further, the $500 in disfigurement benefits that Claimant is entitled to receive as a result of this order must also be credited against the TTD overpayment. Thus the Claimant has been overpaid TTD benefits in the final amount of $12,419.12 ($12,919.12 - $500).

FINDINGS CONCERNING MAINTENANCE MEDICAL TREATMENT

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

114. Dr. Nagamani and Dr. Fall credibly opined that Claimant does not need "maintenance care." Both of these physicians credibly and persuasively noted that no treatment provided to Claimant, surgical or otherwise, has significantly diminished his pain complaints. The medical records demonstrate Claimant has undergone extensive treatment for his knee including surgery, PT, injection and drug therapy. Nevertheless Claimant's pain complaints have not been alleviated and he continues to exhibit pain behaviors out of proportion to physical findings.

115. The ALJ is not persuaded by Claimant's testimony that he receives any "short-time" benefit from the pain medications and creams prescribed by Dr. Yamamoto. In August 2015 Claimant told Dr. Fall that he has not received benefit from any treatment. Claimant made similar statements to Dr. Carbaugh in August 2013. Considering Claimant's persistent pain behaviors and non-organic findings the ALJ is not persuaded that any medications or treatments actually relieve Claimant's condition.

116. Moreover, Dr. Fall credibly opined that in view of Claimant's persistent symptoms and failure to respond to treatment one must consider that Claimant's symptoms have a psychological origin. Dr. Fall's opinion in this regard is corroborated by Dr. Carbaugh who opined that Claimant has "psychological factors" affecting his medical condition and that Claimant's "personality and coping style" likely impact his perception of symptoms. The ALJ finds that no treatment, except possibly psychological counseling, is likely to alleviate Claimant's symptoms or prevent deterioration of his condition. As for psychological counseling suggested by Dr. Carbaugh the ALJ is persuaded that the need for this treatment, if any, is not causally related to the industrial injury. Rather, the need for such treatment, if any, originates in Claimant's unique psychological make-up and personality style and is not related to the industrial injury. In this regard the ALJ notes that Dr. Nagamani, Dr. Larson and Dr. Fall have all opined that Claimant does not need any maintenance care despite the fact the no psychological counseling has been provided. Not even Dr. Yamamoto has opined that Claimant needs or is likely to need psychological counseling as a form maintenance treatment.

117. Dr. Yamamoto's opinion that Claimant needs continuing management of his medications is not persuasive. As previously found, Dr. Yamamoto has placed undue reliance on Claimant's reports of pain. Moreover, despite the observations and opinions of numerous medical providers, Dr. Yamamoto does not acknowledge that Claimant exhibits pain behaviors and reports symptoms that are out of proportion to the objective evidence and are "non-physiologic" in character.

STIPULATION

118. Claimant's admitted average weekly wage is $730.66. At hearing the parties stipulated that as of September 30, 2015 Claimant's average weekly wage should be increased to $824.12.

CONCLUSIONS OF LAW

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

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

MAXIMUM MEDICAL IMPROVEMENT

Claimant argues that the evidence establishes that he did not reach MMI until September 17, 2014 as found by Dr. Yamamoto. Respondents contend Claimant failed to overcome Dr. Nagamani's finding of MMI by clear and convincing evidence. The ALJ agrees with Respondents.

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

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

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

As determined in Findings of Fact 82 through 88, Claimant failed to prove it is highly probable and free from serious doubt that the DIME physician erred in finding Claimant reached MMI on February 25, 2014. The DIME physician persuasively opined that Claimant reached MMI on February 25, 2014 because no further treatment is likely to improve Claimant's condition and all prior treatments failed to effect significant improvement. The DIME physician's opinion was corroborated by the opinions expressed by Dr. Larson and Dr. Fall. For the reasons stated in Findings of Fact 86 though 88, Dr. Yamamoto's opinion that Claimant did not reach MMI until September 17, 2014 is not sufficiently persuasive to constitute clear and convincing evidence to overcome the DIME physician's finding concerning MMI.

PERMANENT TOTAL DISABILITY

Claimant alleges that the evidence establishes that it is more probably true than not that the effects of the industrial knee injury have rendered him unable to earn wages in the same or other employment. Therefore, Claimant seeks an award of permanent total disability (PTD) benefits. The ALJ disagrees with Claimant's contention.

To prove a claim that he is permanently and totally disabled, a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

In weighing whether Claimant is able to earn any wages, the ALJ may consider various "human factors" including Claimant's physical condition, mental ability, age,

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

As determined in Findings of Fact 89 through 95, Claimant failed to prove it is more probably true than not that the industrial injury has rendered him unable to earn wages in any employment. Rather, the ALJ has discredited the restrictions imposed by Dr. Yamamoto and credited the restrictions imposed by Dr. Fall. The ALJ has credited the testimony of vocational expert Montoya that Dr. Fall's restrictions render Claimant capable of finding employment in many jobs, including most of those that he performed prior to the April 2013 injury. The claim for PTD benefits must be denied.

CONVERSION OF SCHEDULED IMPAIRMENT TO WHOLE PERSON IMPAIRMENT

Claimant argues that if he is denied PTD benefits Dr. Nagamani's (DIME physician's) 33% lower extremity impairment rating should be "converted" to a 13% whole person impairment rating and PPD benefits awarded on that basis. Specifically, Claimant argues that the "restriction limiting his ability to lift more than five pounds along with limiting him to seated work only are functional impairments beyond the schedule" that warrant conversion to a whole person rating. The ALJ is not persuaded by this argument.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21,

2005). The ALJ may also consider whether the injury has affected physiological structures beyond the leg at the hip. *Cf. Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

Section 8-42-107(2)(w), C.R.S., provides for scheduled compensation based on "loss of a leg at the hip or so near thereto as to preclude the use of an artificial limb." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Maestas v. American Furniture Warehouse,* WC No. 4-662-369 (June 5, 2007).

As determined in Findings of Fact 96 through 99, Claimant failed to prove it is more probably true than not that he sustained an injury causing "functional impairment" beyond the leg at the hip. Claimant has not shown that the injury to his knee caused any damage to tissues located beyond the leg at the hip, or that the knee injury has caused him to experience pain in tissues located beyond the leg at the hip. Neither does the record contain any credible or persuasive medical opinion tending to prove that knee injury cause functional impairment beyond the leg at the hip. Even Dr. Yamamoto opined that Claimant's injury involved injury to the left menisci, aggravation of preexisting left knee osteoarthritis and a cartilage injury to the left femoral condyle.

The ALJ is not persuaded by Claimant's argument that he has proven functional impairment beyond the leg at the hip because Dr. Yamamoto restricted him to seated work and lifting no more than 5 pounds. First, the factual predicate for Claimant's argument is invalid. As found above, the ALJ credits Dr. Fall's opinion that the knee injury has not caused any restrictions that limit Claimant to lifting 5 pounds and performing only seated work. Rather, the ALJ has credited Dr. Fall's opinion that Claimant's only restrictions are no kneeling on the left knee and avoidance of high-impact activities. (*See* Findings of Fact 90 and 91.)

However, even if Dr. Yamamoto's restrictions were considered valid, the ALJ concludes they would not prove the existence of functional impairment beyond the leg at the hip. It is clear from Dr. Yamamoto's reports and testimony that he imposed the lifting and seated work restrictions based on Claimant's complaints of pain and dysfunction in the left knee. The Claimant did not, and does not now contend that the restrictions were necessitated by injury to or dysfunction involving any part of the body other than his left knee. Therefore, it is the left knee that suffered the "ultimate loss" and was functionally impaired. Restrictions that Dr. Yamamoto imposed because of injury to the Claimant's left knee do not prove that Claimant sustained functional impairment to any part of the body beyond the leg at the hip.

Claimant's request that he be awarded PPD benefits based on conversion of a lower extremity impairment rating to a whole person rating must be denied.

SCHEDULED IMPAIRMENT RATING

Claimant contends that if his PPD benefits are awarded under the schedule they should be based on Dr. Yamamoto's 45% lower extremity rating. The Claimant argues that this is so because Dr. Yamamoto's rating includes impairment based on the aggravation of preexisting osteoarthritis. Conversely Respondents argue that Claimant's scheduled PPD benefits should be based on Dr. Fall's 15% lower extremity rating rather than Dr. Nagamani's 33% lower extremity impairment rating. Respondents assert that Dr. Fall's rating is the most credible rating. The ALJ concludes that Dr. Nagamani's rating is the most credible and persuasive impairment rating.

As determined above, Claimant's impairment is correctly rated under the schedule of disabilities. Consequently, the Claimant bears the burden of proof to establish the degree of his impairment by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000); *Maestas v. American Furniture Warehouse,* WC 4-662-369 (ICAO June 5, 2007).

Based on Findings of Fact 100 through 105, the ALJ finds the credible and persuasive evidence proves it is more probably true than not that Claimant is entitled to PPD benefits based on Dr. Nagamani's 33% lower extremity impairment rating.

DISFIGUREMENT

Claimant seeks an award of disfigurement benefits based on his scars, limp, "use of a cane," use of a Neoprene Sleeve, and swelling of the lower leg caused by wearing the sleeve.

Section 8-42-108(1), C.R.S., provides for an award of disfigurement benefits if an "employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As determined in Findings of Fact 106 Claimant has sustained permanent disfigurement to a parts of the body normally exposed to public view. These disfigurements consist of two half-inch scars located on the outside and inside of the knee.

As determined in Finding of Fact 107 the Claimant failed to prove it is more probably true than not that the knee injury has caused a permanently disfiguring limp.

As determined in Finding of Fact 107 Claimant's use of a cane does not evidence a permanent disfigurement. Rather, the ALJ credits Dr. Fall's opinion that there is no medical indication for Claimant's use of a cane.

The ALJ concludes Claimant's use of a cane and neoprene sleeve do not constitute "disfigurements" to "parts of the body" normally exposed to public view. A disfigurement is an "observable impairment of the natural appearance of a person." A

disfigurement, such as the loss of a tooth or an eye, exists even if the disfigurement can be concealed by use of a prosthetic device. *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961). Moreover, to be compensable the disfigurement must be to a "part of the body" that is normally exposed to public view. *See Twilight Jones Lounge v. Showers*, 732 P.2d 1230, 1232 (Colo. App. 1986) (abdominal scar is to part of body normally exposed to public view since "males commonly appear at swimming pools or other public places without upper body garments" during warm months). Assistive and prosthetic devices, such as canes, wheel chairs and braces are not "parts of the body." Rather, they are external medical devices that may be prescribed to assist with or preserve bodily function.

The ALJ further concludes that the swelling in Claimant's lower extremity does not constitute a "permanent" disfigurement. Rather, the ALJ credits Dr. Fall's testimony that the swelling is the result of Claimant's personal decisions to wrap up the knee and to remain inactive so as to reduce return blood flow to the heart. (Findings of Fact 57 and 91). The ALJ finds that Claimant's decisions to wrap the knee and remain inactive are not medically necessary because, as Dr. Fall testified, the knee is not unstable and Claimant is fully capable of standing and walking for most of the day. It follows that swelling of the lower extremity is not "permanent" because it the product of Claimant's own decisions, not any medical necessity caused by the injury. *Cf. Irvin v. Medical Center of Aurora,* WC 4-320-720 (ICAO January 6, 2006).

Based on the scars on the ALJ concludes Claimant is entitled to an award of disfigurement benefits in the amount of $500.

OVERPAYMENT

Respondents contend that because Claimant reached MMI on February 25, 2014, but the Insurer continued to pay TTD benefits Claimant has been "overpaid" $12,919.12 in TTD benefits. Respondents further contend that that they are entitled to recover an overpayment of PPD benefits in the amount of $8,329.78 based on Dr. Fall's opinion that Claimant sustained 15% impairment of the lower extremity. Thus, Respondents seek an order requiring Claimant to repay a total of $21, 248.90. The ALJ concludes that after credits Claimant has been overpaid TTD benefits in the amount of $12,419.12 and Claimant should be ordered to repay this amount to the Insurer.

The Respondents bear the burden of proof to establish that Claimant received an overpayment of benefits. See *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002). An overpayment is defined to include "money received" by the claimant that exceeded the amount that should have been paid or that the claimant "was not entitled to receive." For an overpayment to occur it is "not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles." Section 8-40-201(15.5), C.R.S. Section 8-43-303(1), C.R.S. provides that a claim may be reopened to recover overpayments and "repayment shall be ordered." *See Simpson v. Industrial Claim Appeals Office,* 219

P.3d 354 (Colo. App. 2009); *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

As determined in Finding of Fact 108, Respondents failed to prove that the Claimant received an overpayment of PPD benefits. As found Claimant is entitled to PPD benefits based on Dr. Nagamani's 33% lower extremity rating. Respondents' FAL admitted liability for PPD benefits in the amount of $18,325.51 based on Dr. Nagamani's 33% rating. Because the ALJ rejects Respondents' argument that Claimant's PPD benefits should be based on Dr. Fall's 15% lower extremity impairment rating there has been no overpayment of PPD benefits.

As determined in Findings of Fact 109 through 111 Respondents proved it is more probably true than not that Claimant was overpaid TTD benefits in the amount of $12,919.12. Because Claimant reached MMI on February 25, 2014 his right to receive TTD benefits ended on that date. Section 8-42-105(3)(a), C.R.S. However, on February 25, 2014 Respondents were not legally entitled to terminate payment of Claimant's TTD benefits because no ATP had yet placed the Claimant at MMI and the DIME process had not yet been triggered let alone completed. See sections 8-42-107(8)(b)(I) and (b)(II), C.R.S.; § 8-43-203(2)(b)(II)(A), C.R.S.; § 8-42-107.2(4)(c), C.R.S. As a result, Respondents continued to pay and Claimant continued to receive TTD benefits after February 24, 2015.

The TTD benefits paid to Claimant after February 24, 2014 constituted an "overpayment" within the meaning of the Act because they represented money in excess of the amount Claimant should have been paid. Section 8-40-201(15.5). The mere fact that Claimant was entitled to receive the TTD payments at the time they were being made does not vitiate their ultimate status as an "overpayment." Section 8-40-201(15.5). *Simpson v. Industrial Claim Appeals Office, supra*; *Marquez v. Americold Logistics,* WC 4-896-504-04 (ICAO August 7, 2014; *Mattorano v. United Airlines,* WC 4-861-379-01 (ICAO July 25, 2013*); Haney v. Shaw, Stone and Webster,* WC 4-796-763 (ICAO July 28, 2011).

As found, Claimant has been overpaid TTD benefits in the amount of $12,419.12 after being given credit for PPD benefits paid to Claimant and disfigurement benefits owed to Claimant. Claimant is ordered to repay Insurer $12,419.12. Claimant shall repay this amount at the rate of $50 per week.

MAINTENANCE MEDICAL TREATMENT

Claimant requests an award of ongoing medical treatment subsequent to MMI including payment for the treatments provided by Dr. Yamamoto since the date of MMI. The ALJ concludes Claimant is not entitled to an award of post-MMI medical benefits.

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his

condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As determined in Findings of Fact 113 through 117 Claimant failed to prove it is more probably true than not that he is entitled to ongoing medical benefits to alleviate his symptoms or prevent deterioration in his condition. As found, the persuasive opinions of Dr. Fall and Dr. Nagamani establish that no treatment provided to Claimant has resulted in any improvement in his condition and it is unlikely any treatment ever will. Despite an extensive course of invasive and non-invasive treatment Claimant's reported symptoms have never substantially improved. Indeed, Claimant told Dr. Fall in August 2015 that no treatment had provided benefit.

The ALJ is persuaded that no ongoing medical treatment is likely to relieve Claimant's symptoms because the origin of Claimant's ongoing symptoms lies in his psychological make-up and personality style, not the effects of the industrial injury. To the extent that psychological counseling could alter Claimant's condition the need for such treatment is not necessitated by the injury.

ORDER

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

1. Claimant reached maximum medical improvement on February 25, 2014.

2. The Claimant's request for an award of permanent total disability benefits is denied.

3. Claimant is entitled to permanent partial disability benefits based on a scheduled impairment rating of 33% of the leg at the hip. Respondents have admitted the value of this rating is $18,325.51.

4. Respondents are liable to pay disfigurement benefits in the amount of $500.

5. Insurer's claim for recovery of an alleged overpayment of permanent partial disability benefits is denied.

6. Insurer is entitled to recover an overpayment of temporary total disability benefits. As determined the amount of the overpayment, after crediting payments for permanent partial disability benefits and disfigurement

benefits, is $12,419.12. Claimant shall repay this overpayment at the rate of $50 per week.

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, 2016

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

Did the claimant establish by a preponderance of the evidence that she should be compensated for a 10% whole person permanent impairment rather than the extremity ratings?

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer on May 18, 2012 working as a laboratory technician and a phlebotomist. In this capacity she was on her feet for eight to nine hours a day. The floor surface was mad of concrete, and she was working 40+ hours per week.

2. The claimant's duties required her to draw blood from the facilities patients and to conduct lab tests.

3. The claimant suffered from an admitted work related condition which manifested itself in May 2012 as a severe heel pain with burning and sharp pain causing the claimant to be almost unable to walk.

4. Dr. Lakin was the claimant's original authorized treating physician and he had referred the claimant to Dr. Simpson.

5. The claimant underwent surgery on her right foot on February 6, 2014, after which she was in a walking boot for four to six weeks.

6. The claimant had surgery on her left foot on April 17, 2014, after which she was again in a walking boot.

7. The claimant had repeat surgery on her left foot on October 2, 2014; once again the claimant was in a walking boot post-surgery.

8. The use of a walking boot affected the way the claimant walks. Her walking was unstable causing her hips and S-I joint to hurt.

9. The claimant states that she thinks she still does not walk normally, as she did before the surgeries.

10. The claimant states that she still has an abnormal gait. As of the hearing date the claimant foot is still bothersome. Her left foot is worse than her right and she favors the left foot. There is burning and shooting pain down the side of the foot.

11. The claimant states that she began to experience pain in her low back and hip in 2013. The claimant indicates that she discussed this low back and hip pain with Dr. Lakin and that Dr. Lakin did a mild adjustment but had indicated to her that he didn't think insurance would cover the low back and hip issue.

12. Although the claimant would fill out pain diagrams she states that she stopped indicating low back pain on the diagrams subsequent to Dr. Lakin telling her that it would not be covered.

13. Additionally, subsequent to being told that it would not be covered she initiated treatment on her own.

14. The claimant states that every day she has low back, hip, and S-I joint pain. To alleviate the pain she does a lot of stretching. She states she is limited in doing daily activities such as yard work; where she needs to stop, stretch, and shift.

15. The claimant was placed at maximum medical improvement in June 2015. The claimant indicates that at the time of MMI she was suffering from low back and hip pain.

16. Just prior to being given her impairment rating the claimant underwent a Functional Capacity Evaluation. During that evaluation the claimant experienced pain more pain in her back than in her feet, and her ability to lift was limited due to the back pain.

17. As of the date of hearing the claimant still has pain in her feet and this pain limits the way she walks and limits how she can lift.

18. Upon releasing the claimant at MMI Dr. Lakin provided permanent restrictions, based upon the FCE, of: Limit standing tolerance to tolerance of pain, 10-15 minutes at one time and 30-40 minutes in any one hour time period.

19. He additionally provided for post-MMI maintenance care with the anticipation that the claimant would continue having pain and possibly need surgery within the next five years.

20. The claimant was seen by Dr. Allison Fall for an independent medical examination on December 8, 2015.

21. Dr. Fall opined that the claimant's functional loss is at her bilateral feet and left ankle area. She indicates that she believes there is no functional deficit proximal to the lower leg and foot that is work related. Dr. Fall cites the fact that the claimant is no longer wearing a boot or a cast and therefore there would be no reason for her to have compensatory back pain.

22. The ALJ finds that the claimant is credible.

23. The ALJ finds that, while Dr. Fall's opinion is based in pertinent part on the fact that the claimant is no longer in a boot or cast, the claimant's credible testimony is that she has an altered walking patter due to the pain that remains in her.

24. Additionally, the claimant's FCE results support a finding of a functional deficit beyond the lower extremities.

25. The ALJ finds that the claimant has established that it is more likely than not that the functional deficit she suffers extends beyond the lower extremity and into the back and hip.

26. The ALJ finds that the claimant has established that it is more likely than not that she should be compensated for the whole person rating of 10%.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. 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).

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 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).

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 (2007).

6. The question of whether the claimant sustained a loss of a loss of a foot below the ankle within the meaning of Section 8-42-107(2)(y), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question the ALJ must determine the situs of the claimant's functional impairment, and the situs of the functional impairment is not necessarily the situs of the injury itself. *See Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo.App. 1996); *Staunch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996).

7. The "loss of a foot below the ankle" is on the schedule of injuries listed under Section 8-42-107 (2)(y), C.R.S. Depending on the particular facts of the claim, damage to the structures above the foot may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107(2), C.R.S.

8. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment beyond the "loss of a foot below the ankle" is probative evidence of whole person impairment.

9. As found above, the ALJ concludes that the claimant's testimony was credible and supported by the medical record.

10. The ALJ concludes as found above, that as a result of her work-related injury the claimant has functional impairment of the foot below the ankle, and the claimant has functional impairment in areas beyond the foot extending into the low back and hip area. As a result of her work-related injuries the claimant's functional impairment is not limited to the foot below the ankle.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that her lower extremity impairment rating should be converted to a whole person impairment rating.

12. The ALJ concludes that the claimant suffered 10% permanent impairment of the whole person.

ORDER

It is therefore ordered that:

1. The respondent-insurer shall compensate the claimant for permanent impairment of 10% whole person.

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

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

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

DATE: February 22, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

STIPULATIONS

1. The Respondents are currently processing the Claimant's request for the medical benefit of a pool pass and admit for this benefit.

2. The Claimant's commutable labor market is Kingman, AZ / Mojave County, AZ.

3. In position statements submitted post-hearing, the Claimant and Respondents both confirm that the total current overpayment to the Claimant as a result of receiving Social Security Disability benefits of $1,910/ per month is a current overpayment amount of $8,299.20. Respondents further elaborated in their brief that Respondents were entitled to reduce receipt of the Claimant's workers' compensation TTD benefits by $220.38/week ($1910.00 x 12 divided by 52 x 0.5). Because Claimant received TTD benefits for 11 months after the award of SSD benefits and failed to timely notify Respondents, Respondents overpaid TTD in the amount of $10,505.00 ($1910.00 x 11 x 0.5). Upon learning of the duplicative benefits, Respondents ceased payments of PPD, after $13,248.82 of the $15,449.62 PPD benefits had been paid. As such, the overpayment amount was offset, or reduced, by $2,200.80. Respondents thus claim a current overpayment of $8,299.20 (which is the amount that both parties confirm for overpayment).

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is permanently totally disabled?

2. Whether the Claimant is entitled to compensation for disfigurement pursuant to C.R.S. § 8-42-108 and, if so, the amount of compensation.

3. Whether the Respondents established the Claimant received an overpayment of indemnity benefits by virtue of his receipt of social security benefits and whether such overpayment is subject to repayment, and, if so, the manner in which the Claimant should be ordered to repay such amounts.

FINDINGS OF FACT

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

1. The Claimant's date of birth is November 5, 1951 and he is currently 64 years old. He currently lives in Golden Valley, Arizona which is in the commutable labor market for the Kingman, Arizona area. His last employment was with the Respondent Employer.

2. On July 15, 2013, the Claimant was pulling a side-dump trailer and the electric tarp was not functioning properly so the Claimant had to get up onto the material in the trailer and manually tarp it. The Claimant testified that at a certain point he realized he got too far over, had lost his balance and he was about to fall so he jumped to the ground to avoid more serious injuries. He landed on both feet and suffered fractures to both feet. This testimony is consistent with his reporting of the mechanism of injury in the medical records and is credible and found as fact.

3. The Claimant saw Erica Herrera, PA-C, at Work Partners Occupational Health Clinic on July 15, 2013 reporting severe right and left ankle pain. The Claimant reported a pain level range from 4-9/10 with weight bearing increasing his pain. On examination there was significant swelling present over the entire right and left ankle joints. After x-rays confirmed the Claimant had fractured both the ankles, the Claimant was sent for CT scans which showed that the left calcaneus was comminuted. The Claimant was placed in splints, provided a wheelchair and placed on restricted duty limited to non-weight bearing, sedentary work (Claimant's Exhibit 4, pp. 124-127; Respondents' Exhibit A).

4. On July 23, 2013, the Claimant's case was assigned to nurse-case manager Jill Francini, RN (Claimant's Exhibit 3, p. 73). RN Francini noted that in her first contacts with the Claimant and his wife on July 23, 2013 and July 24, 2013, the Claimant expressed a good deal of frustration over delay in authorization for the Claimant to see an orthopedic foot specialist and the Claimant's wife felt they should get an attorney due to the delay. RN Francini noted that due to the swelling, it was not likely the Claimant could have proceeded to surgery any earlier (Claimant's Exhibit 3, p. 74). On July 24, 2013, the Claimant reported a pain level of 4/10 at the visit, but stated that his pain level ranged from 4-9/10 depending on activity (Claimant's Exhibit 4, p. 131).

5. The Claimant was evaluated by Dr. Christopher Copeland on July 29, 2013. Dr. Copeland diagnosed the Claimant with a distal fibula fracture of the right lower extremity. He diagnosed a left foot calcaneus fracture. Dr. Copeland recommended treating the right lower extremity with a cast and immobilization, followed by a cam boot and keeping the Claimant non-weight bearing for 8-10 weeks. As for the left lower extremity, Dr. Copeland recommended surgical and non-surgical options and the Claimant opted to proceed with the surgical repair (Claimant's Exhibit 2, pp. 4-10;

Respondents' Exhibit B). RN Francini attended this medical appointment with the Claimant and noted that the Claimant's knuckles were very calloused from transferring with his knuckles. She noted that Dr. Copeland stressed the need to stop smoking and drinking as surgery was indicated in this case. RN Francini also noted that the swelling was still preventing surgery and the Claimant was advised to keep the leg elevated to get the swelling down for a possible surgery date on August 5, 2013 (Claimant's Exhibit 3, p. 75).

6. The Claimant underwent surgery for his left lower extremity on August 5, 2013. Dr. Copland performed a left calcaneus open reduction internal fixation, left subtalar joint arthrodesis and iliac crest bone marrow aspiration (Claimant's Exhibit 2, pp. 11-14; Respondents' Exhibit C).

7. RN Francini attended a follow up appointment with the Claimant, his wife and Dr. Copeland on August 13, 2013. She noted that the Claimant did well with his surgery. The Claimant was taking Percocet and Oxycodone for pain at the 6-7/10 level RN Francini noted the Claimant was applying for SSDI on this date (Claimant's Exhibit 3, p. 78).

8. The Claimant saw Erica Herrera, PA-C, on August 27, 2013 and on October 1, 2013 while he was recovering from his work injury and subsequent surgery. The Claimant reported pain in the left and right ankle. The Claimant reported that he was improving and continued to use a wheelchair to get around. By the October visit, the Claimant still reported the bilateral ankle pain to be sharp but felt it was improving and variable depending on activity level. The Claimant was in therapy and still non-weight bearing, but was to begin slowly transitioning back to weight bearing status. At this point, the Claimant remained off work (Claimant's Exhibit 4, pp. 143-150).

9. By October 1, 2013, Dr. Copeland noted the Claimant was healing well from the surgery. The left lower extremity cast was removed and significant improvement was noted for the right ankle. No complications were noted and the plan was for the Claimant to slowly transition to weight bearing (Claimant's Exhibit 2, pp. 18-19).

10. As of October 21, 2013, the Claimant's pain levels continued to improve and the Claimant continued with his physical therapy. Although he was slowly transitioning to weight bearing status, the Claimant reported that he was still reliant on his wheelchair and was having a difficult time using crutches (Claimant's Exhibit 4, pp. 151-153). RN Francini attended this appointment and noted that the Claimant was wearing CAM boots on both legs and had rashes, right worse than left, on both legs due to the CAM boots. The toes and ankle on the left side was still swollen. The Claimant reported that he uses crutches at home and at PT but otherwise mostly uses the wheelchair as he fatigues easily (Claimant's Exhibit 3, p. 84).

11. RN Francini accompanied the Claimant and his wife to a November 12, 2013 appointment with Dr. Copeland. She noted that the Claimant's wife reported that she didn't feel that physical therapy was doing much for the Claimant and that he could do what they were offering on his own. The Claimant advised that he and his wife would like to return home (to Arizona) as their home needed care and it was difficult staying with relatives. RN Francini advised that she would see about transferring care for physical therapy to Arizona. RN Francini noted that they experienced a very long, over 2 hour, wait for Dr. Copeland. She also noted that Dr. Copeland examined the Claimant's left knee and found prepatellar bursitis and advised the Claimant to keep off the knee as much as possible and he added PT for the left knee (Claimant's Exhibit 3, p. 85).

12. In the November 12, 2013 medical note of Erica Herrera, PA-C, the Claimant was non-weight bearing and in a wheelchair. Swelling to his bilateral ankles was noted, but the pain symptoms were reportedly improving with a pain level of 2/10. For the first time in the medical records, Ms. Herrera notes that she examined the Claimant's left knee and notes swelling in the pre-patellar bursa with tenderness (Claimant's Exhibit 4, p. 156). RN Francini also attended this appointment with the Claimant and his wife and noted that after the exam, Ms. Herrera had PT come in to help the Claimant with gait instruction with his crutches and provided a cortisone patch for the knee and recommended icing and staying off the knee as much as possible (Claimant's Exhibit 3, pp. 85-86).

13. On January 2, 2014, the Claimant saw Dr. Copeland and reported that he was using crutches and a CAM boot and was weight bearing with the assistance of his crutches (Claimant's Exhibit 2, pp. 25-27). That same day, the Claimant also saw Erica Herrera, PA-C at Dr. Gustafson's office and the Claimant reported his pain level, numbness and swelling was improving significantly. He rated his pain level at 0/10. Ms. Herrera noted that the Claimant was starting to bear weight without his crutches. Ms. Herrera examined the Claimant's left knee again on this visit, in addition to his ankles. She noted that the examination showed continued swelling in the pre-patellar bursa with tenderness. Ms. Herrera also noted the Claimant was going back to Arizona the next weekend. The plan was for the Claimant to continue to transition into complete weight bearing without crutches. Ms. Herrera also advised the Claimant to avoid any kneeling as he was exacerbating his left knee bursitis. She also provided the Claimant with a prescription for the bursitis. The Claimant's work status was changed from no work to restricted duty with restrictions limiting his standing and walking each to 1 hour per day and his sitting to 6 hours per day (Claimant's Exhibit 4, pp. 159-163; Respondents' Exhibit D). RN Francini also attended this appointment with the Claimant and noted that the Claimant was walking with a CAM boot on the left and in a regular shoe with a brace on the right and using crutches. The Claimant reported that he was very pleased with the physical therapy in Arizona. RN Francini also noted that as for the knee swelling, the Claimant was advised to keep off the knee and not to bump it. If there was no change by the next visit, Dr. Copeland indicated he would consider an injection (Claimant's Exhibit 3, pp. 91-92).

14. RN Francini accompanied the Claimant to a visit with PA-C Herrera on January 2, 2014 as well. She noted that due to the continued bursitis, PT for the knee was recommended. PA-C also recommended the Claimant use a knee pad due to the need for him to transfer into his truck on his knee when he goes to PT (Claimant's Exhibit 3, p. 92).

15. On February 10, 2014, the Claimant received notification that he was entitled to monthly Social Security Disability benefits of $1,910.00 per month. The notification indicated that the Claimant was entitled to benefits beginning January 2014 and he would receive the benefit check for January 2014 on or around February 16, 2014 and thereafter would receive the benefit check in the amount of $1,910.00 on or about the second Wednesday of the month (Respondents' Exhibit X pp. 115-118).

16. On February 11, 2014, the Claimant presented himself for an Arizona Department of Transportation Commercial Driver Fitness Determination. The Medical Examination Report was issued on February 11, 2014. The medical examiner Stephen Shuffler noted that after the Claimant's 7/15/13 injury, he has "limited gait and activity" and he is not yet released by his orthopedic surgeon, otherwise he would be qualified for re-certification (Claimant's Exhibit 8, p. 297-299). On February 14, 2014, the Arizona Department of Transportation sent the Claimant notice of his CDL revocation (Claimant's Exhibit 8, p. 300).

17. The Claimant saw Dr. Copeland again on March 4, 2014 and the Claimant reported that over the past 3 weeks he had regressed without physical therapy. The Claimant also reported an inability to stand for long periods of time. Dr. Copeland recommended continued physical therapy (Claimant's Exhibit 2, pp. 29-31). The Claimant saw Ms. Herrera at Dr. Gustafson's office 2 days later on March 6, 2014 reporting that his left ankle remained his primary problem and that his right ankle was feeling great and "his left knee bursitis is almost completely resolved." Ms. Herrera noted that secondary to pain in the left ankle the Claimant was still having difficulty getting to full weight-bearing and she prescribed a walking cane (Claimant's Exhibit 4, pp. 164-166). RN Francini attended the medical appointment on March 6th with the Claimant and his wife and noted that the knee was better but there was still some swelling. The Claimant was walking with 2 crutches and RN Francini noted that the Claimant can walk without the crutches but any standing for more than several minutes causes pain and selling with the pain reaching 5/10 (Claimant's Exhibit 3, p. 101).

18. On May 8, 2014, the Claimant saw Dr. Copeland who noted that the Claimant was able to walk without crutches or a wheelchair, but the Claimant's wife did report that the Claimant could not walk very long without having to utilize his cane. Dr. Copeland suspected that the Claimant was having peroneal tendon irritation secondary to the hardware placed during surgery. He discussed a second surgery to remove the hardware and conduct an exploration of the peroneal tendon (Claimant's Exhibit 2, pp. 37-39). RN Francini attended the medical appointment with Dr. Copeland on this date and noted that the Claimant was walking without cane or crutches. He was wearing

ankle braces on both ankles and he reported that he can't go too long or too far without the cane. The Claimant also reported he has difficulty with stairs, especially descending them. The Claimant expressed concerns about his ability to return to truck driving. A heel wedge and Ritchy brace were ordered for the Claimant (Claimant's Exhibit 3, p. 108).

19. On May 12, 2014, Dr. Copeland requested authorization for left foot hardware removal, peroneal tendon exploration and lateral wall decompression (Claimant's Exhibit 2, p. 42; Respondents' Exhibit E).

20. On June 18, 2014, the Dr. Copeland performed the second surgical procedure on the Claimant's left lower extremity to remove the hardware and repair the peroneal tendon (Claimant's Exhibit 2, pp. 52-54; Respondents' Exhibit F). In the initial months after the second surgery, the Claimant was in a cast and was provided with a scooter so he was not weight bearing on the left ankle and foot (Claimant's Exhibits 2 and 4, pp. 56, 58, 177 an 185).

21. On October 3, 2014, Dr. Copeland noted the Claimant's left side was doing well but he was having increased pain in the right ankle. Dr. Copeland switched the Claimant's right ankle brace and gave him a diagnostic and therapeutic injection (Claimant's Exhibit 2, pp. 61-63; Claimant's Exhibit O). RN Nacole Williams attended this medical appointment with the Claimant and also noted the increased pain in the Claimant's right ankle and that this could be attributed to the Ritchie brace or from arthritis worsening in his joint. The RN also accompanied the Claimant to an office visit with PA-C Herrera on that same date and she noted the Claimant's work restrictions were standing and walking limited to 1 hour each per 8 hour shift, sitting limited to 6 hours and sedentary work only with no CDL driving (Claimant's Exhibit 3, p. 114).

22. On November 7, 2014, Dr. Copeland responded to questioning regarding the Claimant's prognosis and need future medical care. Dr. Copeland opined the Claimant was under postoperative care for the left ankle and appeared to be doing well. Dr. Copeland did not foresee future treatment for the left side other than potentially orthotics. As for the right ankle, Dr. Copeland opined that further imaging evaluation with CTs and/or MRIs might be warranted along with potential surgical intervention. Dr. Copeland noted that the Claimant was currently working with orthotic and bracing on the right side. In terms of the Claimant's ability to return to work, Dr. Copeland recommended an FCE because it was unclear if the Claimant's limitations with climbing, loading and chaining up would prevent him from returning to his regular truck driving duties (Claimant's Exhibit 2, p. 67; Respondents' Exhibit P).

23. On November 25, 2014, Dr. Copeland reported that the Claimant did very well with the right ankle injection provided on October 3, 2014 and that he felt it was still working. The Claimant also reported the left ankle was doing good at this point. Dr. Copeland felt that the Claimant was at MMI from his standpoint, but noted that the Claimant may require future medical treatment. However, at this point the Claimant

wished to continue with conservative care (Claimant's Exhibit 2, pp. 69-70; Respondents' Exhibit Q).

24. The following day, on November 26, 2014, the Claimant saw Dr. Gustafson who noted that Dr. Copeland felt the Claimant was at MMI and scheduled no further follow up. The Claimant was not wearing any braces, but was wearing a wedge with his right foot that the Claimant stated was helpful. The Claimant described his right ankle pain as aching and considered it to be minimal, intermittent and improved with time. The Claimant rated the pain at 0/10. The Claimant described his left ankle pain as aching and minimal as well and also felt it was intermittent and minimal with a pain level of 0/10. Dr. Gustafson left the Claimant's work restrictions limited to 1 hour per day of walking, 1 hour per day of standing and 6 hours per day of sitting. He was permitted to return to sedentary work restrictions but no CDL driving. The Claimant was scheduled for a Functional Capacity Evaluation (FCE) in the next couple of days and then scheduled to return to Dr. Gustafson for an impairment rating (Claimant's Exhibit 4, pp. 193-195, Respondents' Exhibit R).

25. The Claimant underwent an FCE on December 1, 2014. The listed work restrictions of 1 hour per day of walking, 1 hour per day of standing and 6 hours per day of sitting appear to be part of a summary of medical records in this case about the Claimant's condition and taken from the last visit with Dr. Gustafson. The Claimant was able to push and pull a sled with a weight of 50 lbs. for a distance of 40 feet. He was able to carry 30 lbs. of weight for a distance of 40 feet. The Claimant was able to lift 60 lbs. of weight from the floor to his waist. The Claimant only completed one repetition of a squat to 80 degrees and did not want to continue due to pain. The Claimant completed 40 steps up and 30 steps down and then did not want to continue due to discomfort. On the ladder, the Claimant completed 10 steps up and 10 steps down before he wished to discontinue due to discomfort. The Claimant did not want to perform the balance/SLS test due to fear of pain and swelling (Claimant's Exhibit 4, pp. 198-201; Respondents' Exhibit S).

26. The Claimant saw Dr. Gustafson the following day on December 2, 2014 to review the FCE results and for an impairment rating. Dr. Gustafson noted that the Claimant's pain level for the right and left ankles was now 1/10 and there was some swelling as a result of the FCE the day before. Dr. Gustafson performed range of motion measurements and provided the Claimant with a 10% whole person impairment rating for both lower extremities based on range of motion deficits for his bilateral ankles. The scheduled impairment ratings for each extremity (if not converted to a whole person impairment) were 16% for the left lower extremity and 11% for the right lower extremity. Dr. Gustafson opined the Claimant's need for maintenance care may include follow up visits with Dr. Copeland and Work Partners, possible repeat surgeries, possible injections, a one year gym pass and further physical therapy up to 4 visits per year. Having reviewed the FCE report and conducting a physical examination, the only recommended activity restrictions imposed by Dr. Gustafson was "NO jumping off of anything higher than 12 inches." This was the only restriction listed in the both the

narrative medical report as well as the closing Physician's Report of Worker's Compensation Injury sent to the injured worker and to the Insurer. There were no limitations placed on standing, walking or climbing stairs. There was no restriction requiring the Claimant to elevate his lower extremities. Dr. Gustafson also checked the box on the form that the Claimant was able to return to modified duty as of 12/2/2014 (Claimant's Exhibit 4, pp. 202-207; Respondents' Exhibit T).

27. On January 20, 2015, the Respondents submitted a Final Admission of Liability admitting for medical expenses to date, temporary total disability payments of $38,390.40 and permanent partial disability based on a 16% scheduled impairment of the left lower extremity and an 11% scheduled impairment of the right lower extremity per the medical report of Dr. Gustafson dated December 2, 2014. Respondents calculated the PPD payment as $15,449.61(Respondents' Exhibit Z).

28. On February 24, 2015, the Claimant filed an Amended Application for Hearing on the issues of Average Weekly Wage, Disfigurement, Temporary Total Disability benefits and Permanent Total Disability benefits. On that same day, the Respondents filed an Amended Response to the Claimant's original January 21, 2015 Application for Hearing endorsing the additional issue of offsets (Respondents' Exhibits AA and BB).

29. On March 25, 2015, the Claimant was seen by Dr. Tashof Bernton for an independent medical evaluation. Dr. Bernton took a history from the Claimant and the mechanism of injury reported was consistent with prior reporting in the medical records (Respondents' Exhibit U, p. 55). Dr. Bernton also reviewed the medical records, including diagnostic imaging, physician records, surgical records, physical therapy records and partial records from the functional capacity evaluation (Respondents' Exhibit U, pp. 55-57). The Claimant described his current condition to Dr. Bernton as aching in the left ankle and aching with pain in the right ankle. The Claimant reports this is worse with standing or walking and better with elevation. The Claimant advised that he has not returned to work since his injury, but currently he will go out to his garage and sit, making furniture out of wood and welding horseshoes. The Claimant advised Dr. Bernton that he does not currently have a CDL but that he does drive. The Claimant reported concerns when he has to use his right foot for quick braking. The Claimant reported he was not taking any medications as of the date of the examination with Dr. Bernton (Respondents' Exhibit U, p. 57). The Claimant also reported balance problems due to the injury and memory problems, to the extent that when his pain is increased, it affects his memory and thinking (Respondents' Exhibit U, p. 58). On physical examination, Dr. Bernton noted that the Claimant had an irregular gait when barefoot that is improved when he wears shoes. Dr. Bernton also noted that the Claimant had mild patellofemoral crepitus on examination of his knees, left greater than right with a minimal prepatellar bursal effusion bilaterally (Respondents' Exhibit U, p. 58). Dr. Bernton noted that, as of the date of the IME, the Claimant had some persistent, mild swelling and expected limitation of motion on the left following his subtalar arthrodesis. Dr. Bernton noted that radiographic studies document appropriate healing, physical

therapy notes indicate good progress, and physician notes indicate “minimal” pain. Dr. Bernton noted that the Claimant currently takes no medication and no tenderness was present on examination. Dr. Bernton found the recommended limitations from the FCE of 1 hour per day walking, 1 hour per day standing and up to 6 hours per day of sitting, to be excessive and inconsistent with physical therapy notes. Rather, Dr. Bernton opined that the Claimant “has no other significant restrictions beyond those associated with his ankles.” Dr. Bernton opined that

> reasonable restrictions based on the nature of the patient’s injury, review of medical records, physical examination, and history from the patient include at least up to four hours per day of standing or walking. Although, the patient should have a five-minute break per hour, and, in addition, walking on uneven surfaces should be limited to no more than five minutes per hour, and the patient should not be doing ladder climbing or shoveling. Lifting in a seated position is limited to 50 pounds occasionally and 25 pounds frequently. The patient should not be carrying over 20 pounds occasionally. The patient should not be shoveling or ladder climbing or working in areas where balance difficulties may create safety risks. The patient should be limited to one flight of stairs per hour. In addition, he should not be required to run on the job (Respondent’s Exhibit U, pp. 59-60).

Dr. Bernton agreed that it was not feasible for the Claimant to return to commercial over-the-road driving due to the necessary job duties this work entails. However, Dr. Bernton found the Claimant should be able to drive a regular vehicle with power brakes (Respondents’ Exhibit U, p. 60).

30. The Claimant was evaluated by Robert Van Iderstine, CRC, for an evaluation of the Claimant’s ability to earn wages in the labor market where he resides. Mr. Van Iderstine prepared a written vocational evaluation report dated March 20, 2015. Mr. Van Iderstine interviewed the Claimant by telephone and he reviewed medical records from Dr. Gustafson, Dr. Copeland and Erica Herrera, PA. He also reviewed the Claimant’s Social Security Administration application in vocational rehabilitation industry literature (Claimant’s Exhibit 10, p. 308; Respondents’ Exhibit V, p. 61). Mr. Van Iderstine reported that the Claimant currently has a valid AZ drivers’ license and reliable transportation although he no longer has his CDL. Mr. Van Iderstine noted that the Claimant advised him that he used to hunt, fish, camp and hike prior to his work injury and that he cut logs and built furniture which he sold and provided to friends. However, currently, the Claimant advised he is only able to be active for 30-45 minutes at a time before he needs to sit and break for 15-20 minutes. He and his wife have a home computer, but the Claimant advised he only plays Solitaire or occasionally reads Facebook information about family and friends. The Claimant has a high school degree and obtained additional training on-the-job with his work experience (Claimant’s Exhibit 10, p. 309; Respondents’ Exhibit V, p. 62). Mr. Van Iderstine noted that the Claimant’s prior vocational history that included truck driving and working as an oil and gas driller.

He worked for a number of different companies. The Claimant also worked as an owner-operator of a trucking company operating commercial vehicles on several occasions (Claimant's Exhibit 10, pp. 310-311; Respondents' Exhibit V, pp. 63-64). In discussing the Claimant's medical records, Mr. Van Iderstine did not address the permanent restrictions of no jumping over 12 inches, and did not reference such restrictions in his report. Instead, he based his analysis on the temporary restrictions of one hour standing/walking (Claimant's Exhibit 10, pp. 312-313; Respondents' Exhibit V, p. 65-66). He noted that the Claimant lost his CDL and had recently been awarded SSD benefits due to his inability to return to his past employment (Claimant's Exhibit 10, p. 311 and 314; Respondents' Exhibit V, p. 64 and 67), but did not comment on the fact that these decisions were made at a time when the Claimant was in a wheelchair or otherwise not weightbearing, and was much more disabled than he was at the time of his vocational evaluation, over one year later. In his written report, Mr. Van Iderstine opined that the Claimant's prior employment did not provide transferrable skills to sedentary employment and that, to obtain employment, the Claimant would have to find an entry level, unskilled/semi-skilled sedentary job opening (Claimant's Exhibit 10, p. 315; Respondents' Exhibit V, p. 68). Mr. Van Iderstine mentioned some general positions in his "labor market research" section, but provided only minimal detail as to the job requirements for these positions, before finding that such positions were not consistent with the restrictions the Claimant was under as Mr. Van Iderstine understood them (Claimant's Exhibit 10, pp. 316-317; Respondents' Exhibit V, pp. 69-70). Mr. Van Iderstine reiterated that the physical limitations upon which he based his report were the one hour walking and one hour of standing and six hours a day of sitting restrictions, which placed the Claimant in the sedentary work category. Mr. Van Iderstine was unable to find any positions in the commutable labor market of Kingman, Arizona (Claimant's Exhibit 10, p. 318; Respondents' Exhibit V, p. 71). Nowhere in this initial March 20, 2015 written vocational evaluation does Mr. Van Iderstine address any personality traits or characteristics that would be an impediment to the Claimant obtaining and maintaining employment. Rather, the opinions reached in the written report appear based solely upon the Claimant's physical limitations and lack of transferable skills to a sedentary occupation (Claimant's Exhibit 10; Respondents' Exhibit V).

31. The Claimant was evaluated by Patricia Anctil, CRC, CDMS, CCM, for an evaluation of the Claimant's ability to earn wages in the labor market where he resides. Ms. Anctil prepared a report dated April 14, 2015 with her findings (Respondents' Exhibit W). Ms. Anctil met with the Claimant, his wife and his attorney at his attorney's office in Grand Junction, CO for an interview and to gather data for the assessment. Prior to that meeting, Ms. Anctil reviewed medical records from Dr. Gustafson, Dr. Copeland, Erica Herrera, PA, Nacole Williams, RN, physical therapy records, imaging/diagnostic records, surgical records, the Claimant's Response to Interrogatories, the FCE, the Claimant's application for SSDI benefits, and the March 20, 2015 report of Mr. Van Iderstine. Subsequent to the meeting, Ms. Anctil reviewed Dr. Bernton's March 25, 2015 IME report (Respondents' Exhibit W, p. 76). In summarizing the extensive medical records, Ms. Anctil noted that the Claimant

sustained injuries to both of his ankles and underwent surgical procedures on the left ankle, but has not undergone any surgery on his left ankle (Respondents' Exhibit W, p. 77). She noted that, as of the impairment rating with Dr. Gustafson on December 2, 2014, the Claimant reported pain in his bilateral ankles at a level of 1/10 and that the whole person impairment rating was 10%. She noted the Claimant may need follow up care including visits with Dr. Copeland, possible repeat surgeries and possible injections along with a gym pass and limited physical therapy (Respondents' Exhibit W, p. 78). Ms. Anctil also summarized Dr. Bernton's report, noting that the Claimant had some persistent, mild swelling and expected limitation on the left side following surgery with radiographic studies documenting appropriate healing and physical therapy notes indicating minimal pain (Respondents' Exhibit W, p. 79). Per the Claimant's interview with Ms. Anctil, she noted that the Claimant felt that physical therapy helped somewhat but he is no longer doing a home exercise program since about one month after he stopped physical therapy since he didn't think it seemed to help. While the Claimant acknowledged that he was more independent now that following the initial injury when he was in a wheelchair, including the ability to walk a little bit, he reported that there was little improvement and he cannot walk very good. The Claimant also reported aching in his ankles, greater on the left than the right (Respondents' Exhibit W, p. 79). The Claimant also reported right wrist and left knee pain due to the time period that he was crawling on his hands and knees while living at his daughter's home which is not handicap-accessible. The Claimant acknowledged that the wrist and knee pain is improving and he is no longer using a cane, which resulted in improved right wrist symptoms (Respondents' Exhibit W, p. 80). In terms of physical capacity, Ms. Anctil noted that Dr. Gustafson opined on December 2, 2014 that the Claimant's work status was restricted duty and his restrictions were, "NO jumping off anything higher than 12 inches." She also noted that Dr. Gustafson signed off on the December 1, 2014 FCE (Respondents' Exhibit W, p. 82). Ms. Anctil also noted that Dr. Bernton commented on the recommended limitations set forth in the FCE of "one hour per day of walking, one hour per day of standing, and up to six hours per day of sitting." Ms. Anctil noted that Dr. Bernton stated that, "the basis for this is not available for review, and these restrictions seem both excessive with respect to the nature of the patient's injuries and complaints and healing and inconsistent with the physical therapy notes." Ms. Anctil further notes that Dr. Bernton found that reasonable restrictions include, "at least up to four hours per day of standing or walking" with 5 minute breaks each hour, limits on walking on uneven surfaces and no ladder climbing or shoveling with lifting and carrying restrictions and limits on climbing stairs (Respondents' Exhibit W, p. 83). As part of her report, Ms. Anctil also noted and considered various additional factors, such as the Claimant's activities of daily living, socioeconomic factors, the Claimant's vocational and employment history, his vocational interests and his avocational interests (Respondents' Exhibit W, pp. 85-92). Using the physical capacity information from Drs. Gustafson and Bernton, along with Ms. Anctil's transferable skill analysis, Ms. Anctil identified some occupations at the sedentary work level for the Claimant, including: order clerk, surveillance-system monitor, machine operator, bench hand, and assembler (Respondents' Exhibit W, p. 92). Per her labor market research in the Claimant's commutable labor market, Ms. Anctil identified specific positions including receptionist, general clerk and attendance

clerk with the Kingman Unified School District 20. She also identified a security guard position at a microelectronics manufacturing company, front desk clerk positions at 2 different hotels, and telework-customer service/surveyor positions (although these positions required fairly substantial fees for services needed in order to obtain the telephone/customer service/surveyor positions) (Respondents' Exhibit W, pp. 93-97). Ms. Anctil described the Claimant's skills as including "supervising and instructing employees, basic computer skills and hunt and peck typist." She noted that the Claimant, "was pleasant, had a sense of humor and was personable during our meeting." She felt that if he were to increase his computer skills, he would increase his employability. However, even without this, she opined that, taking the opinions of Dr. Gustafson and Dr. Bernton into account regarding the Claimant's physical capacities, there were occupations and positions available that represented some, but not all, of the potential employment for the Claimant within his residual functional capacities, education and skill level in his commutable labor market that would provide him with a wage (Respondents' Exhibit W, p. 100).

32. At the hearing the Claimant testified that his work injuries included fractures in his bilateral lower extremities. He underwent surgeries on the lefts side but not on the right. During recovery from surgery, the Claimant testified that he had to crawl around on his hands and knees to get around and get to the bathroom because he couldn't use a wheelchair in the house. He crawled until he was able to use crutches. As a result of this crawling, the Claimant testified that he has bursitis in his knee and his right wrist is "all goofed up" and he can't move it well or grip anything. He testified that his current lower extremity symptoms include left foot numbness that goes half-way up his shin and left foot swelling and irritation. As for his right foot, the Claimant testified that every once in a while he gets a sharp pain, like someone is stabbing him with a knife. He also testified that due to balance problems, he has a hard time getting around. The Claimant testified that he can only walk or stand at 15-20 minute intervals, sometimes less, or his foot becomes irritated and numb. He feels that the longest he can stay up on his feet is 30 minutes. When asked why the Claimant needed to take his shoe off during the hearing, the Claimant testified that "it feels like it's on fire." The Claimant testified that he has concerns with driving a vehicle because he doesn't know if he can take his right foot off the throttle and brake fast enough if he had to react quickly. The Claimant disagreed with Dr. Bernton's assessment of his ability to drive because he does not know if he could stop suddenly or continue to apply pressure to a brake if the sharp pain in his right foot is happening. He testified that he generally has his wife drive him everywhere he needs to go. The Claimant testified that the reason he does not use a cane to assist with walking is that it causes him too much wrist pain. The Claimant testified that his pain levels are generally lower in the morning, but increase over the course of the day, depending on his activity level. At the end of the day, his pain level is about 3-4/10. During the day, the Claimant elevates his feet because it relieves some of the pain. At night, he generally sits and watches TV while keeping his feet up. The Claimant testified that he does not take any pain medications because he does not want to become addicted to it and he takes baby aspirin very infrequently. The Claimant disagrees with Dr. Bernton's assessment of his physical capabilities,

specifically the Claimant does not agree he can be on his feet for up to four hours per day, that he could climb 1 flight of stairs per hour or that he could push or pull a sled weighing 40 pounds. The Claimant also testified that he disagrees with Dr. Bernton's opinion that his feet were not tender, stating that he screamed out when Dr. Bernton touched his feet. The Claimant testified that he does no household chores and does not pay bills as his wife takes care of all of that. He testified that he just "barely graduated" from high school and he cannot really operate a computer. He does not turn the computer on and get the system booted up, his wife does that for him. He only uses the computer to play spider solitaire, but he can't play for very long since it hurts his wrist. He does not turn the computer off after he is done playing solitaire. He can't do internet searches and has not typed letters on the computer or accessed any other software programs or filled out forms on the computer or sent an e-mail. The Claimant testified that he could not presently get certified to obtain a CDL due to physical limitations.

33. In reviewing the potential employment positions identified by Ms. Patricia Anctil in her report, the Claimant testified that he could not perform any of the jobs she identified because he has never used office equipment, is not familiar with any office software, has poor communication skills and gets irritated on the phone and also cannot hear very well, cannot fill out purchase orders and is not good at filing papers. The Claimant testified that when he had to complete paperwork or log books in prior employment positions, he would have other people help him. The Claimant also testified that he would have to change positions and elevate his feet to relieve pain while at work and he is limited in the amount of walking he is able to tolerate. He did not believe he could watch TV monitors in a booth because he would lose concentration thinking about his foot. As for increasing his computer skills, the Claimant testified that his wife and children tried to teach him how to use a computer but he would get frustrated and walk off. He testified that he has looked in his local newspaper for jobs but does not see anything listed that he can do. He also testified that if he was in pain, he cannot deal with people and he might fly off the handle.

34. On cross-examination, the Claimant testified that he is not having any issues with his back and that when he stood up several times during testimony it was to get circulation to his foot. The Claimant also testified that he understands his activity restrictions to be limited to 1 hour walking, 1 hour standing, 6 hours sitting, and no jumping greater than 12 inches. Also on cross-examination, the Claimant testified that he has previously performed vehicle repair work in connection with prior employment and he conducted pre-trip inspections of vehicles, completed checklists for pre-trip inspections and filled out log books. He testified that he was never fired from any employment position that he held. The Claimant also testified that he worked in the drilling industry operating a drilling rig, taking care of the rig, instructing roughnecks, keeping the rig cleaned up and paperwork. The Claimant agreed that he can read and write, perform basic arithmetic and count change, although he feels he has issues with the arithmetic and counting change. The Claimant also agreed that he can use a telephone and testified that he has not been diagnosed with any learning disability. The Claimant testified that he believes he has less than average intelligence in the areas of

communication and electronics. He testified that he could not learn to operate electronics because he has a “hot temper.” The Claimant testified that when he is not at home, he goes to a casino to play bingo about 1 time per month for 3-4 hours max, he goes out with his wife to supper, he plays horseshoes, and makes furniture/woodworking. The Claimant testified that the last time he drove before the hearing date was in February. He testified that he does not do much yard work anymore, and that is generally limited to weeding. The Claimant testified that he listens to music and attends concerts but has not been to the movies and has not gone camping, hunting or fishing in a long time and he no longer does volunteer work. The Claimant testified that when he was reporting pain levels of 1-2/10 to medical providers prior to reaching MMI, it was because he was reporting these levels in the morning. However, by mid-morning or the afternoon of these days, his pain levels would have been up to 3-4/10. In referencing Respondents’ Exhibits G,I and T, the Claimant agrees that the medical appointments occurred at either 10:30 AM or 11:00 AM which would be mid-morning and he was reporting 0-1/10 pain levels. The Claimant acknowledged that at the time he obtained a favorable SSDI decision, he was in a wheelchair with one foot bundled up. He testified that he is a little better now, but, per his opinion, not that much.

35. On redirect, the Claimant reiterated that he can no longer perform many of the tasks that would be required by prior employment positions that he has held. As for his telephone abilities, the Claimant testified that he can’t hear very well so he gets angry and just hands the phone to his wife or if she’s not there, he just hangs up. As for past attempts to learn how to use the computer, the Claimant reiterated that he didn’t get too far due to his frustration level. With respect to future surgery, the Claimant testified that he would like to avoid surgery on the right ankle because he has been advised it will be more extensive that the left ankle surgery he already had and he doesn’t want to do it unless he can’t stand it anymore.

36. Over the course of the hearing the Claimant exhibited some difficulty with walking and issues with his left foot and his wrist, although the times when the Claimant physically displayed activities indicating pain and/or discomfort were sporadic. The Claimant very actively engaged in behaviors indicating pain and/or discomfort for the first half-hour of his testimony. Then, he did not display such behaviors for over an hour in the middle of his testimony, then he engaged in the behaviors again for about 10 minutes, and then from about 11:45 AM until the hearing was concluded at 12:20 AM, the Claimant did not display as many behaviors indicating pain and/or discomfort. The ALJ specifically observed that at the commencement of his testimony, the Claimant removed his shoe and he had a slow and irregular gait as he walked up to the table in the Grand Junction courtroom to testify (approx. 9:25 AM). At approximately 9:35 AM, the Claimant requested to use another chair so he could elevate his left foot. He appeared to have difficulty walking as he got the chair. At approximately 9:45 AM, the Claimant stood up for about 1 minute or less and lifted his feet up and down. At approximately 9:50 AM, the Claimant was fidgeting in his chair and, on and off, he began massaging his wrist or supporting his wrist with his other hand. At 11:36, the Claimant stood up for about 1 minute, lifting his foot up and down while standing. At

approximately 11:42, while sitting, the Claimant moved his foot around and adjusted his knee.

37. The Claimant's wife, Julia Morgan, testified by telephone deposition on May 19, 2015 (Depo. Tr., Julia Morgan, May 19, 2015, p. 4). She has been married to the Claimant for 33 years and they currently reside in Golden Valley, Arizona (Depo. Tr., Julia Morgan, May 19, 2015, p. 5). Ms. Morgan testified that she was aware that the Respondents were asserting a $10,505.00 overpayment based on the Claimant's receipt of SSDI payments. She testified that no one asked if the Claimant had received SSDI and, if they had, she and her husband would have advised the Workers' Compensation insurer about the SSDI award (Depo. Tr., Julia Morgan, May 19, 2015, p. 6). Ms. Morgan testified that the only source of income for their household is the $1,945.00 per month SSDI benefits and they have no savings account. She testified that the mortgage is $1,025.00 per month, utilities and insurance total about $462.00 per month and their food bill averages about $500.00 per month. The Claimant and his wife also have a credit card with a $400.00 balance for which they make payments each month of about $25.00. Ms. Morgan testified that if the Claimant were required to enter into a repayment with the Workers' Compensation carrier, they could not pay the $10,505.00 in a lump sum and does not know what monthly payment they could afford (Depo. Tr., Julia Morgan, May 19, 2015, pp. 6-10).

38. With respect to the Claimant's recovery process after the first surgery after his accident, Ms. Morgan recalled the Claimant had a rough time and had to crawl on his hands and knees between August 5, 2013 until October or November of 2013 because he was non-weight bearing on both feet (Depo. Tr., Julia Morgan, May 19, 2015, p. 11). Ms. Morgan attended all of the Claimant's medical appointments with him and has had ample opportunity to observe the Claimant

39. Ms. Morgan testified that she has seen the Claimant stand for maybe 15-20 minutes at any given time, but that after that he has to sit down and take a break. She sees him put his feet up every day. He will put his feet up off and on all throughout the day for about 15-20 minutes – long enough to ease the pain in his foot and then he will get up (Depo. Tr., Julia Morgan, May 19, 2015, p. 15). Ms. Morgan testified that she has concerns that the Claimant has underreported his pain levels to his doctors because he does not complain about his pain and "he wouldn't tell them if he was dying." On cross-examination, Ms. Morgan reiterated that her husband doesn't tell his doctors when he is in pain and sometimes won't even tell her (Depo. Tr., Julia Morgan, May 19, 2015, p. 16 and pp. 58-59). She later testified that even though she thought the Claimant was downplaying his pain to his doctors that she didn't correct this or say anything to the doctors because she let the Claimant handle that (Depo. Tr., Julia Morgan, May 19, 2015, pp. 61-63). Ms. Morgan further testified that the Claimant has issues with balance. Claimant will just be walking and all of a sudden he will lose his balance, and reach out for whatever is near him (Depo. Tr., Julia Morgan, May 19, 2015, p. 16). Ms. Morgan also testified that she has observed the Claimant having difficulty walking steps. He takes the steps one at a time, stepping up with one foot and

then the other on the same step all while holding onto the wall (Depo. Tr., Julia Morgan, May 19, 2015, p. 17-18).

40. Ms. Morgan was present for the Claimant's FCE. She observed that the Claimant had a really hard time completing the FCE and he pushed himself way too much. Mrs. Morgan explained that there was too much weight to start with and that Claimant forced himself to complete the tasks given during the FCE and even took ibuprofen that day, which is not typical. She testified how each of the exercises during the FCE were difficult for the Claimant and noted that it was a real struggle for the Claimant to complete each of the tasks. In the days following the FCE, Claimant had his feet up as much as he could and laid on their daughter's couch (Depo. Tr., Julia Morgan, May 19, 2015, pp. 18-21). Ms. Morgan disagrees with Dr. Bernton's opinion that the restrictions for the Claimant from the FCE are too restrictive. She testified that she lives with the Claimant and she knows what his limits are. There is no way that the Claimant could stand up to 4 hours in an 8 hour day. The most she has seen the Claimant stand in 8 hours is 30 minutes. When the Claimant pushes himself and stands too much, the next day the Claimant's foot will swell and cause him constant pain. For example, if the Claimant goes to the store with her, he will leave her in the checkout line to head to the truck because he cannot stand in line that long. And then, most of the time, she still beats him to the truck because he is so slow moving. Based on what she has observed, Mrs. Morgan does not believe the Claimant could climb down two flights of stairs in an hour. Coming down stairs is really hard for the Claimant (Depo. Tr., Julia Morgan, May 19, 2015, pp. 21-23). Ms. Morgan testified that she attended the appointment with the Claimant and Dr. Bernton. Ms. Morgan recalled Dr. Bernton feeling the Claimant's foot during the exam and Dr. Bernton pushing on the Claimant's foot and he yelled out when Dr. Bernton pushed on his foot and that the doctor then apologized (Depo. Tr., Julia Morgan, May 19, 2015, p. 22).

41. Ms. Morgan testified that she and the Claimant previously owned a water hauling business. Her role was to do all of the paperwork and bookwork and the Claimant drove a truck and did the mechanics on the truck. Ms. Morgan did observe the Claimant's customer service skills in the course of owning their own business and she describes them as "nonexistent." She usually dealt with the customers because the Claimant did not have the patience or tolerance to deal with people. The Claimant does not have any phone skills and is hard of hearing. Ms. Morgan testified that the Claimant shouts into the phone, he is impolite and uncourteous and comes across as very rude (Depo. Tr., Julia Morgan, May 19, 2015, pp. 23-25).

42. In regard to computer use, Ms. Morgan testified that the Claimant does not get on the computer very often and when he does it is to play one game on the computer and then gets off because it hurts his wrist. She describes the Claimant's computer skills as nonexistent, as the Claimant does not know how to navigate a computer or use different programs on a computer. She has tried teaching Claimant how to use a computer for 20 years and he does not retain any of it. Per Ms. Morgan's testimony, the Claimant can click on an icon, but cannot navigate or close it from there.

Ms. Morgan states that to look something up on the internet, she has to get to the location on the internet. The Claimant does not know how to send an email and Ms. Morgan has never seen him type a letter or try to use a letter typing program. When she has tried to teach the Claimant how to use a computer, Ms. Morgan testified the Claimant "gets mad, he curses at it and yells at it, and he's done. He just stomps off and he's done with it. Ms. Morgan takes care of any forms that have to be filled out on the computer. Ms. Morgan strongly disagrees with the opinion of Ms. Anctil that the Claimant has basic computer skills. Ms. Morgan testified that the Claimant is also unable to handle customer service phone calls because he is hard of hearing and he doesn't understand what the person on the line is saying to him, both of which frustrate him and he hands the phone off to her. Ms. Morgan also testified that the Claimant cannot successfully send a text message. Mrs. Morgan has tried to teach him that as well and Claimant just pushes the wrong buttons and cannot seem to ever get it to work (Depo. Tr., Julia Morgan, May 19, 2015, pp. 26-30).

43. Ms. Morgan reviewed the report of Ms. Anctil and disagrees that her husband can perform jobs identified by Ms. Anctil such as an attendance clerk and hotel clerk. She testified that she believes the Claimant is not the type of person to deal with the public on a daily basis. He does not have the tolerance or patience for rude or disrespectful people and she believed the Claimant would probably smack the first kid that was disrespectful to him (Depo. Tr., Julia Morgan, May 19, 2015, p. 30). In addition, she has seen the Claimant try to use standard office equipment and she testified that it doesn't usually go well because he does not comprehend office equipment - he has tried and he has never been able to do it (Depo. Tr., Julia Morgan, May 19, 2015, pp. 31-32 and 48). While Ms. Anctil described the Claimant as pleasant, with a sense of humor and personable in her report, Ms. Morgan stated that is not how he usually comes across with the public. Specifically, Ms. Morgan testified that, "most people, I think their first impression is probably that he's a real jerk" and that he has a quick temper. Ms. Morgan testified that she has seen her husband throw his cell phone across the room and storm out because he can't figure out how to get into it with a password. She testified that she has also seen him break a glass coffee table by slamming a television remote onto it when it did not work the way he thought it should. She also testified that she has seen the Claimant throw a hammer through the wall of the garage (Depo. Tr., Julia Morgan, May 19, 2015, pp. 32-34). On cross-examination, Ms. Morgan agreed that the Claimant coming across like a "jerk" is a longstanding trait that was pre-existing to the Claimant's work injury. Nevertheless, Ms. Morgan also agreed that the Claimant has remained gainfully employed the entire time that she has been with him (Depo. Tr., Julia Morgan, May 19, 2015, pp. 40-41) and he has never been fired from any jobs (Depo. Tr., Julia Morgan, May 19, 2015, p. 42). On re-direct examination, Ms. Morgan testified that the Claimant was able to sustain employment in spite of his personality and demeanor because he was a good, dependable, hard worker (Depo. Tr., Julia Morgan, May 19, 2015, p. 66).

44. As for the hotel clerk position, Ms. Morgan testified that her husband could not perform this job because, "the first person that would walk in there that did not

speak English, [the Claimant] would have an issue with it" because "if [the Claimant] can't understand anybody, he gets really frustrated" and "if there's a lot of people talking at the same time, no, he does not do well" (Depo. Tr., Julia Morgan, May 19, 2015, pp.34-35). Other issues with the hotel clerk position would be that he could not work the computer system and answering the telephone would be a huge issue because of his hearing problem (Depo. Tr., Julia Morgan, May 19, 2015, pp. 35-36). Also, the Claimant is unable to work in a space if it is too small because he needs room to get his composure. The Claimant does not do well moving side to side or step backwards. When Claimant has to get up and down, he is very slow. And once he stands, he needs a few seconds to make sure his feet are going to hold him up before he takes a step.
Before the Claimant starts going, after being in a seated position, he has to make sure that he is stable on his feet (Depo. Tr., Julia Morgan, May 19, 2015, p. 36). Ms. Morgan also testified that she does not believe her husband could perform the parking lot monitor job identified by Ms. Anctil either. She testified this is because the Claimant cannot walk without needing to sit down and rest. Further, the Claimant would have to hold onto the cars to balance himself (Depo. Tr., Julia Morgan, May 19, 2015, p. 37). Ms. Morgan testified that she has looked in the newspaper for jobs that the Claimant could perform and saw nothing in the paper he could do. (Depo. Tr., Julia Morgan, May 19, 2015, p. 38). Prior to the Claimant's injury, Ms. Morgan testified that the Claimant was very handy around the house and took care of everything. Ms. Morgan states that now the Claimant cannot do most of it because of his feet (Depo. Tr., Julia Morgan, May 19, 2015, pp. 46-47). In spite of the fact that Ms. Morgan concedes that her husband used to be handy and mechanical, she testified that she still does not believe that the Claimant could learn to operate general office equipment (Depo. Tr., Julia Morgan, May 19, 2015, p. 48).

45. The Claimant's daughter Chelsea O'Conor also testified by deposition on May 19, 2015 (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 4). Ms. O'Conor testified that the Claimant stayed at her home after his injury and through two surgical procedures. While he stayed with Ms. O'Conor, she testified that to get around the house the Claimant would either crawl on his hands and knees or he was in a wheelchair (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 5). Ms. O'Conor has had opportunities to see the Claimant since he moved back to Kingman, AZ and he has stayed again at her house. When he was at her house in the six months prior to her deposition, Ms. O'Conor testified that the Claimant is not very active, mostly sitting on the couch watching TV or sitting out on the deck. She has only seen him on his feet for 15-20 minute timeframes, and usually not that long. He also moves slowly getting up from a seated position and has issues with balance (Depo. Tr., Chelsea O'Conor, May 19, 2015, pp. 6-7). Ms. O'Conor testified that in the six months prior to her deposition, she has not observed the Claimant do anything that he used to do before the injury such as working on his vehicles or his house or doing yard work (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 9). Ms. O'Conor also testified that the Claimant does not deal well with talking to sales people or customer service representatives and he gets upset very fast, especially if someone is rude (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 11). Ms. O'Conor testified that she has tried to teach her father how to use a

computer for the better part of her life and “he just does not get it.” He has difficulty with the steps required and he gets lost, upset and frustrated and then “he’s just done” (Depo. Tr., Chelsea O’Conor, May 19, 2015, pp. 11-12). Regarding the Claimant’s communication skills, Ms. O’Conor testified that except for friends and family, he does not try to communicate with people (Depo. Tr., Chelsea O’Conor, May 19, 2015, p. 15).

46. The Claimant’s son Chad Morgan also testified by deposition on May 19, 2015 (Depo. Tr., Chad Morgan, May 19, 2015, p. 4). In the six months prior to his deposition, Mr. Chad Morgan has had opportunities to observe the Claimant and he testified that after about 4-5 minutes of activity, the Claimant is looking for a place to sit down (Depo. Tr., Chad Morgan, May 19, 2015, p. 5). Mr. Chad Morgan is a diesel mechanic and is also familiar with his father’s ability to work on vehicles. He testified that the Claimant’s abilities are at the “maintenance level” and not up to a “technician level.” Moreover, Mr. Chad Morgan testified that since the Claimant’s injury, he would not even be able to stand and balance and lift 50 pounds on a regular basis, so the Claimant would not be able to work on a daily basis even at the maintenance level (Depo. Tr., Chad Morgan, May 19, 2015, pp. 6-7). In addition, Mr. Chad Morgan testified that the new technology and electrical for trucks now is very different from the 1997 Kenworth that his father used for his prior business (Depo. Tr., Chad Morgan, May 19, 2015, pp. 7-8). Mr. Chad Morgan is familiar with the job position of truck service advisor and testified that it is a job that requires being on your feet almost 100 percent of the time, assisting less experienced technicians and requiring that they physically assist with repairs. He also testified that the job requires customer service skills, including the ability to deal with irate customers. Based on the level of technical ability required, the physical requirements and the need to have customer service skills, Mr. Chad Morgan testified that this is not a job position that the Claimant could perform currently (Depo. Tr., Chad Morgan, May 19, 2015, pp. 8-12).

47. The Claimant’s son Brock Morgan also testified by deposition on May 19, 2015 (Depo. Tr., Brock Morgan, May 19, 2015, p. 4). Mr. Brock Morgan testified that he saw his father approximately two weeks after his work injury and the Claimant was not able to get around or do much of anything. Mr. Brock Morgan testified that although the Claimant had a wheelchair it was hard to get around in it and he watched his father crawl around on his hands and knees (Depo. Tr., Brock Morgan, May 19, 2015, pp. 6-7). In the six months prior to Mr. Brock Morgan’s deposition, Mr. Brock Morgan testified that he has not seen the Claimant stand or walk for more than 5 minutes at a time and he would have to sit down and put his feet up. He also testified that it’s hard for his father to get up from a seated position and he does not do this quickly (Depo. Tr., Brock Morgan, May 19, 2015, p. 7). Mr. Brock Morgan has observed various physical limitations for the Claimant in the six months prior to the deposition such as a lack of balance and need to hold on to things, difficulty getting in and out of a vehicle, and a difficulty walking up stairs (Depo. Tr., Brock Morgan, May 19, 2015, p. 8). Mr. Brock Morgan testified that he has a CDL and has had one for about 10 years. He testified that the Claimant would not currently be able to obtain a CDL at this point because he would not meet the physical requirements and wouldn’t have the ability or reaction time

to operate the brakes on a commercial vehicle (Depo. Tr., Brock Morgan, May 19, 2015, pp. 9-11). As for the Claimant's communication skills, Mr. Brock Morgan characterized them as "zero. He doesn't have any." In observing the Claimant deal with customer service situations, "it usually ends up with him cussing." Mr. Brock Morgan testified that the Claimant has a temper and a really short fuse (Depo. Tr., Brock Morgan, May 19, 2015, p. 12). Mr. Brock Morgan further testified that the Claimant is not very proficient on the computer because he types one finger at a time and he is not able to use a computer mouse correctly (Depo. Tr., Brock Morgan, May 19, 2015, p. 13). In the six months prior to the deposition, Mr. Brock Morgan has not seen his father stand up on his feet for four hours out of a day and he has less endurance (Depo. Tr., Brock Morgan, May 19, 2015, p. 13). On cross-examination, Mr. Brock Morgan testified that he does not consider the Claimant to be of below-average intelligence but he is not good with electronics. Mr. Brock Morgan testified that the Claimant can perform more complex tasks such as mechanical work on trucks, but that he just can't perform simple computer skills although his family has tried to teach him for 15 years (Depo. Tr., Brock Morgan, May 19, 2015, pp. 14-16).

48. On June 19, 2015, vocational rehabilitation counselor Robert Van Iderstine testified by deposition on behalf of Claimant. He testified that his process for performing a vocational assessment in Worker's Compensation cases includes an interview of the injured individual to get background information (education, training, work experience, skills, etc.) and the current family and community situation and to determine the appropriate labor market. He also uses the interview to help determine the injured worker's physical capabilities and he reviews medical records and independent evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 7-9). Mr. Van Iderstine testified that,

> Taking all of those things into account, I tried to develop a profile, a vocational profile, of the individual, and then utilizing that profile take a look at the labor market where the individual resides and say is there anything realistically that this person can qualify for and accomplish given all of the aspects of their profile, their age, their education, their training, all of the factors that would go into that, including the physical – their physical capabilities and limitations, and then determine, you know, what impact the injury and the resulting medical condition has on their employability.
> (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 9).

49. In reviewing the Claimant's FCE, Mr. Van Iderstine testified that it placed Claimant in a sedentary work category, with an inability to stand and walk for more than two hours in a day, as opposed to a light duty category (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 13). Mr. Van Iderstine testified that he assumed the work restrictions set forth in the FCE were the Claimant's permanent restrictions, and they were consistent with what the Claimant identified, and that is why he used them in his report (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 77-78). He stated that Claimant's

subjective reports that he could only stand for 30 minutes a day and then has to take a break for 15-20 minutes was a “big factor” that would preclude him from many jobs evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 15). He felt that Claimant’s need to elevate his foot during the day would be a “deal breaker” for some of the sedentary jobs evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 25). Mr. Van Iderstine’s ultimate conclusion is that the Claimant is not capable of finding and maintaining employment due to his age, prior work experience in the medium-heavy work categories and lack of customer service and computer skills evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 14-15). Mr. Van Iderstine testified that the Claimant’s only basic transferable skill was operation of a vehicle and he cannot drive, other than for very short periods of time (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 17). Mr. Van Iderstine testified that in his opinion, the Claimant does not have the technical and mechanical skills for a truck service writer position and he also could not stand for the required time, nor would he have the necessary customer service and computer skills for this position evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 18-19).

50. As part of his evaluation, Mr. Van Iderstine performed a labor market survey using the Mohave County, Arizona geographic area. He contacted the workforce center there and spoke with an employment counselor and looked at available jobs on the website for Arizona Work Connection. He noted positions including courtesy clerks, guest services, retail sales and cashiers but because these jobs required standing and walking, Mr. Van Iderstine opined that he didn’t believe the Claimant could perform these job positions (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 20-22). Mr. Van Iderstine also provided his opinion as the Claimant’s ability to perform various job positions that were identified by Ms. Pat Anctil in her written report. Addressing job positions Ms. Anctil had identified within the Kingman School District of receptionist and attendance clerk, Mr. Van Iderstine also opined that he did not agree that the Claimant could perform these jobs because they are clerical jobs revolving around interpersonal communication with people, customer service and computer skills which Mr. Van Iderstine does not see matching up with the Claimant’s overall profile and skill set (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 23-24). Due to a lack of customer service skills, lack of computer skills and limitations related to physical requirements of the job, Mr. Van Iderstine also disagrees with Ms. Anctil that the Claimant could perform the job position of hotel/motel clerk (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 27-28). Of the jobs identified by Ms. Anctil, Mr. Van Iderstine opined that the position of security guard or parking lot attendant “would probably be the closest jobs that he might have a capacity to accomplish,” but Mr. Van Iderstine still questioned the Claimant’s ability to function in these jobs. Mr. Van Iderstine questioned the ability of the Claimant to elevate his feet and noted that the Claimant’s compromised upper extremities would present a difficulty with the parking lot attendant position. Overall, Mr. Van Iderstine did not see that the Claimant could physically perform these jobs and maintain the degree of attention during the course of the day that would be required (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 28-29). On redirect examination, Mr. Van Iderstine again stated that the need to elevate his feet would preclude the Claimant from all

employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 76). Mr. Van Iderstine also disagreed with Ms. Anctil that the Claimant could perform assembly type job positions. He noted that these production assembly positions can be done from both standing and seated positions, but questioned the Claimant's ability to elevate his legs. Mr. Van Iderstine also opined that these positions require constant use of the upper extremities and if the Claimant' upper extremities are compromised then he would not be able to sustain this type of employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 29-30).

51. Mr. Van Iderstine reviewed Dr. Bernton's work restrictions that the Claimant was capable of performing work of standing and walking 4 hours out of an 8 hour work day, taking a 5 minute break each hour and climbing one flight of stairs per hour. Mr. Van Iderstine opined that these restrictions don't strictly place him into any one work category in terms of light, sedentary and medium, but rather a hybrid of all three. Nevertheless, Mr. Van Iderstine opined that the physical restrictions are only one part of the Claimant's profile and the lack of training, preparation and background must still be taken into account when locating and maintaining employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 32-34).

52. Mr. Van Iderstine opined that, in addition to physical restrictions, there are too many inconsistencies in the Claimant's profile that lead him to the conclusion that the Claimant cannot perform any of the semiskilled, light duty positions identified by Ms. Anctil (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 35). Specifically, Mr. Van Iderstine discussed that the production pace required by jobs like assembly or clerical work would be problematic as they would not allow the Claimant to do the work at his own pace with breaks as needed and this is another factor that would prevent the Claimant from sustaining employment on an ongoing basis (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 41-43). Mr. Van Iderstine does not believe that the Claimant is simply unmotivated to return to work because, in looking at the Claimant's work history up until his accident, he had a good work record. The accident took away the Claimant's ability to do the type of work he has done all his life and also took him away from recreational activities that he can no longer do. Mr. Van Iderstine characterizes this as a significant life change rather than a motivational issue (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 44-45).

53. Mr. Van Iderstine opined that the Claimant would have difficult performing jobs that involved computer use or work with office machinery based solely on the prior testimony from his family members that he lacked patience and would become frustrated when his family members would try to teach him computer skills. In fact, Mr. Van Iderstine noted that, other than the prior testimony, there is nothing in the records that would indicate that the Claimant could not learn basic computer skills if he were motivated to do so (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 52-55). Mr. Van Iderstine also concurred that there was nothing in the Claimant's prior work history or the testing that would indicate from an intellectual standpoint that the Claimant could not

learn to use basic office machinery Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 55-56).

54. On cross-examination, Mr. Van Iderstine agreed that he is not aware of any restrictions in the medical records that require the Claimant to elevate his foot (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 57). He also agreed that the medical records generally indicate that the Claimant was reporting pain levels of 0-1/10 and that he was doing well (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 63). He further testified that the specific work restrictions used for his labor market survey were limiting standing and walking to 1-2 hours per day and the need for positional changes (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 63-64). Mr. Van Iderstine testified that he found it appropriate to take the restrictions provided by physicians and the information provided by the injured worker and then attempt to identify jobs that are the closest match to restrictions identified consistently by both the injured individual and the doctor (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 64-65). Mr. Van Iderstine testified that he did not amend the restrictions provided by the treating or evaluating physicians, but rather he was just looking for consistencies (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 65 and pp. 79-80). Mr. Van Iderstine agreed that it is not appropriate to place a person in a permanent position based on temporary restrictions (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 66). Mr. Van Iderstine testified that he assumed the restrictions noted in the FCE summary sections were Claimant's permanent restrictions (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 77). Mr. Van Iderstine testified that he did not know how to correlate the apparent discrepancy between Dr. Gustafson signing the FCE with the more limiting restrictions one day and then the next day listing "no jumping over 12 inches" as the only explicit restriction. He indicated that he would like to have some clarification on that (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 86). When asked if his opinion as to vocational options would be changed if the only restriction was no jumping over 12 inches, he admitted that he "would change my opinion, yes." He went on to state that he would find that Claimant was not permanently and totally disabled based on such restrictions, even after including his intellect, age and all of the other factors and personal characteristics of Claimant to which he had previously testified (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 71). He testified that the Claimant could perform a cashier position identified by Ms. Anctil consistent with Dr. Bernton's restrictions and that that he "could probably do the job physically," although did remark of his lack of customer service skills. Likewise, Mr. Van Iderstine testified that the parking lot attendant could also be another position that he might find appropriate under Dr. Bernton's restrictions, discounting only the Claimant's age and lack of experience. He also stated that he was "sure there might be other positions [the Claimant] could perform" (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 72-75). On redirect examination, Mr. Van Iderstine clarified that if Dr. Bernton's restrictions were found to be applicable, the Claimant could physically perform positions identified by Ms. Anctil such as attendant or cashier, but his personality, lack of customer service skills and lack of computer skills would still be inconsistent with those job positions (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 87-90). Later, Mr. Van Iderstine did recall the 5-minute break per hour that Dr.

Bernton imposed and he testified that this also would be an impediment to obtaining and maintaining employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 91-92).

55. On July 2, 2015, vocational rehabilitation counselor Patricia Anctil testified by deposition on behalf of Respondents (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 4). As part of her evaluation, Ms. Anctil performed a vocational assessment and labor market survey. Prior to meeting with the Claimant, she reviewed the Claimant's medical records, performed a transferable skills analysis based on his work history and did labor market research in the Claimant's commutable market to assess the availability of jobs in his skill level and residual capacity (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 5-6). Ms. Anctil also interviewed the Claimant for approximately two hours regarding his current medical treatment, medications and current symptoms and pain levels (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 7). Ms. Anctil testified that the Claimant's subjective report of his condition was limitations for standing, walking, stairs and some balance issues, but he is able to bend and lift 35-40 pounds (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 8). Ms. Anctil testified that the Claimant reported to her that he is ambidextrous and alternates hands when engaged in hobbies such as woodworking and welding (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 9). She summarized his past education and aptitude levels, as well as vocational and volunteer work history, and noted his history included supervising up to five crew members, to whom he would delegate work and would "have to communicate with his employees to get the job done" (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 10-12). For the labor market survey, Ms. Anctil testified that she looked at the FCE report, Dr. Bernton's report, the Claimant's subjective report and Dr. Gustafson's records, and pulling all of that information together, she used restrictions of mostly sedentary duty, with more sitting than standing (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 13). So, overall she used restrictions that were more limiting than those provided by Dr. Gustafson and more in alignment with those of Dr. Bernton per his IME report (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 13-14). She considered the Kingman, Arizona area to be the Claimant's commutable labor market (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 14). In speaking with employers in this labor market, Ms. Anctil testified that she found 3 appropriate job openings with the school district in the area in addition to possibilities for other positions in that job market using Dr. Bernton's more restrictive limitations (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 15-18). Had she strictly used Dr. Gustafson's restrictions, Ms. Anctil testified that there would be more available positions for the Claimant in his commutable labor market (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 23). With respect to activity restrictions gleaned from the Claimant's FCE, Ms. Anctil testified that the FCE did not provide any permanent restrictions, and she agreed with Dr. Bernton that it was "not a complete FCE" (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 29).

56. On the issue of the Claimant's personality, Ms. Anctil testified that when she met the Claimant, "he was pleasant, he had a sense of humor, he was personable," and that she did not see anything in the records regarding his personality that would make him unable to find or keep employment (Depo. Tr., Patricia A. Anctil, July 2, 2015,

p. 29). She had no information that he had been terminated from jobs due to his personality, and also saw indication in the medical records that there were any emotional or personality concerns that would make it difficult for him to find or keep employment (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 29-30). In regard to the Claimant's statements that he had difficulty hearing and the suggestions that this would make customer service positions more difficult to perform, she responded that the Claimant stated to her that he previously used hearing aids, so she found that his hearing loss is correctable and commented that he did previously pass the CDL exam, which involved a hearing test. Ms. Anctil also testified that "people who are deaf find employment" (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 30-31).

57. Ms. Anctil also testified that the Claimant's testimony that he is unable to use or learn to use basic office equipment was not consistent with his vocational history, and also noted that the Claimant did not have a learning disability or head injury, and that his aptitude levels established that he should be able to use such equipment (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 31-32). Moreover, she testified the positions she identified for the Claimant did not require significant computer use and provided on-the-job training (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 32-33). When asked if the Claimant's relative inexperience with computers and office equipment would be an impediment to finding employment, she disagreed, and stated that "through the many years I've been doing this, employers will say to me, if a person is motivated and wants to work, that's the most important criteria to them" (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 34).

58. Ultimately, Ms. Anctil testified that it is her opinion that the Claimant is capable of finding and holding gainful employment in his commutable labor market (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 39). In this regard, she disagrees with Mr. Van Iderstine and, in reviewing his deposition transcript, opines that Mr. Van Iderstine may not have had all of the information she did regarding the Claimant's history and level of participation with volunteer groups such as the Shriners (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 38). As to the Claimant's claim that he needs to elevate his leg, Ms. Anctil testified that she did not see anything in the records indicating that that was an actual restriction, but that she was aware of security and desk jobs that potentially would allow this and she noted that the Claimant was able to elevate his leg while meeting with her (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 39). Ms. Anctil disagreed with Mr. Van Iderstine's opinion that the Claimant's age of 63 years was a "concerning factor;" she had spoken to numerous employers who hire people in their sixties and seventies, and many employers are seeking older workers to fill in employment gaps due to their "maturity, experience and ability to mentor younger workers," and that such issue "comes down to motivation" and "does the person want to work" (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 42-43).

59. On cross-examination, Ms. Anctil testified that she had no reason to believe that the Claimant was not being honest with her when they met for the interview that Claimant's counsel also attended (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 48).

Ms. Anctil conceded that the Claimant did advise her that he had not driven in the two months prior to her meeting with him (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 50). After considerable questioning, Ms. Anctil conceded that the Claimant would need to work on his computer skills to be considered for a customer service representative position (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 63-65). However, Ms. Anctil testified that positions such as receptionist, general clerk or attendance clerk are not classified as data entry positions and would require only occasional computer use (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 72-73). When questioned if the Claimant's vocational profile includes an individual who cannot stand or walk more than an hour out of an eight-hour work day, with a need to alternate positions and elevate feet, at the age of 63 with no computer experience, Ms. Anctil testified that the Claimant is not necessarily less likely to get a job position than someone who is younger with no physical limitations and computer and office experience. Ms. Anctil testified that there are many factors that go into a hiring decision and persons who are not skilled but are motivated to work are considered for sedentary, entry level positions (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 85-86). In speaking with a potential employer at the school district and discussing the Claimant's physical limitations, Ms. Anctil used the November 26, 2014 temporary restrictions used in the FCE of standing and walking for an hour each day, and also factoring in the Claimant's subjective report of not being able to stand and walk for more than 15-20 minutes and these restrictions would not prevent the Claimant from working in the receptionist or clerical positions at the school district as they are willing and able to accommodate people with disabilities (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 87-92). Ms. Anctil also testified that when she researched the position of parking lot attendant/security, the amount of walking and standing is an hour per less the whole day and there is no reason to believe the Claimant would not be able to elevate his feet during the day (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 98-101) although she noted there was not an open position at the time that she called.

60. On redirect examination, Ms. Anctil testified that she had not seen anything in the Claimant's records that restricted him or limited him from driving or that the Claimant had to put his feet up 15-20 minutes every hour (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 112-113 and p. 117). Ms. Anctil also testified that, based on the Claimant's prior work history and his aptitude levels, he has the capacity to learn basic computer skills and count change, and she finds that allegations that the Claimant would be unable to do so are inconsistent with his intelligence level (Depo. Tr., Patricia A. Anctil, July 2, 2015, p.115).

61. Dr. John Tashof Bernton testified by deposition on July 14, 2015 as an expert witness in the field of occupational medicine (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 4-5). Dr. Bernton testified that he performed an IME of the Claimant on March 25, 3015 (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 5). Dr. Bernton noted that the type of lower extremity injuries suffered by the Claimant have a fairly wide spectrum of outcome, but that the Claimant experienced a very good recovery from the injury and subsequent first surgery (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 7-8). After this, the Claimant underwent a second surgery for removal of the hardware

and reconstruction of the peroneal tendon which had torn. Dr. Bernton testified hardware removal was not a setback, but the tendon split tear was a setback, although Dr. Bernton would not characterize it as a "major" setback (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 9-10). Commenting on medical records about a month after the second surgery in which the Claimant described his pain as dull and mild with a pain level of 1/10, Dr. Bernton opined that this was a very good recovery (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 11). As for the right foot that was treated conservatively and allowed to heal without surgery, Dr. Bernton testified that, based on physical therapy and medical records, the Claimant experienced a good to excellent recovery (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 12-13). Dr. Bernton noted that per the Claimant's last PT session report dated October 1, 2014, the report indicated that the Claimant's left ankle strength was 5/5 with no pain and this meant that the Claimant had good strength and was able to move the foot appropriately, and did not have pain when he exerted full effort (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 15). The medical reports for the final visit with Dr. Copeland on November 25, 2014 and the November 26, 2014 medical note of Dr. Gustafson also indicated the Claimant achieved maximum medical improvement and the Claimant was providing a pain level report of 0/10 which equates with no pain (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 15-16).

62. After discussing the value of FCEs and how an FCE should be performed, including validity testing, Dr. Bernton opined that the FCE the Claimant underwent on December 1, 2014 was not a true FCE with no validity testing and there was a lack of objectivity in that the Claimant simply chose not to perform or discontinued certain tasks due to fear of pain and swelling (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 20-21). Dr. Bernton also opined that the "restrictions" listed in the FCE were not restrictions which were determined based upon the FCE. He testified that this is clear because they are in the "history" section and they don't relate at all to the data obtained during the FCE which demonstrated the Claimant could do tasks that were very inconsistent with the restriction (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 22-23). Dr. Bernton also noted that when Dr. Gustafson put the Claimant at MMI on December 2, 2014, the day following the FCE, the Claimant was reporting a pain level of 1/10 which is a very low level of pain for the day after performing all of the activities at the FCE, which emphasizes that the Claimant retains the capacity to perform the minimum functions detailed in the FCE report (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 23-24). Dr. Bernton also notes that Dr. Gustafson provided only one permanent work restriction when he placed the Claimant at MMI, and that was that the Claimant was not to jump off anything higher than 12 inches (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 26).

63. Dr. Bernton commented that a patient's subjective reports are important data, but "if it's not in line with all the other data you have, physical examination, nature of the injury, medical records, progress over the course of time," then such reports should be given less weight (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 28). In this case, Dr. Bernton points out that since filing for PTD, the Claimant is engaging in "fairly dramatic symptom exaggeration," which was not consistent with the nature of the

injuries, his examination, or the medical records. The Claimant's statements that he was in extreme pain, highly disabled, needed to elevate his feet for 20 to 30 minutes every hour and was unable to perform numerous tasks, was "not even remotely" consistent with the prior records, and he also did not see anything on his examination that would be consistent with such level of dysfunction, which was "grossly inconsistent with the nature of the injuries given the progress that's been demonstrated" following the surgeries (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 29-30). Overall, Dr. Bernton testified that his physical examination of the Claimant was consistent with the medical records leading up to MMI and not consistent with the later subjective reports of the Claimant regarding significant pain and disability (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 34). At the time of his examination, Dr. Bernton noted no bursitis of the knee, shoulder injury or wrist injury that would require permanent work restrictions (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 35-39).

64. In considering the sole restriction that Dr. Gustafson imposed of no jumping off anything higher than 12 inches, Dr. Bernton opined that Dr. Gustafson's restrictions were not onerous enough, and noted that his own restrictions were "very conservative" by comparison (although he believed the Claimant could "probably do more than that"). However, Dr. Bernton took into account the fact that the Claimant had significant degenerative arthritis in his ankle before his injury and surgeries and although he opined that the Claimant had a good recovery, he "would not be as ambitious as Dr. Gustafson's restrictions" noting "they're really not limiting enough" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 45). Dr. Bernton reiterated his more limiting restrictions, which included up to four hours per day walking or standing with a 5 minute break per hour, no walking on uneven surfaces for more than 5 minutes per hour and no ladder climbing or shoveling" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 45). He repeated that the Claimant actually demonstrated the ability to go up and down a ladder 10 steps so, by definition, "these are fairly conservative restrictions," and noted that the FCE demonstrated that he went up more stairs than his restrictions, so he was "absolutely confident" that Claimant could perform within the restrictions Dr. Bernton assigned, and probably "more than that" (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 45-46). He clarified his statement that the Claimant required a five minute break per hour was intended to mean that Claimant "simply needs to be able to change positions," and not that the Claimant had to stop work; any other interpretation was "not a valid use of these restrictions" per Dr. Bernton (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 46-47). Dr. Bernton opined that there was "absolutely not" any reference that the Claimant had to elevate his feet for 20-30 minutes per hour and, if that were the case, the Claimant was "not getting the treatment he needs to" and he also did not see any indication on examination that that level of elevation would be required, and that there was "just nothing in this type of injury, with this type of recovery which would indicate that that's the case and if it was, then such can be treated" (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 47-48). Further, if the Claimant were now experiencing talar dome issues, he would expect to see significant gait abnormalities, which were not present, and would not expect the Claimant to be able to do something like walk up a ladder, as was demonstrated in the FCE, so these assertions are simply

inconsistent with all of the other information in this case (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 48).

65. Dr. Bernton testified that in order to determine if a particular person with work restrictions can perform a job, it is important to understand the specific tasks associated with that job in order to match up the worker's physical abilities. In that light, Dr. Bernton characterized Mr. Van Iderstine's vocational evaluation as "a pretty worthless piece of work" as the job positions discussed in the evaluation did not provide the specific job tasks associated with the job positions in question (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 63-64).

66. With reference to Ms. Anctil's vocational evaluation report, Dr. Bernton took issue with the Claimant's subjective reports of his capabilities stating, "it's grossly inconsistent with what you would expect and what he demonstrated in his functional capacity evaluation" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 65). Dr. Bernton opined that most or all of the positions located by Ms. Anctil were consistent with his abilities per the "very conservative" restrictions he assigned (and not the less onerous restrictions of the ATP) (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 67-68). He thought that some of the positions located by Ms. Anctil would be consistent with the fictional work restrictions of one hour standing, one hour walking and six hours sitting (temporary restrictions), but that "no physician has ever determined those to be permanent restrictions for this patient" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 68). Dr. Bernton also saw nothing in the records suggesting the Claimant's personality or intelligence would preclude him from performing those positions (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 68-69).

67. Dr. Bernton's deposition was completed on August 20, 2015 (Depo. Tr., John Tashof Bernton, August 20, 2015, pp. 76). On cross-examination, Dr. Bernton testified that the Claimant's surgery was a complex orthopedic procedure due to complex fracture patterns that may be challenging to reconstruct (Depo. Tr., John Tashof Bernton, August 20, 2015, p. 94). Dr. Bernton testified that, "I don't disagree that given the nature of the injury, it's certainly possible that further care could be required" (Depo. Tr., John Tashof Bernton, August 20, 2015, p. 137). However, he stated that the Claimant's pathology would not be expected to increase only several months later, and remarked that "once you're recovered, absent new pathology, the patient's pain is not going to dramatically increase, the function is not going to dramatically decrease" and "it isn't consistent with his clinical status" (Depo. Tr., John Tashof Bernton, August 20, 2015, p. 154). With respect to the Claimant's wrist complaints, Dr. Bernton reiterated that the Claimant's statement that he stopped using the cane because of pain in the right wrist was inconsistent with the medical records, and also his examination, and noted that the PT records indicated the Claimant was not using a cane because he did not need to use it, and also added that if a person needed a cane, such could be accommodated through various ways (Depo. Tr., John Tashof Bernton, August 20, 2015, pp. 155). As to the Claimant's balance issues, Dr. Bernton noted that he could use a cane or other structured balance assistance and aids, but that he did not believe

the Claimant needed any of those devices and would not expect that to be a major problem, and also remarked that, if the pathology here caused balance issues, such would be noted consistently, and would be worse earlier, when he was going through the healing process, and that PT would have specifically notated such issues, but there was nothing documented in those records (Depo. Tr., John Tashof Bernton, August 20, 2015, pp. 157-158).

68. During the second day of Dr. Bernton's deposition, Claimant's counsel moved for the admission of the audio CD of Dr. Bernton's IME examination of the Claimant. The ALJ admits the CD (Exhibit Bernton 4) over the objection of the Respondents. In reviewing the CD, the ALJ addresses some allegations made during the hearing and deposition testimony and in the post-hearing briefs. Namely, there are allegations that Dr. Bernton's deposition testimony and his written report do not accurately reflect what occurred during the examination of the Claimant. Also, there was an allegation that the Claimant "yelled out" when Dr. Bernton palpated his left ankle. In listening to the portion of the examination of the left foot (from approximately 28:30 to 28:50), Dr. Bernton was palpating the Claimant's foot and the Claimant did make a noise and, when asked, told Dr. Bernton that it hurt when he touched the ankle near the surgical scar. However, the Claimant did not yell, as has been represented. Further, the Claimant was able to complete the remainder of the examination, including some provocative maneuvers and was able to comply with some, but not all, of Dr. Bernton's requests related to movement of the foot. The Claimant spoke with Dr. Bernton and responded to questions in a normal tone of voice for the remainder of the IME. While Dr. Bernton's written report and his deposition testimony do not include the totality of the conversation on the IME recording, neither the written report nor the deposition testimony misrepresented what occurred at the IME, neither does Dr. Bernton appear to be downplaying the levels of pain the Claimant described to him, even if Dr. Bernton ultimately concluded that there was no physiological basis for the levels of pain and the extent of the disability that the Claimant now reports.

69. A rebuttal deposition of Mr. Van Iderstine was taken on September 22, 2015 (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 4). Mr. Van Iderstine testified that since his prior deposition, he had reviewed the deposition transcripts of Ms. Anctil and Dr. Bernton (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 4-5). Mr. Van Iderstine testified that he disagreed with Ms. Anctil's statement that he was applying Social Security Disability standards for disability to the Claimant's case rather than Workers' Compensation standards. Mr. Van Iderstine testified that he does many cases for both types of disability determinations and he understands the difference in the standards and definitions of disability in each type of case. In referencing the Claimant's age, he was not applying the Social Security standards, but merely pointing out that the Claimant's age is a factor in terms of difficulty learning new skills (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 6). Mr. Van Iderstine also questioned Ms. Anctil's transferable skills analysis. Specifically, he noted that while the Claimant completed paperwork in the past related to his work as a truck driver, Mr. Van Iderstine opined that this type of paperwork is a skill indigenous to truck driving and does not

readily transfer to the type of skill needed for an office job or as a receptionist (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 8-9). Similarly, Mr. Van Iderstine opined that a supervisor position in a volunteer organization such as the Shriners or as a drill rig supervisor does not necessarily transfer as a skill in another field and Mr. Van Iderstine does not believe this is an applicable skill to any significant degree to his overall vocational profile (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 9-10). Mr. Van Iderstine also disputes that it is necessary to contact specific employers in the context of labor market research, this is only relevant if you are looking to place someone in a specific position (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 11-12). In response to the criticism from Dr. Bernton that his report was useless because Mr. Van Iderstine did not contact employers, Mr. Van Iderstine countered that he has done so many job analyses over the course of his career that he is familiar with the jobs and what work is entailed and he does not feel it is necessary to contact specific employers if he is not looking to place someone (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 12-13). Mr. Van Iderstine further testified that even with Dr. Bernton's clarification of his restrictions that 5 minute break every hour was actually the need to alternate positions, his opinion did not change regarding the positions of hotel clerk, sales clerk or attendance clerk as job positions the Claimant would not be able to perform (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 13-15).

70. In terms of Mr. Van Iderstine's definition of "basic computer skills," he testified that this can be a variable term, but it is more than just a fundamental ability to turn the computer on; rather a person has to at least know certain applications and have a certain degree of familiarity. Based on his interviews with the Claimant and his wife and the review of testimony by other family members, Mr. Van Iderstine finds that the Claimant does not have the necessary patience to learn the skill and he has been unsuccessful in learning computer skills and is frustrated with his lack of accomplishment (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 16-18). In his experience, Mr. Van Iderstine has found that job positions such as front desk clerks or attendance clerks do require fundamental computer skills. It is not necessarily an extensive part of the job, but basic fundamental skills are required to check people in and out and to register people or look up reservations (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 19). Mr. Van Iderstine agreed that motivation was a factor to consider, but also pointed out that the ability to perform the job is also a factor. Motivation can overcome some difficulties but the ability to perform the essential functions of a job is critical to an individual being able to find and maintain the job (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 21). He agreed "partially" with Ms. Anctil that older workers were being sought out and preferred over younger workers when they have a good work history, but he still opined that "the difference becomes when they don't have the ability to perform the essential functions of the job (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 23-24). Mr. Van Iderstine distinguished between having an "aptitude" versus having an "ability." He stated that the definition of a skill is the ability to perform a specific job whereas as aptitude is the capacity to learn the skill, but you don't actually have the skill, which is learned through

education, past training, and experience (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 24-25). He disagreed with Ms. Anctil that the Claimant had the skill levels and residual functional capacity to be a fast food clerk, machine operator or bench hand. Mr. Van Iderstine testified that he does not have the skill, so it becomes a question of whether he has the ability to learn to do the job. Because of his age and because he has not performed this type of work before, in combination with the factor that his family members have testified that the Claimant would not have the ability to interact with people, Mr. Van Iderstine does not believe that the Claimant has the capacity to perform these positions (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 26). Mr. Van Iderstine further finds that the Claimant's need to elevate his feet on and off throughout the day means that it is less likely that the Claimant would be hired as opposed to a younger worker with experience (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 26-27).

71. Mr. Van Iderstine disagreed with Ms. Anctil that his analysis was based on restrictions that are not applicable to the Claimant. He testified that his vocational evaluation was based on restrictions (noted in the history/summary section) of the FCE of one hour standing/walking (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 29-30). He reiterated that the Claimant would have trouble finding a job where he had to elevate his feet on an "ongoing basis," but admitted that neither the FCE nor any of the medical records documented that the Claimant needed to elevate his foot (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 30-31). In terms of the testimony of the Claimant's family members that the Claimant cannot turn on a computer or click a mouse button, Mr. Van Iderstine stated that the testimony as to an inability to turn on a computer or click a mouse was "perhaps an overstatement of his lack of computer skills" and was "not credible" (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 33-34). Overall, however, Mr. Van Iderstine does not believe that it would be more effective for the Claimant to take a computer class than it has been for family members to attempt to teach him computer skills (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 34). Mr. Van Iderstine opined that the Claimant does not have the skills to perform jobs he has never performed before in customer service type settings; he does would not be able to perform the core tasks or the aptitude necessary to perform these types of jobs (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 36-37). Of the potential job positions identified by Ms. Anctil, Mr. Van Iderstine opined that the surveillance position, which involved sitting in a booth and watching monitors with limited walking and standing, was the position the Claimant was most likely to be able to perform. Mr. Van Iderstine still expressed some questions as to whether the Claimant could maintain the level of attention for the period of time required by the job, but opined, "that would be the job out of everything that we've talked about that I would feel would be the one possibility" if it were available (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 37-38). If the Claimant were in a lot of pain, Mr. Van Iderstine opined that this could impact his ability to perform this job and maintain his attention (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 39). Finally, Mr. Van Iderstine clarified that when he was considering the Claimant's work restrictions, in addition to the

FCE, he also considered the limitations outlined by Dr. Bernton (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 40-41).

72. At the hearing, the Claimant testified that Exhibit 12, p. 238 is a photograph of the outside of his left foot with the measuring tape running across the length of the horizontal scar. He testified that Exhibit 12, p. 329 is a photograph of the outside of his left foot with the measuring tape running up the height of the length of the vertical portion of his scar. He testified that Exhibit 12, p. 330 is the same left foot and scarring, just from another view. The Claimant testified that his last surgery was performed on June 18, 2014 and that the appearance of the scarring has stabilized since the surgery. Through photographs, the Claimant exhibited an L shaped scar on his left ankle that was approximately 4 inches long and less than 1/16 of an inch in width along the horizontal portion of the scar and approximately 2.5 inches in length and less than 1/16 of an inch in width along the vertical portion of the scar. The center of the scar differed in color and texture from the surrounding skin.

Ultimate Findings of Fact

73. There was considerable discrepancy between the physical activity restrictions for the Claimant that were used by the two vocational rehabilitation expert witnesses in this case. The conclusions reached by the experts were, in great part, driven by consideration of the limitations placed on the Claimant's physical activities. The permanent restrictions decisions were reached by each expert considering the medical records, opinions of Dr. Gustafson and Dr. Bernton, and testimony and input from the Claimant, his wife, and the Claimant's children regarding his abilities and tolerance for physical activities. In considering these various sources, the vocational rehabilitation experts came to significantly distinct conclusions as to the Claimant's ability to perform various job positions. Thus, the ALJ considers the appropriate permanent activity restrictions for the Claimant.

74. The ALJ finds that after having the opportunity to review the Claimant's FCE results and after performing a physical examination in order to provide the Claimant's impairment rating, Dr. Gustafson provided very minimal permanent restrictions for the Claimant's physical activity. The only recommended activity restriction imposed by Dr. Gustafson was "NO jumping off of anything higher than 12 inches." This was the only restriction listed in the both the narrative medical report as well as the closing Physician's Report of Worker's Compensation Injury sent to the injured worker and to the Insurer. There were no limitations placed on standing, walking or climbing stairs. There was no restriction requiring the Claimant to elevate his lower extremities. Dr. Gustafson also checked the box on the form that the Claimant was able to return to modified duty as of 12/2/2014. Thus, Dr. Gustafson clearly anticipated that the Claimant had the ability to return to work.

75. Dr. Bernton, on the other hand, opined that Dr. Gustafson's restriction was not sufficient and imposed much more conservative restrictions. Specifically, he would

limit the Claimant to four hours per day of standing or walking, with an ability to change positions during five minutes of every hour. In addition, walking on uneven surfaces should be limited to no more than five minutes per hour, and the Claimant should not be doing ladder climbing or shoveling. Lifting in a seated position is limited to 50 pounds occasionally and 25 pounds frequently and the Claimant should not be carrying over 20 pounds occasionally. Nor should the Claimant be shoveling or ladder climbing or working in areas where balance difficulties may create safety risks, and the Claimant should be limited to one flight of stairs per hour. In addition, he should not be required to run on the job. While Dr. Bernton considered the Claimant's subjective reports regarding his activity limitations, he determined that the Claimant is engaging in "fairly dramatic symptom exaggeration," which was not consistent with the nature of the injuries, his examination, or the medical records. The Claimant's statements that he was in extreme pain, highly disabled, needed to elevate his feet for 20 to 30 minutes every hour and was unable to perform numerous tasks, was "not even remotely" consistent with the prior records, and he also did not see anything on his examination that would be consistent with such level of dysfunction, which was "grossly inconsistent with the nature of the injuries given the progress that's been demonstrated" following the surgeries. Overall, Dr. Bernton testified that his physical examination of the Claimant was consistent with the medical records leading up to MMI and not consistent with the later subjective reports of the Claimant regarding significant pain and disability. At the time of his examination, Dr. Bernton noted no bursitis of the knee, shoulder injury or wrist injury that would require permanent work restrictions. Dr. Bernton specifically opined that there was "absolutely not" any reference that the Claimant had to elevate his feet for 20-30 minutes per hour and he also did not see any indication on examination that that level of elevation would be required.

76. Overall, in consideration of all of the testimony and evidence, the ALJ finds the permanent restrictions provided by Dr. Bernton to be the most reasonable for the Claimant. While Dr. Gustafson was the Claimant's authorized treating physician and had the opportunity to see the Claimant improve over time after the injury and subsequent surgeries, his restrictions are not sufficient, in light of the testimony of Dr. Bernton and the fact witnesses in this case. Dr. Bernton's restrictions take into account the mechanism of injury, the progress of the Claimant's recovery and involved a thorough physical examination. His restrictions are in line with the data contained over the course of the Claimant's recovery from the date of injury, through MMI, and subsequent to MMI through the hearing. However, the ALJ further finds that reliance on activity restrictions that are in addition to those provided by Dr. Bernton, such as the need of the Claimant to elevate his foot, is misplaced in this case as these additional restrictions are not supported by the record taken as a whole.

77. With respect to his disfigurement claim, and with reference back to paragraph 72 of these findings of fact, the ALJ finds that the Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation per § 8-42-108 (1), C.R.S. The ALJ finds that the Claimant is entitled to compensation of $1,625.00 for that disfigurement.

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 resolving the question of whether the Claimant is permanently totally disabled, the ALJ addresses the Claimant's physical ability and overall physical condition, his education and vocational training, his former employment, his mental capabilities and the availability of work within the Claimant's abilities within the Claimant's commutable labor market.

In this case, there was a great deal of conflicting information presented regarding the Claimant's pain levels, physical condition and reasonable restrictions or limitations on the Claimant's physical activities. Inherent in these factors are the issues of pain, functionality, and reasonable work restrictions.

There has been a great deal of inconsistency in the Claimant's reporting of pain levels and ability to function. At the hearing, and since filing for PTD, the Claimant has complained of 7-9/10 pain and advised Respondents' IME physician Dr. Bernton of this same pain level. This is higher that the level of pain he experienced early after his injury. He now reports significant balance issues, suggesting that he cannot walk without holding onto something, and reports that it is necessary to regularly elevate his legs, varying from in the evening (as told to Ms. Anctil) to "sometimes (as stated at

hearing) to “ongoing” (as assumed by Mr. Van Iderstine in his testimony). At the hearing and in reports to the medical and vocational expert witnesses in this case, the Claimant also reports problems with his wrist and knee that increase his pain and decrease his ability to function.

The Claimant’s testimony in this regard and his more recent reports to the expert witnesses in this case are inconsistent with the Claimant’s medical records detailing the Claimant’s recovery from two left lower extremity surgeries following his injury and the conservative treatment for his right lower extremity and his knee and wrist. The medical records admitted in this case establish that initially, and in the early aftermath of his injury, the Claimant reported high levels of pain. At this point, the Claimant was reporting pain range levels of 4-9/10, depending on activity. The Claimant resolved well following both his initial surgery and hardware removal. Dr. Bernton testified credibly that the records indicate a very good recovery. After the hardware removal on June 18, 2014, the Claimant routinely reported 0-1/10 pain that was only intermittent, and noted few issues other than some occasional swelling (there was reference to 5/10 pain in the right ankle in October 2014, the day Claimant received an injection, but this is the exception). The Claimant often reported that he had no pain. Although the Claimant’s wife testified he is one to underrepresent his pain level, at the outset of his medical treatment, the Claimant was reporting much more substantial pain levels. This calls into question why the Claimant would minimize his pain in March through December 2014, but not earlier and, then again, not since filing for hearing.

Per the medical records, physical therapy records, and even in the Claimant’s reports to Dr. Bernton and the vocational rehabilitation experts, in the later part of 2014 and through 2015, the Claimant continued to perform yard work, welding and engage in other activities. He ceased taking medications very shortly after his second surgery and for months leading up to his MMI placement denied the need for any medication. In interviews with Dr. Bernton and the vocational rehabilitation experts, the Claimant again denied that he took any pain or other medications, which is inconsistent with the level of pain and lack of function he now claims. The Claimant declined any additional treatment, other than the pool pass, despite the topic being raised by his ATP prior to MMI, inconsistent with the level of pain and lack of function he now claims. He did not challenge the doctors’ opinions that he did not require further pre-MMI treatment or challenge his placement at MMI – nothing is referenced in records indicating that he disagreed with it, and he did not file for a Division IME. He was discharged from medical care in early December 2014.

There is no objective evidence that activity increases the Claimant’s pain, only his subjective reports and these reports have not been consistent over the relevant time period. The Claimant had stated back in September 2014 that he performed yard work without any increased problems. That same month, he went to a weekend concert and then specifically reported that Tuesday that he had “no pain” and then stated a few days later that did not know why he needed his cane and would not use it. The pain level he reported to Dr. Gustafson the day after the FCE was 1/10.

The Claimant now claims significant balance issues. But none of the records reference any such problems with balance. He states that his ankles are very weak, but the medical records do not corroborate this assertion and, in fact, document 5/5 strength by September 2014. The Claimant told his therapist on September 4 that he did not understand why he needed crutches, and refused to use a cane by September 15. The FCE did not document balance issues. Records, pathology and testing are not consistent with balance deficiencies, in this case. This evidence is at odds with the testimony of the Claimant and his family members that the Claimant had to hold onto walls and other objects in order to maintain his balance while he walks.

The Claimant claims now that he can only walk 15-20 minutes, but as Dr. Bernton noted, the Claimant's condition would not be expected to worsen as time went by, absent new injury or intervening event, and the records provide no explanation as to why the Claimant would have such minimal pain and good function throughout 2014, especially towards the end, but then suddenly be unable to stand or walk more than an one to two hours/day and must brace to keep from falling, once litigation began. But Claimant's position is not even necessarily that he has worsened in more recent weeks and months. Rather, Claimant testified that his condition had remained essentially the same since at least the time when he lost his CDL (in February 2014 – when he was still transitioning from the wheelchair), and was at the time of the May 2015 hearing still "fairly close" to his condition when he applied for SSDI (in August 2013 – while in a wheelchair following his initial injury just one month earlier). He claims similar and constant issues throughout, and not some new aggravation or increased disability.

The significant improvement, limited pain and good function documented in the medical records, especially since the hardware removal, is what would be anticipated recovery from the type of injury sustained here, the pathology and the records, and not the significant pain and limited function the Claimant claims only now in more recent months. Dr. Bernton has stated that the Claimant's presentation is wholly inconsistent with the progress of the case prior to his filing for PTD, as evidenced by the treatment records, PT findings and the FCE, as well as the nature of pathology and type of injury and the Claimant's documented recovery. Because the Claimant's reports of pain and function since litigation began are not consistent with the record, they do not carry as much weight as the statements that the Claimant made to his physicians leading up to and at the time the Claimant was placed at MMI.

In resolving conflicting information as to the Claimant's permanent work restrictions, the ALJ found the permanent restrictions provided by Dr. Bernton to be the most reasonable for the Claimant. While Dr. Gustafson was the Claimant's authorized treating physician and had the opportunity to see the Claimant improve over time after the injury and subsequent surgeries, his restrictions are not sufficient, in light of the testimony of Dr. Bernton and the fact witnesses in this case. Dr. Bernton's restrictions take into account the mechanism of injury, the progress of the Claimant's recovery and involved a thorough physical examination. His restrictions are in line with the data

contained over the course of the Claimant's recovery from the date of injury, through MMI, and subsequent to MMI through the hearing. However, the ALJ further found that reliance on activity restrictions that are in addition to those provided by Dr. Bernton, such as the need of the Claimant to elevate his foot, is misplaced in this case as these additional restrictions are not supported by the record taken as a whole.

Despite this, the Claimant and his vocational evaluator support the claim for permanent total disability around one hour walking and standing restrictions, which are not permanent restrictions applicable to this case, per any medical provider or otherwise, and also assumed balance issues and a need to elevate feet that is not only unmentioned in the permanent restrictions, but not documented in any of the medical reports. Thus, the baseline restrictions upon which the Claimant bases his claim for PTD, and which his expert based his survey, are not appropriate.

In seeking PTD benefits, the Claimant also asserts general incompetency and what appears to be a personality issue which results in the Claimant engaging in inappropriate, rude and possibly insulting behavior when required to communicate with the public or utilize office equipment, phone and computers at an entry level capacity. The Claimant and his family portray him as a person who would easily lose his temper, be unable to talk on the phone or possibly learn how to perform the most rudimentary tasks on a computer or office equipment. The testimony of the Claimant was at odds with how the Claimant presented during the IME examination (as evidenced by the audio CD of the examination), at the hearing, and in an interview with the Respondents' vocational rehabilitation expert, Ms. Anctil. While the Claimant and his family testified that the Claimant is unable to successfully perform in most any position that requires any technology or interaction with another human, his interactions over the course of this claim do not support those contentions. In particular, Ms. Anctil credibly found that Claimant was quite personable when she met him, and both she and Dr. Bernton noted that the records do not demonstrate anything as far as a personality disorder or indicate any likely impediment to employment. In any event, the Claimant's wife admitted that these personality traits long pre-existed Claimant's injury, and despite these personality traits, Claimant had always been gainfully employed, and never had any issues with maintaining employment.

In fact, the Claimant's vocational history includes performing substantial tasks of a mechanical nature and complex character, including performing some more routine mechanical tasks for his truck, completing log books and past supervision of multiple subordinates. The Claimant's SSDI application (in Exhibit X) documents both the nature of complex and varied tasks performed by the Claimant over the years. Outside of work, the Claimant also routinely performed mechanical work around the house and on his personal vehicle. All family members agree that the Claimant is of at least of average intelligence. Overall, the Claimant's vocational and non-vocational history are contradictory to a claim that the Claimant is incompetent and would be unable to perform entry level positions.

In asserting this pronounced incompetence as a bar to vocational attainment, the Claimant's presentation is more indicative of a lack of motivation as opposed to a lack of ability or at least an ability to learn. Also, Ms. Anctil testified credibly that the Claimant's age should not be an obstacle, as many employers are seeking older individuals due to maturity; Mr. Van Iderstine did not entirely disagree with this assertion, but then fell back on the Claimant's alleged lack of ability and physical limitations.

Also persuasive is that, even if the restrictions and personal characteristics the Claimant asserts are accurate, the Claimant still does meet his burden of establishing that he likely incapable of finding and holding employment. The Respondents' vocational expert has found him employable even taking into account more of the subjective reports of the Claimant and his family. In her vocational evaluation for the Claimant, Ms. Anctil used restrictions of mostly sedentary duty, with more sitting than standing, which were "very much" more significant than those assigned by ATP Dr. Gustafson and even more significant than those assigned by Dr. Bernton. Even considering the Claimant's subjective reports and assumptions of the Claimant's very limited computer abilities and inexperience with office equipment, Ms. Anctil still located employment opportunities for the Claimant in his commutable labor market.

Specifically, she located three jobs with the local school district that Claimant not only could perform consistent with these subjective restrictions and his limited personal characteristics, but which positions were open and available. These positions were consistent with his subjective need to alternate positions standing/walking limitations, required only a GED or high school diploma, very little computer use and were otherwise fully consistent with the Claimant's skill level and history. Ms. Anctil also identified security positions, which require very limited walking/standing and no lifting, and presumably little customer contact, as well. An actual guard currently employed in the field confirmed job duties that would even be compliant with even the most onerous restrictions claimed by the Claimant, and which, required no computer use or substantial interface with technology or the public, or any advanced degree.

In addition to the actual positions that Claimant not only could perform which were open and available, Ms. Anctil also credibly and persuasively opined that there would be numerous other positions if Dr. Bernton's restrictions were found to be the applicable standard. Even Mr. Van Iderstine agreed that the Claimant would not be permanently totally disabled if the permanent restrictions assigned by the ATP, after review of all the medical evidence and objective data, including the FCE, were determined to be the appropriate restrictions upon which a vocational evaluation should be based. Mr. Van Iderstine also admitted that the Claimant was more likely capable of working if the restrictions per Dr. Bernton were controlling, referencing the jobs of front desk clerk, courtesy clerk, retail sales and cashier, at least physically and excluding the "personal" issues, and that such restrictions were "more conducive to light duty jobs" than the restrictions upon which he based his evaluation. He went on to note that the Claimant could physically perform a cashier and parking lot attendant job within these restrictions, and that the only considerations potentially precluding such was "his age

and lack of experience." He also stated that those two positions were merely the ones that came to mind but that he was "sure there might be other ones."

Therefore, the ALJ finds that Mr. Van Iderstine's opinion as to the issue of the Claimant being permanently totally disabled is less persuasive than that of Ms. Anctil in this case. This is in part because Mr. Van Iderstine's is relying on inappropriate permanent restrictions. Next, it is important to note that Mr. Van Iderstine found it significant that the Claimant was found eligible for SSDI and lost his CDL, but then neglects to mention that the former application occurred just one month post-injury when the Claimant was in a wheelchair and the latter occurred in February 2014 when the symptoms were still significantly pronounced. This highlights Mr. Van Iderstine's reliance on temporary rather than permanent restrictions and physical conditions. In addition, Mr. Van Iderstine repeatedly referred to restrictions beyond those even identified in the temporary restrictions related to balance issues and the need for the Claimant to elevate his legs for substantial parts of the day, which Mr. Van Iderstine testified was – for many of the jobs under consideration - the "deal-breaker." As noted by Dr. Bernton, balance problems and a need to elevate the feet are not part of any temporary or permanent restrictions and are also inconsistent with the pathology and other information in the record. Mr. Van Iderstine also assumed that Dr. Bernton's reference to five minute breaks means he has to be off-task for that period. However, even after Dr. Bernton clarified that it does not mean that, Mr. Van Iderstine continue to consider this in evaluating the Claimant's ability to obtain and maintain employment.

Finally, Mr. Van Iderstine posits that the Claimant is unable to learn new tasks based on his age and the testimony of the Claimant and his family members, even though this would appear to be inconsistent with his vocational and non-vocational history, in which the Claimant performed varied mechanical activities requiring intellect. Mr. Van Iderstine testified that to the extent the Claimant had skills from previous employment, these are not "transferable skills," but were "indigenous" to his prior positions. In rebuttal testimony, Mr. Van Iderstine admits that portions of the testimony from the Claimant and his family may have represented "an overstatement of his lack of computer skills" and was "not credible," but then disregards this to base his opinion, in part, on the Claimant's inability to perform entry level tasks required of various sedentary job positions. Leaving aside the question as to why the Claimant could not perform such tasks, or learn to do so if properly motivated, such testimony is not credible, especially in light of Mr. Van Iderstine's own admission that the Claimant is of average intelligent, has no learning disability and that there is no evidence in the records to suggest an inability to learn such activities.

Since commencing litigation claiming PTD, the Claimant has raised some other issues to support his assertion that he is PTD, such as knee complaints, wrist issues and hearing deficiencies. These are all unsupported, temporary, correctable and/or irrelevant issues. With respect to the Claimant's wrist issues, such issues appear to have resolved or were not particularly significant. Dr. Bernton agreed that the Claimant's wrist condition, at the time of his examination, was likely related to a cyst, which would

not be work-related and is easily and fully correctable. The Claimant did not challenge his placement at MMI without any rating for the wrist, through a Division IME or otherwise. While Claimant now claims that it was wrist issues that led him to abandon use of the cane by September 2014, this is contradicted by the records, which make no reference to wrist problems during that period, work-related or otherwise, and document that Claimant refused to use a cane because he "didn't need it." Most relevant, the Claimant was not provided work restrictions for wrist issues, and there is no information to support any disability for the wrist. Similarly, the Claimant complains of knee issues due to having to "crawl around" when he was less ambulatory while recovering from surgery. The Claimant's knee issues were really noted only in early records, including those records from November 12, 2013, January 23, 2014 and for the last time on March 6, 2014, when the issues were noted to be "almost completely resolved." A Cortisone injection was considered, but then never occurred, presumably because the issue resolved once Claimant no longer had to crawl around. The issue did not arise at the time of the Claimant's impairment rating when he was placed at MMI. At the time of his IME, Dr. Bernton found no evidence of bursitis when he examined him. Whatever the case, and whether such might be work-related, these issues appear to have been temporary and would have been considered by the treaters, who did not assign any specific restrictions related to that condition. There is no documentation of ongoing knee issues in the last 19 months, and nothing indicating that this condition is a relevant consideration for PTD.

The Claimant and his family members also testified that the Claimant could not obtain or maintain employment in customer service positions in part due to hearing issues, with his wife testifying that he would become easily frustrated if he could not understand someone, and could also not engage in telephonic activities as a result thereof. The Claimant and his wife failed to mention during their testimony that Claimant previously had hearing aids and that any such hearing issues are correctable. There is also a lack of persuasive evidence that hearing issues precluded the Claimant from finding and holding employment previously. Both Dr. Bernton and Ms. Anctil stated that they experienced no trouble in communicating with the Claimant and he did not seem to experience any difficulty in hearing or responding to questioning while he testified at hearing (which was conducted via videoconference with the Claimant and his counsel in Grand Junction and the ALJ and counsel for the Respondents in Denver. As such, any potential hearing deficiencies is questionable, and would otherwise be pre-existing, correctable and non-permanent, and also non-disabling, and will not be considered in the context of this PTD claim.

In sum, it is found that the Claimant continues to experience pain due to his significant injury in July 2013, and the ALJ acknowledges that there is functional diminishment and recurring swelling and other issues. These issues were evident at the hearing and documented in the findings of fact. However, for the purposes of claiming permanent total disability, the Claimant and his family have magnified his condition, symptoms and disability, and have made statements that are contradicted by other, more persuasive, evidence in the record. The Claimant's vocational rehabilitation expert, Mr. Van Iderstine, relied upon these statements in spite of the inconsistencies and based his

opinion using this information and, in addition, he used inapplicable physical activity restrictions.

On the other hand, the Respondents' expert witness, Ms. Anctil used the more reliable and appropriate physical activity restrictions. In addition, she even found job positions in the Claimant's commutable labor market that the Claimant could perform based on restrictions per Claimant's subjective reports and his relative inexperience in using a computer or performing work in an office setting. Even based on the more substantial restrictions, that are not actually applicable, there are available positions the Claimant could perform. However, these are not the appropriate restrictions under consideration. Under the restrictions set forth by Dr. Bernton, there are, more likely than not, even more available job positions the Claimant could obtain and maintain. As established by the evidence, the Claimant is capable of finding and maintaining gainful employment in his commutable labor market. As such, his claim for permanent total disability is denied and dismissed.

Disfigurement Award

Pursuant to C.R.S. § 8-42-108, if the Claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits…the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement." The area normally exposed to public view has been interpreted to include all areas of the body that would be apparent in swimming attire. *Twilight Jones Lounge v. Showers,* 732 P.2d 1230 (Colo. App. 1986). The ability to conceal a disfigurement, by means of clothing or a prosthetic or artificial device does not defeat an entitlement to benefits for the disfigurement. *Arkin v. Industrial Commission,* (145 Colo. 463, 358 P.2d 879 (1961).

At the hearing, the Claimant testified that Exhibit 12, p. 238 is a photograph of the outside of his left foot with the measuring tape running across the length of the horizontal scar. He testified that Exhibit 12, p. 329 is a photograph of the outside of his left foot with the measuring tape running up the height of the length of the vertical portion of his scar. He testified that Exhibit 12, p. 330 is the same left foot and scarring, just from another view. The Claimant testified that his last surgery was performed on June 18, 2014 and that the appearance of the scarring has stabilized since the surgery. Through photographs, the Claimant exhibited an L shaped scar on his left ankle that was approximately 4 inches long and less than 1/16 of an inch in width along the horizontal portion of the scar and approximately 2.5 inches in length and less than 1/16 of an inch in width along the vertical portion of the scar. The center of the scar differed in color and texture from the surrounding skin. The Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view, which entitles the Claimant to additional compensation. Accordingly, in the discretion of the ALJ, it is determined that the Claimant is entitled to $1,625.00 for that disfigurement.

Overpayment

C.R.S. § 8-42-103(1)(c), provides that where periodic disability benefits are payable under social security, the aggregate benefits payable by the employer for TTD, TPD and PTD under § 8-42-103 shall be reduced by an amount equal to one half of the amount of the benefit. As such, Respondents can offset their wage loss liability by 50% of the SSDI receipts paid during the relevant period.

The term "overpayment" is defined in C.R.S. § 8-40-201, 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." Thus, any amounts Respondent paid in excess of their liability through MMI while Claimant received SSDI benefits constitute an overpayment.

C.R.S. § 8-42-113.5, requires that a claimant provide written notice to the employer or insurer within 20 days of any payment of disability payments. If the claimant or legal representative fail to give such notice, any overpayment that resulted from the failure to make the appropriate reduction in the original calculation of such disability benefits shall be recovered by the employer or insurer in installments at the same rate as, or a lower rate than, the rate at which the overpayments were made. If the claimant fails to give the notice, the employer or insurer is authorized to cease all disability payments immediately until the overpayments have been recovered in full.

Pursuant to subsection (c), "[i]f for any reason recovery of the overpayment as contemplated … is not practicable, the employer or insurer is authorized to seek an order for repayment."

In this case, the parties concur that the current overpayment amount is $8,299.20. The Claimant received social security benefits at a rate of $1,910.00/month since January 2014. The Claimant received TTD benefits through December 1, 2014. Respondents were entitled to reduce receipt of such benefits by 50%, or $220.38/week ($1910.00 x 12 divided by 52 x 0.5). The Claimant received TTD benefits for 11 months after the award of SSD benefits. Because the Respondents were unaware of Claimant's receipt of the SSD benefits, as the Claimant did not timely notify the Respondents, the Respondents did not reduce the TTD benefits by the amount they were entitled. Thus, Respondents overpaid TTD in the amount of $10,505.00 ($1910.00 x 11 x 0.5). Upon learning of the duplicative benefits, Respondents ceased payments of PPD, after $13,248.82 of the $15,449.62 PPD benefits had been paid. As such, the overpayment amount was offset, or reduced, by $2,200.80.

Under such circumstances, repayment must be ordered. Respondents are entitled to recover $8,299.20. The Respondents may offset or recover $1,625.00 of the current overpayment amount by application of the $1,625.00 to which the Claimant is entitled for permanent disfigurement. This leaves a balance owed of $6,674.20.

Through testimony, it was established that it would be a serious hardship to repay the entire amount of the overpayment in a lump sum. The Claimant's wife, who handles the finances for the Claimant and herself testified that the only source of income for their household is the $1,945.00 per month SSDI benefits and they have no savings account. She testified that the mortgage is $1,025.00 per month, utilities and insurance total about $462.00 per month and their food bill averages about $500.00 per month. The Claimant and his wife also have a credit card with a $400.00 balance for which they make payments each month of about $25.00. Ms. Morgan testified that she does not know what monthly payment they could afford. Based on financial status, in the Claimant's post hearing brief, the Claimant requested a payment of $25.00 per month.

In Respondents' post hearing brief, the Respondents requested payments of $220.38 per week, which is the same rate as the Respondents initially overpaid the Claimant.

The ALJ finds that based on the financial information presented by the Claimant, the Claimant is not required to pay the entire $8,299.20 in a lump sum. Rather, the total overpayment amount will first be offset by the $1,625.00 disfigurement award, leaving a balance of $6,674.20. Thereafter, the Claimant shall pay 133 payments of $50.00 each month with a final payment of $24.20. The first payment shall be due on the 20th day of the month following the month in which this order is served on the parties.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

2. The Claimant is entitled to $1,625.00 for permanent disfigurement in accordance with C.R.S. § 8-42-108, C.R.S.

3. The Respondents are entitled to recover an overpayment of $8,299.20, by first offsetting the amount by the $1,625.00 due to the Claimant for his disfigurement award, leaving a balance of $6,674.20. Thereafter, the Claimant shall pay 133 payments of $50.00 each month with a final payment of $24.20. The first payment shall be due on the 20th day of the month following the month in which this order is served on the parties.

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, 2016

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

ISSUES

1. Whether Claimant suffered compensable industrial injuries during the course and scope of his employment with Employer on April 26, 2013.

2. Whether Employer has proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. or worked for Wade Pate.

3. Whether Insurer has demonstrated by a preponderance of the evidence that it properly cancelled Employer's Workers' Compensation insurance policy effective April 16, 2013.

STIPULATIONS

The parties agreed to the following:

1. If Claimant's claim is compensable, he is entitled to a general award of medical benefits.

2. If Claimant's claim is compensable, he is entitled to Temporary Total Disability (TTD) benefits for the period April 27, 2013 until terminated by statute.

3. Claimant's TTD benefits are subject to a Social Security Disability Insurance (SSDI) offset in the amount of $755.00 per month since October 1, 2014.

4. Claimant earned an Average Weekly Wage (AWW) of $1,153.84.

FINDINGS OF FACT

1. Employer is a sole proprietorship owned by Aaron McKeehan. Employer provides logistical, planning and coordinating services for companies seeking construction, maintenance and landscaping work.

2. Altisource Solutions, Inc. is a corporate entity located in Chicago, Illinois On September 21, 2012 Employer and Altisource executed a field vendor agreement for the purposes of property preservation and inspection.

3. Mr. McKeehan and Wade Pate have been friends for approximately 15 years. In early April 2013 Mr. McKeehan offered property preservation and inspection work to Mr. Pate in Granby, Colorado.

4. On April 21, 2013 Mr. Pate and Claimant completed the job in Granby, Colorado. They cleaned up firewood and other materials. Mr. McKeehan reviewed a picture of the job site, noted his satisfaction with the work and asked Mr. Pate to travel to Chicago to complete additional work supplied by Altisource. Employer noted that Mr. Pate would earn at least $10,000 each month working on projects in the Chicago area.

5. Mr. McKeehan did not directly offer any work in Chicago to Claimant. Instead, Mr. Pate asked Claimant to help him complete the job duties. Mr. Pate explained that he would split 50% of his expected monthly earnings or $5,000 with Claimant. Claimant agreed to accompany Mr. Pate to Chicago and Employer acquiesced to the arrangement.

6. On April 26, 2013 Claimant and Mr. Pate were involved in a motor vehicle accident in Buffalo County, Nebraska while traveling to Chicago on I-80. Claimant and Mr. Pate suffered catastrophic injuries during the crash that included traumatic brain injuries. The parties do not dispute that Claimant was injured during the accident. However, they argue about whether Claimant worked for Employer and whether Employer possessed Workers' Compensation insurance coverage through Insurer on April 26, 2013.

7. Andy Lease testified that he works as an Underwriter for Insurer. He previously worked for Insurer as a New Business Representative and Customer Service Representative. Mr. Lease explained that Employer obtained a Workers' Compensation insurance policy with Insurer in January 2013. The policy was issued in Mr. McKeehan's name and Mr. Lease was the assigned underwriter.

8. On March 27, 2013 Insurer sent a letter dated March 26, 2013 via certified mail to Mr. McKeehan notifying him that his insurance premium was overdue. The letter apprised him that his policy would be canceled on April 16, 2013 unless Insurer received the amount due by April 15, 2013 ("Notice of Cancellation"). The Notice of Cancellation was mailed to Mr. McKeehan at 4137 Warbler Drive, Ft. Collins, CO, 80526. Insurer contemporaneously sent a copy of the Notice of Cancellation to Mr. McKeehan's insurance agent.

9. Rhonda Isham testified that she works for Insurer as a Corporate Services Assistant. Ms. Isham aids the manager who oversees Insurer's outgoing mail team and previously was a member of the outgoing mail team. She remarked that Insurer has business customs of sending all notices of cancellation via certified mail and entering the assigned certified mail numbers into Pitney Bowes' electronic equipment. The Pitney Bowes equipment meters and tracks Insurer's mail. Insurer also uses envelopes that allow the contact information of the addressees listed in outgoing letters to be seen through transparent "windows" to ensure they are sent to the correct recipients. Ms. Isham explained that "certified mail" and "return receipt certified mail" are different. Insurer's standard practice is to send notices of cancellation via certified mail rather than return receipt certified mail.

10. Ms. Isham commented that the Pitney Bowes equipment generated a report reflecting that Insurer's March 26, 2013 Notice of Cancellation was mailed to Mr. McKeehan's zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893. Although the report did not reflect that an individual had signed for the Notice of Cancellation, Ms. Isham explained that she has never seen a similar report that revealed an individual had signed for the document. Finally, a "Delivery Status" confirmation from the United States Postal Service (USPS) also states that tracking number 9171082133393950727893 was delivered.

11. Mr. Lease explained that Insurer sent the Notice of Cancellation to Mr. McKeehan at his address of record via certified mail because he failed to timely pay his insurance premiums. Mr. Lease commented that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic "notepad entry" when a notice of cancellation is issued and Insurer's underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail.

12. Mr. Lease also testified that Insurer has sent other correspondence to Mr. McKeehan using the same name and address since the inception of his Workers' Compensation insurance policy in January 2013. Mr. McKeehan has never reported any trouble receiving mail. Although Mr. Lease acknowledged that Insurer does not possess a return receipt for the Notice of Cancellation, he explained that USPS only retains return receipts for two years and he had no reason to believe one might be relevant within the timeframe. Mr. Lease further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to McKeehan's insurance agent.

13. Mr. Lease noted that Insurer did not receive any premium payments from Mr. McKeehan after mailing the Notice of Cancellation. In fact, Mr. McKeehan agreed that he did not pay any Workers' Compensation insurance premiums during March and April 2013. Insurer thus cancelled Employer's insurance policy effective April 16, 2013 based on the non-payment of premiums. Insurer sent a letter to Mr. McKeehan informing him of the termination.

14. Mr. McKeehan testified that he learned of the April 26, 2013 motor vehicle accident shortly after it occurred. He believed that Employer did not have Workers' Compensation insurance coverage on the date of the accident because "we were getting these cancellations, you know, letters." Mr. McKeehan acknowledged that he received the Notice of Cancellation but could not recall when he received the document or whether he signed for it.

15. Mr. McKeehan commented that he was aware Claimant and Mr. Pate were traveling to Illinois, but did not believe that he needed Workers' Compensation

insurance coverage for them because they were independent contractors. In fact, he had sent Mr. Pate and Claimant "Independent Contractor Agreements" but they never completed the documents. Mr. McKeehan explained that his role in projects for Altisource was limited to reviewing pictures to ensure that work was satisfactorily completed. He noted that he loaned a credit card to Mr. Pate so that Mr. Pate could incur expenses while traveling to Illinois. In fact, at the scene of the April 26, 2013 motor vehicle accident tools and supplies that Mr. Pate had purchased with Mr. McKeehan's credit card were strewn about the area. Nevertheless, Mr. McKeehan expected reimbursement for the expenditures. He added that the credit card belonged to a different company that he owns by the name of Western Waste, LLC.

16. On November 14, 2014 Altisource filed a Motion for Summary Judgment requesting dismissal based on a lack of jurisdiction. On December 30, 2014 ALJ Felter issued an Order granting the Motion and dismissing Altisource from the claim.

17. ALJ Felter conducted hearings in this matter on January 21, 2015 and April 6, 2015. He issued a Full Findings of Fact, Conclusions of Law, and Order on April 15, 2015, in which he ruled that all of the previous proceedings were "a nullity and held for naught because [Insurer] did not receive notice thereof," and the matter would begin again if Insurer was joined as a party.

18. On April 10, 2015 Claimant filed an Application for Hearing in which it joined Insurer as a party.

19. On September 9, 2015 the Industrial Claim Appeals Office (ICAP) determined that it lacked jurisdiction to consider Claimant's Petition to Review ALJ Felter's December 30, 2014 and April 15, 2015 Orders. The ICAP reasoned that ALJ Felter's Orders were interlocutory.

20. Employer has failed to prove by a preponderance of the evidence that Claimant was an independent contractor pursuant to statute or was an employee of Mr. Pate. Initially, on April 21, 2013 Mr. Pate and Claimant completed the job in Granby, Colorado. They cleaned up firewood and other materials. Mr. McKeehan reviewed a picture of the job site, noted his satisfaction with the work and asked Mr. Pate to travel to Chicago to complete additional work supplied by Altisource. Although Mr. McKeehan did not offer any work in Chicago to Claimant, he acquiesced to Claimant's participation in the Illinois projects. Mr. Pate did not operate a trade or business but simply performed work for Mr. McKeehan and was paid personally. Claimant was simply a co-worker with Mr. Pate who was traveling to Illinois to complete additional assignments.

21. Employer has established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer demonstrated that it did not provide more than minimal training for Claimant. However, the overwhelming evidence reflects that Claimant was an employee of Employer on April 26, 2013. Claimant did not operate a trade or business and did not complete an independent contractor agreement or any other written document reflecting that he was not an employee. The record reveals that there was no fixed or contract rate of pay based on the completion of a

specific project. There was some evidence that Mr. Pate would earn $10,000 for his work in Illinois and that Claimant would receive 50% of the total, but there was no mention that the pay was contingent on the completion of a specific project. Furthermore, Mr. McKeehan acknowledged that Claimant and Mr. Pate had completed work in Granby, CO on April 21, 2013. Moreover, Mr. McKeehan established a quality standard for the completion of projects because he reviewed pictures to ensure that work was satisfactorily completed. He also noted that he loaned a credit card to Mr. Pate so that Mr. Pate could purchase tools and supplies for the projects while traveling to Illinois . Finally, by sending Claimant and Mr. Pate to Illinois to work on Altisource projects for an extended period of time, Claimant was effectively required to work exclusively for Employer.

22. Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the service performed" during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Based on the expectation that he would earn $5,000 while in Illinois for an unspecified time period, Claimant's income was wholly dependent on his earnings from Employer. Accordingly, Claimant was an employee of Employer on April 26, 2013.

23. The record reflects that Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's Workers' Compensation insurance policy. Initially, on March 27, 2013 Insurer sent a letter dated March 26, 2013 via certified mail to Mr. McKeehan notifying him that his insurance premium was overdue. The letter apprised him that his policy would be canceled on April 16, 2013 unless Insurer received the amount due by April 15, 2013. The Notice of Cancellation was mailed to Mr. McKeehan at 4137 Warbler Drive, Ft. Collins, CO, 80526. Insurer contemporaneously sent a copy of the Notice of Cancellation to Mr. McKeehan's insurance agent.

24. Ms. Isham credibly remarked that Insurer has business customs of sending all notices of cancellation via certified mail and entering the assigned certified mail numbers into Pitney Bowes' electronic equipment. The Pitney Bowes equipment meters and tracks Insurer's mail. Ms. Isham commented that the Pitney Bowes equipment generated a report reflecting that Insurer's March 26, 2013 Notice of Cancellation was mailed to Mr. McKeehan's zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893. Finally, a "Delivery Status" confirmation from the United States Postal Service (USPS) also states that tracking number 9171082133393950727893 was delivered. Moreover, Mr. Lease credibly explained that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic "notepad entry" when a notice of cancellation is issued and Insurer's underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail. Mr. Lease further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to

McKeehan's insurance agent. Based on the preceding credible testimony, Insurer has established by a preponderance of the evidence the existence of several business customs that warrant presumptions that the Notice of Cancellation was sent to Mr. McKeehan via certified mail and his insurance agent via regular mail.

25. Mr. Lease noted that Insurer did not receive any premium payments from Mr. McKeehan after mailing the Notice of Cancellation. In fact, Mr. McKeehan agreed that he did not pay any Workers' Compensation insurance premiums during March and April 2013. Furthermore, Mr. McKeehan acknowledged that he knew the policy was cancelled when he first learned of the accident "shortly" after it occurred because he had already received the Notice of Cancellation. Because Employer had an adequate opportunity to avoid non-insured status and any mailing deficiency did not adverse affect his interests, Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's Workers' Compensation insurance policy. Insurer thus cancelled Employer's insurance policy effective April 16, 2013 based on the non-payment of premiums. Employer thus did not possess Workers' Compensation insurance coverage for Claimant on April 26, 2013.

26. Employer was not insured on April 26, 2013. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period April 27, 2013 until terminated by statute. As of the date of this Order, the period covers 1035 days. Claimant's weekly TTD rate of $769.15 shall be increased by 50%, for a lack of insurance, to a TTD rate of $1,153.84 each week. Multiplying $1,153.84 for a total period of 1035 days or 147.86 weeks yields a total TTD amount of $170,603.49.

27. Claimant's TTD benefits are subject to a SSDI offset in the amount of $755.00 per month since October 1, 2014. For the 17 month period from October 1, 2014 through the date of this Order, the total TTD offset is $12,835.00. Subtracting $12,835 from $170,603.49 equals total TTD benefits of $157,768.49.

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).

Independent Contractor

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 second prong of §8-40-202(2)(a), C.R.S. as to whether an claimant should be deemed an employee is whether the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011). Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document. The "employer" may also 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 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, does not provide tools or benefits except materials and equipment, 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), C.R.S. 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. *Id.*

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is

protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. As found, Employer has failed to prove that it is more probably true than not that Claimant was an independent contractor pursuant to statute or was an employee of Mr. Pate. Initially, on April 21, 2013 Mr. Pate and Claimant completed the job in Granby, Colorado. They cleaned up firewood and other materials. Mr. McKeehan reviewed a picture of the job site, noted his satisfaction with the work and asked Mr. Pate to travel to Chicago to complete additional work supplied by Altisource. Although Mr. McKeehan did not offer any work in Chicago to Claimant, he acquiesced to Claimant's participation in the Illinois projects. Mr. Pate did not operate a trade or business but simply performed work for Mr. McKeehan and was paid personally. Claimant was simply a co-worker with Mr. Pate who was traveling to Illinois to complete additional assignments.

7. As found, Employer has established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer demonstrated that it did not provide more than minimal training for Claimant. However, the overwhelming evidence reflects that Claimant was an employee of Employer on April 26, 2013. Claimant did not operate a trade or business and did not complete an independent contractor agreement or any other written document reflecting that he was not an employee. The record reveals that there was no fixed or contract rate of pay based on the completion of a specific project. There was some evidence that Mr. Pate would earn $10,000 for his work in Illinois and that Claimant would receive 50% of the total, but there was no mention that the pay was contingent on the completion of a specific project. Furthermore, Mr. McKeehan acknowledged that Claimant and Mr. Pate had completed work in Granby, CO on April 21, 2013. Moreover, Mr. McKeehan established a quality standard for the completion of projects because he reviewed pictures to ensure that work was satisfactorily completed. He also noted that he loaned a credit card to Mr. Pate so that Mr. Pate could purchase tools and supplies for the projects while traveling to Illinois . Finally, by sending Claimant and Mr. Pate to Illinois to work on Altisource projects for an extended period of time, Claimant was effectively required to work exclusively for Employer.

8. As found, Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the service performed" during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Based on the expectation that he would earn $5,000 while in Illinois for an unspecified time period, Claimant's income was wholly dependent on his earnings from Employer. Accordingly, Claimant was an employee of Employer on April 26, 2013.

Insurance Coverage

9. Once the existence of a valid insurance contract has been established, the burden is on the insurer to establish that the policy has lapsed. *Butkovich v. ICAO*, 690

P.2d 257, 259 (Colo. App. 1984). It is undisputed that Employer had a Workers' Compensation insurance policy with Insurer prior to April 16, 2013.

10. Employer asserts that Insurer's March 26, 2013 Notice of Cancellation failed to comply with §8-44-110, C.R.S. because it was not sent by certified mail. The procedure for cancelling a workers' compensation policy is established by §8-44-110, C.R.S. The statute provides:

> Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall notify any employer insured by the carrier or Pinnacol Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage. Such notice shall be sent at least thirty days prior to the effective date of the cancellation of the insurance. However, if the cancellation is based on one or more of the following reasons, then such notice may be sent less than thirty days prior to the effective date of the cancellation of the insurance: Fraud, material misrepresentation, nonpayment of premium, or any other reason approved by the commissioner of insurance.

The statute is designed to "afford the insured advance notice of an impending cancellation of insurance so that the insured has an opportunity to avoid non-insured status." *Perez v. Lags Exploration, d/b/a Waterboyz Int'l, LLC*, W.C. Nos. 4-734-913 & 4-734-795 (ICAP, Mar. 23, 2009). Because the policy cancellation was based on Mr. McKeehan's non-payment of premiums, Insurer was permitted to terminate the policy fewer than 30 days prior to the effective date of the cancellation.

11. In *EZ Building Components v. Industrial Claim Appeals Office,* 74 P.3d 516 (Colo. App. 2003), the Colorado Court of Appeals analyzed the specific language of §8-44-110, C.R.S. At the time §8-44-110, C.R.S. required notice of cancellation by certified mail to the Division, employer and insurer. *EZ Building Components,* 74 P.3d at 518. The Court reasoned that substantial compliance with the notice provisions of the statute is sufficient to cancel a Workers' Compensation insurance policy. *Id.* The Court affirmed the final order of the Industrial Claim Appeals Office and concluded that the insurer substantially complied with the notice provision of §8-44-110, C.R.S. when the employer was notified of the policy cancellation by certified mail but there was no evidence that the employer's insurance agent or the Division was also notified by certified mail. *Id.* at 518-19. The Court noted that the existence of a business custom is sufficient to warrant a presumption that notice was sent. *Id.* at 519 The Court explained that there was no evidence that the failure to notify the agent and the Division by certified mail adversely affected the employer's interests. *Id.* at 518.

12. In *Acosta v. Plumbing Co. of Colorado*, W.C. No. 4-732-044 (ICAP, Mar. 9, 2010) ICAP concluded that the record was "sufficient to establish a presumption that the notice of cancellation was mailed to and received by the employer based on the

business custom" of the insurer. Substantial compliance with the notice requirements of the statute was thus sufficient to effect cancellation of the policy. *Id.* Whether Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's policy, and whether Mr. McKeehan actually received the Notice of Cancellation, are questions of fact for the ALJ to resolve. *See EZ Building Components,* 74 P.3d at 519.

13. As found, the record reflects that Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's Workers' Compensation insurance policy. Initially, on March 27, 2013 Insurer sent a letter dated March 26, 2013 via certified mail to Mr. McKeehan notifying him that his insurance premium was overdue. The letter apprised him that his policy would be canceled on April 16, 2013 unless Insurer received the amount due by April 15, 2013. The Notice of Cancellation was mailed to Mr. McKeehan at 4137 Warbler Drive, Ft. Collins, CO, 80526. Insurer contemporaneously sent a copy of the Notice of Cancellation to Mr. McKeehan's insurance agent.

14. As found, Ms. Isham credibly remarked that Insurer has business customs of sending all notices of cancellation via certified mail and entering the assigned certified mail numbers into Pitney Bowes' electronic equipment. The Pitney Bowes equipment meters and tracks Insurer's mail. Ms. Isham commented that the Pitney Bowes equipment generated a report reflecting that Insurer's March 26, 2013 Notice of Cancellation was mailed to Mr. McKeehan's zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893. Finally, a "Delivery Status" confirmation from the United States Postal Service (USPS) also states that tracking number 9171082133393950727893 was delivered. Moreover, Mr. Lease credibly explained that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic "notepad entry" when a notice of cancellation is issued and Insurer's underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail. Mr. Lease further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to McKeehan's insurance agent. Based on the preceding credible testimony, Insurer has established by a preponderance of the evidence the existence of several business customs that warrant presumptions that the Notice of Cancellation was sent to Mr. McKeehan via certified mail and his insurance agent via regular mail.

15. As found, Mr. Lease noted that Insurer did not receive any premium payments from Mr. McKeehan after mailing the Notice of Cancellation. In fact, Mr. McKeehan agreed that he did not pay any Workers' Compensation insurance premiums during March and April 2013. Furthermore, Mr. McKeehan acknowledged that he knew the policy was cancelled when he first learned of the accident "shortly" after it occurred because he had already received the Notice of Cancellation. Because Employer had an adequate opportunity to avoid non-insured status and any mailing deficiency did not

adverse affect his interests, Insurer substantially complied with §8-44-110, C.R.S. in canceling Employer's Workers' Compensation insurance policy. Insurer thus cancelled Employer's insurance policy effective April 16, 2013 based on the non-payment of premiums. Employer thus did not possess Workers' Compensation insurance coverage for Claimant on April 26, 2013.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

16. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005). The penalty in §8-43-408(1), C.R.S. is mandatory not discretionary. *See Eachus v. Cooper*, 738 P.2d 383, 386 (Colo. App. 1986) (noting that "courts have no discretion in imposing the penalty").

17. As found, Employer was not insured on April 26, 2013. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period April 27, 2013 until terminated by statute. As of the date of this Order, the period covers 1035 days. Claimant's weekly TTD rate of $769.15 shall be increased by 50%, for a lack of insurance, to a TTD rate of $1,153.84 each week. Multiplying $1,153.84 for a total period of 1035 days or 147.86 weeks yields a total TTD amount of $170,603.49.

18. As found, Claimant's TTD benefits are subject to a SSDI offset in the amount of $755.00 per month since October 1, 2014. For the 17 month period from October 1, 2014 through the date of this Order, the total TTD offset is $12,835.00. Subtracting $12,835 from $170,603.49 equals total TTD benefits of $157,768.49.

ORDER

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

1. Claimant suffered compensable industrial injuries during the course and scope of his employment with Employer on April 26, 2013.

2. Claimant worked for Employer as an employee not an independent contractor.

3. Insurer substantially complied with §8-44-110, C.R.S. in cancelling its Workers' Compensation insurance policy with Employer effective April 16, 2013.

4. Employer is financially liable for Claimant's reasonable and necessary medical treatment that is designed to cure or relieve the effects of his April 26, 2013 industrial injuries. Claimant suffered extensive brain injuries during the motor vehicle accident, he required the appointment of a conservator and guardian and he has received home healthcare. A conservative estimate of his medical expenses is $1,000,000.

5. Claimant earned an AWW of $1,153.84.

6. Employer shall pay Claimant total TTD benefits in the amount of $157,768.49..

In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $1,157,768.49 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 and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $1,157,768.49 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation <u>or</u>

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

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

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

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

DATED: February 25, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303, C.R.S.?

- If claimant has proven by a preponderance of the evidence that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury?

- If claimant has proven by a preponderance of the evidence that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the period of March 29, 2015 through August 12, 2015?

FINDINGS OF FACT

1. Claimant is employed by employer as an over the road truck driver. Claimant testified he sustained a work injury on July 30, 2013 when he was run off the road in Barstow, California. Claimant testified he injured his left shoulder and left foot in the injury.

2. Claimant was initially seen at the emergency room ("ER") in Barstow on July 31, 2013. Claimant underwent x-rays of his left shoulder but did not seek treatment for his left foot. Claimant testified at hearing that three days after the injury, his toes on his left foot began popping, cracking with associated pain.

3. Claimant began treating with Dr. Klein after returning home. Dr. Klein examined claimant on August 5, 2013 and noted that in addition to his shoulder injury, claimant had mild tenderness of his left tibia with bruising. Claimant reported he was able to fully bear weight on the left leg. Claimant returned to Dr. Klein on August 14, 2013 and reported he got his foot jammed into the floorboards in the accident. Claimant was reporting pain in his left foot, including cracking and popping. Dr. Klein noted that the pain appeared to be coming from claimant's existing hammertoes and opined that he did not see enough evidence of injury on exam to warrant this problem related to his workers' compensation claim.

4. Dr. Klein saw claimant on August 20, 2013 and noted that while claimant reported his shoulder was still hurting, he was much improved. Dr. Klein also noted claimant complaining of left foot pain, but reported that this had resolved. Claimant continued to treat with Dr. Klein for his shoulder injury, but was not actively getting treatment to his left foot.

5. Claimant eventually underwent shoulder surgery under the auspices of Dr. Luker on January 30, 2014.

6. Records indicate claimant was complaining of losing both of his great toenails on May 21, 2014 after changing shoes. Claimant also had a sore on the medial aspect of his first metatarsal joint which was noted to be a diabetic foot ulcer.

7. Claimant eventually got placed at maximum medical improvement ("MMI") by Dr. Klein on June 23, 2014 with a permanent impairment rating of 17% of the upper extremity. A final admission of liability ("FAL") admitting for the impairment rating on July 10, 2014. No objection to the FAL was filed and claimant's case was closed as a matter of law.

8. Claimant returned to Dr. Klein on October 13, 2014 with continued complaints involving the left shoulder. Dr. Klein provided claimant with a Kenalog injection into his left shoulder. Claimant did not complain to Dr. Klein of issues with his toes according to the medical report.

9. Claimant returned to Dr. Klein on February 24, 2015 with complaints of an ulcer on his left 4th toe. Claimant noted he had a "corn" on the top of the toe that rubbed off and was sore and within a few days, he noted some purulent drainage. Dr. Klein referred claimant to Dr. Griffiths.

10. Claimant was examined by Dr. Griffiths on February 26, 2015. Claimant reported to Dr. Griffiths that he had issues with his left foot since a rollover truck accident on June 30, 2013 when his left foot was pinned under the brake pedal. Claimant noted he had some black and blue changes to the foot and some swelling. Dr. Griffiths obtained x-rays of the foot and noted that the third, fourth and fifth metatarsals have been fractured consistent with claimant's subjective history of injury. Dr. Griffiths further noted that the toes appear to be well healed. Dr. Griffiths recommended continued conservative care, but noted claimant may at some point require surgical reduction of the dislocated metatarsophalangeal joints ("MTPJ's) and the rigid hammertoes.

11. Claimant returned to Dr. Griffiths on March 5, 2015 and noted that his foot was significantly improved. However, when claimant returned on March 30, 2015, it was noted that claimant had developed an infection in his left foot. Dr. Griffiths performed debridement of the heperkeratotic lesion and ulceration plantar right (sic) foot.

12. Claimant returned to Dr. Griffiths on April 1, 2015 and was diagnosed with a diabetic foot infection with localized infection/abscess of the left forefoot. Dr. Griffiths recommended a simple aspiration incision and drainage. Claimant agreed with the surgical recommendation and the incision and drainage was performed. Claimant continued to follow up with Dr. Griffiths following the incision and drainage. Dr. Griffiths also referred claimant to Dr. Lockwood.

13. Claimant was examined by Dr. Lockwood on April 22, 2015. Dr. Lockwood noted claimant has a long history of diabetes and hyperlipidemia. Dr. Lockwood indicated claimant had a problem that developed in early February 2015 when he removed a corn from his foot and ultimately developed ulcers on his feet. Dr. Lockwood diagnosed claimant with osteomyeltis and noted claimant's diabetes was under poor control. Dr. Lockwood noted cultures are showing strep dysgalactae and opined that oral antibiotics were not going to be sufficient in claimant's case. Dr. Lockwood therefore recommended intravaneous antibiotics.

14. Claimant returned to Dr. Griffiths on May 19, 2015. Dr. Griffiths noted that there were some questions regarding the cause of his dislocated MTPJ's. Dr. Griffiths noted claimant sustained an accident previously with obvious trauma at the metatarsal shafts that were confirmed on the MRI evaluation. Dr. Griffiths noted that it was probable that the accident led to the malalignment of the metatarsals and subsequent dislocation of the metatarsophalangeal joints and hammertoe deformities. Dr. Griffiths noted that claimant did not have clinical dislocation of the MTPJ's on the contralateral (right) foot.

15. Claimant underwent pan metatarsal head resection and hammertoe corrective surgery on or about May 27, 2015. Claimant followed up with Dr. Griffiths on June 1, 2015 and reported he was doing quite well.

16. Claimant was referred for an independent medical examination ("IME") with Dr. Hughes on June 29, 2015. Dr. Hughes reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant in connection with his IME. Dr. Hughes noted that x-rays were interpreted by Dr. Griffiths as showing dislocated 2nd, 3rd, and 4th metatarsophalangeal joints along with well-healed-appearing fractures involving the 3rd, 4th and 5th metatarsals "consistent with his subjective history of injury." Dr. Hughes opined that claimant's infectious cascade of events leading to his surgery of May 27, 2015 was initiated by the motor vehicle accident of July 30, 2013. Dr. Hughes opined that claimant was not at MMI and recommended addition treatment including rehabilitation and reconditioning.

17. Claimant underwent an IME with Dr. Lindberg at the request of respondents on September 1, 2015. Dr. Lindberg reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with the IME. Dr. Lindberg noted claimant reported to him that he had pain in his foot the entire time since the accident. Claimant reported to Dr. Lindberg that he had had hammertoes prior to his accident but that the cracking and popping seemed to occur after the accident.

18. Dr. Lindberg diagnosed claimant with hammertoe deformities and diabetic neuropathy and a current active diabetic ulcer on the dorsal aspect of his right 4th toe. Dr. Lindberg opined that the hammertoe deformities and/or dislocations of the MTP joints were a natural progression of severe hammertoes and not related to his motor vehicle accident. Dr. Lindberg noted that the same pathology can been seen happening on claimant's right foot, albeit at a different stage.

19. Dr. Lindberg testified by deposition in this matter. Dr. Lindberg testified consistent with his IME report. Dr. Lindberg testified that following claimant's accident he was evaluated by various providers and there was no comment about any ecchymosis or selling that extended down into the foot. Dr. Lindberg also noted that claimant, on examination, had significant hammertoe development on his right foot, which would have been unaffected by the injury. Dr. Lindberg testified that if hammertoes are left unchecked, many times they end up dislocating.

20. Dr. Klein issued a report on September 24, 2015 to clarify his opinion in this case. Dr. Klein noted that claimant's hammertoes could make toe dislocations difficult to detect without an x-ray and claimant did not get an x-ray following his work injury of his left foot. Dr. Klein opined in this report that it was his opining that it was more likely than not that the accident on July 30, 2013 caused the claimant's dislocations or at a minimum disrupted/aggravated a pre-existing pathology.

21. Dr. Klein testified at hearing in this matter. Dr. Klein testified that prior to claimant's motor vehicle accident he had uncontrolled diabetes and hammertoes. Dr. Klein acknowledged that claimant denied left foot pain when he was seen in the emergency room on July 30, 2013. Dr. Klein testified that to go from a hammertoe without dislocation to a hammertoe with a dislocation, it would take only a small amount of trauma.

22. Dr. Klein testified that on August 5, 2013 when he examined claimant, claimant did not have problems weight bearing. Dr. Klein testified that on August 14, 2013 he examined claimant's left foot and believed at that time that claimant's left foot problems were not related to the motor vehicle accident. Dr. Klein testified that by August 20, 2013, claimant's foot seemed to have gotten better. Dr. Klein testified that there was no indication that claimant had dislocated his toes prior to being placed at MMI.

23. Dr. Klein testified that although Dr. Griffiths had indicated that there was "obvious trauma" to his foot after the motor vehicle accident, Dr. Klein noted that there was no obvious trauma to claimant's foot.

24. Dr. Klein testified that it was his opinion that claimant's injury in this case predisposed claimant to have a problem with his foot. Dr. Klein testified that his opinion expressed in the September 24, 2015 letter had not changed during the hearing.

25. The ALJ credits the opinions expressed by Dr. Lindberg in his report and testimony over the contrary opinions expressed by Dr. Klein, Dr. Hughes and Dr. Griffiths and finds that claimant has failed to prove that it is more likely than not that his medical treatment for his left foot are related to the work injury of July 30, 2013. The ALJ notes that claimant did not present with obvious trauma to the foot following the motor vehicle accident and did not immediately complain of any problems with his left foot. The ALJ further credits Dr. Lindberg's testimony that if claimant had dislocated his toes associated with the motor vehicle accident, he would have presented with some symptoms related to that dislocation immediately following the incident.

26. In this case, claimant didn't complain of pain in his left foot at the ER following the accident. Additionally, when claimant was examined by Dr. Klein on August 5, 2013, claimant was noted to have ecchymosis on his left anterior tibia and left anterior thigh, but no bruising was noted in claimant's left foot. Claimant displayed no pain with weight bearing on this examination.

27. The ALJ notes that Dr. Griffiths' statement that claimant's dislocations and well-healed fractures that were associated with claimant's subjective history relies, at least in part, on the incorrect history that claimant "had some black and blue changes to the foot and some swelling." This history is simply not reflected in the medical records and was disputed by Dr. Klein in his testimony at hearing. Moreover, this history is likewise recited by Dr. Hughes in his IME report and was likely relied upon, to some degree, in formulating Dr. Hughes' opinion in this case.

28. When claimant returned to Dr. Klein on August 14, 2013, he did complain of some problems with his left foot, but those issues were noted by Dr. Klein to have resolved by claimant's next visit on August 20, 2013.

29. Based on the evidence presented that ALJ can not indicate that claimant has demonstrated that it is more likely than not that the medical treatment provided by Dr. Griffiths and Dr. Lockwood in February 2015 is related to the July 30, 2013 work injury. As such, claimant's request to have his claim reopened must be denied.

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 error, mistake or a change in condition. Section 8-43-303(1), C.R.S. When considering whether the claim should be reopened based on a mistake, the ALJ must determine whether a mistake was made, and if so, whether it is the type of mistake which justifies reopening the case. *See Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). 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 prove by a preponderance of the evidence that his claim should be reopened based on either a mistake or a worsening of his condition. Due to the fact that claimant has failed to meet this burden of proof, claimant's request to have his case reopened is denied.

ORDER

It is therefore ordered that:

1. Claimant's request to have his claim reopened is hereby DENIED.

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, 2016

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 presented were:

1. Has the claimant established by a preponderance of the evidence that he maintained concurrent employment at the time of the industrial injury;

2. If so, has the claimant established by a preponderance of the evidence what his average weekly wage is as a result of such concurrent employment; and,

3. If so, has the claimant established by a preponderance of the evidence that his temporary total disability benefits and his permanent partial disability benefits require adjustment related to the concurrent employment and wages.

FINDINGS OF FACT

1. The claimant was injured on the job on September 9, 2013 while working for the respondent-employer. The respondent-insurer has admitted this injury as evidenced by the Final Admission of Liability dated August 14, 2015.

2. The claimant, acting as a home health CNA, was wheeling a patient out the patient's front door. The wheelchair tipped over, the claimant fell over it and the patient landed on top of the claimant severely injuring the claimant's right shoulder.

3. The claimant's injury required him to undergo surgery on his right shoulder.

4. Due to his shoulder injury, the claimant was unable to work for the respondent-employer from September 10, 2013 through June 15, 2014, the date of maximum medical improvement, and the respondent-insurer admitted to temporary total disability benefits for that period.

5. At the time of the work related injury the claimant was working concurrent employment as a home health care CNA for Primary Home Health Care, doing the same job duties with similar physical requirements.

6. Following the job related injury at the respondent-employer, the claimant was unable to perform his job duties with Primary Home Health Care as a result of those injuries and did not work from September 10, 2013 through June 15, 2014.

7. The claimant's wages for Primary Home Health Care for the period of May 19, 2013 to August 24, 2013, a 12 week period of time prior to the injury, was $3,328.71. The ALJ finds that this amounts to an average weekly wage from the concurrent employer of $277.39.

8. The ALJ finds the claimant's testimony of concurrent employment and wages to be credible.

9. At hearing the respondents stipulated that the average weekly wage with the respondent-employer was $145.86 with a temporary total disability rate of $97.24.

10. As the result of the injury of September 9, 2013, the claimant suffered a wage loss from the respondent-employer and Primary Home Health Care.

11. The admission by the respondent-insurer for the wages lost solely at the respondent-employer does not fairly compute the average weekly wage of the claimant.

12. The fair determination of the claimant's average weekly wage includes his average wage earned in his concurrent employment with Primary Home Health Care. The average weekly wage with the respondent-employer of $145.86 plus the average weekly wage with Primary Home Health Care of $277.39 yields a total average weekly wage of $423.25. The revised temporary total disability rate is $282.17.

13. The ALJ finds that the claimant has established that it is more likely than not that he suffered a wage loss as a result of his industrial injury that includes the wages lost from his concurrent employer Primary Home Health Care.

14. The ALJ finds that the claimant has established that it is more likely than not that his total AWW is $423.25 per week.

15. The ALJ finds that the claimant has established that it is more likely than not that his TTD and his PPD benefits require adjustment based upon his correct AWW.

CONCLUSIONS OF LAW

1. The ALJ has great discretion in calculating AWW. Further, discretionary authority is granted to the division of labor to utilize an alternative method of computing an AWW if concurrent employments exist. *Coleman v. National Produce Service,* W. C. No. 4-601-676 (July 12, 2005). There is nothing specific in the Act which mandates wages from concurrent employment be included in the AWW. *Miranda v. ISS Prudential Services, Inc. and/or Denver Public Schools,* W.C. 3-833-976, 3-908-234 and 4-105-113 (February 28, 1994). There is no *ipso facto* rule requiring the ALJ to include wages from concurrent employments. *Sanchez v. Pueblo Medical Investors,* W.C. No. 3-942-960 (December 14, 1998).

2. Where the claimant holds two concurrent employments at the time of the injury, the ALJ has discretion to calculate the AWW so as to include the total income from the multiple employments. The basic objective when calculating the AWW is to arrive at a "fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993).

3. Colorado Revised Statutes, Section 8-42-102(3) grants the Administrative Law Judge discretion in fairly determining an employee's average weekly wage. Where an injury impairs a claimant's ability to earn from concurrent employment, a "fair" computation of the average weekly wage may warrant inclusion of all such wages. *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988); *Broadmoor Insurance Co. v. Industrial Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1966).

4. The ALJ exercises this discretion and determines that the concurrent wages of the claimant at the time of the injury should be combined to determine a fair average weekly wage.

5. The ALJ concludes that the claimant has established by a preponderance of the evidence that he suffered a wage loss as a result of his industrial injury that includes the wages lost from his concurrent employer Primary Home Health Care.

6. The ALJ concludes that the claimant has established by a preponderance of the evidence that the average weekly wage with the respondent-employer of $145.86 plus the average weekly wage with Primary Home Health Care of $277.39 yields a total average weekly wage of $423.25, with a revised temporary total disability rate is $282.17.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant's TTD and PPD benefits require adjustment based upon his correct AWW.

ORDER

It is therefore ordered that:

1. The claimant's concurrent employment requires adjustment of his average weekly wage.

2. The claimant's average weekly wage is $423.25.

3. The respondent-insurer shall adjust the claimant's permanent partial disability payments to reflect this higher AWW.

4. The respondent-insurer shall adjust the claimant's temporary total disability payments to reflect this higher AWW.

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

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

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

DATE: February 4, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the right knee replace surgery recommended by Dr. Heil is reasonable and necessary medical treatment related to claimant's September 6, 2013 industrial injury?

- Whether claimant has proven by a preponderance of the evidence that the right hip arthrogram recommended by Dr. Heil is reasonable and necessary medical treatment related to claimant's September 6, 2013 industrial injury?

FINDINGS OF FACT

The first two findings of fact are taken from the April 27, 2015 findings of fact issued by the court and are recited here pursuant to a stipulation entered into at the hearing regarding the facts surrounding claimant's September 6, 2013 workers' compensation injury.

1. Claimant was employed as a heavy equipment operator for employer. Claimant is a 53 year old female who sustained an admitted injury on September 6, 2013 in the course and scope of her employment with employer. Claimant testified at hearing she was driving heavy equipment on an off-road pipeline project in western Colorado. Claimant testified that at the time of the injury she had been driving heavy equipment for approximately 13 years for various employers.

2. Claimant testified that on the date of the injury she was operating a water pole truck. Claimant testified that while working on the pipeline project there was a waterway that needed to be crossed and that because of the steepness of the grade near the bridge over the waterway, the water pole truck could not drive over it independently. Claimant testified that she and her co-workers had a "tailgate meeting" where it was discussed how the water pole could be towed across the bridge. It was decided that a side boom, a tractor-like piece of equipment used to lower large sections of pipe into trenches, would tow claimant's water pole slowly down the slope and then up and over the bridge. Claimant testified that once the side boom started towing her water pole down the slope, the side boom was traveling faster than was agreed upon. Claimant testified she attempted to slow her water pole, but that the front of her water pole collided with the rear of the side boom when the two vehicles reached the bottom of the slope. Claimant testified that she was restrained in a seatbelt, but that when the two vehicles collided, she was tossed about in the cab of the water pole. Claimant testified that several parts of her body, including her knees, hit the metal front dash and the metal box around the vehicle's steering column. Claimant testified that the force of the impact knocked off a weight that was attached to the side boom.

3. Following the injury, claimant was evaluated at St. Mary's Hospital Emergency Room ("ER"). Claimant noted she had a lap belt restraint on and hit the steering wheel with her knees, abdomen and chest. Claimant complained of pain to her left knee with bruising to the prepatellar area and the medial aspect with some swelling. Claimant also complained of a knot to her right prepatellar knee, but only minimal discomfort. Claimant was diagnosed with multiple contusions with an acute cervical strain and provided with medications.

4. Claimant sought care following her work injury with Work Partners. Claimant was evaluated by PA-C Herrera on September 30, 2013 and complained of low back pain, neck pain, left knee pain and right knee pain. PA Herrera noted claimant's knees had no ecchymosis or bony deformity and no effusion. Claimant was diagnosed with a cervical spine strain, a lumbar spine sprain, and bilateral knee contusions.

5. Claimant continued to follow up with Ms. Herrera for complaints involving her right knee and low back. On October 14, 2013, Ms. Herrera recommended claimant undergo a magnetic resonance image ("MRI") of the right knee. Claimant eventually underwent the right knee MRI on November 11, 2013. The MRI showed articular disease in the central patella, deep patellar groove, and in the medial and lateral joint compartment. The MRI also noted there was mild fragmentation and probably a small radial tear at the central tip in the middle third of the medial meniscus.

6. Claimant came under the care of Dr. Stagg on December 23, 2013. Dr. Stagg noted claimant presented with complaints of neck pain, low back pain and bilateral knee pain. Dr. Stagg reviewed claimant's MRI results and referred claimant to Dr. Reeder and Dr. Clifford at Rocky Mountain Orthopaedic Associates for further evaluation.

7. Claimant underwent an MRI of her left knee on January 3, 2014. The left knee MRI showed severe tricompartmental degenerative changes, especially medially.

8. Claimant was evaluated by Dr. Reeder on January 6, 2014. Dr. Reeder noted claimant's accident history that involved being in a heavy equipment collision causing claimant to hit the metal column in front of her with both knees. Dr. Reeder noted that although claimant's left knee was more symptomatic, her right knee had anterior and lateral diffuse pain symptoms and was worse with kneeling, bending, and squatting. Dr. Reeder noted that with regard to claimant's left knee, her pain was mostly medially to some anterior pain and was very painful with any pressure. Dr. Reeder recommended claimant undergo an injection to her right knee. Dr. Reeder noted that with regard to claimant's left knee, he felt she had an exacerbation of her underlying arthritis. Claimant indicated she would like to undergo an injection for her left knee as well.

9. Claimant underwent a cortisone injection into her right knee on February 19, 2014. Claimant ultimately reported that she had pain relief following the injection for

only 48 hours. Claimant returned to Dr. Reeder on March 27, 2014 and noted that she had burning pain in her right knee, mostly in the distal patellar area with some medial discomfort. Dr. Reeder referred claimant to Dr. Heil for surgical consultation.

10. Claimant was initially evaluated by Dr. Heil on April 16, 2014. Dr. Heil noted that claimant reported that her left knee was worse than her right knee. Dr. Heil also noted claimant's ongoing complaints of right hip pain. Dr. Heil noted that claimant had x-rays in January 2014 that showed right knee tricompartmental arthritis and left knee more medial and patellofemoral compartment arthritis. Dr. Heil noted that the injections had not really helped with claimant's symptoms. Dr. Heil noted that about the only option claimant had left was a total knee arthroplasty on her left knee. Dr. Heil recommended claimant obtain an MRI of her right hip to make sure there was not an injury to her abductor muscles.

11. Claimant eventually underwent the left total knee replacement surgery on June 9, 2015.

12. Following the surgery, claimant continued to follow up with her treating physicians, including Dr. Heil, Dr. Price and Dr. Stagg. Claimant's treatment included not only her knees but also her neck and back issues as well.

13. Claimant returned to Dr. Heil on July 16, 2015. Dr. Heil noted claimant was doing okay following her surgery and the focus at this point was to wean her off her main medications. Claimant was again evaluated by Dr. Heil in follow up after her surgery on August 6, 2015. Dr. Heil noted that while claimant's left knee range of motion was improving, she was still having significant right knee pain. Dr. Heil noted that her x-rays had shown near bone on bone changes in the medial compartment of her right knee along with patellofemoral arthritis. Dr. Heil noted that heading in the direction of getting the right knee replaced would make sense based on her overall symptoms.

14. Claimant was examined by Dr. Price on September 1, 2015. Dr. Price noted claimant was doing a little better from her left knee surgery and was happy with the results. Dr. Price noted claimant was mostly having low back pain. Dr. Price diagnosed claimant with a pain disorder.

15. Claimant returned to Dr. Clifford on September 2, 2015 with complaints of low back pain and left greater than right leg pain. Dr. Clifford noted claimant's treatment had included injections, epidural steroid injections, perifacet injection and an electromyelogram ("EMG") that did not show obvious evidence of a nerve injury.

16. Claimant was evaluated by Dr. Heil on September 17, 2015. Dr. Heil noted claimant was doing well after her total left knee replacement. Dr. Heil noted claimant was using a cane, but this was for her right knee condition. Dr. Heil noted claimant also had pain in her right hip and recommended an MR Arthrogram of the right

hip to determine if there was something that they could do for her right hip. Dr. Heil noted that the prior MRI of the right hip was normal.

17. Dr. Heil referred claimant for additional weight bearing x-rays of the right knee on November 2, 2015. Dr. Heil noted that the x-rays showed narrowing of the medial compartment of the right knee. Dr. Heil noted claimant had osteoarthritis and post-traumatic arthritis of the right knee and opined that claimant's knees were related to her work-related injury. Dr. Heil noted that claimant's symptoms and treatment were well documented in Dr. Reeder's notes from the initial visit. Dr. Reeder further opined that obtaining an MRI arthrogram of claimant's right hip would be appropriate given her complaints of right hip pain.

18. Dr. Price testified at hearing in this matter. Dr. Price testified that while she felt the left knee replacement surgery was related to her September 6, 2013 work injury, Dr. Price did not believe claimant's right knee replacement surgery was related to the work injury. Dr. Price testified that she believed the left knee surgery was related to her work injury because claimant had objective evidence of an injury to her left knee in that she had a bruise to her left knee after the work injury. However, the records document claimant having objective evidence of an injury to her right knee after the injury as well, in that claimant was noted to have a knot on her right prepatellar knee in the ER record.

19. Dr. Price testified that she was concerned that the proposed right knee replacement surgery could make claimant worse. Dr. Price testified that claimant should undergo more conservative care, including physical therapy and exercise as opposed to the recommended knee replacement surgery.

20. Claimant testified at hearing that prior to her accident on September 6, 2013, she did not have right hip pain and never received medical treatment for her right hip. Claimant testified that following her injury, she has experienced pain in her right hip and would like to undergo a right hip arthrogram to determine if there is any medical treatment that could alleviate her ongoing pain involving her right hip.

21. Claimant testified that following the injury she now has constant right knee pain and that on occasion, her right knee will give out on her. Claimant testified that she would like to undergo the right total knee replacement recommended by Dr. Heil as it was her understanding that the surgery could provide her with pain relief and more stability and mobility involving her right knee.

22. The ALJ credits the testimony of claimant at hearing along with the medical records and reports from Dr. Heil and finds that claimant has demonstrated that it is more probable than not that the recommended right knee arthroplasty proposed by Dr. Heil is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

23. The ALJ notes that claimant has consistently complained of right knee pain following her September 6, 2013 work injury for which she has been under active medical care. The ALJ credits the opinions expressed by Dr. Heil after reviewing claimant's x-rays that the total knee replacement surgery is reasonable and necessary to cure and relieve claimant from the effects of the work injury. The ALJ determines that claimant's testimony and the medical opinions of Dr. Heil establish that it is more likely than not that the work related injury on September 6, 2014 aggravated, accelerated or combined with claimant's pre-existing condition to produce the need for treatment recommended by Dr. Heil.

24. The ALJ credits the testimony of claimant at hearing along with the medical records and reports from Dr. Heil and finds that claimant has demonstrated that it is more probable than not that the recommended right hip MR Arthrogran proposed by Dr. Heil is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ finds claimant's testimony regarding the onset of symptoms in her right hip to be credible and supported by the medical records entered into evidence. The ALJ finds the reports of Dr. Heil credible that the proposed MR Arthrogram is necessary to determine if there is underlying damage related to the work injury that can be treated and relieve the ongoing symptoms claimant continues to experience in her right hip.

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., 2013. 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. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has proven by a preponderance of the evidence that the proposed medical treatment recommended by Dr. Heil including the right total knee arthroplasty and the right hip MR Arthrogram are reasonable and necessary medical treatment related to the industrial injury. As found, claimant's testimony and the medical opinions of Dr. Heil establish by a preponderance of the evidence that claimant's right knee condition necessitating the right knee total arthroplasty are a result of the work related injury that aggravated, accelerated or combined with claimant's pre-existing condition to produce the need for treatment.

ORDER

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 6, 2013 work injury including the total right knee arthroplasy recommended by Dr. Heil and the right hip MR Arthrogram recommended by Dr. Heil pursuant to the Colorado Medical Fee Schedule.

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 19, 2016

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Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-941-297-02

STIPULATION

The parties stipulated to hold the issue of Permanent Total Disability benefits in abeyance pending resolution of the issue of Maximum Medical Improvement.

ISSUES

- Whether Respondent has overcome the Division IME physician's opinions on Maximum Medical Improvement by clear and convincing evidence.
- Whether Respondent has overcome the Division IME physician's opinion on permanent impairment by clear and convincing evidence.
- Whether Respondent has proven Claimant's Average Weekly Wage by a preponderance of the evidence.
- Whether Claimant has proven entitlement to temporary disability benefits by a preponderance of the evidence.
- Whether Claimant has proven entitlement to disfigurement benefits, and if so, in what amount.

FINDINGS OF FACT

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

1. On January 26, 2014, Claimant was removing a loaded pallet from a semi-truck when the top of the pallet load shifted, broke loose and slid towards Claimant, striking Claimant in the left side of the head.

2. Claimant was taken by ambulance to the Medical Center of Aurora (MCA). Records from the ambulance service provide that Claimant sustained a brief loss of consciousness and that "Neuros checked and were normal."

3. MCA's triage notes state, "Bystanders state loss of consciousness 30-60 seconds." Medical staff performed CT scans of Claimant's thoracic spine, brain, and cervical spine, and x-rays of his lumbar spine. All were read as negative and the brain CT revealed no intra cranial hemorrhage or acute process. At discharge, MCA provided Claimant with information regarding head injuries which provided in part, "You suffered an injury to the head. At this time it does not appear to have caused a concussion." Claimant was specifically advised to return to the emergency department if he had, among other things, severe headaches, confusion, or trouble remembering things. Claimant did not return to the emergency department.

4. On January 27, 2014, Claimant presented to Hiep Ritzer, M.D., for an initial evaluation. Dr. Ritzer documented that Claimant's "Chief Complaint" was "head, neck and back pain and right hand pain." Claimant also completed a pain diagram documenting complaints of pain in the area of his left eye, the front and back of his neck, bilateral shoulders and entire back area. Dr. Ritzer's assessment was head contusion, thoracic and back contusion and right hand contusion. Dr. Ritzer is Claimant's ATP and oversees Claimant's treatment and referrals.

5. After numerous diagnostic tests and treatments including two surgeries, Dr. Ritzer placed Claimant at maximum medical improvement (MMI) on January 29, 2015. Dr. Ritzer rated Claimant for the following impairments: 5% upper extremity for loss of range of motion in the left shoulder, and 14% upper extremity for loss of range of motion in the right shoulder. Combined and converted, this equalled an 11% whole person impairment. Dr. Ritzer placed Claimant on permanent work restrictions and provided for limited maintenance care. Respondents filed a final admission of liability (FAL) based on Dr. Ritzer's report.

6. Claimant objected to the FAL and pursued a Division sponsored independent medical examination (DIME). Dr. Lynn Parry performed the DIME on May 28, 2015. Dr. Parry found Claimant not to be at MMI. She rated Claimant's bilateral shoulder impairment at 16% whole person. In addition, she gave Claimant a 17% whole person psychological impairment rating, and also gave him a cervical spine impairment rating of 13% whole person. Dr. Parry's final combined rating was 39% whole person.

Neck Pain

7. Dr. Ritzer saw Claimant eight times between January 30, 2014 and April 30, 2014, each time documenting a "Chief Complaint" of neck pain. However, Claimant's pain diagrams on each of those visits documented only bilateral shoulder pain without any notation by Claimant of neck pain. In addition, Dr. Ritzer's notes of February 7, 2014 specify, "His neck is nonpainful." As a result of Claimant no longer complaining of neck pain, Dr. Ritzer stopped documenting neck pain in Claimant's "Chief Complaint" after April 30, 2014. Dr. Ritzer dies not document neck pain again until November 6, 2014. Dr. Ritzer determined that Claimant's November neck pain is not work related, but rather is attributable to Claimant's sleep position. Although Dr Ritzer ordered a cervical spine MRI on July 21, 2014, it was to assess whether Claimant's continued right shoulder pain was referred pain from the cervical spine, and not because Claimant complained of neck pain. Further, although cervical spine MRI showed some pathology, the findings were deemed not work related by Dr. Ritzer and were not producing any symptoms.

8. Dr. Ritzer referred Claimant to Rudy Kovachevich for bilateral shoulder pain. Because Claimant did not improve with more conservative care, on March 21, 2014, Dr. Kovachevich performed a right shoulder rotator cuff repair. Claimant continued to complain of pain in his right shoulder following surgery and a repeat MRI on July 21, 2014, documented recurrent rotator cuff tear. On August 15, 2014, Dr. Kovachevich performed repeat rotator cuff repair surgery. Claimant attended twenty-

five appointments with Dr. Kovachevich between February 24, 2014, and March 17, 2015, and Dr. Kovachevich did not document any complaints of neck pain in any of those office visits.

9. From May 14, 2014, through October 30, 2014, Dr. Ritzer saw Claimant an additional seventeen times. At no time during any of those visits did Claimant mark that he was experiencing neck pain on his pain diagrams and at no time during any of those visits did Dr. Ritzer document neck pain in Claimant's subjective complaints, "Chief Complaint," or assessment.

10. Claimant's pain diagram for the visit with Dr. Ritzer on June 16, 2016, circled his entire head. During that visit Dr. Ritzer documented that Claimant was "quite 'snappy and angry' at work … tearful. Loses his patience at work … losing his appetite 'sick to his stomach.'" During that appointment Dr. Ritzer had Claimant call Dr. Dworetsky's office to discuss Claimant's depressive symptoms. Nowhere in Claimant's complaints to Dr. Ritzer or in his pain diagram did Claimant indicate neck pain, and the visit clearly focused on Claimant's psychological status. Pain diagrams on July 31, 2014, and August 7, 2014, again show that Claimant circled his entire head. Dr. Ritzer's report of August 7, 2014, states that "[o]n the pain diagram, he is circling his head. States he is making 'wrong' decisions. Recently fired his lawyer, and states he is making wrong decisions while driving." Thus, on questioning from Dr. Ritzer about the meaning of circling his entire head on the pain diagram, Claimant responded by complaining of psychological issues, not neck pain. Context makes clear that by circling his entire head on the pain diagram, Claimant was complaining of psychological issues and not neck pain.

11. Dr. Ritzer referred Claimant to Yusuke Wakeshima, M.D., a pain medicine physician, specifically to address Claimant's pain complaints. Dr. Wakeshima's Initial Comprehensive Medical Consultation dated June 24, 2014, specifically documented that Claimant reported right shoulder region pain but "denies any neck pain." Dr. Wakeshima documented a physical examination of the cervical spine which had "no tenderness to palpation about the cervical paraspinal musculature, upper trapezius, and levator scapula. There was no tenderness to palpation about the periscapular muscle region." In addition, Dr. Wakeshima documented that he performed a Spurling's maneuver. During this maneuver Dr. Wakeshima rotated Claimant's head to one side, hyperextended and flexed his neck, and then applied pressure to the forehead. Dr. Allison Fall, who performed a Respondent sponsored independent medical examination (IME) of Claimant, testified that if Claimant had neck pain this maneuver would have elicited complaints of pain. However, Dr. Wakeshima's report documents no complaints of neck pain despite the pressure applied to Claimant's neck during the maneuver. Given that Claimant

- specifically denied neck pain when asked by Dr. Wakeshima,
- Dr. Wakeshima performed a detailed examination of the neck and cervical spine without documenting any complaints of pain, and

- Claimant did not complain of neck pain during the Spurling's maneuver,

it is highly probable and free from serious or substantial doubt that Claimant was not experiencing neck pain when examined by Dr. Wakeshima.

12. William Beaver, MA, LPC, performed seven sessions of psychophysiology/biofeedback therapy from July 7, 2014, through August 25, 2014. A purpose of the biofeedback therapy was to increase Claimant's ability to recognize and decrease muscle tension levels and to assist Claimant with improving his pain management and stress management skills. Therefore, it would have been important for Mr. Beaver to document the areas where Claimant was having pain in order to focus treatment on those areas and to measure progress. On each visit Claimant reported his areas of pain to Mr. Beaver, and there is no mention of any complaints of neck pain. On each visit Mr. Beaver marked the ICD-9 codes for headache, shoulder pain, and arm pain, but did not mark the ICD-9 code for neck pain. Claimant did not complain of neck pain to Mr. Beaver in July or August 2015.

13. Allison Fall, M.D., testified that shoulder pain can be caused by certain cervical conditions, and that when a patient complains of shoulder pain it frequently is appropriate to order a cervical MRI to determine whether the shoulder pain actually is caused by a cervical condition. On July 10, 2014, Dr. Ritzer recommended a cervical spine MRI "to assess whether this pain to the right shoulder is also referred pain from the cervical spine." If Claimant had been complaining of cervical spine pain when Dr. Ritzer ordered the cervical MRI, Dr. Ritzer would have stated she was obtaining the cervical MRI because of complaints of neck pain, not to determine if the shoulder pain was coming from the cervical spine. Thus, it is highly probable that the referral for a cervical MRI was not made because of any complaints of neck pain, but rather to determine whether Claimant's shoulder pain was coming from his cervical spine.

14. Claimant underwent MRIs of the right shoulder, cervical spine, and brain on July 21, 2014. Dr. Ritzer documents that she reviewed the findings of all three MRIs with Claimant on July 31, 2014, including the findings of the cervical MRI. Dr. Ritzer specifically documented that the cervical MRI showed a focal disk protrusion at C4-5 indenting the cord. However, Dr. Ritzer did not recommend any treatment to the cervical spine based on the MRI findings. Dr. Fall testified that it was appropriate for Dr. Ritzer not to make any referral for treatment to the cervical spine after reviewing the MRI report because Claimant was not experiencing neck pain at that time. This testimony is consistent with the Division of Workers' Compensation Impairment Rating Tips, which indicate that greater than 50% of patients 50 years and older have disc degeneration or loss of signal intensity on MRI without experiencing any pain, and that the existence of anatomic findings including cervical disc bulging cannot be considered pathological unless there are clear physiologic ties and correlation with clinical findings in an individual patient. Since the medical records from multiple physicians document that Claimant's neck pain had resolved before April 30, 2014, the degenerative findings on MRI in July 2014 were not symptomatic and Claimant did not need treatment for his neck.

15. Dr. Fall performed an IME on September 25, 2014. Dr. Fall stated that Claimant's "symptoms include bilateral shoulder pain." As part of the IME, Claimant completed a questionnaire in which Claimant stated that his pain complaints were limited to "shoulders and mental." Claimant also completed a pain diagram in which Claimant marked pain in his shoulders and the very top of his head, but did not mark any pain in his neck. Dr. Fall documented that Claimant's cervical spine range of motion was "within functional limits without tenderness or radicular symptomatology."

16. Dr. Ritzer's November 3, 2014 report documents that Claimant presented as a walk-in patient because at the end of his workday on November 2, 2014, Claimant "went home and fell asleep in his clothes, slept funny, and awoke with right-sided neck pain, which he has not had for quite some time. Pain is 8/10 in severity, right sided neck area, and right posterior parascapular area." Dr. Ritzer's statement that Claimant had not experienced neck pain for quite some time is consistent with her medical records and those of Dr. Wakeshima, Mr. Beaver, Dr. Fall, and Claimant's pain diagrams over the prior ten months. Dr. Ritzer advised Claimant that "awaking with the kink in his neck on the right side due to positional changes in his sleep … would be deemed not work related."

17. The medical records document that Claimant's original complaint of neck pain at his initial evaluation with Dr. Ritzer had resolved by April 30, 2014, and recurred only due to positional changes during his sleep. It is highly probable and free from serious or substantial doubt that the recurrence of Claimant's neck pain in November 2014, is not related to his industrial injury.

18. On May 28, 2015, Claimant underwent a Division IME by Lynn Parry, M.D. Dr. Parry opined that Claimant is not at Maximum Medical Improvement (MMI) for his cervical spine because the "cervical MRI done in July 2014 showed cord impingement and abnormal signal within the cord. This is not only abnormal but it is also concerning. He has ongoing sensory symptoms into the right arm." However, the ALJ finds the following flaws in Dr. Parry's opinion regarding Claimant's cervical spine:

- Dr. Parry's report does not include any analysis of whether the injury caused or aggravated the findings on MRI or if his neck pain at the time of the DIME was causally related to the industrial injury.

- Dr. Parry does not explain how Claimant had no complaints of neck pain from April 30, 2014 until the event on November 3, 2014, when he "slept funny" and "awakened with a kink in his neck."

- While Claimant clearly complained of neck pain on his first visit with Dr. Ritzer, it is highly probable and free from serious or substantial doubt that those complaints of neck pain resolved by April 30, 2014 and despite the findings on MRI, Claimant did not experience any neck pain again until November 3, 2014, when he slept on his neck wrong.

19. On June 24, 2015, Dr. Fall performed a repeat IME. When asked to list his current symptoms in order of most to least severe, Claimant listed "neck muscles" as the least severe symptom. Claimant indicated that he did not know to what he attributes his neck muscle pain, and that "it did not hurt after the accident but, now it does." Thus, Claimant acknowledges that the neck pain he experienced originally resolved and he did not attribute his then-current neck pain complaints to the injury. If Claimant's neck had hurt since the injury, Claimant would not have admitted that his neck did not hurt after the accident and that he did not know what caused the neck problems. Dr. Parry failed to recognize that Claimant's neck complaints resolved for over seven months. Because she was unaware of this fact, she did not determine whether Claimant's neck pain at the time of the DIME was causally related to the industrial injury.

20. Dr. Fall, Dr. Ritzer, and Dr. Wakeshima all have opined that Claimant's neck pain is not causally related to the industrial injury. Their opinions are based on a detailed review of the medical records and a thorough analysis of whether the neck pain Claimant experienced subsequent to November 3, 2014, was caused by the injury. Dr. Parry performed no such causation analysis, and did not mention that Claimant's neck complaints clearly resolved for more than seven months until the incident on November 3, 2014. Rather, Dr. Parry's report simply assumes that Claimant's neck complaints at the time of the DIME were causally related to the injury. Respondents have proven by clear and convincing evidence that Claimant's neck condition resolved by April 30, 2014, and that his neck complaints beginning on November 3, 2014, were not work related and thereafter were not caused by the industrial injury.

Traumatic Brain Injury (TBI)

21. The paramedic report on January 26, 2014, indicated that Claimant experienced a brief loss of consciousness but that his neurological system was checked and was normal. The MCA Emergency Department report indicates that bystanders reported that Claimant lost consciousness for only thirty to sixty seconds. Claimant's exam revealed "no altered mental status or neurological deficits". A CT scan of Claimant's brain taken in the emergency department also was negative.

22. Dr. Ritzer's initial evaluation report of January 27, 2014, documented that Claimant denied memory loss or confusion. Dr. Ritzer completed a neurological exam which was unremarkable. Dr. Ritzer examined Claimant ten times from January 27, 2014, through May 22, 2014, some of the visits lasting as long as forty minutes. At no time did Dr. Ritzer document any signs or symptoms of cognitive deficits.

23. On June 2, 2014, more than five months after his injury, Claimant presented to Dr. Ritzer as a walk-in patient complaining that he was "mentally unstable" and "emotionally a wreck," depressed and suffering from daily panic attacks. Dr. Ritzer assessed Claimant with acute stress reaction/anxiety/depression and referred Claimant to Kevin J. Reilly, Psy.D., for counseling and to Steven Dworestsky, M.D., for medication management.

24. Dr. Reilly specializes in clinical neuropsychology, including neuropsychological assessments, neurobehavioral consultations, and cognitive therapy. Hal Wortzel, M.D., testified that Dr. Reilly is experienced in treating patients with TBI. Dr. Reilly treated Claimant on five occasions from June 10, 2014 through August 12, 2014, and documented his assessment of Claimant's cognition. Given his stated specialties, his experience with patients with TBI, and being aware that Claimant sustained a loss of consciousness at the time of the injury, the ALJ reasonably infers that Dr. Reilly would have been alert to whether Claimant was exhibiting any signs or symptoms of a TBI or cognitive deficits. Dr. Reilly's reports do not document any signs or symptoms of a TBI. Instead, Dr. Reilly diagnosed Claimant with Adjustment Disorder with Mixed Anxious and Depressed Mood, and Somatic Symptom Disorder with Predominant Pain. Dr. Reilly referred Claimant to William Beaver, M.A., for biofeedback therapy.

25. Mr. Beaver's medical records from July 7, 2014, through August 25, 2014, document that he used a cognitive-behavioral therapy technique to improve Claimant's self-management of psychophysiological symptoms. None of Mr. Beaver's reports document signs or symptoms consistent with a TBI or support the proposition that Claimant presented with cognitive deficits during his treatment.

26. Dr. Dworetsky conducted ten psychiatry sessions with Claimant from June 11, 2014 through October 21, 2014. He did not document any signs or symptoms of TBI or cognitive deficits, and did not diagnose Claimant with a TBI. Further, on November 16, 2014, Dr. Dworetsky authored a three-page report summarizing his medical treatment and responding to a psychiatric IME opinion by Dr. Weingarten regarding Claimant's psychiatric diagnosis and the cause of Claimant's psychiatric/mental complaints. Despite specifically addressing various concerns regarding Claimant's mental and emotional presentation, Dr. Dworetsky still did not diagnose Claimant with a TBI or document any of the cognitive deficits associated with a TBI during his treatment.

27. Hal Wortzel, M.D., is a fellowship-trained psychiatrist, board certified in general psychiatry, forensic psychiatry, and certified by the United Counsel of Neurological Subspecialties in neuropsychiatry and behavioral neurology. A substantial portion of Dr. Wortzel's practice involves research, writing, and scholarship regarding and treatment of patients with TBIs. Dr. Wortzel performed a Respondent sponsored IME of Claimant on September 18, 2015, which included a detailed analysis of Claimant's medical records. Dr. Wortzel testified that the nature and severity of cognitive deficits Claimant reported experiencing would have been "readily apparent" to a treating psychiatrist even with little understanding or experience with traumatic brain injury, and that a treating psychiatrist would have had ample opportunity to notice "prominent cognitive complaints that featured subjectively or objectively" in treatment.

28. Judith Weingarten, M.D., who performed a Respondent sponsored psychiatric IME, testified that Dr. Dworetsky specializes in treatment of patients suffering from TBI and head trauma. Since Dr. Dworetsky specialized in the treatment of TBI and did not document cognitive deficits that would have been readily apparent to

even a psychiatrist with little experience with TBI, it is highly improbable that Claimant presented to Dr. Dworetsky with the nature and severity of the cognitive deficits with which Claimant presented at the time of his DIME and thereafter.

29. At Dr. Wortzel's IME, Claimant presented with complaints of "rather prominent functional deficits relating to cognitive impairment that [Claimant] attributed to a traumatic brain injury" including "slowed thought processes, difficulty sustaining or maintaining conversations, even suggesting that his combined cognitive deficits and musculoskeletal injuries had rendered him incapable from even rudimentary activities like cooking for himself." Dr. Wortzel testified that Claimant's presentation was grossly inconsistent with the medical records, which showed an initial presentation consistent with a concussive injury "after which there is no mention of traumatic brain injury or neuropsychiatric or neurocognitive deficits relating to such up until May 2015 and his evaluation with Dr. Parry."

30. Dr. Wortzel testified that because medical records most contemporaneous with the time of injury document a brief loss of consciousness of less than 30 minutes and his post-traumatic amnesia did not exceed 24 hours, Claimant's injury meets the criteria for a mild TBI. Furthermore, since the CT scan of the brain on the date of injury was negative and Claimant had not reported prior concussions, Claimant's injury is characterized as single and uncomplicated (i.e. no evidence of brain injury on MRI or CT scan). Dr. Wortzel testified that the vast majority of patients sustaining a single, uncomplicated mild TBI will experience a full and relatively fast recovery and that Claimant's medical records prior to Dr. Parry's Division IME on May 28, 2015, are consistent with a full and fast recovery for his single, uncomplicated mild TBI.

31. Dr. Wortzel testified that although Claimant did sustain a single, uncomplicated mild TBI in January 2014, the nature, severity, persistence, and trajectory of his presentation of illness subsequent to being placed at MMI all are inconsistent with the natural history of mild TBI. The vast majority of people sustaining a single, uncomplicated mild TBI will reach full recovery within three months, and a patient taking even one year to recover would be considered an outlier. Claimant presents with complaints that are quite severe and getting worse, which is profoundly inconsistent with the natural course of single, uncomplicated mild TBI, especially in light of the medical records immediately after the injury which are very benign from a neuropsychiatric standpoint and are devoid of any prominent cognitive complaints which cannot be more accurately explained by the anxiety and depression Claimant was experiencing. As Dr. Wortzel testified, there appears to be "an eruption" of neuropsychiatric complaints beginning in May 2015 at the time of Dr. Parry's Division IME.

32. Dr. Wortzel performed a number cognitive screening evaluations in which Claimant performed so poorly that, if taken at face value, suggested "rather severe executive dysfunction" which would put him below the first percentile for patients with Claimant's age and education level. On another test, Claimant endorsed severe problems that more than 75% of time interfere with audition, verbal communication, nonverbal communication, attention/concentration, memory, fund of information, novel

problem-solving, anxiety, sensitivity to mild symptoms and appropriate social interactions. It is highly improbable that Claimant's condition could have been affected to this degree while undergoing treatment prior to the Division IME, as Claimant would have been unable to communicate and interact with his physicians to the extent shown in the medical records and those same medical providers would have documented these highly readily apparent deficits.

33. Dr. Wortzel testified that patients with a single, uncomplicated mild TBI almost universally experience their worst symptoms immediately after the injury and gradually improve over time, and do not "fall of the neurocognitive cliff" eighteen months after the injury. However, given the essentially complete lack of documentation of cognitive deficits from multiple medical providers during the course of Claimant's treatment, there is no way to interpret Claimant's presentation but to conclude that he either worsened over time or there are other explanations for Claimant's current presentation.

34. Dr. Parry failed to explain the discrepancy between Claimant's treatment records which essentially lack any documentation of cognitive deficits by multiple medical providers who specifically evaluated Claimant's cognition (including two mental health professionals who specialize in treatment of patients with TBI) and Claimant's presentation at the time of her Division IME. In addition, Dr. Parry did not review Dr. Ritzer's notes from Claimant's January 27, 2014 exam showing that Claimant had no memory loss or confusion at that time. As Dr. Wortzel testified, Dr. Parry's opinions are a "wild outlier in terms of the rest of the medical records." Not one of Claimant's treating physicians opined that Claimant sustained a TBI.

35. It is highly probable and free from serious or substantial doubt that Dr. Parry erred when she opined that Claimant is not at MMI for the psychological aspects of his injury. The nature, severity, persistence, and trajectory of Claimant's presentation of illness all are inconsistent with the natural history of a single, uncomplicated mild TBI. Claimant's presentation to Dr. Parry for the May 2015 DIME is (1) highly inconsistent with his presentation to Dr. Wortzel for his September 2015 IME and (2) unsupported by any documentation of cognitive deficits in the extensive medical records from January 2014 through April 2015.

36. Respondent has overcome by clear and convincing evidence Dr. Parry's finding that Claimant is not at MMI for the psychological aspects of his injury.

Bilateral Shoulder Condition

37. Dr. Parry opined that Claimant is not at MMI for his shoulder condition because he needs "another orthopedic opinion" from an orthopedist who specializes in disorders of the shoulder. However, Dr. Parry failed to appreciate that Claimant received a second opinion from Craig A. Davis, M.D., a shoulder surgeon, on January 5, 2015. Dr. Davis opined that further surgical treatment was not likely to benefit Claimant. Thus, Claimant already has had the second opinion which Dr. Parry recommended.

38. Further, Dr. Parry's opinion that Claimant was not at MMI for his shoulder was based on Claimant's continued complaints of shoulder pain which Dr. Parry opined "were not likely to resolve on their own and ongoing repeated cortisone injections would not be appropriate." However, Claimant returned to Dr. Kovachevich on September 15, 2015, for a repeat cortisone injection consistent with his prior expectation regarding maintenance care. Claimant's own expert, John Hughes, M.D., opined that a third surgical opinion was not reasonable and that Claimant had reached MMI for his shoulder injuries. Dr. Parry failed to appreciate:

- that Claimant already had a second opinion surgical consult,
- that Dr. Kovachevich had recommended continuing cortisone injections as maintenance therapy, and
- that Dr. Fall, Dr. Kovachevich, Dr. Davis, and Claimant's own expert Dr. Hughes all have opined that Claimant is at MMI for his shoulder conditions.

39. It is highly probable and free from serious or substantial doubt that Dr. Parry's opinion that Claimant is not at MMI for his shoulder condition is incorrect. The ALJ finds that Respondent has proven by clear and convincing evidence that Claimant is at MMI for his shoulder conditions.

Average Weekly Wage

40. Respondent filed a General Admission of Liability on February 11, 2014, which admitted to an Average Weekly Wage (AWW) of $801.15, based on Claimant's earnings for the thirteen weeks prior to the industrial injury.

41. John Casados testified that he is the store manager for King Soopers Store 16, the store to which Claimant transferred on December 8, 2013, and where Claimant worked at the time of his injury on January 26, 2014. Mr. Casados credibly and persuasively testified that the grocery business is seasonal and that the busiest time of the year runs from mid-November just before the Thanksgiving holiday until mid-January just after the New Year holiday. During that time period, all employees work substantial overtime. During ten of the thirteen pay periods used to determine Claimant's AWW, Claimant was required to work substantial overtime in excess of his usual schedule. In addition, Claimant earned eight hours of holiday pay on Thanksgiving and another eight hours of holiday pay on Christmas.

42. Mr. Casados testified that Claimant's position for Store No. 16 would not have required him to continue to work the amount of hours Claimant worked around the holiday season, and that Claimant's wages for the thirteen weeks prior to the injury were greater than he would have continued to earn for the remainder of 2014 because:

- Claimant worked excess overtime during the holiday season;

- Claimant earned sixteen hours of holiday pay on Thanksgiving and Christmas day;

- Claimant was a new hire replacing a position which had been vacant, requiring him to work excess hours after the holiday season in order to get the department caught up; and

- Claimant was forecast to work a forty hour week.

Claimant presented no persuasive evidence to contradict Mr. Casados' testimony.

43. Respondent has proven by a preponderance of the evidence that the AWW of $801.15 for which Respondent admitted liability is not an accurate reflection of the wages that Claimant would have earned over the course of Claimant's disability because Claimant earned more in the thirteen weeks used to calculate Claimant's AWW than Claimant would have normally earned. Thus, Claimant is experiencing a windfall by calculating his AWW using only the thirteen weeks prior to his injury. Respondent has sustained its burden of proving that the most fair and accurate method of calculating Claimant's AWW would be to average Claimant's total earnings in the 52 weeks prior to his industrial injury, increasing the total earnings to reflect Claimant's wage increases in the weeks ending September 21, 2013 and December 21, 2013, which calculates to an average of $558.92.

Temporary Disability Benefits

44. Dr. Ritzer placed Claimant at MMI on January 29, 2015. As found above, the ALJ has determined that the DIME was overcome on this issue. Thus, Claimant's entitlement to temporary disability benefits terminated on January 29, 2015 by operation of statute.

Disfigurement

45. The ALJ finds and concludes that as a result of his January 26, 2014 work injury, Claimant has a visible disfigurement to the body consisting of a one inch long well healed scar in the crease of his right underarm, a three-quarter inch well healed scar with minor dimpling and a one-quarter inch very well healed scar both on the back of his right shoulder. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

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 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*.

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).

Maximum Medical Improvement

The Division IME physician's opinion on Maximum Medical Improvement is 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 is it "highly probable" that the Division IME physician's opinion 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).

Dr. Parry's opinion that Claimant was not at Maximum Medical Improvement for his shoulder condition was based on Claimant's continued complaints of shoulder pain which "were not likely to resolve on their own and ongoing repeated cortisone injections would not be appropriate." However, Claimant returned to Dr. Kovachevich on September 15, 2015, for a repeat cortisone injection consistent with his prior expectation regarding maintenance care. Claimant's own expert, John Hughes, M.D., opined that a third surgical opinion was not reasonable and that Claimant had reached MMI for his shoulder injuries. Given that Dr. Parry failed to appreciate that Claimant already had a second opinion surgical consult and that Dr. Kovachevich had recommended continuing cortisone injections as maintenance therapy, and that Dr. Fall, Dr. Kovachevich, Dr. Davis and Claimant's own expert Dr. Hughes all have opined that

Claimant is at MMI for his shoulder conditions, it is highly probable and free from serious or substantial doubt that Dr. Parry's opinion that Claimant is not at MMI for his shoulder condition is incorrect. The ALJ concludes that Respondent has proven by clear and convincing evidence that Claimant is at MMI for his shoulder conditions.

Cause of Claimant's Neck Complaints

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 must be overcome by the same clear and convincing evidence standard. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

It is highly probable and free from serious or substantial doubt that Claimant's neck pain had resolved by April 30, 2014, at the latest. Dr. Parry failed to recognize that Claimant's neck complaints had resolved for over seven months and recurred only after sleeping awkwardly on his neck. Because she was unaware of this fact, she made no attempt to determine whether Claimant's neck pain at the time of the DIME was causally related to the industrial injury, and instead based her opinion only on the MRI findings, which cannot be correlated to Claimant's lack of neck pain complaints from April 30, 2014 until November 3, 2014. Thus, it is highly probable and free from serious or substantial doubt that the recurrence of Claimant's neck pain in November 2014, is not related to his industrial injury.

Cause of Claimant's Complaints of Cognitive Deficits

It is highly probable and free from serious or substantial doubt that Dr. Parry erred when she opined that Claimant is not at MMI for the psychological aspects of his injury. The nature, severity, persistence, and trajectory of Claimant's presentation of illness all are inconsistent with the natural history of a single, uncomplicated mild TBI. Claimant's presentation to Dr. Parry for her DIME in May 2015 and to Dr. Wortzel for his IME in September 2015 are so inconsistent with the lack of any documentation of cognitive deficits in the extensive medical records from January 2014 through April 2015 as to be incredible. The ALJ concludes that Respondent has overcome by clear and convincing evidence Dr. Parry's finding that Claimant is not at MMI for the psychological aspects of his injury.

ORDER

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

1. Respondent has sustained its burden of proving by clear and convincing evidence that Claimant is at MMI for his shoulder condition.

2. Respondent has sustained its burden of proving that Claimant's current neck complaints and current complaints of cognitive deficits are not causally related to the industrial injury.

3. Respondent has failed to overcome Dr. Parry's impairment rating of 11% right upper extremity and 17% left upper extremity.

4. Claimant's Average Weekly Wage is $558.92.

5. Claimant's request for temporary total disability benefits is denied and dismissed.

6. Insurer shall pay Claimant $300 for his disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

7. Respondents shall pay Claimant interest at 8% on all benefits 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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 26, 2016

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

ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that the prehearing conference order (PHCO) issued by Prehearing Administrative Law Judge (PALJ) Thomas DeMarino on June 16, 2015, dismissing Claimant's application for hearing on all endorsed issues with prejudice, as well as, PALJ DeMarino's subsequent PHCO denying Claimant's Motion for Reconsideration issued July 23, 2015, should be reversed because the judgments of PALJ DeMarino exceeded the bounds of reason constituting an abuse of discretion.

FINDINGS OF FACT

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

1. Claimant sustained a compensable injury on March 25, 2014 (Ex. A). Respondents issued a Final Admission of Liability on February 5, 2015, admitting to medical benefits, temporary total disability benefits, and MMI with permanent partial disability benefits pursuant to the Division IME Examiner's 19% impairment rating. The FAL denied liability for maintenance medical benefits (Ex. B, pgs. 2-14). Claimant, on February 25, 2015, timely filed an Objection to that FAL (Ex. C), and, on March 3, 2015, filed an Application for Hearing endorsing the issues of medical benefits, AWW, TTD, TPD, PPD benefits, and "Maintenance Medical Care." (Ex. D, pg. 16) Claimant's AFH listed 34 hearing witnesses (Id., pgs. 17-18).

2. Respondents sent interrogatories to claimant's attorney on April 1, 2015 (Ex. F). Claimant's attorney has never claimed that the interrogatories were not received or that they were deficient in any way. Claimant's attorney answered respondent's interrogatories on April 17, 2015 (Ex. G). Respondents, finding claimant's answers non-responsive, and that claimant's objections to respondents' interrogatories were misplaced and incorrect, sent a letter to claimant's attorney on April 20, 2015, outlining the deficiencies in claimant's interrogatory answers, and requesting supplemental answers (Ex. H). Claimant's attorney did not reply to that letter, and did not supplement claimant's interrogatories. Respondents therefore scheduled a PHC to compel responsive and sufficient answers to interrogatories from claimant. That PHC, held on May 21, 2015, before PALJ Barbara Henk, produced a PHCO granting each facet of respondents' motion to compel claimant to supplement claimant's answers to respondents' interrogatories numbered 1, 5, 6, 10, 13, 14, 15, 17, and 18 (Ex. I, pg. 45). Judge Henk gave claimant's attorney specific directions on how to supplement claimant's answers, and what information to provide in the supplemental answers to interrogatories:

a. Supplement her answer to interrogatory number 1 to provide and disclose the wage records, gross wages, hours worked per week for her work for The Center at Centennial, LLC;
b. Supplement her answer to interrogatory 5 to provide and disclose a summary of the anticipated testimony of claimant's hearing witnesses sufficient to put respondents on notice as to the testimony claimant expects to submit in her case-in-chief at hearing on the issues endorsed for hearing;
c. Supplement claimant's response to interrogatory number 6 to provide her hours, wages, wage records, and description of her employment duties for her employers where she has worked since the March 25, 2014, date of injury in this claim;
d. Supplement claimant's answer to interrogatory number 10 to disclose and state the average weekly wage claimant will request at the approaching hearing, explain and disclose how that AWW was calculated, and provide copies of all records, documents, paychecks, and documents supporting claimant's claimed AWW;
e. Supplement claimant's answer to interrogatories numbered 13, 14, and 15 to disclose the specific maintenance medical benefits claimant seeks at hearing or to state claimant seeks a general award of maintenance medical benefits, and clarify claimant does not seek any curative medical benefits at hearing as claimant's attorney stated at the prehearing conference;
f. Supplement claimant's response to interrogatory number 17 to state claimant does not seek any new TTD or TPD benefits, but that she seeks an increase in the previously paid TTD and TPD benefits based on the increase in claimant's average weekly wage sought by claimant at the approaching hearing; and
g. Supplement claimant's response to interrogatory number 18 to state claimant does not seek any new PPD benefits, but that she seeks an increase in the previously paid PPD benefits based on the increase in claimant's average weekly wage sought by claimant at the approaching hearing.

(Id., pg. 46). Claimant did not challenge PALJ Henk's PHCO, and does not do so now. Claimant admits her April 17, 2015, answers to respondents' interrogatories were deficient and non-responsive, and that the PHCO compelling these supplemental answers was correct and binding.

3. On May 28, 2015, claimant's attorney submitted Claimant's Supplemental Answers to Interrogatories (Ex. J). Judge Henk's PHCO gave clear instruction in subparagraph 1 (b) for the information to be disclosed in the supplemental response to interrogatory 5:

b. Supplement her answer to interrogatory 5 to provide and disclose a summary of the anticipated testimony of claimant's hearing witnesses sufficient to put respondents on notice as to the testimony claimant expects to submit in her case-in-chief at hearing on the issues endorsed for hearing;

However, claimant's supplemental response to this interrogatory republished the previously voiced objections to the interrogatory, and stated only, "[T]he claimant will properly testify to all of the endorsed issues. Claimant will testify as to all aspects concerning her injury, her ongoing pain, her employment history, why she is entitled to an increase in her AWW, why her MMI date is not correct, her treatment and what she would like in regards to future care." (Ex. J, pg. 50-51) Respondents' attorney sent a letter to claimant's attorney on June 1, 2015, telling claimant's attorney:

> Despite the specific instructions given to you by Judge Henk during the prehearing conference on May 21, 2015, and Judge Henk's Prehearing Conference Order compelling your supplemental answers, your supplemental answer did not disclose the summary of the facts claimant is expected to testify about and the testimony she is expected to provide at the approaching hearing on June 23, 2015. Simply giving respondents a list of the issues claimant will address or discuss during her testimony is not responsive. This failure to properly supplement claimant's answers places claimant in violation of Judge Henk's Prehearing Conference Order.

(Ex. K). Claimant's attorney did not reply to that letter, or supply the requested supplemental information to respondents' attorney. Therefore, respondents set a second PHC for June 11, 2015, to compel claimant to comply with PALJ Henk's May 27, 2015, PHCO, and seeking the striking of claimant's March 3, 2015, Application for Hearing with prejudice because of claimant's willful failure to comply with the discovery order of Judge Henk.

4. PALJ Thomas DeMarino presided at the June 11, 2015, PHC. Judge DeMarino found, after listening to the parties' arguments and reviewing the interrogatories, claimant's answers to respondents' interrogatories of April 17, 2015, PALJ Henk's PHCO, and claimant's supplemental answers to respondents' interrogatories sent May 28, 2015, that claimant had not complied with PALJ Henk's PHCO. PALJ DeMarino's PHCO quotes claimant's supplemental response to interrogatory five verbatim (Ex. J, pg. 61), showing he was not mistaken about claimant's supplemental answer. Judge DeMarino stated in his order that he noted, "[C]ounsel for claimant believes that he properly complied with the Order of ALJ Henk." (Ex. J, pgs. 61-62) He wrote, "This PALJ concludes the claimant entirely missed the mark in supplementing her response to respondents' interrogatory No. 5." PALJ DeMarino found claimant's attorney had again issued objections to the interrogatory in the supplemental answer to interrogatory five that had been overruled by PALJ Henk, and that claimant's supplemental answer to inadequate and not responsive. Judge DeMarino stated, "Claimant has failed to comply with the May 27, 2015, Order of ALJ Henk, which then invokes the following sequence of authorities to sanction claimant."

Citing WCRP Rules 9-1 (G) and (E), CRS § 8-43-207 (1) (p) (I), and CRCP Rule 37 (b), PALJ DeMarino concluded, "[T]he sanction that this PALJ imposes in this case regarding this issue is that claimant's Application for Hearing filed on 03/03/15 is hereby stricken on all issues, with prejudice." (Ex. L, pgs. 62-63)

5. On July 8, 2015, claimant's attorney filed a Motion for Reconsideration of PALJ DeMarino's PHCO (Ex. M). Claimant's attorney, in that motion, incorrectly asserts that Judge DeMarino mistakenly based his PHCO on claimant's original answers to respondents' interrogatories, and ignored her supplemental answer to interrogatory five (Id, pgs. 66-67). This is clearly incorrect, for, as stated above, and as clearly seen on page 61 of Judge DeMarino's PHCO, he quotes and incorporated claimant's supplemental response to interrogatory five in its entirety. Claimant's also asserted that there was no pattern of failure to comply with discovery requirements or orders, and that the sanction given by PALJ DeMarino was unduly harsh (Id. pgs. 67-68).

6. Respondents, on June 18, 2015, filed on Objection to Claimant's Motion for Reconsideration (Ex. N). Respondents stand by the facts asserted, application law referenced, and arguments made in that objection for purposes of this position statement. There was a pattern of conduct by claimant of non-compliance with discovery requests, rules, discovery orders, and the PHCO issued by PALJ Henk (Id. pg. 74). Claimant's assertion that PALJ DeMarino was not aware of claimant's supplemental response to interrogatory five was not true (Id.). The sanction for claimant's prolonged, sustained, and repeated discovery violations and violations of the May 27, 2015, PHCO provided by PALJ DeMarino was permissible and well-supported by applicable rules and long-standing case law on this issue (Id. pgs. 75-76). On July 23, 2015, PALJ DeMarino issued an Order stating it is, "ORDERED that claimant's motion for reconsideration shall be and hereby is DENIED, based up the reasons stated in "Respondents' Objection to Claimant's Motion for Reconsideration" dated 7/18/15." (Ex. O; emphasis in original)

7. On September 9, 2015, claimant filed the pending Application for Hearing and Notice to Set, endorsing as the only issue, "Review of Division's Order 06-16-15." (Ex. P)

8. At no time after June 16, 2015, did claimant further supplement her response to interrogatory five, and indeed had not done so as of the December 15, 2015, hearing. Claimant remains in violation of PALJ Henk's May 27, 2015, PHCO, and has taken no steps to address the inadequate supplemental answer to interrogatory five PALJ DeMarino's June 16, 2015, PHCO delineates. This is further evidence of a willful, sustained, prolonged pattern of conduct by claimant of not complying with discovery requests, Orders, or rules. Claimant presented no evidence, testimony, or facts in mitigation or explanation at hearing.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

C. Section 8-43-207.5, C.R.S., authorizes a PALJ to conduct prehearing conferences to address certain limited issues of ripeness, discovery matters, and evidentiary disputes. The PALJ is authorized to conduct prehearing conferences and settlement conferences, approve settlements, and issue "interlocutory orders," among other things. Subsection (3) provides in pertinent part, "An order entered by a prehearing administrative law judge shall be an order of the director and binding on the parties. Such an order shall be interlocutory." The statute remains silent on any appeals from PALJ orders.

ALJ Review of PALJ DeMarino's Prehearing Conference Order

D. Section 8-43-207, C.R.S., enumerates powers of a hearing ALJ. Hearings

shall be held to "determine any controversy concerning any issue arising under" the Workers' Compensation Act. In conducting such hearings, the hearing ALJ is empowered to issue subpoenas, administer oaths, make evidentiary rulings, limit evidence, permit discovery, rule on discovery matters, impose sanctions for willful failure to comply with discovery requests, conduct prehearing conferences upon written motion and good cause, dispose of procedural requests, control the course of the hearing, grant extensions of time, adjourn a hearing to take additional evidence, issue orders, appoint some guardians *ad litem* for dependents, determine the competency of witnesses, dismiss issues for failure to prosecute, set aside fees for medical services, and require repayment of overpayments. The statute does not enumerate any specific power to review the decision of a PALJ, nor does it appear to restrict the ALJ's powers due to the fact that a PALJ has issued a prehearing conference order.

E. Few reported cases have dealt with the powers of a PALJ. In *Industrial Claim Appeals Office v. Orth*, *965 P.2d 1246* (Colo. 1998), the Supreme Court held that a PALJ may approve a settlement agreement and the order approving the settlement is a final order subject to appeal rather than an interlocutory order. The Court also noted, "a PALJ's order relating to a prehearing conference is interlocutory (i.e., not immediately appealable) because a prehearing conference, by definition, is followed by a full hearing before the director or an ALJ. . . . Thus, the propriety of a PALJ's prehearing order may be addressed at the subsequent hearing." The Court distinguished the interlocutory nature of the prehearing order from the order approving a settlement, which was at issue in *Orth*. After *Orth*, parties began seeking ALJ review of PALJ prehearing orders. This ALJ has noticed increasing numbers of such appeals without any clear consistent procedure or standards. Some parties to cases which present with similar issues to that presented in the instant case file motions indicating they want a hearing ALJ to review the PALJ order. Still other parties file applications for hearing on the appeal issues. As found here, Claimant filed an Application for Hearing endorsing "Review of Division's Order 06/16/15." Under such circumstances and consistent with settled case law, the undersigned ALJ concludes that he is vested with jurisdiction to address the content and correctness of Judge DeMarino's PHCO dated June 16, 2015.

Standard of Review

F. The conduct of discovery is a matter committed to the discretion of the ALJ, for § 8-43-207 (1) (e), C.R.S. provides that an ALJ may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery. *See also,* Workers' Compensation Rule of Procedure 9-1 ("If any party fails to comply with the provisions of this rule [providing for discovery] and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule"). As noted above, Section 8-43-207.5 (1), C.R.S. provides that discovery matters are issues among those which the PALJ is empowered to address, and subsection (2) states the PALJ has the power to strike a party's application for hearing, "[F]or failure to comply with any provision of this section." Consequently, the ALJ determines that PALJ DeMarino was not acting outside of his enumerated powers when he struck Claimant's application for hearing.

Nonetheless, the question of whether, based upon the unique facts of this case, PALJ DeMarino applied an appropriate sanction in this case must be addressed.

G. An ALJ's exercise of discretion in determining the appropriate discovery sanction is broad, and is binding in the absence of an abuse of discretion. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 at 869 (Colo. App. 2001) Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the ALJ's discretion. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office,* 85 P.3d 619 (Colo. App. 2003). The ALJ has flexibility in choosing the appropriate sanction and should exercise informed discretion in imposing a sanction that is commensurate with the seriousness of the disobedient party's conduct. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office, supra.* The imposition of discovery sanctions generally serves the dual purposes of protecting the integrity of the truth-finding process and deterring discovery-related misconduct. *People v. Cobb,* 962 P.2d 944, 944, 949 (Colo. 1998); *People v. District Court,* 808 P.2d at 836. Discovery rules should be interpreted liberally, which "[A]ssures that all parties are afforded their day in court and guarantees that all relevant evidence is available for presentation at trial." *J.P. v. District Court*, 873 P.2d 745, 750 (1994).

H. WCRP Rule 9-1 (G) holds, "Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful." WCRP Rule 9-1 (E) gives the judge power to impose sanctions for failure to comply with that rule and discovery that rule governs. Section 8-43-207 (1)(p)(I), C.R.S. states that a judge may, "Impose the sanctions provided in the Colorado rules of civil procedure… for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40-47 of this title." C.R.C.P. 37 (b)(2)(C) clearly states a judge may issue an Order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof . . . ," for a party's failure to obey a discovery order. A party's disobedience of a discovery order warrants sanctions under § 8-43-207(1) (e), C.R.S. if the noncompliance is intentional, deliberate, a flagrant disregard of discovery obligations, or a substantial deviation from reasonable care in complying with such obligations. *Reed v. Industrial Claim Appeals Office,* 13 P.3d 810,813 (Colo. App. 2000). Claimant's failure to comply with a previous discovery order without explanation means the judge may infer a deliberate, or "willful," intent not to comply with discovery under the statute. See *Shafer Commercial Seating, Inc. Industrial Claim Appeals Office,* 85 P.3d 619, 621 (Colo. App. 2003). "Willful" under the Act means deliberate intent and party's failure to comply with order to compel is sufficient to support sanctions. *Shafer Commercial Seating, Inc. Industrial Claim Appeals Office,* supra; *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (ICAO July 23, 2008).

I. Because the PALJ has, under C.R.S. § 8-43-207.5 (1), authority to address discovery matters and as Colorado's courts have previously reviewed rulings by judges in challenges to those rulings under an abuse of discretion standard, the undersigned ALJ agrees with Respondents that PALJ DeMarino's PHCO, striking all issues endorsed in Claimant's application for Hearing, should be subject to review under an abuse of

discretion standard. An abuse of that discretion is only shown where the order "exceeds the bounds of reason," such as where it is not in accordance with applicable law, or not supported by substantial evidence in the record. *Coates, Reid and Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District #1,* 710 P.2d 1095 (Colo. 1985); *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). Where a matter is discretionary, the judge is empowered to make a decision within a range of permissible decisions. The fact finder only abuses that discretion where the decision rests upon an error of law, the underlying findings of fact are not supported by substantial evidence, or the decision "cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 168 (2d Cir. 2001). *See also Wheat v. United States,* 486 U.S. 153, 164, 108 S. Ct. 1692 (1988) (discretion implies a range of choice).

J. The undersigned ALJ concludes that the application of the abuse of discretion standard to review of PALJ discovery orders promotes and otherwise effectuates the principal purpose of the Workers' Compensation Act, namely as noted above, to provide "[T]he 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." As stated in *Dee Enterprises v ICAO*, 89 P.3d 430, 437 (Colo. App. 2003):

> [R]eview . . . for errors of law and abuse of discretion is sufficient to protect the proper exercise of judicial function. This scheme is consistent with the purpose of the Act, which is to avoid congestion of the courts with piecemeal litigation and to provide a method whereby claims arising out of work-related injuries can be resolved in a just and speedy manner. *See Indus. Comm'n v. Globe Indem. Co.,* 145 Colo. 453, 358 P.2d 885 (1961); *cf. Huizar v. Allstate Ins. Co.,* 952 P.2d 342 (Colo.1998) (de novo review of workers' compensation claims not required).

K. Based upon the entirety of the record evidence presented, the undersigned ALJ concludes that PALJ DeMarino's order striking all issue endorsed in Claimant's application for hearing did not exceed the bounds of reason so as to constitute an abuse of discretion. Rather, the order was appropriate in light of claimant's sustained, prolonged and repeated refusal to appropriately answer interrogatory five, comply with PALJ Henk's PHCO, respect the purpose of discovery, respond to respondents' attorney's letters sent giving notice of the deficient answers, appropriately supplement the interrogatory answer despite PALJ Henk's clear instructions and long-established case law on what is expected for discovery responses, and failure to even attempt to supplement the answer after Judge DeMarino's PHCO issued June 16, 2015. Taken together, the undersigned ALJ finds and concludes that there is no basis to disturb PALJ DeMarino's decision, affirmed in his Order denying claimant's motion for reconsideration. Accordingly, the ALJ affirms the June 16th and July 23rd, 2015 PHCOs of PALJ DeMarino.

ORDER

It is therefore ordered that:

1. The June 16th and July 23rd, 2015 PHCO's of PALJ DeMarino are affirmed.

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 11, 2016

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the left shoulder arthroscopic surgery proposed by Dr. Pak is reasonable and necessary and related to her admitted April 6, 2014 industrial injury.

FINDINGS OF FACT

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

1. Claimant sustained an admitted left shoulder work related injury on April 6, 2014 while employed as a registered nurse for Employer. Claimant experienced immediate pain in her left shoulder after lifting a bag of wet linens while cleaning an operating room. Claimant has had no prior injuries to her left shoulder.

2. Claimant was referred by her employer to Centura Center for Occupational Medicine (CCOM) under the direction of Dr. Johnson. The Claimant continues treating with Dr. Johnson to the present date.

3. Claimant received conservative care under the direction of Dr. Johnson, including medications, injections and physical therapy.

4. Claimant's first evaluation was with Dr. Johnson on April 10, 2014 at which time Dr. Johnson diagnosed a left shoulder sprain. (See Cl. Ex. 2, Bates No. 108).

5. Dr. Johnson initially opined that Claimant would not require shoulder surgery although this opinion was rendered prior to any diagnostic evaluations. Claimant was eventually referred for a left shoulder MRI of her left shoulder which occurred on May 4, 2014. The MRI demonstrated minimal distal supraspinatus tendinopathy, but no evidence for rotator cuff tendon tear and trace fluid in sub-acromial subdeltoid bursa, possibly bursitis. (Cl. Ex. 6(b), Bates No. 142).

6. Subsequent to reviewing the MRI, Dr. Johnson prescribed additional physical therapy and considered a repeat steroid injection in the shoulder. (CL. Ex. 2, Bates No. 92).

7. Due to worsening shoulder pain, The Claimant was referred to Dr. Weinstein, orthopedic surgeon. Dr. Weinstein's initial evaluation of the Claimant occurred on June 30, 2014. (Cl. Ex. 5, Bates No. 138-140).

8. In his initial evaluation, Dr. Weinstein noted that the Claimant's treatment to date consisted of physical therapy, cortisone injections, rest, heat, activity modification, medications with no significant improvement. (Cl. Ex. 5, Bates No. 138). Dr. Weinstein's diagnostic impression included right rotator cuff/bicep tendinitis and right mild paracervical/shoulder girdle myofascial inflammation. Dr. Weinstein recommended a second cortisone injection and resumption of physical therapy. (Cl. Ex. 5, Bates No. 140).

9. Claimant returned to Dr. Weinstein on August 11, 2014 with continuing symptoms and increased pain in the area of the anterior shoulder. Dr. Weinstein noted that a significant portion of the Claimant's left shoulder symptoms were coming from the rotator cuff and biceps. Dr. Weinstein's medical report of this date indicates that he discussed non-operative versus operative options and the Claimant expressed a desire to avoid surgery. Dr. Weinstein provided another cortisone injection with directions to continue physical therapy. (Cl. Ex. 5, Bates No. 136-137).

10. By September 22, 2014, Dr. Weinstein noted that Claimant continued with marked tenderness with pain in the area of her biceps and lateral shoulder. The Claimant was having difficulty sleeping and had undergone three cortisone injections without improvement. Dr. Weinstein noted further that Claimant has remained symptomatic since the beginning of April, 2014. (Cl. Ex. 5, Bates No. 134-135).

11. Dr. Weinstein, in his medical report of January 14, 2015 again noted that Claimant's limitations with shoulder level and overhead activity continued and that she had remained symptomatic over an extended period of time without improvement. As a result, Claimant elected to proceed with surgery. (Cl. Ex. 5, Bates No. 132-133).

12. Claimant underwent left shoulder surgery on February 20, 2015. The surgical procedures involved left arthroscopic subacromial decompression and biceps tenodesis. Dr. Weinstein's operative notes states that Claimant had significant inflammation of the biceps tendon with fraying along with outer surface rotator cuff fraying. (Cl. Ex. 5, Bates No. 130-131).

13. Post-surgery, Claimant noted gradual improvement with her left shoulder pain. She continued prescribed medications and was referred for physical therapy. (Cl. Ex. 5, Bates No. 129, Cl. Ex. 2, Bates No. 55-57).

14. Claimant testified, and the medical records establish that she experienced increased shoulder pain as a consequence of engaging in too much therapy. According to an April 18, 2015 report authored by Physician Assistant (PA) Miyoko Ivis Claimant reported that she had a "loud pop" in her shoulder while performing her post-surgical rehabilitation exercises at home following a formal session of physical therapy the day before. Claimant had an increase in her pain following this event and was concerned that she re-tore the rotator cuff. Consequently, the Claimant was referred for a repeat MRI of the left shoulder. (Cl. Ex. 2, Bates No. 47-48). See also (CL. Ex. 5, Bates No. 124-126). Dr. Johnson opined that the Claimant may have reinjured her shoulder. (Cl. Ex. 2, Bates No. 45).

15. Claimant had a second left shoulder MRI on May 19, 2015. Among other findings, the MRI demonstrated a slightly thickened and edematous axillary recess synovium in addition to edema in the rotator interval, and an indistinct coracohumeral ligament. While the findings were noted to be "non-specific", they raised the possibility of "adhesive capsulitis." (Cl. Ex. 6(a), Bates No. 141).

16. Claimant was evaluated by Dr. Johnson on May 22, 2015. Dr. Johnson reviewed the May 19, 2015 MRI and noted… "there are concerning findings in the MRI." (Cl. Ex. 2, Bates No. 39-41). The Claimant continued attending physical therapy per the direction of Dr. Weinstein and Dr. Johnson throughout May, June and July of 2015. (Cl. Ex. 2, Bates No. 26-28; 31-33; 35-37).

17. On June 22, 2015, Claimant returned to Dr. Weinstein following her May 19, 2015 MRI. During this visit, Claimant reported mild pain in the front of her shoulder along with pain in the area of her triceps which was radiating down the outside of the arm and which was exacerbated by overhead lifting or repetitive activity. Dr. Weinstein explained that the findings noted on Claimant's May 19, 2015 MRI were "primarily postoperative in nature." He also felt that the majority of Claimant's symptoms appeared to be myofascial in nature. Dr. Weinstein performed a cortisone injection and indicated that Claimant should continue with physical therapy with a wellness program. (Cl. Ex. 5, Bates No. 122-123).

18. On August 18, 2015, Dr. Johnson's medical report of August 18, 2015 states that the Claimant would be transitioned from physical therapy to work hardening. Further, Dr. Johnson referred the Claimant to Dr. Pak, orthopedic surgeon, for second opinion in regards to the Claimant's symptomatic left shoulder. (Cl. Ex. 2, Bates No. 20-22).

19. On September 1, 2015, Claimant presented to Dr. Pak's offices for a second opinion evaluation. A medical report generated from this date of visit reflects that Claimant was evaluated by Nurse Practitioner (NP-C), Trisha Finnegan. NP Finnegan took a history from Claimant, reviewed imaging studies and preformed a detailed physical examination which revealed limited left shoulder range of motion, posterior shoulder pain with external and internal range of motion and positive physical exams tests for shoulder impingement. Although the report from this date was authored by NP Finnegan, the record reflects that Claimant was "seen and evaluated with Dr. Pak." Claimant testified that both Dr. Pak and his nurse practitioner evaluated her. Claimant's examination was consistent with left shoulder adhesive capsulitis and she was formally assessed as having the same per the medical record generated in conjunction with her September 1, 1015 visit. Dr. Pak recommended arthroscopic debridement and capsular shift (release) to address Claimant's adhesive capsulitis. (Cl. Ex. 3, Bates No. 112-113).

20. Subsequent to Dr. Pak's evaluation and surgical recommendation, Dr. Johnson's medical notes indicate that Dr. Pak was recommending surgery and the surgery was pending approval. Dr. Johnson, in his medical appointment notes does not indicate that he is opposed to or in disagreement with the plan for surgery as submitted by Dr. Pak. (Cl. Ex. 2, Bates No. 11-13; 15-17).

21. Respondents denied the recommended surgery and Claimant returned to Dr. Johnson on October 6, 2015. Dr. Johnson's medical report from this encounter documents that Claimant had been diagnosed with adhesive capsulitis and that Dr. Pak had recommended surgery. However, the note also indicates that Respondents had asked Dr. Weinstein to "evaluate Dr. Pok's (sic) recommendation." Dr. Johnson addressed Claimant's return to work, noting that he felt she could return to "full duty work without difficulty." According to Dr. Johnson's October 6, 2015 report, Claimant became "upset" with the suggestion, reporting that "she knew she could not work because of her pain." As of the date of this visit, Claimant was noted to be in excess of 7 months post op and still having what she reported as constant, moderate left shoulder pain. Dr. Johnson noted that he would get a functional capacity assessment (FCE) to determine Claimant's work capacity.

22. On October 21, 2015, Claimant presented to Dr. Johnson in follow-up of her shoulder condition. Careful review of the medical report authored by Dr. Johnson reveals no substantial change in Claimant's condition. She continued to complain of constant, moderate left shoulder and neck pain. Dr. Johnson opined that Claimant was "nearing" maximum medical improvement (MMI) and he again discussed Claimant's return to work. Claimant again expressed strong reservations about her ability to return to full work. Dr. Johnson noted that Claimant had scheduled the FCE discussed at her October 6, 2015 appointment for November 12, 2015.

23. On October 26, 2015, in response to a letter from Respondents, Dr. Johnson indicated that Claimant's report of neck/upper back pain following her surgery was not an uncommon occurrence. He further noted that Claimant had "nearly normal" left shoulder range of motion. Consequently, he questioned whether Dr. Pak's recommended surgery would result in significant improvement from her current shoulder condition. (Cl. Ex. 2, Bates No. 2). This is the first notation made by Dr. Johnson indicating any concerns regarding the proposed surgical procedure. Finally, Dr. Johnson commented upon videotape from 9/17 which he was asked to review. In this regard, Dr. Johnson noted: "Her 9/17 videotape showed her functioning better with her left arm than she was on 8/28. This would be expected."

24. On December 14, 2015, in response to an inquiry from Respondents, Dr. Weinstein conducted a chart review which included Dr. Pak and Dr. Abercrombie's notes. Based upon that review, Dr. Weinstein noted that Claimant had good range of motion in the left shoulder with minimal restrictions. He noted further that Dr. Abercrombie diagnosed Claimant with myofascial pain and that her examination (as documented in the aforementioned records) was not "significantly changed from when [he] previously saw her. He reiterated his opinion that the restrictions in Claimant's shoulder were "secondary to her muscle inflammation and pain", i.e. her myofascial symptoms. Dr. Weinstein also reviewed surveillance video tape, commenting that the images from September 12, 2015 demonstrated Claimant to be "lifting her left arm up well which generally does not occur with adhesive capsulitis." Dr. Weinstein expressed an opinion that further surgery would not be of any benefit. He went on note that he did not believe that Claimant's myofascial

pain was "correctable" with surgery and that additional surgery may only result in additional inflammation and was "unlikely to affect her outcome." (Cl. Ex. 5, Bates No. 120-121). The ALJ infers from the content of Dr. Weinstein's December 14, 2015 note that he disagrees with Dr. Pak's diagnosis of adhesive capsulitis.

25. Claimant testified that she was not referred back to Dr. Weinstein for an additional evaluation or follow-up subsequent to Dr. Pak's surgical evaluation.

26. Claimant also testified she continues to have pain and impaired function of the left shoulder, particularly for activities which require her to reach across and away from the body, such as buckling her seatbelt and reaching out to close a car door. Claimant testified and demonstrated that she can reach, i.e. flex her left arm above shoulder level. Simply put, Claimant can reach overhead with her arm straight-out in front of her. While she can reach overhead, Claimant testified that she cannot perform any weighted shoulder flexion. Based upon the Claimant's testimony, the ALJ finds that she has difficulty for movements which require abduction, adduction and external rotation of the left shoulder.

27. Regarding the surveillance videotape viewed by Dr. Johnson and Dr. Weinstein, Claimant testified that her vehicle is equipped with an automatic tailgate and requires no force to open. Rather, the tailgate is opened and closed by simply pushing a button. The ALJ reviewed surveillance videotape from August 28, 2015, August 29, 2015 and September 12, 2015. Careful review of the videotape reveals no activity captured on August 28, 2015. On August 29, 2015, Claimant is observed from a distance. While most of the video is marginal in quality and partially obscured by cars and other people, Claimant appears in no obvious distress. Nonetheless, Claimant does not use her left arm/shoulder for any functional activity beyond using it to assist in stabilizing a camera held below shoulder level. Indeed, the surveillance from August 29, 2015 shows Claimant to use her right arm to unlatch the tailgate of her vehicle, to reach out and grab the door handle of her car to close the car door and fasten her seatbelt and her right shoulder to bear the weight of moderate sized bad and her camera. While Claimant flexes her left elbow to reach her hand toward her face occasionally, she is never observed to reach her left arm up or away from her body to any significant degree. Moreover, while sitting in a chair on the sidelines of a playing field, during what the ALJ finds is probably a soccer tournament, Claimant is observed to reach her right arm across her body to rub her left shoulder. The August 29, 2015 surveillance videotape confirms Claimant's testimony that the tailgate of her car is automatic. In the September 12, 2015 videotape, Claimant is observed to support a moderate bag on her right shoulder. While Claimant uses the left arm to unlatch the tailgate of her car with her left hand and raise the left arm up as the tailgate ascends, she does not raise the elbow above shoulder height. Rather, Claimant flexes her elbow to approximately 90 degrees while flexing the arm to 90 degrees. Consequently, Claimant's left forearm is the only left upper extremity structure above the level of the shoulder. Moreover, Claimant does not push or pull the tailgate up or down.

28. Claimant is a registered nurse and is aware of the details involved in the surgical procedure proposed by Dr. Pak. Claimant testified that her condition is sometimes referred to as a frozen shoulder and the surgery is intended to loosen scar tissue and

allow for greater movement. Claimant stated that the surgery recommended by Dr. Pak gives her the best opportunity for improved functioning so that she can return to gainful employment so she can return to gainful employment.

29. The ALJ finds record support, for Dr. Pak's opinion that Claimant likely has adhesive capsulitis. The May 19, 2015, MRI raises this as a concern and her physical examination findings on September 1, 2015 are consistent with the diagnosis.

30. The ALJ finds Claimant's testimony regarding the functionality of her left arm/shoulder credible and persuasive. Despite Respondents' contrary suggestions, the video surveillance tape supports Claimant's testimony that the functionality of her left shoulder remains restricted despite substantial post operative care, including extensive physical therapy and additional injections. Indeed, the ALJ finds that the content of the surveillance video tape supports a finding that Claimant does not use her left arm/shoulder to any significant degree, likely secondary to pain and restricted motion. Based upon the totality of the evidence presented, the ALJ finds that Claimant's limited ability to abduct, externally rotate and adduct her left shoulder is a consequence of her adhesive capsulitis diagnosis, which developed after Claimant experienced a set back while performing home exercises following her February 20, 2015 surgery. Consequently, the ALJ finds that claimant's current condition is related to her April 6, 2014 industrial injury.

31. Based upon the evidence presented, the ALJ credits Dr. Pak's opinions to find that the proposed arthroscopic debridement and capsular shift procedure will, more probably than not, cure and relieve Claimant from the ongoing effects of her largely posterior left shoulder symptoms and afford her improved shoulder abduction, adduction and internal and external rotation. Consequently, the ALJ finds the proposed surgery reasonable and necessary.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records and the surveillance videotape submitted at hearing. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

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

Medical Benefits

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

E. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury.

Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Based upon the evidence presented, the ALJ concludes that Claimant has proven that the left shoulder arthroscopic debridement and capsular shift recommended by Dr. Pak reasonable and necessary. The medical reports submitted at hearing along with the video surveillance tape outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Pak to recommend surgical capsular. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the recommended procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of her compensable injury. Respondents' primary basis for denying the surgery in this case rests on the opinion of Drs. Johnson and Weinstein. In this case, Dr. Weinstein provided an opinion letter opining against surgery. However, Dr. Weinstein had not personally evaluated the Claimant in six months. There is no indication that he contacted Dr. Pak to discuss the recommended surgery or any other related issues. Consequently, the ALJ concludes that Dr. Weinstein's opinions regarding the appropriateness of surgery are not as persuasive at those of Dr. Pak. Further, Dr. Weinstein selectively extrapolated one portion of video surveillance that is clearly not representative of the Claimant's limited left shoulder functioning when the surveillance video tape is considered in its totality. Finally, the ALJ rejects Dr. Johnson's surgical opinion as unconvincing. Dr. Johnson is not a surgeon and for several months after Claimant sustained her April 6, 2014 injury, Dr. Johnson opined that surgery would not likely be necessary. Moreover, the ALJ finds that Dr. Johnson did not persuasively explain why the proposed surgery was unlikely to result in significant improvement from Claimant's current condition. While it can be inferred from the content of Dr. Johnson's October 26, 2015 letter that he believes Claimant's left shoulder range of motion is adequate, his opinion does not address whether the proposed procedure is likely to reduce Claimant's ongoing pain and thereby substantially improve her function.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of her ongoing left shoulder pain and dysfunction including, but not limited to, the left shoulder arthroscopic debridement and capsular shift as recommended by Dr. Pak.

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 10, 2016

/s/ Richard M. Lamphere

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

PROCEDURAL BACKGROUND

A prior hearing in the above captioned matter was held before Margot Jones, Administrative Law Judge (ALJ) on April 17, 2015 in Greeley, Colorado. Claimant appeared via telephone and was represented by Michael D. Mullison, Esq. Insurer was represented by Lynda S. Newbold, Esq. Employer Waste Chasers was represented by James Peters, Esq. Employer Bender did not appear at the hearing in this matter.

A Summary Order was issued by ALJ Jones concluding that Employer Bender had not been afforded notice of the hearing by the Office of Administrative Courts consistent with the provisions of Section 8-43-211, C.R.S. The parties were therefore instructed to re-set the matter for hearing on all issues. In a subsequent prehearing conference order, ALJ Jones clarified that the parties would be required to re-file all evidence which they wished to have considered as part of the record for determination of the issues.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he suffered a work related injury in the course and scope of his employment on April 18, 2014;

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding authorized reasonable, necessary and related medical benefits;

3. Whether Employer Waste Chasers proved by a preponderance of the evidence that it timely paid its workers' compensation insurance premium;

4. Whether Bender Industrial Group is the statutory employer; and

5. Whether Claimant proved by a preponderance of the evidence that Claimant is entitled to an award of penalties against Employer Waste Chasers for failure to maintain workers' compensation insurance under Section 8-43-409, C.R.S.

STIPULATIONS

1. The parties filed an unopposed motion to file into evidence the official transcript from the April 17, 2015, hearing in Greeley, CO as to the issue of insurance coverage. The transcript was received into the record on November 13, 2015.

2. Counsel for Employer Waste Chasers stipulated on the record that this employer received proper, timely and sufficient actual notice of cancellation of the employer's policy pursuant to Section 8-44-110, C.R.S.

3. The issues of temporary total disability benefits and penalties against Employer Waste Chasers for failure to properly insure for workers' compensation were preserved for later determination.

FINDINGS OF FACT

Having considered the evidence presented at hearing on April 17, and November 13, 2015, the following Findings of Fact are made.

1. Claimant injured his right hand in the course and scope of his employment on April 18, 2014, when he was electrocuted while taking apart an electrical box. Claimant was employed at the time of the injury by Employer Waste Chaser as a pump truck driver and general laborer. Claimant had worked for Employer Waste Chaser for seven or eight months.

2. Employer Waste Chaser was engaged in the business of demolition. John Garber is the owner of Employer Waste Chaser and Claimant's uncle. On the day of the accident, Claimant was assigned by John Garber to take apart electrical boxes at a demolition site. Claimant was expected to separate valuable metals from invaluable metals for recycling purposes. It was in this process that Claimant suffered an injury to his right hand through electrocution.

3. Immediately following Claimant's injury on April 18, 2014, John Garber took him to the emergency room at Poudre Valley Hospital for treatment of his right hand. At the emergency room, an EKG was administered to check Claimant's heart and morphine was prescribed for pain. Claimant was transferred to North Colorado Medical Center Burn Unit. John Garber took Claimant to North Colorado Medical Center where Claimant remained in the hospital for four days receiving medical treatment.

4. At North Colorado Medical Center, Claimant received medical treatment for the right hand electrical wound to assure that it healed properly. Claimant also received occupational therapy, vestibular therapy and physical therapy. Following Claimant's discharge from the hospital, he returned two weeks later for a follow up appointment with a Dr. Cook.

5. As a result of the work related injury, Claimant has outstanding medical bills at Poudre Valley Hospital, North Colorado Medical Center, Emergency Physicians of the Rockies, Colorado Health Medical Group and Advanced Medical Imaging. Claimant incurred bills to these providers for reasonably necessary, authorized and related medical treatment of the April 18, 2014, work injury.

6. Josef Bender appeared on behalf of Employer Bender as the president of Bender Industrial Group. Employer Bender is an Oregon Corporation that was conducting business in Fort Collins, CO as a general contractor on a construction job taking place at 3138 West Drake Rd., Fort Collins, CO.

7. Employer Bender normally conducted business as a general contractor on projects. On April 18, 2014, Employer Bender was the general contractor on the job site at which Claimant was injured.

8. Mr. Bender testified that the overall nature of the project at 3138 West Drake Rd. was construction of a medical office building. In order to complete Employer Bender's obligations for that medical office building, partial demolition of the existing property was necessary, including removal of all wiring and electrical boxes.

9. Employer Bender hired Employer Waste Chasers as a subcontractor to perform demolition duties at the job site which included removing all metal, piping, ducting, wiring and fixtures from the existing building. The project work order and agreement found at Exhibit 7 of Claimant's hearing exhibits was an accurate representation of the work order and agreement entered into between Employers Bender and Waste Chasers. This contract was in place on April 18, 2014.

10. Mr. Bender was of the opinion that the work performed by Employer Waste Chasers as a subcontractor was essential to the completion of the project, and that Employer Bender would have had to hire their own employees if the services were not provided by a subcontractor.

11. Claimant was performing duties included in the contract between Employers Waste Chasers and Bender at the time he was injured. Mr. Bender was made of aware of Claimant's April 18, 2014, injury by John Garber after the injury took place.

12. Employer Bender did not have a workers' compensation insurance policy in place on the project at the time Claimant was injured. Employer Bender did not maintain workers' compensation insurance coverage in Colorado because the company does not have employees in Colorado.

13. Employer Bender is a general contractor who typically contracts out necessary labor activities to subcontractors in order to complete construction

projects. Subcontractor's work was essential to completion of the overall project for Employer Bender.

14. Employer Bender is a statutory employer pursuant to Section 8-41-401, C.R.S. Pursuant to that statute, Employer Bender is a corporation operating and engaged in a business in Colorado where they contracted out work to complete the overall project. Under the circumstances, Employer Bender is liable to pay compensation for injuries sustained by the Claimant in the event Employer Waste Chasers is determined to be a noninsured employer.

15. John Garber received a notice by certified mail of the pending cancellation of the workers' compensation insurance policy for Employer Waste Chasers which was in place with the Insurer. In response to this notice, he wrote a check for the past due premium on April 10, 2014. He placed the check in the envelope provided by Insurer, along with the payment coupon, and placed it in the outgoing mail "cubby hole." Mailing a check was Employer Waste Chasers usual method of paying the premiums on the insurance policy with the Insurer. Mr. Garber had no way of knowing if the post office promptly delivered the check once it was mailed.

16. Elizabeth Garber is John Garber's wife and also works in the office of Employer Waste Chasers. Ms. Garber was also aware that Employer Waste Chasers received the notice of cancellation from Insurer. Ms. Garber typically dealt with the Insurer on insurance premium issues. Ms. Garber could not specifically testify whether the premium check was mailed on April 10 or April 11, 2014, but Ms. Garber represented that she was sure the check was mailed on one of those days. It was her practice to remove envelopes from the "cubby hole" and drive the mail to the post office.

17. Ms. Garber credibly testified that the bank statement for Employer Waste Chasers reflects that the check cleared their bank after May 2, 2014. Ms. Garber credibly testified that she did not remember the specific date the bank statement reflected that the check cleared. She also acknowledged that in the past, premium payments from the company had occasionally been processed electronically, through their agent.

18. Jeff Bunn is an underwriter with Insurer who has been at Insurer for 22 years and an underwriter since 2004. Mr. Bunn credibly testified explaining that the computer system generates the notice of cancellation letters to the policyholder when the premiums have not been received by the due date. If the premiums are not received by the date identified on the notice, the policy is automatically canceled at 12:01 on the day after the premium due date. In this case, the policy was canceled at 12:01 a.m. on April 17, 2014. Mr. Bunn verified that the notices are sent to the policyholders by certified mail and identified the receipt signature from Mr. Garber. He also verified that to his knowledge, Insurer has never accepted premiums as paid upon the date of

mailing, only as of the date of receipt as is stated on the cancellation notice.

19. Mr. Bunn clarified that the Insurer's system automatically cancels the policy if the premium has not been received by the due date in the cancellation notice. In this case, he was contacted after this cancellation to begin the procedure for issuance of a new policy. The canceled policy was not eligible for reinstatement because Claimant's injury occurred the day after the cancellation. Therefore, the only option was to complete a final audit of the canceled policy and begin the process to issue a new policy of insurance.

20. Elizabeth Schmieder is an employee of the Insurer who has worked in the Accounts Receivable Department for 16 years. Her job duties include overseeing the posting of premium payments to the various insurance policies issued by Insurer. During Ms. Schmieder's employment for Insurer, premium payments have never been accepted as of the date of mailing. Rather, actual receipt of the premium has always been required for valid payment.

21. Ms. Schmieder credibly testified and explained that payment coupons are mailed to the policyholder with the premium invoice. The purpose of the coupon is to insure proper credit of a premium check when the payment is deposited and credited to the policyholder's account. The address which appears on this coupon is a post office box in the control of U.S. Bank used exclusively by Insurer for receipt of premium checks. No other mail is addressed to this address. This address has been used by Insurer since June 2012. Checks received at this post office box are handled directly by U.S. Bank.

22. Each day at approximately 2:00 p.m., Ms. Schmieder receives information from U.S. Bank concerning that day's deposits. The information is transmitted electronically and consists of a data file and an image file. The image file contains copies of each deposit's documents including the front and back of the policyholder's check as well as the payment coupon, if returned by the customer. These images are stored in the customer's policy file. If U.S. Bank should make an error on a deposit, Ms. Schmeider is notified of the error and any corrective action taken.

23. Also received is a data file which transmits electronic information concerning each deposit including the policyholder's identifying information, the amount of the deposit, the date of the deposit, and the invoice number. Ms. Schmieder identified the canceled premium check in this case which reveals it was deposited on May 2, 2014. Insurer considers the receipt date of the premium to be the date on which U.S. Bank receives, processes and deposits the check. In this case, therefore, the premium payment was received by Insurer on May 2, 2015.

24. Further evidence of when this payment was received by Insurer is the batch

screen print. This printout shows the policy number, the policyholder's name, the invoice number, the payment amount and check number for all payments deposited on a particular day. This document reflects that the premium payment was received on May 2, 2014.

25. When the electronic data file is received by Insurer, the internal system automatically uploads the information and posts the payments to each policyholder's account. This happens on the same day, and therefore the date of posting, of deposit and of receipt are the same. Each individual policyholder's information is posted to their policy management screen.

26. The payment information also appears on their Policy Financial Transactions Report which provides a running history of payments (or credits) made to a policyholder's account. The employer's Policy Financial Transactions Report reflects that the payment in question was received on May 2, 2014. Because of the automated nature of the processing of premium checks, once deposited, payments are posted to the account of the identified policy number regardless of whether the policy has been previously canceled. If payments are made to a canceled policy, they are either refunded later to the policyholder or, as in this case, transferred to the policyholder's newly issued policy. The Policy Financial Transactions Report reflects that this occurred on May 7, 2014.

27. Michael Mosher is the Lock Box Operations site manager for U.S. Bank in Denver, Colorado. He has been at this position with U.S. Bank for 17 years. The Lock Box Facility is a facility dedicated to processing premium or other payments for corporate customers. Insurer has a dedicated post office box with the bank which is number 561434. This post office box is used for receipt of coupons and premium checks for Insurer's customers only. Insurer has used this post office box for approximately three years. U.S. Bank owns the zip code used with this post office box address which protects the policyholders' payments from being misrouted. Further protection is provided by the fact that the return envelopes provided by Insurer also contain as the pre-printed return address the post office box for Insurer's lock box. Even if there is a problem with postage at mailing, the envelope will be returned to the lock box facility. However, U.S. Bank has no control over the United States Postal Service, and if the mail delivery is delayed in getting to the post office box, this is out of the bank's control.

28. The workers at this facility begin work at 2:00 a.m. Mail is collected from the post office box at 2:00, 4:00, 6:00 and 8:00 a.m. The mail is opened, sorted and prepared for processing. The contents of each envelope are extracted and organized for scanning through an automated system. Depending on the number of payments received, the entire process can take from a half hour to several hours. All payments received in the mail are processed the same day. There are no exceptions.

29. During the automated process, an electronic image of the check and payment coupon is created and the lines on the bottom of the payment coupon are read to identify the policyholder for the electronic data file. Mr. Mosher credibly testified that the endorsement on the Waste Chasers check reflects it was deposited, and therefore received by Insurer on May 2, 2014.

30. Once the processing is complete, the data files and image files are transmitted to Insurer no later than 2:00 p.m. Physical copes of the checks and coupons are retained for 60 days before being destroyed. Envelopes are not kept but are shredded after the contents are removed. Based on Mr. Mosher's credible testimony it is concluded that the envelope in which Employer Waste Chasers' payment was mailed would not provide relevant information to determination of the cancellation issue. The only information on the envelope which is unknown at this time would be the USPS postmark. Since the date of mailing is not the relevant inquiry herein, this information would not have any effect on the determination of when the payment was received by Insurer.

31. Mr. Mosher explained that since U.S. Bank has no way of knowing whether a policy has been canceled, all checks are deposited according to the coupon information provided with the policyholder's payments. Depending on the size of the bank and whether it has a particular relationship with U.S. Bank, this can take up to several days. However, the payment is considered received by Insurer on the deposit date, May 2, 2014, in this case, and not the later date of clearance on the policyholder's account.

32. When asked whether a check could be misplaced during the handling process, Mr. Mosher credibly testified this is highly unlikely. The lock box facility has a clean desk policy to help guard against any such issues. This means that all items are processed the same day they come in, there are no items on top of the employees' desks, and no work can be kept in a drawer or anywhere other than the top of the desk at which the employee is working. Mr. Mosher is not familiar with any incident in which a payment for Insurer has been lost or delayed by the bank's handling process.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are reached.

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

2. 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 Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008); *Kroupa* v. ICAO, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses 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).

COMPENSABILITY

3. The ALJ concludes that Claimant's testimony is credible and persuasive as to the injuries he sustained in the course and scope of his employment on April 18, 2014. Claimant established by a preponderance of the evidence that the injuries he sustained are compensable.

MEDICAL BENEFITS

4. Section 8-42-101(1)(a), C.R.S. provides that Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007. Respondents are liable for medical treatment by authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

5. In this case, Claimant has established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits to cure and relieve the effects of the injuries. Claimant's persuasive and credible testimony establishes that the treatment he received from Poudre Valley Hospital, North Colorado Medical Center, Emergency Physicians of the Rockies, Colorado Health Medical

Group and Advanced Medical Imaging was authorized, reasonable, necessary and related to the injuries he sustained on April 18, 2014.

WASTE CHASERS' INSURANCE COVERAGE

6. Section 8-44-110, C.R.S. requires an insurer to notify an employer when it cancels coverage:

> Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall notify any employer insured by the carrier or Pinnacol Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage. Such notice shall be sent at least thirty days prior to the effective date of the cancellation of the insurance. However, if the cancellation is based on one or more of the following reasons, then such notice may be sent less than thirty days prior to the effective date of the cancellation of the insurance: Fraud, material misrepresentation, nonpayment of premium, or any other reason approved by the commissioner of insurance.

7. In *Perez v. Lags Exploration, d/b/a Waterboyz Int'l, LLC*, W.C. 4-734-913 & 4-734-795 (ICAO March 23, 2009), the Industrial Claim Appeals Office stated: "We have construed this provision (Section 8-44-110, C.R.S. 2008) to afford the insured advanced notice of an impending cancellation of insurance so that the insured has an opportunity to avoid non-insured status. *Davidovich v. Team Builders, Inc.*, W.C. 4-468-801 (October 5, 2001).

8. In the present case, the ALJ concludes that Insurer did provide proper notice of cancellation by certified mail to the employer. Proof of receipt of the notice of cancellation by certified mail is evidenced by the signature card signed by John Garber on behalf of Employer Waste Chasers. In addition, counsel for Employer Waste Chasers stipulated that notice was received by his client. The ALJ concludes that Employer Waste Chasers raised no other issue at hearing in this matter regarding the sufficiency of notice under Section 8-44-110, C.R.S. The ALJ therefore concludes that Insurer proved by a preponderance of the evidence that Insurer complied with the notice requirement of Section 8-44-110, C.R.S.

9. Once the existence of a valid insurance contract has been established, the burden rests with the insurer to establish that policy lapsed or was validly canceled. *Butkovich v. Industrial Claim Appeals Office,* 690 P.2d 257 (Colo. App. 1984.) In the insurance context, "[a]bsent an express agreement or a course of dealing to the contrary, the mailing of a premium or a statement alone is not *per*

se sufficient to constitute delivery thereof." *Butkovich, supra.* Further, the risk of postal loss is on the insured where no facts indicate that the insurer intended the mere mailing of a premium to be sufficient as payment. *Thomason v. Schnorr,* 587 P. 2d 1205 (Colo. App. 1978.) There is no credible evidence in the record to establish such a course of dealing between Employer Waste Chasers and Insurer that would warrant a finding that mere mailing of the premium payment constituted receipt thereof.

10. Rather, the evidence established that the Notice of Cancellation expressly states that the premium payment must be "received" by April 16, 2014 or the policy would be canceled. Under these circumstances, mailing the check was not in itself sufficient to avoid cancellation. *Butkovich, supra; Thomason, supra.* There were no credible or persuasive facts presented to establish that Insurer intended to accept payment as of the date of mailing. In fact, the credible, persuasive and uncontroverted testimony of Insurer's employees establishes that the opposite is true. The documentary evidence also clearly establishes that it is the receipt of the payment that determines the timeliness of the payment.

11. Therefore, the ALJ concludes that the Employer Waste Chasers' policy was properly canceled for nonpayment of premium. The preponderance of the evidence establishes that Employer Waste Chasers' premium payment was not received by Insurer until it was processed and deposited by U.S. bank on May 2, 2014. It is further concluded that Employer Waste Chasers was uninsured on the date of Claimant's April 18, 2014, injury.

STATUTORY EMPLOYER

12. The primary purpose of the Act is to provide injured workers a remedy for job-related injuries without regard to fault. *See Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985). The statutory scheme of the Act provides an injured worker compensation from the employer without regard to negligence; in return, the responsible employer is granted immunity from common-law negligence liability. *Buzard v. Super Walls, Inc.*, 681 P.2d 522 (Colo. 1984). The Act contemplates that "statutory employers" are also afforded such immunity. *Travelers Insurance Co. v. Savio*, *supra*. While a company may not be an injured worker's employer under common law, it may nevertheless be a statutory employer for purposes of workers' compensation coverage and immunity purposes. *O'Quinn v. Walt Disney Productions,* 177 Colo. 190, 493 P.2d 344 (1972).

13. Section 8-41-401(1)(a), C.R.S., provides:

> Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sub lessee, contractor, or subcontractor ... shall be construed to be an

> employer ... and shall be liable ... to pay compensation for injury ... resulting there from to said lessees, sub lessees, contractors, and subcontractors and their employees ....

14. This provision of the Act makes general contractors ultimately responsible for injuries to employees of subcontractors. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976). Its purpose is to prevent employers from avoiding responsibility for injuries under the Act by contracting out their regular work to uninsured independent contractors. *Heflely v. Morales,*197 Colo. 523, 595 P.2d 233 (1979).

15. The test for determining whether an alleged employer is a "statutory employer" under Section 8-41-401(1)(a), C.R.S. is whether the work contracted out is part of the employer's "regular business" as defined by its total business operation when considering elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. *Finlay v. Storage Technology,* 764 P.2d 62 (Colo. 1988). This test requires inquiry into the importance of the disputed service to the alleged employer's total business operation, which may be demonstrated by showing that, in the absence of a subcontractor's services, the contractor would find it necessary to accomplish the work by use of the contractor's own employees rather than to forego the performance of the work. *Id.*

16. The ALJ is persuaded through the documentary evidence and the testimony of John Garber and Josef Bender that Employer Waste Chasers worked as a subcontractor on the accident site. The credible and persuasive evidence presented at hearing through these witnesses established that Employer Waste Chasers was hired by the general contractor Bender Industrial Group, Inc. to perform work under contract that was a regular part of Bender Industrial Group's business and for which Bender would have had to hire employee to perform if Employer Waste Chasers had not performed it. Therefore, it is found and concluded that Bender Industrial Group, Inc. is the statutory employer of Claimant and is liable for Claimant's April 18, 2014, work injury.

ORDER

It is therefore ordered that:

1. Employer Bender is the statutory employer of Claimant;

2. Employer Bender shall be liable for authorized, reasonably necessary and related medical benefits for the April 18, 2014, work injury. Specifically, Employer Bender shall be liable for medical expense incurred for medical treatment of the April 18, 2014, work injury pursuant to the Workers' Compensation Fee Schedule as established at hearing for services rendered to Claimant by Poudre Valley Hospital, North Colorado Medical Center, Emergency Physicians of the Rockies, Colorado Health Medical Group and Advanced Medical Imaging.

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

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

DATED: February 8, 2016

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

The issues addressed in this decision concern Claimant's entitlement to medical benefits, specifically left knee surgery. The question is whether a recommended left total knee replacement procedure is reasonable, necessary, and related to Claimant's admitted February 24, 2014 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Rook and McBride, the ALJ enters the following findings of fact:

1. Claimant works as a carpenter-rigger for Employer. His duties involve setting forms for completion of vertical and horizontal concrete projects. As part of his duties Claimant must lift and install concrete forms, sometimes at significant heights off the ground.

2. On February 24, 2014, while Claimant was working to secure equipment due to excessive wind on the upper deck of a multistory structure, a gust caught a piece of plywood he was carrying. As the ground was icy and slick, Claimant slide across the deck where he struck his left knee cap on a steel concrete form beam.

3. Claimant sustained a 3.5 cm laceration to his left knee and was taken to the Penrose-St. Francis emergency room for treatment. X-rays showed no fractures. Claimant received six sutures and was released. (See Respondents' Exhibit F).

4. Claimant testified that he was "knocked out," at the time of his work injury. (H. Tr. p. 14 ll 17-18). Claimant's testimony is contradicted by medical records from Penrose-St. Francis Hospital which show that Claimant denied any loss of consciousness just two hours after the incident occurred. (Respondents' Exhibit F, p. 148).

5. On February 25, 2014 Claimant followed-up with Premier Urgent Care, the authorized treating provider in this matter. Claimant denied twisting his knee. He was diagnosed with left knee sprain and laceration. He was prescribed oxycodone and a knee immobilizer with recommendations to elevate and ice his knee. (Respondents' Exhibit C, p. 61-70).

6. On February 27, 2014 Claimant returned to Premier Urgent Care and reported his knee was getting better. (See Respondents' Exhibit C, p. 57). Claimant

completed a pain diagram on this date depicting aching pain in his right knee. Based upon the evidence presented, the ALJ finds that Claimant was probably confused by the body diagram and intended to indicate that he had aching pain in his left knee. Consequently, the ALJ also finds that the triage nursing note from this date indicating that Claimant was in for follow up for his "right" knee is also in error.

7. On March 5, 2014, Dr. Anjmum Sharma, of Premier Urgent Care, evaluated Claimant. Dr. Sharma's notes indicate that Claimant had no complaints of pain; however, a pain diagram completed by Claimant on this date depicts aching pain in the knees bilaterally. (Respondents' Exhibit C, p. 52 & 53). Claimant's sutures were removed and he was placed at maximum medical improvement (MMI) without impairment and released to full duty work. (*Id*. at p. 49).

8. Approximately three weeks later, Claimant returned to Dr. Sharma on March 28, 2014 with complaints of pain in his left knee. (Respondents' Exhibit C, p. 44-48). Radiographs from March 28, 2014 showed mild degenerative changes of the medial patellofemoral compartments. (Respondents' Exhibit G, p. 213). Claimant completed a pain diagram depicting what the ALJ interprets, from the diagram, was burning pain in the left knee. While Dr. Sharma's report is difficult to read, he documents that Claimant had developed cellulitis. Claimant was diagnosed with a left knee contusion with cellulitis. (Respondents' Exhibit C, p. 44). Based upon the evidence presented, the ALJ finds that, more probably than not, Claimant's laceration became infected after his sutures were removed causing cellulites and resultant burning pain in the left knee.

9. On April 11, 2014, Claimant returned to Dr. Sharma for follow-up. Although Dr. Sharma's report documents complaints of left knee pain, Claimant's pain diagram from this date indicates that he was having aching in the right knee. As found at paragraph 6 above, Claimant's reference to having aching in the right knee was, more probably than not, an inadvertent mistake based upon the evidence presented.

10. On April 17, 2014 an MRI of Claimant's left knee was performed. It demonstrated findings consistent with "prepatellar bursitis with marked edema in the surrounding soft tissues, cartilage loss over the medial, median, and lateral patellar facets with subchondral marrow edema, extending up to full-thickness at the medial facet consistent with chondromalacia patella, and small joint effusion." No loose bodies were appreciated. (Respondents' Exhibit G, p. 209-210).

11. On April 21, 2014 Dr. Sharma referred Claimant to Dr. David Walden at Premier Orthopedics for an orthopedic evaluation. Claimant's pain diagram from this encounter depicts stabbing pain in the front of the right knee and the back of the left knee. The ALJ finds from the pain diagram that Claimant likely intended to depict that he had stabbing pain on the front and back of the same knee; however, was probably confused by the reverse images of the body resulting in his marking both the right and left leg. Given that Claimant has always verbally reported left knee pain, the ALJ finds it probable that he intended to depict that he had stabbing pain in the front and back of

the left knee. Again, the ALJ finds that Claimant was likely confused by the body diagram as noted at paragraphs 6 and 9 above.

12. Dr. Walden saw Claimant on April 22, 2014. After reviewing the April 17, 2014 MRI and examining Claimant, Dr. Walden's impression was that of "left knee acute on chronic irritation/exacerbation of patellar chondral damage and left knee septic prepatellar bursitis with no evidence of current infection." Dr. Walden provided an injection for Claimant's knee. (Respondents' Exhibit D, p. 92-93).

13. Claimant returned to Dr. Walden on May 20, 2014. Dr. Walden noted that Claimant's cellulitis had resolved with antibiotics. He discussed with Claimant that the April 17, 2014 MRI primarily showed osteoarthritis. He recommended visco-supplementation injections followed by maximum medical improvement. He stated that surgery was not indicated. (*Id.* at p. 89-91).

14. Dr. Sharma found Claimant to be at MMI on May 21, 2014 without permanent impairment. Dr. Sharma provided a diagnosis of left knee chondromalacia. Claimant's pain diagram from this date of appointment is devoid of any indication that Claimant was having any aching, burning or stabbing sensations as he had noted on previous diagrams. While the pain diagram is blank, the triage nursing note from this date of encounter reflects that Claimant was in for follow up of his work related left knee injury and he was "not better." Moreover, Dr. Sharma's notes in the HPI section of his report from this date that Claimant had positive complaints of left knee pain. Dr. Sharma released Claimant to full duty without permanent work restrictions. Dr. Sharma recommended the three visco-supplementation injections be performed under maintenance care. (Respondents' Exhibit C, p. 51).

15. Respondent's filed a Final Admission of Liability consistent with Dr. Sharma's opinions on June 5, 2014.

16. Claimant received additional Orthovisc injections on June 9 and June 16, 2014. The additional injections failed to provide Claimant relief from his ongoing pain.

17. Claimant filed a timely objection to the Final Admission of Liability requesting a Division Independent Medical Examination ("Division IME").

18. Claimant attended a Division IME with Dr. Stephen Scheper on September 10, 2014. Dr. Scheper opined that Claimant was not at MMI and recommended Claimant return to Dr. Walden for continued treatment. (Claimant's Exhibit 9). In so opining Dr. Scheper noted: that "[i]n consideration of his long professional career without difficulty, the inciting event on 2/24/2014 resulted in a dramatic change to his functional capacity for gainful employment and deserves further management." (Claimant's Exhibit 9, p. 109).

19. Dr. Scheper recommended that Claimant "be referred back to orthopedic surgery for continued treatment with Dr. Walden, or an additional provider at the

claimant's discretion. The specific treatment options should be left to the expertise of his orthopedist at this point." (Claimant's Exhibit 9, p. 109).

20. At the request of Respondents, Dr. Wallace Larson performed an Independent Medical Examination (IME) of Claimant on December 10, 2014. As part of his evaluation, Dr. Larson reviewed Claimant's medical records, Dr. Scheper's Division IME report, and performed a physical examination of Claimant. Dr. Larson noted that on April 5, 2008 Claimant had an MRI of his right knee which demonstrated evidence of posttraumatic osteoarthritis and mild chondromalacia of the patella. He also noted that the March 5, 2014 medical records of Premiere Urgent Care indicated Claimant reported "no pain". Dr. Larson noted that Claimant's pain diagram from this date "does not demonstrate any pain." As noted at Finding of Fact (FOF) ¶ 7 above, Claimant completed a pain diagram on March 5, 2014, which the ALJ finds depicts aching in the knees bilaterally. Consequently, the ALJ finds Dr. Larson's suggestion that Claimant was not having any pain erroneous and unconvincing. Dr. Larson further noted that the March 28, 2014 radiographs of Claimant's left knee demonstrated no fracture but showed mild degenerative changes of the medial and patellofemoral compartments, and that the April 17, 2014 MRI of Claimant's left knee demonstrated prepatellar bursitis with marked edema in the surrounding tissue, cartilage loss over the medial, median, and lateral patellar facets with subchondral marrow edema extending up to full-thickness at the medial facet consistent with chondromalacia patella, and small joint effusion. He opined that Claimant sustained a work-related left knee contusion and laceration and was at MMI, without indication for surgical intervention. (Respondents' Exhibit B).

21. Claimant returned to Dr. Walden for further evaluation on January 13, 2015. Dr. Walden noted that the MRI scan showed complete loss of cartilage of the medial facet of the patella. Dr. Walden stated it was "difficult to tell whether or not this was acute or chronic phenomenon." In recommending consideration for a total knee arthroplasty, Dr. Walden noted as follows: "The patient does not seem to (sic) getting better and, according to him, he is "unemployable." I am <u>not</u> <u>certain</u> that all of the patient's arthritic changes in the knee are related to trauma, however, certainly this incidence seem (sic) to worsen the symptoms and <u>may</u> have worsened the underlying condition as well." (emphasis added) The ALJ finds, based upon the opinions expressed in this report, that Claimant had pre-existing left knee arthritis and that Dr. Walden is uncertain whether that arthritis was aggravated or accelerated by Claimant striking his knee on a steel concrete form beam on February 24, 2014.

22. Claimant returned to Dr. Walden on April 21, 2015. It was noted that on physical exam both of Claimant's knees had crepitus through range of motion. Dr. Walden referred Claimant to Dr. Schuck for "evaluation and possible total knee arthroplasty." (*Id.* at p. 76-77).

23. On May 5, 2015, Dr. Schuck's office requested authorization for a left total knee replacement (TKR).

24. On June 1, 2015, Dr. John McBride, a board certified, level II accredited orthopedic surgeon conducted an IME of Claimant at Respondents' request. Dr. McBride took a history from Claimant, reviewed the medical records, and performed a physical examination. Dr. McBride noted that Claimant's pain appeared to be "significantly out of proportion" to his injury. He applied the Medical Treatment Guidelines, Rule 17, Exhibit 6 (hereinafter "MTGs") to determine whether Claimant's February 24, 2014 work injury was sufficient to meet the criteria to establish proof of an aggravation of his pre-existing osteoarthritis resulting in Claimant's need for a total knee arthroplasty (TKA).

25. The ALJ takes judicial notice of the MTGs, Rule 17, Exhibit 6.

26. Dr. McBride noted the MTGs state that the provider must establish an occupational relationship establishing a change in the patient's baseline condition in relationship to the work activities. Dr. McBride further noted that Claimant met this criterion because he had pain and he did have an injury to his knee which was evidenced by the acute effusion in films.

27. Nonetheless, Dr. McBride explained that the MTGs provide that in order to entertain previous trauma (injury) to the knee as a causative factor for an asserted aggravation of pre-existing osteoarthritis, the patient should have medical documentation of meniscectomy or hemarthrosis at the time of the original injury (trauma), evidence of meniscus or ACL damage, and the prior injury (trauma) should have been at least two years from the presentation of the new complaints. He explained that according to the treatment guidelines to have aggravation of osteoarthritis as a need for a total knee replacement, Claimant's osteoarthritis should have been "significantly changed" on the radiographs and there should be at least two years for the increasing pathology. Dr. McBride noted that Claimant's MRI from April 2014 showed full thickness chondromalacia with cystic changes indicating chronic osteoarthritis which predated the February 24, 2014 injury. Accordingly, Dr. McBride explained that Claimant did "not meet the guidelines under the lower extremity, section 2, section A, aggravated arthritis with regards to the injury on exhibit page 47." Dr. McBride noted further that Claimant also has medial joint line osteoarthritis which would not be affected by a direct blow to the anterior aspect of his knee as described by Claimant. He opined that while a total joint replacement may be appropriate, Claimant does not meet the guidelines to have a TKA as part of his workers' compensation claim. (Respondents' Exhibit A).

28. On September 23, 2015 Claimant attended an IME with Dr. Jack Rook at Claimant's request. Dr. Rook diagnosed Claimant with left knee chondromalacia, left knee osteoarthritis, and a sleep disturbance. Dr. Rook opined that Claimant's left knee condition and his need for a TKA is directly related to the February 24, 2014 occupational injury. He noted Claimant did not have any problems with his left knee prior to the work injury. He stated that Claimant sustained direct trauma to his left knee on February 24, 2014 and the knee pain has persisted since. Dr. Rook noted that Claimant had "not improved despite conservative treatment and his primary

occupational orthopedic physician, Dr. Walden, has recommended a resurfacing procedure." According to Dr. Rook, "that procedure would not have been necessary at this point in time if not for the patient's injury of February 24, 2014."

29. Dr. Rook disagreed with Dr. McBride's interpretation of the guidelines, opining that the "principal" criteria which must be met is that of establishing a relationship to work activities such as repetitive kneeling, crawling, squatting, and climbing or heavy lifting. Regarding Dr. McBride's decision to "consider" other causative factors as provided for in the MTGs, Dr. Rook noted: "There is a clear occupational relationship to the patient's left knee condition and his current need for more aggressive treatment. Dr. McBride erroneously relied upon the "other causative factors to consider" with regards to the patient's aggravated osteoarthritis. This patient does not have any other causative factors to consider because he was asymptomatic in February 24, 2014. Dr. McBride is misinterpreting this section of the guidelines with regards to the medical reasoning that he applied in the discussion section of his report."

30. Dr. Rook stated that a physician only needs to consider "other causative factors" in the case of an occupational disease. (Claimant's Exhibit 12).

31. Dr. Rook's deposition was taken on October 9, 2015. Dr. Rook is a board certified physiatrist with expertise in physical medicine and rehabilitation (PM&R) and level II accredited. Dr. Rook testified consistently with his report opining that Claimant sustained a traumatic injury to his left knee on February 24, 2014. (Deposition of Dr. Rook, October 9, 2015, hereinafter "Rook Depo.", p. 8 ll 24-25, p. 9 ll 1-2). He opined that Claimant's April 17, 2014 MRI showed swelling of the bone indicative of bony trauma and fluid in the joint. He stated it was his opinion that this was indicative of an acute injury because of the findings of edema and fluid within the joint. (*Id*. at p. 10 ll 6-24). Dr. Rook also testified that he disagreed with Dr. McBride's opinion that the recommended TKA was not related to Claimant's work injury. He opined that Dr. McBride misinterpreted the guidelines by utilizing "other causative factors" as he believed these factors should only be taken into consideration if the patient has a pre-existing condition or when dealing with an occupational disease. (*Id*. at p. 14 ll 5-12, p. 16 ll 9-25, p. 17 ll 1-15).

32. Dr. Rook explained that it was not his opinion that Claimant's osteoarthritis was caused by trauma due to his February 24, 2014 injury, but that his osteoarthritis was permanently aggravated as a result of his injury. (*Id*. at p. 24 ll 9-16, p. 27 ll 6-15). He conceded that if Claimant's pathology was caused by the injury he would expect Claimant to have continuous symptoms from the date of injury. (*Id*. at p. 25 ll 7-12). Dr. Rook testified that he did not know if the specifics of Claimant's history included a period of time where Claimant reported being better and then his knee became symptomatic again, however, if this was the case one would need to figure out if there was a new injury or if Claimant did something to re-aggravate his condition. (See *Id.* at p. 25 ll 13-25, p. 26 ll 1-11). Additionally, Dr. Rook conceded that the Rule 17, Exhibit 6, page 47 does not actually list or refer to primary and secondary factors; it was merely his opinion that they were implied. (Rook Depo. at p. 26 ll 19-25, p. 27 ll 1-5).

33. Dr. McBride also testified by deposition taken on November 5, 2015. Dr. McBride has been a board certified orthopedic surgeon for 30 years. He testified that in his opinion the recommended TKA was not related to Claimant's February 24, 2014 work injury. (Deposition of Dr. McBride, November 5, 2015, hereinafter "McBride Depo.", p. 11 ll 7-11). He testified that Claimant's MRI from April 17, 2014 showed end-stage arthritis, which is the medical basis for replacement of the joint. (*Id*. at p. 11 ll 11-25). He testified that the April 17, 2014, MRI showed full thickness cartilage loss over the medial patellar facet, subchondral cystic changes and edema. He explained that the edema was secondary to Claimant's arthritis and his subchondral cystic changes. Dr. McBride testified that subchondral cystic changes develop from wear and tear arthritis and not from a direct blow to the knee as described by Claimant. Moreover, according to Dr. McBride it takes years to develop subchondral cystic changes. (*Id*. at p. 12 ll 1-12).

34. Based upon the evidence presented, the ALJ finds that Claimant likely had severe pre-existing, yet asymptomatic, osteoarthritis in the left knee at the time of his February 24, 2014 work injury and that this arthritis was not caused by striking his knee on a steel concrete form beam. See also, Finding of Fact (FOF) ¶ 19.

35. Regarding the question of whether Claimant's need for a TKA was related to an occupationally induced aggravation or acceleration of Claimant's pre-existing osteoarthritis, Dr. McBride testified that, while the MRI showed a small joint effusion, the MTGs require a hemarthrosis and a large effusion for occupational relatedness, which Claimant did not have. (*Id*. at p. 12 ll 17-25, p. 13 ll 1). He also explained that there were no loose bodies appreciated in the MRI which indicated there had been no acute chondral injury to Claimant's knee. (*Id*. at p. 13 ll 1-4). Dr. McBride further explained there was no evidence of significant intra-articular damage (inside the knee joint), which are the articular surfaces that are replaced with a total knee arthroplasty. (*Id*. at p. 13 ll 12-21). He testified the damage to Claimant's knee was all to the superficial surface, i.e. the outside of the knee joint as documented by both Dr. Walden and Dr. Larson. (*Id*. at p. 15 ll 5-8).

36. Dr. McBride reviewed both Dr. Rook's IME report and the transcript of his deposition testimony. Following that review, Dr. McBride testified that Dr. Rook was not accurate in his description of "primary" and "secondary" factors under the guidelines for aggravation of osteoarthritis. He explained that in determining whether wear and tear arthritis is secondary to an occupational injury you need to consider causative factors. He explained, according to the guidelines, the prior injury must be at least two years from presentation of the new complaints. He testified that the guidelines specifically state under the section of aggravated osteoarthritis "in order to entertain previous trauma as a cause" there has to have been a significant deterioration of the condition as documented in objective studies, i.e., normal studies then two years later abnormal studies. (*Id*. at p. 29 ll 1-11; p. 15 ll 11-19). He testified that Claimant's studies from a month and a half after his work injury are significantly abnormal; therefore, they would

have been abnormal at the time of the injury as this was not enough time for Claimant to develop subchondral cystic changes and edema.

37. Dr. McBride explained that, contrary to the opinion of Dr. Rook's that the edema present on imaging study was indicative of acute injury, the edema was actually more suggestive of chronic osteoarthritis and the subchondral cystic changes as edema is the first stage before cysts develop and Claimant's cystic changes indicated his arthritis was more than five years old. (*Id*. at p. 15 ll 20-25, p. 16, p. 17 ll 1-7). He testified that Claimant's 2008 MRI of his right knee also showed evidence of edema associated and consistent with osteoarthritis. (*Id*. at p. 17 ll 14-25, p. 18). Therefore, the edema noted in Claimant's left knee MRI was more indicative of a natural progression of osteoarthritis and not an acute injury. (*Id*. at p. 19 ll 1-5).

38. Dr. McBride opined Dr. Sharma's note from March 5, 2014 which indicated Claimant had no pain complaints was significant in that it meant Claimant had returned to baseline from his February 24, 2014 work injury. He stated the fact that Claimant returned several weeks later with pain complaints is consistent with the natural progression of his pre-existing degenerative osteoarthritis and not from acute trauma caused by Claimant's February 24, 2014 work injury. (*Id*. at p. 21 ll 21-25, p. 22, p. 23 ll 1-11). The ALJ finds this testimony ignores Claimant's March 5, 2014 pain diagram which constitutes some evidence that Claimant was not pain free on March 5, 2014 as suggested by Respondents. Moreover, the opinions expressed by Dr. McBride do not account for the fact that Claimant's pain had changed in nature from aching on March 5, 2014 to burning on March 28, 2014, which the ALJ finds was probably due to Claimant's acute cellulitis rather than an interval progression of Claimant's osteoarthritis over a three week time frame. Based upon the evidence presented as a whole, the ALJ finds the suggestion that Claimant returned to "baseline" following his February 24, 2014 work injury dubious.

39. Based upon the evidence presented, the ALJ finds that Claimant has not returned to his previous baseline level of function despite significant conservative care.

40. During his hearing testimony, Claimant adamantly denied having any problems with either of his knees prior to his February 24, 2014 work injury. (Hrg. Tr., p. 25 ll 17-19; p. 27 ll 6-11). Medical records contradict Claimant's assertion, as they show Claimant previously complained of pain and swelling in his right knee which appears to have been so significant as to result in an MRI being performed on April 5, 2008. (Respondents' Exhibit G, p. 215-216). Nonetheless, after careful review of the medical record evidence, the ALJ finds no evidence to suggest that Claimant's left knee was symptomatic, that he was actively engaged in ongoing treatment for his left knee or that his left knee was functionally limiting prior to February 24, 2014. Consequently, while there are inconsistencies between Claimant's testimony and the medical records submitted concerning loss of consciousness following his February 24, 2014 work injury and prior pain in the right knee, the evidence presented persuades the ALJ that Claimant's pre-existing left knee osteoarthritis was asymptomatic and non-limiting until it was aggravated and made symptomatic when he struck his left knee on a steel beam

on February 24, 2014. Based upon the evidence presented, the ALJ finds, more likely than not, that Claimant aggravated his previously asymptomatic osteoarthritis and that conservative treatment measures have failed to return him to his baseline level of function.

41. Consistent with the opinions expressed by Dr. Walden, Dr. Rook and Dr. McBride, Claimant's need for a TKA is reasonable and necessary. Regardless, the question of whether the need for the procedure is related to Claimant's February 24, 2014 work injury must be resolved. To that extent, Dr. McBride testified that the question is whether Claimant's knee is worn out because of the direct blow to it, an infectious process related to the work injury, or damage to the ligament or hemarthrosis as outlined in Rule 17, to which he stated the answer, is "clearly no." (*Id.* at p. 26 ll n23-25, p. 27 ll 1-10). Based upon his report and testimony, the ALJ finds that Dr. McBride's opinion is that Claimant's need for surgery is the result of the natural progression of a pre-existing condition, specifically degenerative osteoarthritis of the knee. The ALJ is not persuaded.

42. The ALJ has carefully considered the MTGs and the opinions of Dr. McBride. Based upon the record evidence presented as a whole, the ALJ finds the opinions of Dr. Rook regarding the causal relationship between Claimant's industrial injury and his need for a TKA more persuasive than the contrary opinions of Dr. McBride. The ALJ has weighed the evidence and concludes that the opinions of Dr. McBride ignored critical evidence concerning Claimant's left knee pain leading to an erroneous conclusion that Claimant had returned to "baseline." Moreover, having carefully reviewed the MTGs, the ALJ is persuaded that Dr. McBride misapplied the guidelines to the injury in this case. The section of the MTGs entitled "Other causative factors to consider" addresses prior trauma/injury to the knee joint as a likely cause for a claimant's aggravated arthritis. Here, the ALJ is convinced that there are no causative factors at play which would explain Claimant's aggravated osteoarthritis other than his February 24, 2014 work injury. Claimant did not have previous meniscus or ACL damage that would predispose him to degenerative change in the knee as provided for by the MTGs.

43. Taken as a whole, the ALJ finds that the record evidence supports a finding that Claimant's current need for a left total knee arthroplasty flows proximately and naturally from his February 24, 2014 work related injury. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that his need for a left total knee replacement is related to his February 24, 2014 work injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

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

Claimant's Entitlement to a Left Total Knee Arthroplasty and the Colorado Workers' Compensation Medical Treatment Guidelines

D. 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).

E. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

F. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of the cause for aggravated osteoarthritis. While the MTGs provide for specific steps in analyzing whether there is sufficient proof to causally connect an aggravation of pre-existing osteoarthritis to a Claimant's need for additional treatment, the Court is not bound by the MTGs in deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

G. In this case, the totality of the evidence supports a conclusion that Claimant suffered from a latent pre-existing osteoarthritis in the left knee which manifested after Claimant struck this knee on a steel concrete form beam while performing his work duties. Since that injury, Claimant has experienced increasing functional decline despite extensive conservative treatment. Specific surgical treatment for the knee has been recommended as a consequence. Such injuries are compensable. *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); see also, *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990)(industrial injuries which aggravate, accelerate, or

combine with preexisting conditions so as to produce disability and a need for treatment are compensable). As found, Claimant has proven by a preponderance of the evidence that he suffered a compensable aggravation of a pre-existing condition when he struck his left knee on a steel concrete beam, that this aggravation has resulted in disability and that Claimant's current need for a total knee arthroplasty flows proximately and naturally from the February 24, 2014 aggravation/injury. Contrary to Dr. McBride's testimony, the persuasive evidence does not support a conclusion that conservative care restored Claimant to "baseline."

H. Further, as noted above, the ALJ has considered the MTGs and the opinions of Dr. Rook and McBride regarding their application to the injury in this case. In this case, the finds and concludes that the evidence supports Dr. Rooks opinions that Claimant's need for a TKA is directly related to the compensable aggravation of Claimant's underlying osteoarthritis. Dr. McBride's contrary opinions are not persuasive. When the evidentiary record is considered in its entirety, the ALJ concludes that substantial evidence exists to support a conclusion that Claimant's February 24, 2014 work injury aggravated his underlying osteoarthritis hastening his need for a TKA. Consequently, Claimant has proven by a preponderance of the evidence that the recommended procedure is reasonably necessary and related to his compensable February 24, 2014 work related injury. Accordingly, Respondents are obligated to pay for it.

ORDER

It is therefore ordered that:

1. Respondent shall pay for all medical expenses to cure and relieve Claimant from the effects of the compensable aggravation of his left knee osteoarthritis including, but not limited to, the left TKA as recommended by Dr. Walden and Dr. Schuck.

2. All issues not expressly decided herein are reserved for future determination.

DATED: February 1, 2016

/s/ Richard M. Lamphere

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-956-741-02

ISSUES

- Whether Respondents have overcome the opinion of Lynn Parry, M.D., the Division Independent Medical Exam ("DIME") examiner through a showing of clear and convincing evidence.
- What Claimant's permanent impairment rating should be, and what her entitlement to permanent partial disability benefits should be.
- Whether Claimant is entitled to maintenance medical benefits.
- Whether Claimant has met her burden to support conversion of her upper extremity rating to a whole person rating.
- Whether Claimant is entitled to a disfigurement award, and if so, in what amount.

FINDINGS OF FACT

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

1. On March 4, 2013, Claimant sustained a compensable occupational injury when she slipped and fell in her work parking lot, falling backwards and landing on her back and striking her head. As a result of the slip and fall, Claimant sustained injuries to her head, back, and right shoulder.

2. On March 5, 2013, Claimant sought initial emergency treatment for her injuries at Swedish Medical Center and then established care with her primary authorized treating physician, David A. Zieg, M.D. Dr. Zieg diagnosed Claimant with occipital neuralgia, right rotator cuff syndrome, lumbosacral strain, and tinnitus.

3. Dr. Zieg referred Claimant to Philip A. Stull, M.D., of Colorado Orthopedic Consultants for treatment of the right shoulder injury. Medical records from Colorado Orthopedic Consultants indicate that Claimant's complaints included neck pain. After undergoing extensive conservative care, including rest, medications, injections, and physical therapy, Dr. Stull recommended surgical intervention. On August 7, 2014, Claimant underwent a right shoulder arthroscopy, subacromial decompression, and distal clavicle excision. Following surgery, Claimant reported doing well and noted that her right shoulder symptoms were greatly improved. From August 18, 2014 to November 20, 2014, Claimant sought post-surgical physical therapy at Functional Performance Center which continued to successfully decrease pain and soreness in her right shoulder.

4. Dr. Zieg also referred Claimant to Alan Lipkin, M.D. at Associates of Otolaryngology for treatment of a ringing sensation in her ears. Dr. Lipkin diagnosed Claimant with tinnitus and bilateral sensorineural hearing loss. Dr. Lipkin noted that Claimant's tinnitus symptoms began soon after the March 4, 2013 slip and fall accident, and that Claimant had never experienced symptoms of tinnitus prior to the accident. The medical providers at Associates of Otolaryngology ultimately provided Claimant with binaural behind-the-ear hearing aids with tinnitus masking.

5. Usama H. Ghazi, D.O., of Colorado Rehabilitation and Occupational Medicine evaluated Claimant for treatment of her low back pain. On June 19, 2014, Dr. Ghazi performed a left L5-S1 facet injection and left sacroiliac joint injection. Claimant reported a 100% reduction of back pain for three days following the June 19, 2014 injection. On July 21, 2014, Dr. Ghazi performed a cluneal nerve block and indicated that while he was very pleased with the improvement in Claimant's back symptoms, she may eventually need rhizotomies or another set of steroid injections. Following Claimant's facet injection and nerve block, her lower back symptoms were largely resolved, but the pain then increased once again in December 2014.

6. Dr. Zieg opined that Claimant had reached maximum medical improvement (MMI) on January 6, 2015. He assigned permanent impairment ratings of 11% upper extremity or 7% whole person for Claimant's right shoulder range of motion deficits; and 11% whole person for her lumbar spine condition and range of motion deficits.

7. Claimant timely objected to Respondents' Final Admission of Liability and requested a Division Independent Medical Exam (DIME). Lynn Parry, M.D. was selected as the DIME examiner. Dr. Parry evaluated Claimant on July 17, 2015, approximately six months after Claimant was placed at MMI.

8. Respondents hired John Burris, M.D. to perform an independent medical examination (IME) of Claimant which took place on October 19, 2015.

9. Dr. Parry and Dr. Burris both agreed with Dr. Zieg that Claimant reached MMI on January 6, 2015, and that date is not contested.

10. Dr. Zieg, Dr. Parry, and Dr. Burris all also agreed that Claimant was entitled to an impairment rating for loss of range of motion in the right shoulder. Dr. Zieg and Dr. Burris both assigned an 11% scheduled rating for loss of range of motion in the shoulder, and Dr. Parry assigned 19%. Dr. Parry testified that in her opinion, the difference between the range of motion calculations taken by Dr. Zieg in January 2015 and her range of motion calculations taken in July 2015 was explained by six months having passed during which time Claimant had not received substantial treatment, and that during that time period Claimant had developed adhesive capsulitis from underuse of her shoulder. Dr. Burris agreed that the passage of six months could have led to a change in Claimant's medical condition.

11. In addition to the impairment rating given to Claimant for loss of range of motion in the right shoulder, Dr. Parry and Dr. Burris also agreed that pursuant to the AMA Guides, Claimant was entitled to an additional 10% impairment rating for undergoing a distal clavicle excision.

12. With regard to Claimant's lumbar spine, Dr. Zieg, Dr. Parry, and Dr. Burris all gave Claimant a 5% impairment for a specific disorder of the spine under Table 53 of the AMA Guides. All three doctors also acknowledged that Claimant had restricted range of motion in the lumbar spine. However, only Dr. Zieg and Dr. Parry awarded an impairment rating for that loss of range of motion. Dr. Burris opined that Claimant's loss of range of motion was "meaningless" considering her body habitus and deconditioning. Dr. Burris did not explain why Claimant's body habitus rendered Claimant's loss of lumbar range of motion "meaningless," or why it affected Claimant's lumbar range of motion measurements but not her shoulder range of motion measurements. The ALJ finds no persuasive evidence to support Dr. Burris' opinion that obese individuals are not entitled to lumbar range of motion impairment ratings. In contrast, Dr. Zieg and Dr. Parry both believed that Claimant's loss of range of motion in the spine was related to her work injury. Dr. Zieg awarded a 6% whole person impairment for loss of range of motion in the spine, and Dr. Parry awarded a 13% whole person impairment for same. Dr. Parry testified that in her opinion, the reason that Claimant's range of motion deteriorated between the time of MMI and the time that she evaluated Claimant was due to Claimant not receiving treatment for six months and continuing to work a significant amount of overtime for Employer which involved prolonged sitting, a documented aggravating factor for Claimant's lumbar spine injury. Dr. Parry's opinion is also supported by Claimant's credible testimony confirming her lack of treatment for the six months prior to th DIME, and her testimony that she was on pain medications at the time she was placed at MMI, but was no longer on pain medications at the time of her DIME examination. The ALJ finds this was sufficient to resolve the disparity between the ratings.

13. In addition to ratings for the lumbar spine and right shoulder, Dr. Parry also assigned a 2% whole person rating for occipital neuralgia. At his deposition, Dr. Burris testified that while he did not assign an impairment rating for occipital neuralgia, it is a ratable condition under the AMA Guides, and that tables 3, 4 and/or 5 on page 113 should be used in the event that a rating is necessary. Dr. Burris testified that he was not sure how Dr. Parry assigned the occipital neuralgia rating, but that if she could explain her rationale, the decision to do so was not necessarily error, but rather a difference of opinion from his own. Dr. Parry attached Page 113 of the AMA Guides to her report, which showed her handwritten notes regarding how she calculated the occipital neuralgia impairment rating. She also verified in her deposition that she used that Page 113 in assigning an impairment rating for occipital neuralgia.

14. Dr. Parry also assigned Claimant a 4% impairment rating for tinnitus. Dr. Burris opined that this was an error because tinnitus can only be rated when accompanied by a hearing loss sufficient to qualify for impairment. However, medical records establish that Claimant was diagnosed with bilateral sensorineural hearing loss sufficient to require treatment with hearing aids. And the ALJ does not find persuasive

support in the AMA Guides for Dr. Burris' opinion that such hearing loss must be sufficient to qualify for impairment. Dr. Burris also opined in his report that tinnitus is not a typical result of a fall. However, Dr. Burris testified that tinnitus can be caused to a trauma to the head, and that reports indicate that Claimant fell and hit her head during the course of the March 4, 2013 slip and fall accident. Further, Dr. Parry testified that Claimant suffered acute vertigo immediately after falling, indicating that she concussed her ear causing tinnitus.

15. When Dr. Zieg placed Claimant at MMI, he recommended a significant amount of maintenance medical care, including follow-up appointments with his office, follow-up appointments with Dr. Ghazi, and additional medications and/or injections. Similarly, at the DIME examination, Dr. Parry recommended maintenance care in the form of follow-up appointments and a gym pass with a pool therapy program. Dr. Burris disagreed with Claimant's need for maintenance medical care. He testified, "[Claimant's] undergone all kinds of treatment, and it's done nothing to get her better. . . . She's been through all of this, and I don't think she's going to get any different results by doing more of it." Dr. Burris' opinion is not supported by the medical records which demonstrate Claimant's condition improved with surgery, injections, steroid creams, pain medications, and physical therapy which provided continued functional gains including decreased pain and increased strength. Dr. Burris' opinion is also controverted by Claimant's credible testimony that her condition improved with physical therapy, steroid creams, pain medications, injections, and surgery. And her credible testimony that physical therapy provided so much relief that she continued receiving physical therapy after being placed at MMI.

16. Both Dr. Parry and Dr. Burris testified regarding the situs of Claimant's limitation of the right shoulder, and whether that limitation extends past the arm and into the core of the body. Dr. Burris testified that all of Claimant's limitation with respect to the shoulder is located in the arm. However, he also admitted that Claimant circled the collarbone on her pain diagram at the time of her IME to indicate that she was experiencing pain in that area and that the collarbone is above the head of the humerus and considered a part of the core of the body. In contrast, Dr. Parry indicated that Claimant complained of tightness in the upper trapeze area where it attaches to the cervical spine, indicating that effected functionality extends to the core of her body. Dr. Parry's opinion is further supported by Claimant's credible testimony that her pain was greatest in the area of her clavicle.

17. As a result of Claimant's March 4, 2013 work injury, Claimant has a visible disfigurement to the body consisting of two scars over her right shoulder resulting from Dr. Stohl's August 7, 2014 surgery. One scar is two inches long; the other is two and one half inches long. Both scars are thin, white, and well-healed. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

18. To the extent that Dr. Burris' opinions differ from those of Dr. Parry, the ALJ finds the opinions of Dr. Parry to be more credible and persuasive than those of Dr.

Burris as they are better supported by the AMA Guides, Claimant's medical records, and Claimant's persuasive testimony.

CONCLUSIONS OF LAW

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

General

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

The 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).

Overcoming the DIME

The opinion of a DIME examiner is given special weight over the opinions of other physicians in a workers' compensation claim. *Askew v. Sears Roebuck & Co.*, 914 P.2d 416 (Colo. App. 1995). A medical impairment rating assigned by a DIME examiner is binding unless it is overcome by a showing of clear and convincing evidence. § 8-42-107(8)(c); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Clear and convincing evidence is established by showing that the truth of a contention is highly probable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980). Put more simply, in order to overcome a DIME examiner's opinion regarding permanent impairment a party must prove that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co.* at 411. A mere difference of opinion between physicians fails to constitute error.

The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for an administrative law judge. *McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999). In determining whether the DIME examiner's opinion has been overcome, one factor for consideration is whether the DIME physician complied with the AMA Guides. *Kirschenman v. Eastman Kodak*, E.C. No. 4-361-035 (July 31, 2000); *Rivale v. Beta Metals, Inc.*, W.C. No. 4-265-360 (April 16, 1998).

In ascertaining the 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 her initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see also Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Dr. Burris opined that the DIME examiner made several errors, including using the sixth edition of the AMA guides to assign impairment ratings, giving an impairment rating for tinnitus where there is no documented hearing loss, failing to explain in writing how a rating was assigned for occipital neuralgia, and failing to explain the inconsistencies between her own range of motion measurements and the authorized treating physician's measurements.

However, none of the issues brought forth by Dr. Burris are true errors.

- Dr. Parry clearly testified that she only utilized the 3rd revised edition of the AMA guides in assigning impairment ratings in this case, and the ALJ has credited that testimony as persuasive.

- With regard to the tinnitus rating and whether Claimant has documented hearing loss, both the medical records from Associates of Otolaryngology and Dr. Parry's testimony establish that Claimant suffered from bilateral hearing loss.

- Dr. Parry explained what portion of the AMA Guides she used to assign an occipital neuralgia rating. Dr. Parry attached page 113 of the AMA Guides to the back of her report, and she also provided hand-written notes regarding how, specifically, she arrived at a 2% impairment rating.

- Dr. Parry explained the occipital neuralgia rating at her deposition, and the procedure she used to assign an occipital neuralgia rating was the same procedure that Dr. Burris opined can be used to assign such a rating.

- Finally, that Dr. Parry's range of motion findings were higher than the authorized treating physician's and that Dr. Parry chose to use her own range of motion findings does not constitute error. Dr. Parry persuasively testified that the passage of time and the lack of post-MMI medical care explained Claimant's change in function and range of motion.

Respondents have not met their burden of proof to overcome the DIME examiner's opinions in this case. Dr. Parry properly assigned impairment ratings for Claimant's right shoulder, lower back, tinnitus, and occipital neuralgia.

Permanent Partial Disability Benefits

Medical impairment ratings are the basis for permanent partial disability awards. Ratings must be made pursuant to the AMA Guides. § 8-42-101 (3.7), C.R.S.

The impairment ratings assigned to Claimant by Dr. Parry are all accurate and in compliance with the AMA Guides. The ALJ finds Dr. Burris' testimony regarding perceived errors made by the DIME examiner to be unpersuasive.

Maintenance Medical Benefits

A claimant may receive maintenance medical benefits that are reasonable, necessary and related to relieve the effects of a claimant's industrial injury or prevent further deterioration of the claimant's condition. *See* § 8-42-101(1)(a), C.R.S.; *Grover Industrial Commision*, 759 P.2d 705 (Colo. 1988). The burden of proof to establish entitlement to these benefits rests on the claimant. *Id*. In order to receive maintenance benefits, the claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo App. 2003). The question whether the claimant met the burden of proof to establish entitlement to maintenance medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

Claimant's authorized treating physician and the DIME examiner recommended maintenance medical benefits for Claimant. The ALJ credits their opinions over the opinion of Dr. Burris, who opined that Claimant does not need any additional medical care because the medical care she has received in the past has not been helpful. This opinion is inconsistent with the medical records, which demonstrate a marked improvement from surgery, injections, and physical therapy. Claimant is entitled to the maintenance medical benefits recommended for her by Dr. Zieg and Dr. Parry.

Conversion

Section 8-42-107(1)(a), C.R.S. limits a claimant to a scheduled disability award if the claimant suffers an injury or injuries described in section 8-42-107(2), C.R.S.; *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The term "injury," as used in § 8-42-107(1)(a), refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997). The term "injury" refers to the manifestation in a part or parts of the body that have been functionally impaired or disabled as a result of the industrial accident. *Warthen v. Indus. Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004). It is not the location of physical injury or the medical explanation for the "ultimate loss" which determines the issue. *Blei v. Tuscorora,* W.C. No. 4-588-628 (June 17, 2005).

Whether a claimant has suffered an impairment that can be fully compensated under the schedule of disabilities is a factual question for the ALJ. *Walker v. Jim Fuoco Motor Co.,* supra. In determining whether an impairment can be fully compensated under the schedule of disabilities, the ALJ is not limited to the medical evidence. A claimant's testimony, if credited, may be utilized to support a finding on the nature and

extent of the claimant's functional impairment. *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983).

Evidence of pain which restricts a claimant's ability to use a portion of the body located proximal to the arm at the shoulder is a relevant factor in determining whether a claimant has proven a functional impairment above the level of the arm at the shoulder. *Guilotte v. Pinnacle Glass Company,* W.C. No. 4-443-878 (November 20, 2001).

Claimant testified that she has significant ongoing pain in her shoulder, and that the pain extends up into her collarbone and neck. This ALJ finds Claimant's testimony credible. Furthermore, this ALJ credits the testimony of Dr. Parry over Dr. Burris with regard to the situs of Claimant's functional limitation of the shoulder. Claimant underwent a distal clavicle excision as a part of her shoulder surgery on August 7, 2014. Having a portion of the collarbone removed, and experiencing ongoing pain in the area of the collarbone and neck clearly exhibits the fact that the functional limitation of Claimant's shoulder extends to the core of her body. A scheduled impairment rating for the shoulder in this case does not compensate the claimant appropriately. Claimant has proved to a preponderance of the evidence that she is entitled to conversion of her right shoulder impairment rating.

Disfigurement

In addition to other compensation benefits, an additional sum may be paid for scarring or other disfigurement to a part of the body normally exposed to public view. § 8-42-108, C.R.S.

THE ALJ FINDS AND CONCLUDES that as a result of Claimant's March 4, 2013 work injury, Claimant has a visible disfigurement to the body consisting of two scars over her right shoulder resulting from Dr. Stohl's surgery. One scar is two inches long; the other is two and one half inches long. Both scars are thin, white, and well-healed. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

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

1. DIME examiner Lynn Parry, M.D.'s opinions have not been overcome by clear and convincing evidence. Respondents shall pay Claimant permanent partial disability benefits based on the impairment ratings assigned by Dr. Parry.

2. Claimant has established to a preponderance of the evidence that she is entitled to maintenance medical benefits. Respondents are responsible for the maintenance medical treatment recommended for Claimant by Lynn Parry, M.D. and David Zieg, M.D.

3. Claimant's has established to a preponderance of the evidence that her shoulder injury cannot be fully compensated under the schedule of disabilities. The right shoulder impairment rating assigned to Claimant shall be converted to a whole person impairment rating, and permanent partial disability benefits shall be paid based on the converted rate.

4. Claimant has sustained scarring to her shoulder in an area that is normally exposed to the public view. Insurer shall pay Claimant $900 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

7. 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, 2016

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on July 24, 2012.

2. Whether Claimant has proven by a preponderance of the evidence that he suffered compensable injuries to his head and neck during the course and scope of his employment with Employer on December 29, 2014.

FINDINGS OF FACT

1. Claimant is a 58 year old male who works for Employer as an On-Car Supervisor. Claimant has received significant training on investigating and reporting Workers' Compensation claims.

2. Claimant explained that on July 24, 2012 he slipped and fell at Employer's facility after tripping on a rug. He asserts that he injured his lower back during the incident.

3. Claimant's coworker Brandon Martin explained that Workers' Compensation claims are reported to Business Manager Larry Antonio. Alternatively, Mr. Martin remarked that on-call supervisors can enter their own injuries into Employer's reporting system.

4. Instead of reporting his injury to Mr. Antonio, Claimant explained that he contacted District Manager Eldridge Sims. However, Mr. Sims denied that Claimant reported a lower back injury to him in July 2012. Claimant remarked that he deviated from Employer's policy of reporting injuries to the Business Manager because he was concerned about Employer's retaliatory action related to authorization of an expense account.

5. Claimant noted that he subsequently reported his lower back injury to Mr. Antonio. However, Mr. Antonio denied that Claimant mentioned any July 24, 2012 work accident. Instead, Mr. Antonio recalled that Claimant reported a non-work related injury in approximately July 2012. Claimant had stated that he injured his lower back when he fell off a ladder at home.

6. On August 7, 2012 Claimant visited his personal primary care physician Grant Taylor, M.D. Claimant reported that he was in "overall good health this past year without any significant injuries or illnesses." Dr. Taylor specifically evaluated Claimant for his musculoskeletal and neurological health. He noted the Claimant was negative

for back pain, joint pain, extremity weakness, headaches and numbness in the extremities. In an On October 10, 2012 visit to Dr. Taylor Claimant again did not mention back or lower extremity pain.

7. On April 1, 2013 Claimant returned to Dr. Taylor for an examination. Dr. Taylor noted that Claimant reported sharp and consistent pain in the left lower back for the past three days. He commented that Claimant had no specific trauma, falls or injuries. Claimant was negative for extremity weakness, gait disturbance, headaches and numbness in the extremities.

8. On July 24, 2013 Dr. Taylor recorded that Claimant was experiencing an exacerbation of chronic, intermittent lower back pain. He noted that there were no other specific injuries. Claimant had pain across both sides of his lower back that radiated into his posterior thigh. Dr. Taylor referred Claimant to pain specialist Brooke Bennis, M.D. for an evaluation.

9. Claimant subsequently received epidural steroid injections for his lower back. However, Claimant continued to experience numbness and tingling in his lower back that radiated down his right leg into his toes. Dr. Taylor referred Claimant for a surgical consultation and an MRI of his lower back.

10. On February 4, 2014 Claimant entered his own report of the July 24, 2012 injury into Employer's reporting system. Mr. Antonio had recently ceased working for Employer and Gary Penaflor had just become Employer's new Business Manager. Mr. Penaflor took no action on Claimant's July 24, 2012 injury claim because Claimant had told him he had discussed the matter with Mr. Sims.

11. Mr. Sims testified that an employee has never directly reported an industrial injury to him. Instead, Employer's policy is that employees should report injuries to the Facility Business Manager. He recalled that Claimant had noted a back injury prior to 2012 on a boat, but never mentioned a work-related injury. Mr. Sims remarked that, if an employee is concerned about a retaliation problem, the employee can contact Employer's Human Resources Department to file a complaint.

12. On February 24, 2014 Claimant visited Authorized Treating Physician (ATP) Tracy L. Stefanon, M.D. for an evaluation. Claimant reported that on July 24, 2012 he was walking from one office to another in Employer's facility when he tripped on a "ripple" in a rug. He landed on his right shoulder and within approximately one hour he experienced pain on the right side of his lower back. Dr. Stefanon diagnosed Claimant with lower back pain. She determined that, based on the information provided, Claimant's lower back injury occurred during the course and scope of his employment with Employer.

13. Claimant asserts that he also suffered an injury during the course and scope of his employment on December 29, 2014. He explained that he was walking through Employer's parking lot when he slipped and fell on ice. Claimant noted that he landed on his back, left shoulder and head. He took photographs of the scene with his

cellular phone and sent them through a text message to Mr. Penaflor. Claimant then left Employer's facility in his personal automobile to transport his wife to a medical appointment. He subsequently dropped his wife off at home and returned to Employer's facility to complete his work shift. Claimant discussed the fall with Mr. Penaflor and showed him the location of the incident.

14. Mr. Penaflor testified that Claimant reported a lower back injury on December 29, 2014. Claimant did not require emergency treatment and did not mention any head or neck injuries.

15. On January 8, 2015 Claimant visited Dr. Stefanon for an examination. Claimant reported that on December 29, 2014 he slipped on a patch of ice in Employer's parking lot, fell backwards and struck his left shoulder blade. He did not strike his head, elbow or wrist. However, Claimant experienced immediate pain on the left side of his neck. Dr. Stefanon diagnosed Claimant with a cervical strain, a thoracic strain and radicular symptoms in the C8 nerve root distribution. She concluded that Claimant suffered an industrial injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Stefanon referred Claimant for a cervical MRI.

16. On January 28, 2015 Dr. Stefanon noted that the MRI revealed multilevel degenerative changes in Claimant's cervical spine but nothing at the C8 level that would correspond to Claimant's symptomatology. Dr. Stefanon continued Claimant's full duty employment, referred him to physical therapy and prescribed an EMG study.

17. On March 25, 2015 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Dr. Lesnak addressed Claimant's July 24, 2012 lower back injury. Although Claimant had already reported a December 29, 2014 neck injury, he denied neck and cognitive complaints at the evaluation. Dr. Lesnak reviewed Claimant's medical records and conducted a physical examination. He determined that Claimant did not suffer a lower back injury on July 24, 2012 during the course and scope of his employment with Employer. He concluded that there was "absolutely no medical evidence to suggest that [Claimant] had any complaints of low back or leg symptoms that developed as a result of the 07/24/12 occupational incident. In fact he did not have any low back symptoms until approximately over eight months after 07/24/12. The symptoms that developed over eight months after an incident are clearly completely unrelated to the 07/24/12 occupational incident." Dr. Lesnak summarized that, if Claimant sustained a mild injury on July 24, 2012, his symptoms completely resolved by August 7, 2012. None of Claimant's current symptoms are thus related to the July 24, 2012 incident.

18. During the course of Claimant's subsequent treatment with Dr. Stefanon he mentioned cognitive difficulties after his December 29, 2014 fall. On May 13, 2015 Claimant visited Gerald Macintosh, M.D. for an evaluation. Claimant reported that he fell on ice and snow at work and lost consciousness for approximately 10 minutes on December 29, 2014. Dr. Macintosh remarked that the temporal relationship between

the December 29, 2014 accident and Claimant's cognitive symptoms over time remained "spotty."

19. On October 8, 2015 Claimant returned to Dr. Stefanon for an examination. He reported migraine headaches that he attributed to his December 29, 2014 slip and fall. Dr. Stefanon determined that the migraines were remote from his fall and unrelated to the December 29, 2014 incident. Nevertheless, he reported continuing cognitive difficulties.

20. On November 3, 2015 Claimant underwent a neuropsychological evaluation with Suzanne Kennealy, Psy.D. She performed a neuropsychological evaluation involving 12 different clinical procedures for assessing a traumatic brain injury. Dr. Kennealy concluded that "current neuropsychological testing indicated that Claimant has no cognitive sequela associated with the slip and fall injury of December 29, 2014."

21. On January 11, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Stefanon. Regarding the July 24, 2012 date of injury, Dr. Stefanon noted that she had not reviewed Claimant's complete medical history. She did not consider Claimant's prior medical records or his treatment with Dr. Taylor. Shortly prior to her deposition she reviewed Claimant's medical records from July 2012 through February 2014. Dr. Stefanon changed her opinion and concluded that Claimant did not sustain a work-related lower back injury during the course and scope of his employment with Employer on July 24, 2012.

22. In addressing the December 29, 2014 incident, Dr. Stefanon commented that there were no objective symptoms to correlate with Claimant's subjective complaints of cognitive difficulties. She thus determined that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 accident. Moreover, Claimant's brain MRI did not support the diagnosis of a traumatic brain injury. Dr. Stefanon maintained that Claimant's cognitive difficulties were not related to the December 29, 2014 incident or have resolved without permanent disability.

23. Dr. Stefanon maintained that Claimant suffered a cervical strain as a result of the December 29, 2014 slip and fall. She explained that Claimant's cervical MRI revealed multiple levels of chronic degenerative changes. Dr. Stefanon noted that Claimant's fall caused a flare-up of symptoms in the facet joints of his neck. Claimant's facet pain requires additional medical treatment. Dr. Stefanon summarized that her objective findings were consistent with the history of a work-related mechanism of injury if there was a legal determination that the timing and place of Claimant's fall was on Employer's premises.

24. On January 8, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Lesnak. Dr. Lesnak maintained that Claimant did not suffer a lower back injury during the course and scope of his employment with Employer on July 24, 2012. He commented that Claimant noted he had not developed lower back pain until approximately September 2013 when he was bending over to put on his socks after

showering in the morning. Dr. Lesnak commented that Claimant's October 22, 2013 lumbar spine MRI was normal for someone of his age and did not reveal any acute findings. He explained that the medical records did not reflect any specific, documented, reproducible, objective findings on examination that correlated with Claimant's symptoms. Dr. Lesnak summarized that, although Claimant experienced subjective pain, the medical records did not reveal any objective evidence of an injury to his lumbar spine attributable to the July 24, 2012 incident.

25. Dr. Lesnak agreed with Dr. Stefanon that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 slip and fall. He remarked that Claimant's symptoms simply did not comport with the diagnosis of a traumatic brain injury pursuant to the Colorado Medical Treatment Guidelines (*Guidelines*). Dr. Lesnak noted that Claimant did not have any documented loss of consciousness 24 to 72 hours after the slip and fall and did not have any loss of memory concerning events that occurred immediately before and after the injury. He commented that Claimant did not have any alteration in mental status at the time of the injury, did not have any Glasgow Scale Coma disorders and did not suffer posttraumatic amnesia greater than 24 hours or loss of consciousness for 30 minutes or less. Finally, Claimant's abilities to investigate his slip and fall, operate a motor vehicle and return to work after the incident were inconsistent with a traumatic brain injury on December 29, 2014.

26. Dr. Lesnak disagreed with Dr. Stefanon regarding Claimant's cervical spine injury as a result of the December 29, 2014 slip and fall. He concluded that Claimant did not suffer a cervical spine injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Lesnak remarked that subjective pain complaints must be verified through objective testing to constitute a compensable injury. He reiterated that Claimant's cervical MRI reflected degenerative changes consistent with age. Dr. Lesnak testified that Rule 17, Exhibit 8 of the *Guidelines* specifies that pain alone is generally not compensable. Upon reviewing the medical records, Dr. Lesnak determined that Claimant may have had a sprain or strain of the soft tissue in his neck. However, he would have expected those symptoms to resolve a couple of weeks to a couple months after the December 29, 2014 incident. Dr. Lesnak stated that he saw no evidence that Claimant sustained any trauma to his cervical spine, nervous system, spinal cords, discs, joints or any other pathology in the neck. He concluded that Claimant's presentation did not make sense because one would likely not sustain a structural injury to the cervical spine after a fall that was not a compression-type injury.

27. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on July 24, 2012. Initially, Claimant did not report that he tripped and injured his lower back while working for Employer until approximately 18 months after the incident or February 4, 2014. Although Dr. Stefanon originally determined that Claimant suffered a lower back injury while working on July 24, 2012, she noted at her deposition that she had not reviewed Claimant's complete medical history. She had not considered Claimant's prior medical records or his treatment with

Dr. Taylor. Shortly prior to her deposition she reviewed Claimant's medical records from July 2012 through February 2014. Dr. Stefanon changed her opinion and concluded that Claimant did not sustain a work-related lower back injury during the course and scope of his employment with Employer on July 24, 2012. Finally, Dr. Lesnak persuasively maintained that Claimant did not suffer a lower back injury during the course and scope of his employment with Employer on July 24, 2012. He commented that Claimant's October 22, 2013 lumbar spine MRI was normal for someone of his age and did not reveal any acute findings. Dr. Lesnak explained that the medical records did not reflect any specific, documented, reproducible, objective findings on examination that correlated with Claimant's subjective symptoms. He summarized that, although Claimant experienced subjective pain, the medical records did not reveal any objective evidence of an injury to Claimant's lumbar spine attributable to the July 24, 2012 incident. Accordingly, Claimant has failed to establish that the July 24, 2012 incident aggravated, accelerated or combined with his pre-existing lower back condition to produce a need for medical treatment.

28. Claimant has failed to prove that it is more probably true than not that he suffered compensable injuries to his head and neck during the course and scope of his employment with Employer on December 29, 2014. Initially, Claimant has failed to demonstrate that he suffered a traumatic brain injury as a result of the December 29, 2014 slip and fall. Dr. Kennealy concluded that "current neuropsychological testing indicated that Claimant has no cognitive sequela associated with the slip and fall injury of December 29, 2014." Dr. Stefanon commented that there were no objective symptoms to correlate with Claimant's subjective complaints of cognitive difficulties. She thus determined that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 accident. Dr. Stefanon summarized that Claimant's cognitive difficulties were not related to the December 29, 2014 incident or have resolved without permanent disability. Finally, Dr. Lesnak agreed with Dr. Stefanon that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 slip and fall. He remarked that Claimant's symptoms simply did not comport with the diagnosis of a traumatic brain injury pursuant to the *Guidelines*. Dr. Lesnak noted that Claimant did not have any documented loss of consciousness 24 to 72 hours after the slip and fall and did not have any loss of memory concerning events that occurred immediately before and after the injury. He commented that Claimant did not have any alteration in his mental status at the time of the injury, did not have any Glasgow Scale Coma disorders and did not exhibit posttraumatic amnesia greater than 24 hours or loss of consciousness for 30 minutes or less. Claimant's abilities to investigate his slip and fall, operate a motor vehicle and return to work after the incident were inconsistent with a traumatic brain injury on December 29, 2014.

29. Claimant has also failed to establish that he suffered a cervical spine injury as a result of the December 29, 2014 slip and fall. Dr. Stefanon maintained that Claimant suffered a cervical strain as a result of the December 29, 2014 slip and fall. She explained that Claimant's cervical MRI revealed multiple levels of chronic degenerative changes. Dr. Stefanon noted that Claimant's fall caused a flare-up of symptoms in the facet joints of his neck. Claimant's facet pain requires additional

medical treatment. Dr. Stefanon summarized that her objective findings were consistent with the history of a work-related mechanism of injury if there was a legal determination that the timing and place of Claimant's fall was on Employer's premises.

30. However, Claimant initially reported that he had suffered a recurrent lower back injury on December 29, 2014. He did not mention a neck injury to Mr. Penaflor. Dr. Lesnak persuasively disagreed with Dr. Stefanon regarding Claimant's cervical spine injury as a result of the December 29, 2014 slip and fall. He concluded that Claimant did not suffer a cervical spine injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Lesnak remarked that subjective pain complaints must be verified through objective testing to constitute a compensable injury. He testified that Rule 17, Exhibit 8 of the *Guidelines* specifies that pain alone in the neck and cervical spine is generally not compensable. Upon reviewing the medical records, Dr. Lesnak determined that Claimant may have had a sprain or strain of the soft tissue in his neck. However, he would have expected those symptoms to resolve a couple of weeks to a couple months after the December 29, 2014 incident. Dr. Lesnak stated that he saw no evidence that Claimant sustained any trauma to his cervical spine, nervous system, spinal cords, discs, joints or any other pathology in the neck. Finally, the medical records reveal that Claimant's subjective pain symptoms do not correlate with clinical, objective, medical evidence. Accordingly, Claimant has failed to establish that the December 28, 2014 incident aggravated, accelerated or combined with his cervical spine 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 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. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

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

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on July 24, 2012. Initially, Claimant did not report that he tripped and injured his lower back while working for Employer until approximately 18 months after the incident or February 4, 2014. Although Dr. Stefanon originally determined that Claimant suffered a lower back injury while working on July 24, 2012, she noted at her deposition that she had not reviewed Claimant's complete medical history. She had not considered Claimant's prior medical records or his treatment with Dr. Taylor. Shortly prior to her deposition she reviewed Claimant's medical records from July 2012 through February 2014. Dr. Stefanon changed her opinion and concluded that Claimant did not sustain a work-related lower back injury during the course and scope of his employment with Employer on July 24, 2012.

Finally, Dr. Lesnak persuasively maintained that Claimant did not suffer a lower back injury during the course and scope of his employment with Employer on July 24, 2012. He commented that Claimant's October 22, 2013 lumbar spine MRI was normal for someone of his age and did not reveal any acute findings. Dr. Lesnak explained that the medical records did not reflect any specific, documented, reproducible, objective findings on examination that correlated with Claimant's subjective symptoms. He summarized that, although Claimant experienced subjective pain, the medical records did not reveal any objective evidence of an injury to Claimant's lumbar spine attributable to the July 24, 2012 incident. Accordingly, Claimant has failed to establish that the July 24, 2012 incident aggravated, accelerated or combined with his pre-existing lower back condition to produce a need for medical treatment.

8. As found, Claimant has failed to prove by a preponderance of the evidence that he suffered compensable injuries to his head and neck during the course and scope of his employment with Employer on December 29, 2014. Initially, Claimant has failed to demonstrate that he suffered a traumatic brain injury as a result of the December 29, 2014 slip and fall. Dr. Kennealy concluded that "current neuropsychological testing indicated that Claimant has no cognitive sequela associated with the slip and fall injury of December 29, 2014." Dr. Stefanon commented that there were no objective symptoms to correlate with Claimant's subjective complaints of cognitive difficulties. She thus determined that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 accident. Dr. Stefanon summarized that Claimant's cognitive difficulties were not related to the December 29, 2014 incident or have resolved without permanent disability. Finally, Dr. Lesnak agreed with Dr. Stefanon that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 slip and fall. He remarked that Claimant's symptoms simply did not comport with the diagnosis of a traumatic brain injury pursuant to the *Guidelines*. Dr. Lesnak noted that Claimant did not have any documented loss of consciousness 24 to 72 hours after the slip and fall and did not have any loss of memory concerning events that occurred immediately before and after the injury. He commented that Claimant did not have any alteration in his mental status at the time of the injury, did not have any Glasgow Scale Coma disorders and did not exhibit posttraumatic amnesia greater than 24 hours or loss of consciousness for 30 minutes or less. Claimant's abilities to investigate his slip and fall, operate a motor vehicle and return to work after the incident were inconsistent with a traumatic brain injury on December 29, 2014.

9. As found, Claimant has also failed to establish that he suffered a cervical spine injury as a result of the December 29, 2014 slip and fall. Dr. Stefanon maintained that Claimant suffered a cervical strain as a result of the December 29, 2014 slip and fall. She explained that Claimant's cervical MRI revealed multiple levels of chronic degenerative changes. Dr. Stefanon noted that Claimant's fall caused a flare-up of symptoms in the facet joints of his neck. Claimant's facet pain requires additional medical treatment. Dr. Stefanon summarized that her objective findings were consistent with the history of a work-related mechanism of injury if there was a legal determination that the timing and place of Claimant's fall was on Employer's premises.

10. As found, however, Claimant initially reported that he had suffered a recurrent lower back injury on December 29, 2014. He did not mention a neck injury to Mr. Penaflor. Dr. Lesnak persuasively disagreed with Dr. Stefanon regarding Claimant's cervical spine injury as a result of the December 29, 2014 slip and fall. He concluded that Claimant did not suffer a cervical spine injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Lesnak remarked that subjective pain complaints must be verified through objective testing to constitute a compensable injury. He testified that Rule 17, Exhibit 8 of the *Guidelines* specifies that pain alone in the neck and cervical spine is generally not compensable. Upon reviewing the medical records, Dr. Lesnak determined that Claimant may have had a sprain or strain of the soft tissue in his neck. However, he would have expected those symptoms to resolve a couple of weeks to a couple months after the December 29, 2014 incident. Dr. Lesnak stated that he saw no evidence that Claimant sustained any trauma to his cervical spine, nervous system, spinal cords, discs, joints or any other pathology in the neck. Finally, the medical records reveal that Claimant's subjective pain symptoms do not correlate with clinical, objective, medical evidence. Accordingly, Claimant has failed to establish that the December 28, 2014 incident aggravated, accelerated or combined with his cervical spine condition to produce a need for medical treatment.

ORDER

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

1. Claimant's claim based on a July 24, 2012 lower back injury is denied and dismissed.

2. Claimant's claim based on December 29, 2014 injuries to his head and neck is denied and dismissed.

. 3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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 19, 2016.
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DIGITAL SIGNATURE:

Peter J. Cannici

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

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ISSUES

The following issues were raised for consideration at hearing:

1. What is Claimant's Average Weekly Wage (AWW);

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary partial disability benefits (TPD);

3. Whether Claimant proved by a preponderance of the evidence that the right to select the authorized treating physician for maintenance medical benefits passed to Claimant; and

4. Whether Claimant proved by a preponderance of the evidence that Claimant sustained functional impairment not limited to the schedule of injuries.

STIPULATIONS OF FACT

The following stipulations were accepted by the court:

1. Claimant was placed at maximum medical improvement (MMI) on November 14, 2014.

2. Respondents admit to a general medical maintenance award of reasonable, necessary and related medical benefits prescribed by an ATP.

3. Claimant was not provided with a copy of a designated provider list by Respondents.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are made.

1. Claimant sustained an admitted industrial injury to his left shoulder on June 21, 2014, while carrying a heavy metal support with a co-worker. Claimant's co-worker lost his hold on the heavy metal support when the co-worker fell placing the weight of the metal support on Claimant's shoulder.

2. Claimant's job duties at the time of injury required that he perform heavy labor while working in a ditch. Claimant duties in the ditch involved uncovering gas and drainage lines. Claimant's duties required him to use a shovel and to dig a lot. Claimant used his left shoulder extensively in the performance of his job duties.

3. At the time of his injury, Claimant testified that he was paid $20.75 per hour up to 40 hours per week, and time and a half for work over 40 hours. Claimant received a per diem of $270 per week expense reimbursement. Claimant's per diem was not reimbursement and he did not have to incur any expense to receive his per diem. Claimant did not establish by a preponderance that the per diem was considered wages for federal income tax purposes.

4. Respondents admitted for an AWW of $1,543.59 but did not admit for indemnity benefits. Claimant's AWW is calculated, as follows: Employer hired Claimant on April 14, 2014, and Claimant's date of injury was June 21, 2014. The employment period used for AWW calculation purposes shall be the ten-week period of April 14, 2014, through June 22, 2014. Based on wage records, Claimant earned a total of $15,174.93 during this ten-week period. The total of $15,174.93 divided by 10 results in an AWW of $1,517.49.

5. Claimant provided notice of his injury to Employer's safety manager and was taken for medical treatment at a clinic physically on the job site. When Claimant continued to experience pain and difficulty sleeping, a different safety manager for Employer took him to Concentra.

6. Claimant was first seen at Concentra on July 10, 2014, by Dr. Terrell Webb. Claimant provided a history of having received prior treatment in 2008, receiving PT and injection therapy that resolved his problem. Claimant was diagnosed with pain in the left shoulder and shoulder impingement. Claimant underwent x-rays, was prescribed Cyclobenzaprine HCL and Dr. Webb assigned work-restrictions of no repetitive lifting over 10 pounds, no pushing/pulling over 15 pounds of force, no reaching above shoulders, no climbing and limited use of left upper extremity.

7. Claimant was placed on temporary work-restrictions from July 10, 2014, to MMI on November 14, 2014. Claimant's regular job duties required him to lift in excess of his temporary work-restrictions and he was limited in the hours he was able to work due to pain, medical restrictions and sleep deprivation caused by his work-related shoulder injury. Despite the limitations placed on Claimant's activities due to work restrictions and pain, wage records reflect that Claimant continued to work full time for Employer. Although Claimant worked full time for Employer, he worked

fewer hours than before the work injury because of the disability caused by the work injury. Claimant is entitled to temporary partial disability benefits for the period from July 10, 2014, to the date of MMI on November 14, 2014.

8. Claimant had a MRI on September 2, 2014, which revealed tearing of the posterior superior glenoid labrum extending to the biceps labral anchor with rotator cuff tendinopathy with shallow partial interstitial tearing of the supraspinatus tendon.

9. Claimant was initially evaluated by orthopedic surgeon, Dr. Cary Motz, on August 26, 2014. On this date, Dr. Motz provided Claimant with an injection into the subacromial space which reduced Claimant's symptoms.

10. On October 21, 2014, Claimant followed up with Dr. Motz. On this date, Claimant showed mildly positive impingement and Hawkins test. Dr. Motz provided Claimant with the option of living with his symptoms or proceeding to surgery for arthroscopy with subacromial decompression. Claimant did not want to pursue surgery at the time and Dr. Motz indicated Claimant could reopen his case if he wished to pursue surgery in the future.

11. Claimant was placed at MMI on November 14, 2014, by Dr. Kirk Nelson at Concentra. Claimant's musculoskeletal exam was positive for muscle pain, muscle weakness and night pain. Dr. Nelson diagnosed Claimant with glenoid labrum tear, partial tear of the rotator cuff and shoulder impingement. Dr. Nelson released Claimant to full activity and assessed a 6% left upper extremity impairment rating, which converts to a 4% whole person impairment. The doctor prescribed maintenance medical treatment to include the ability to follow up in the next 12 months with Dr. Motz for treatment options to include injections or surgery, if indicated.

12. Claimant underwent a Division Independent Medical Exam (DIME) performed by Dr. Thomas Fry on May 5, 2015. Dr. Fry performed a physical examination of Claimant which showed tenderness with stress of supraspinatous and minimal discomfort of the infraspinatus. Claimant had mildly positive impingement signs and Hawkins maneuver. Claimant had slight guarding against anterior inferior motion of the glenohumeral joint. Assessment was left shoulder pain, probable small supraspinatous tendon tear with mild degenerative changes. Dr. Fry assessed Claimant to have a 9% left upper extremity impairment rating, which converts to a 5% whole person rating.

13. Claimant continued to experience pain and limitation with certain movements, as well as difficulty with sleep. Claimant credibly testified that when he performed range of motion, he experienced pain in the front of

his shoulder and physically pointed to a location which was on his body/chest side of his shoulder. Claimant attempted to return to Concentra, but was told his case was closed and additional treatment was not authorized. Claimant testified that he obtained a second injection from his private doctor which provided temporary relief, but his pain returned. Claimant testified that he understood his previous injury was to his right shoulder and he confirmed this with his previous treating physician but there was some initial confusion. The testimony of Claimant is found credible and persuasive.

14. Dr. Fry testified that Claimant had impingement at the shoulder. Dr. Fry testified that impingement occurs when the tendon goes under the clavicle and acromion. Dr. Fry testified that the impingement occurs cephalad, or to the head side of the glenohumeral joint. Dr. Fry testified that the subacromial space and bursa, supraspinatous tendon, infraspinatus tendon, acromion and clavicle were all located adjacent and cephalad to the glenohumeral joint. The opinions of Dr. Fry are found credible and persuasive on the issue of conversion.

15. Dr. Allison Fall testified as an expert witness in physical medicine and rehabilitation. Dr. Fall testified at hearing that Claimant's pain diagram, testimony at hearing and the locations of his pain were all located at the glenohumeral joint, and not proximal in location. Dr. Fall testified that Claimant's injury was to his rotator cuff and these tendons were responsible for moving the arm. Dr. Fall acknowledged that pain could reduce function. Dr. Fall testified that Claimant's functional limitations were limited to his arm and that his impairment should be limited to the schedule of injuries. Dr. Fall testified that some extraordinary rotator cuff injuries could be converted to a whole person if they impact function of the neck. However, if there was no functional impairment involving the neck, Dr. Fall testified that all rotator cuff injuries should be limited to impairment on the schedule of injuries. The testimony in this case of Dr. Fall is found less credible or persuasive on the issue of conversion than the testimony of Claimant and Dr. Fry.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes 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. 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 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. 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. See *Magnetic Engineering, Inc. v. ICAO, 5 P.3d 385,389 (Colo. App. 2000).*

2. 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 *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008); *Kroupa* v. ICAO, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses 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).

3. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 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 has broad discretion to determine the admissibility and weight of evidence based on an expert's knowledge, skill, experience, training and education. See Section 8-43-210, C.R.S; *One Hour Cleaners v. ICAO*, 914 P.2d 501 (Colo. App. 1995).

AWW

4. "Wages" is defined as the "money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Section 8-40-201 (19(a), C.R.S. The term wages also includes…reasonable value of board, rent, housing, and lodging received by the employee, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case. Section 8-40-201 (19(b), C.R.S. No per diem payment shall be considered wages unless it is considered wages for federal income tax purposes. Section 8-40-201 (19(c), C.R.S. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. Section 8-42-102(3), C.R.S.; *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo.App. 1993);

see *Williams Brother, Incorporated v. Grimm,* 88 Colo. 416, 197 P.1003 (1931); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992).

5. Claimant asserts an AWW of $1,544.28 prior to per diem. Respondents admitted for an AWW of $1,543.59. Based on the wage records, during the 10 week period preceding the work injury from April 14, 2014, through June 22, 2014, Claimant's AWW was $1517.49.

6. The issue is whether Claimant's AWW should include the $270 weekly per diem. Per diem payments are excluded from Average Weekly Wage unless the per diem payment is also considered wages for federal income tax purposes. Section 8-40-201(19)(C), C.R.S.

7. Claimant did not introduce evidence to establish that the $270 per diem payment is considered wages for federal income tax purposes. Thus, based on C.R.S. section 8-40-201(19)(C), the Court holds that the per diem payment shall not be included in AWW.

TPD

8. To establish entitlement to temporary disability benefits, an employee must prove that the industrial injury, or occupational disease, has caused a "disability," and that he/she suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or reduction of bodily function. "Disability" connotes both medical incapacity and restrictions to bodily function.

9. The second element of temporary disability is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete or partial inability to work, or physical restrictions that preclude a claimant from securing employment. See *Culver v. Ace Electric*, supra; *Hendricks v. Keebler Company*, W.C. No. 4-373-392 Industrial Claim Appeals Office (ICAO), June 11, 1999.

10. Claimant proved by a preponderance of the evidence that he suffered a medical incapacity from July 10, 2014, until he was placed at MMI and released to full duty on November 14, 2014, via evidence of continuous work-restrictions by the ATP's at Concentra. Claimant credible testified that he missed hours from work following his injury due to pain, work-restrictions of 40 hours and sleep deprivation caused by his work injury.

11. Claimant shall receive sixty-six and two-thirds percent of the difference between Claimant's AWW at the time of the injury and Claimant's AWW during the continuance of the temporary partial disability. Section 8-42-106(1) C.R.S.

MEDICAL BENEFITS

12. Section 8-43-404(5), C.R.S. provides that an Employer shall provide a list of designated health care providers to the injured worker from which the employee may select the physician who attends the injured worker. If the services of a physician are not tendered at the time of injury, the claimant shall have the right to select a physician. Section 8-43-404 (5)(a)(I)(A), C.R.S.

13. The parties stipulated that Respondents did not tender to Claimant a designated provider list at any time following his injury. Claimant credibly testified that he was taken to multiple health care providers directly by Employer, but was not aware that he had a choice of health care provider that he could select for medical treatment. It is concluded that Claimant's request for change of physician is not a constructive challenged to MMI, since the MMI date was agreed to by the parties. As a result, the right to select the designated provider for Claimant passed to Claimant.

PPD/CONVERSION

14. The question of whether Claimant sustained a scheduled injury within the meaning of Section 8-42-107(2), C.R.S. or a whole person medical impairment under Section 8-42-107(8), is one of fact for determination by the ALJ*. Joseph Velasquez v. UPS and Liberty Mutual,* W.C. No. 4-573-459, (April 13, 2006). In resolving this question, the ALJ must determine the situs of the Claimant's functional impairment and the site of the functional impairment is not necessarily the site of the injury itself. *Id.* Discomfort which interferes with Claimant's ability to use a portion of the body may be considered an "impairment." *See Id. Citing Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996). Referred pain from the primary situs of the injury may establish proof of functional impairment to the whole person*. Id*. Thus, pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for purposes of determining whether an injury is on or off the schedule. *Id.*

15. Claimant established by a preponderance of the evidence that he sustained functional loss not limited to the schedule of injuries. The medical records and Claimant's credible testimony document Claimant's subjective complaints of pain in front of his shoulder and on the body/chest side of his shoulder. Claimant also established limitation involving impingement and pain/tenderness involving the supraspinatus and infraspinatus tendons, including guarding with range of motion movement. Claimant also credibly testified to ongoing difficulty with sleep due to shoulder pain.

16. A claimant's experience of pain in the shoulder or supraspinatus region that restrict range of motion functionally impairs beyond the schedule. *See Franklin Rutherford v. Gale/ Sutton Insulation,* W.C. No. 4-464-456 (August 29, 2001); *Mader v. Popejoy Construction Co., Inc.,* W.C. No.4-198-489 (August 9, 1996). Therefore, as documented in the present case, the pain and discomfort Claimant feels in his shoulder and chest limits his ability to reach forward, out to the side and back which functionally impairs Claimant beyond the shoulder.

17. Dr. Fry credibly opined that Claimant's physical examination and treatment provided evidence of functional loss based on impingement and pain involving the supraspinatous, infraspinatus and subacromial space all located cephalad, or to the head from the glenohumeral joint. It is concluded that the evidence supports functional impairment not limited to the schedule of injuries. Also, consistent with the present case, as documented by MRI and Dr. Nelson, abnormalities involving labral tears support conversion. *Velasquez v. UPS,* W.C. No. 4-573-459 (April 13, 2006); *Ortiz v. Service Experts, Inc.*, W.C. No. 4-657-974, (January 22, 2009).

ORDER

IT IS, THEREFORE ORDERED THAT:

1. Claimant's AWW is $1,517.49.

2. Claimant is entitled to TPD from July 10, 2014 to November 13, 2014.

3. The right to select the authorized treating physician passed to Claimant.

4. Claimant is entitled the 5% whole person impairment rating provided by Dr. Fry.

5. Respondents shall pay 8% statutory interest for all amounts that are not paid when due.

6. All matters not determined by this order are reserved for future determination.

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

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 3, 2016

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable head injury on September 10, 2014.

II. Whether Claimant established that he is entitled to medical benefits associated with his September 10, 2014 head injury.

III. Whether Claimant established that he is entitled to temporary total disability benefits, and, if so, the duration of those benefits.

Because the undersigned ALJ determines that Claimant failed to prove that he sustained a compensable injury, this order does not address issues II and III outlined above.

FINDINGS OF FACT

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

1. On the date of the alleged injury, September 10, 2014, Claimant was working as a civil engineer for Spectrum Wireless Solutions. Ex. A, bates 3. Claimant's job duties included construction of cell phone towers. Hr'g Tr. 17:20-24.

2. At the time of his alleged injury, Claimant was working at the airport, labeling and stacking boxes containing cell phone tower equipment. Hr'g Tr. 18:11-12. While the boxes weighed as much as 80 pounds, Claimant did not consider the work which he was performing "heavy." Hr'g Tr. 16:23-25. Claimant was working at ground level, standing on flat surface. Hr'g Tr. 30:9; 22:23; Ex. A, bates 3, and was working at a "nice, good pace and nothing out of the ordinary." Hr'g Tr. 16:25-17:1. As he was working, he began to develop a headache over his left eye, but worked through the pain. Hr'g Tr. 30:15; Ex. A, bates 2. The last thing he remembered was that he began to feel light-headed. Hr'g Tr. 22:1; 30:10. Claimant then suffered a seizure, falling to the ground and hitting his head, suffering a small epidural hematoma. The next thing Claimant remembers is waking up in the ER. Hr'g Tr. 22:5; Ex. A, bates 1. Claimant would later testify at hearing that he had no idea what caused his injury. Hr'g Tr. 13:18-19.

3. Claimant received treatment at the University of Colorado Hospital (Hospital) intensive care unit. There he underwent serial CT scans of his head as well as blood work. Hr'g Tr. 32:6. The medical records from the Hospital indicate that Claimant had a

history of seizures, although had not had a seizure for 20-25 years. Ex. B, bates 6. Claimant's physicians at University of Colorado Hospital placed him on anti-seizure medication, noting that he had "not been on anti-epileptic drugs (AEDs) in over 20 years. *Id*. and Hr'g Tr. 32:9. His final diagnoses were a "small epidural hematoma" and "seizures." Ex. B, bates 6. Regarding the diagnosis of "seizures", the medical records submitted at hearing reflect that Claimant was moving around on the day of his fall, when he became lightheaded, experienced "ringing" in his ears and fell suffering trauma to the back of his head. According to reports from Claimant's co-workers, Claimant had "tonic-clonic activity" at the time. Claimant was eventually released for outpatient treatment with Dr. Diane Hesselbrock in Colorado Springs, Colorado. Hr'g Tr. 19:23-24.

4. Claimant later filed for workers' compensation benefits. Respondents denied the claim on the basis that Claimant's seizure was not work-related, but was an idiopathic disease personal to Claimant. Claimant was released back to work on October 8, 2014. Hr'g Tr. 21:1-2.

5. Respondents requested and Claimant underwent an independent medical examination (IME) with Dr. Allison Fall on January 22, 2015. Hr'g Tr. 21:22; 28:22; Ex. A, bates 1-4. Dr. Fall is board certified in physical medicine and rehabilitation (PM&R) and she is Level II accredited with the Colorado Division of Workers' Compensation. Hr'g Tr. 26:3-10. Dr. Fall completed her residency at Craig Hospital, a nationally recognized traumatic brain injury treatment center and a large part of her medical practice encompasses diagnosis and treatment of brain injuries. Hr'g Tr. 27:24-28:6.

6. Dr. Fall reviewed Claimant's medical records and Claimant's reported medical history. Hr'g Tr. 28:25-29:10; Ex. A, bates 2. She also performed a physical examination of Claimant. Hr'g Tr. 29:12; Ex. A, bates 3.

7. At the time of his IME, Claimant reported to Dr. Fall that he was standing on a flat surface at the time of his injury. Hr'g Tr. 30:9; Ex. A, bates 3. He had been experiencing a headache over his left eye, but worked through the pain. Hr'g Tr. 30:15-16; Ex. A, bates 2. He recounted to Dr. Fall that the last thing he remembered was feeling light-headed. Hr'g Tr. 22:1; 30:10. The next thing Claimant remembered was waking up in the ER. Hr'g Tr. 22:5; Ex. A, bates 1.

8. When Dr. Fall asked Claimant about his prior seizure history, Claimant reported that he had experienced seizures twice before in his life. Following both occasions, Claimant reported that he was placed on anti-seizure medications. Hr'g Tr. 24:18-19.

9. Medical record evidence indicates that Claimant first had seizures as an infant. Apparently, Claimant suffered bilateral hematomas with delivery which were evacuated. He was placed in three antiepileptics and eventually had a shunt placed after which his AED's were discontinued. Ex C, bates 9; Hr'g Tr. 23:12-13. According to the medical records submitted at hearing, Claimant then had a seizure at age 12 following a bicycle accident. No therapy was provided following this seizure. Ex. C, bates 9. Finally, the

record submitted establishes that at age 26, Claimant suffered seizures following a car accident. Per the record, Claimant had four seizures three days post accident which were "grand mal" in nature. Two of these seizures came on without warning and two were preceded by complaints of lightheadedness and seeing spots. Claimant was on AEDs for a year then stopped taking them. Hr'g Tr. 31:17-18; Ex. A, bates 1; Ex C, bates 9. Claimant testified that he was in a motor vehicle accident in which he was thrown out of the passenger side of the vehicle at 90 miles per hour. Hr'g Tr. 9:18-19; 23:18; Ex. A, bates 1. Claimant told Dr. Fall that, just prior to one of those seizures, he felt light-headed, just as he had prior to the alleged work injury. Hr'g Tr. 31:15-16; Ex. A, bates 3. .

10. Dr. Fall considered two principal diagnoses for Claimant's loss of consciousness (LOC), resulting in his fall: 1. hypoglycemia and 2. seizure. Hr'g Tr. 32:20-25; Ex. A, bates 3. Dr. Fall felt that the medical records did not support a finding that hypoglycemia caused Claimant's LOC and subsequent fall. Hr'g Tr. 33:2-4; Ex. A, bates 3. In opining as such, Dr. Fall noted that Claimant described that the three days before the September 10, 2014 incident; Claimant had gotten good sleep and was eating well. Ex. A, bates 1. He had a good dinner the night before, and stated that the work was not heavy. Ex. A, bates 1. Dr. Fall felt that the medical records and Claimant's prior medical history supported that Claimant suffered a seizure and not an episode of fainting from hypoglycemia. Hr'g Tr. 33:2-4; Ex. A, bates 3. Dr. Fall also opined that, even if the cause of Claimant's fall were hypoglycemia, the fall would have been unrelated to his work. Hr'g Tr. 36:8; Ex. A, bates 3.

11. In Dr. Fall's opinion, the headache and pain over Claimant's right eye was indicative that Claimant suffered a seizure. Hr'g Tr. 30:15-17; 33:13-14. She noted that the ER records indicated that the emergency room personnel felt that Claimant suffered a seizure. Hr'g Tr. 33:1. Dr. Fall also testified at hearing that Claimant's history of seizures made it more likely that what he suffered was in fact a seizure. She expressed that, within a reasonable degree of medical probability, a seizure is the only reasonable explanation for Claimant's injury, given Claimant's history of seizures. Hr'g Tr. 34:18-20; Ex. A, bates 3.Hr'g Tr. 32:24-25. Given all the evidence supporting a seizure, and given the absence of evidence of any other cause for Claimant's injury, Dr. Fall opined that a seizure was in fact the cause of Claimant's injury. Hr'g Tr. 33:3-4.

12. The ALJ credits the testimony of Dr. Fall to find, consistent with Claimant's prior history, that his lightheadedness, eye pain and headache, more probably than not, represented an aura signaling an impending seizure.

13. Dr. Fall also opined to a reasonable degree of medical probability that none of Claimant's job duties caused his seizure. Hr'g Tr. 33:9; Ex. A, bates 3. She reasoned that Claimant was simply working on a flat surface when he began to experience the aura and the eventual seizure. Hr'g Tr. 33:11-15; Ex. A, bates 3.

14. At Hearing, Claimant cross-examined Dr. Fall. Claimant asked Dr. Fall whether it is possible for a person to faint as a result of locking his or her knees. Dr. Fall

confirmed that it is possible, but that fainting from locked knees would require locking the knees for a long period of time. Hr'g Tr. 35:5-6. She clarified that Claimant's account of events indicated that he was working and that his knees were not locked. Hr'g Tr. 35:6-9. Notably, Claimant's testimony, even on rebuttal, did not contain any reference to locked knees and the medical record as noted above indicates that Claimant was "moving around." There are no other references in the record to locked knees.

15. Claimant later testified at hearing that "for it not being work related, I just don't have a clue what would have caused it." Hr'g Tr. 37:12-14.

16. Based upon the evidence presented as a whole, including references to Claimant's prior medical history and the credible testimony of Dr. Fall, the ALJ is persuaded that Claimant's fall and subsequent head injury was caused by a dormant seizure condition which had no underpinnings in Claimant's work-related duties on September 10, 2014.

17. Claimant has failed to carry his burden to establish, by a preponderance of the evidence, that he suffered a compensable head injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *§ 8-43-201, C.R.S.* A Workers' Compensation case is decided on its merits. *§ 8-43-201, C.R.S.*

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ 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 above findings as unpersuasive. *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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this case there is ample record support to establish that Claimant's alleged injury occurred in the scope of his employment. Nonetheless, the question of whether Claimant's head injury "arose out of" his employment must be addressed before the injury can found to be compensable.

F. In C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the Colorado Supreme Court clarified the three categories of risks attendant with all work place injuries in determining whether a fall down a flight of stairs was compensable. The Court in *City of Brighton v. Rodriguez* set forth the following risk categories: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee, (which includes idiopathic conditions or illnesses that are unrelated to the employment, such as epilepsy and fainting spells) and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

G. Under the first category, a fall at work is "typically…only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises." *Id.* at 501, quoting from *In re Margeson*, 162 N.H. 273, 27 A.3d 663, 667 (2011); *See also, Miles v. Denver*, W.C. No. 4-961-742-01 (December 15, 2015) Based upon the evidence presented, the ALJ finds insufficient record support to conclude that an employment-related risk caused Claimant's fall. To the contrary the evidence demonstrates that the floor was clean, dry and otherwise free from defects or other hazardous conditions at the time of Claimant's fall. Indeed, Claimant presented no evidence to suggest that he tripped over a defect on the floor

and by testifying that he had no idea what caused his injury, Claimant necessarily did not attribute his injury to any risks specific to his employment.

H. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean "self-originated." C*ity of Brighton and Cirsa v. Rodriguez, supra* at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when an idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

I. The third category includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. "An injury is compensable under the Act if triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*, 32 P.3d at 477. Concerning unexplained falls the Court noted that injuries resulting from neutral risks arise out of employment only if the employee would not have been injured but for the fact that the conditions and obligations of the employment placed the employee in the position where he was injured. *Id.* at 504. In this case, there is a paucity of evidence to support a contention that Claimant's fall was "unexplained' and the result of a neutral risk. To the contrary, the overwhelming evidence presented supports a finding that Claimant's fall resulted from a seizure. Moreover, while Claimant expresses uncertainty as to the cause of his injury, the remainder of the evidence is unequivocal in support of a finding that Claimant's injury resulted from a seizure. Dr. Fall expressed the possibility that such an injury could theoretically result from fainting, whether from hypoglycemia or from locked knees, but she specifically ruled both out, as Claimant's own account of events did not support the necessary conditions for either cause. Given Claimant's history of seizures and treatment for the same, an emergency room diagnosis of seizure in this case and Dr. Fall's diagnosis of a seizure, in combination with the dearth of evidence supporting an alternate cause for Claimant's LOC, there is a clear explanation for Claimant's head injury, specifically that he suffered a seizure, lost consciousness and hit his head on the ground as a result.

J. The ALJ is persuaded by the following evidence in concluding that Claimant's injury arose entirely out of a personal condition, i.e. an idiopathic seizure condition (category 2 risk factors):

- Claimant has a history of seizures, both as an infant, a child and an adult.
- On two of the occasions when Claimant suffered from seizures, he was prescribed anti-seizure medications.

- Following the injury at issue in this claim, Claimant was diagnosed with a seizure, resulting in a fall and a subsequent epidural hematoma and prescribed anti-seizure medication.

- Claimant experienced auras before the offset of seizure activity similar to that which he experienced in the instant case right before he lost consciousness, fell and hit his head.
.
- Dr. Fall, after reviewing Claimant's medical history, concluded that Claimant most likely suffered a seizure, just as he had several times in the past.

- Other causes for Claimant's LOC and subsequent head injury have been persuasively excluded.

Because Claimant's seizure condition was idiopathic and entirely personal, he carried the burden to prove that an exception applied to the general rule that injuries caused by such personal conditions are not compensable. In concluding that Claimant failed to prove that he suffered a compensable work injury, the ALJ has considered the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989), as noted in paragraph H above. Under the "special hazard" rule," a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Id*. The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See National Health Laboratories v. Industrial Claim Appeals Office, supra; Ramsdell v. Horn, supra.*

K. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). Here Claimant failed to establish that a special hazard of employment combined with his pre-existing idiopathic condition to cause his injury. Accordingly, his claim for benefits must be denied and dismissed and his remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers compensation benefits emanating from an alleged September 10, 2014 work related head injury 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 29, 2016

/s/ Richard M. Lamphere

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

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that he sustained a worsening of his condition that would entitle him to a reopening of his workers' compensation claim under § 8-43-303(1), C.R.S.;

2. If so, whether the claimant has established by a preponderance of the evidence, his entitlement to medical benefits that are reasonably necessary and causally related to the claimant's May 8, 2014 admitted work injury; and,

3. If so, whether the claimant is entitled to recover used sick time through the payment of temporary total disability benefits if this claim is reopened.

Based upon the findings and conclusions below that the case should not be reopened, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant sustained an admitted work injury while working for the respondent-employer on May 8, 2014. He slipped on the kitchen floor at the correctional facility where he performed his duties.

2. Later that day the claimant went to the St. Thomas More emergency department. Dr. Numsen instructed the claimant, "You have strained the muscles in the low back; I would expect you to feel better over the next one to 2 days."

3. The claimant first saw his authorized treating provider, Steve Quackenbush, PA-C, on May 12, 2014. His work related medical diagnosis was "low back muscular strain." Mr. Quackenbush imposed zero work restrictions.

4. The claimant received an MRI on May 23, 2014. The MRI showed a small central disk protrusion, a peripheral annular fiber tear, and no significant spinal canal or neural foraminal stenosis at L3-L4.

5. The claimant underwent conservative treatment. He received trigger point injections, which provided relief.

6. The claimant saw Dr. McIntyre on August 14, September 9 and September 18, 2014. On each visit, Dr. McIntyre noted, “He feels the pain will radiate down the legs intermittently to the feet - bilateral.”

7. The claimant underwent physical therapy with Meghann Vanslager, PT. His initial visit was August 6, 2014. The PT notes, “He presents to physical therapy today with complaints of left low back and leg pain with radiculopathy all the way down to the left foot, right thigh numbness, and bilateral foot pain.” Ms. Vanslager noted the claimant’s radiculopathy again on August 26 and September 5, 2014.

8. Steve Quackenbush placed the claimant at maximum medical improvement (MMI) on March 16, 2015. He imposed zero permanent work restrictions. He assigned zero permanent impairment. He opined, "No further follow up care regarding this care is required.”

9. The claimant testified that he “initiated” his MMI. He stated at that time, his pain was at a level of one or two, and he was still able to do all of his extracurricular activities.

10. After the claimant was placed at MMI on March 16, 2015, the respondents filed a Final Admission of Liability (FAL) on March 19, 2015. The claimant did not object to the FAL, and the claim closed.

11. On July 4, 2015 the claimant awoke in excruciating pain. He stated that “I didn’t feel like I had any mobility in my legs at all—like I couldn’t use them…I just felt like I was burning…I almost felt like my ears were ringing, it was so intense. So I screamed ‘We’ve got to call 911.’”

12. The claimant was taken to the St. Thomas More Hospital. He was admitted to the emergency department at 5:43 a.m. on July 4, 2015.

13. Dr. Geiger’s emergency room record notes that the claimant was given a CT scan. It was discussed with the claimant that the finding “does not appear significantly changed from previous MRI.”

14. Dr. Geiger also noted that “patient does not appear to be in any pain when he is not moving; I do not feel that further pain medication at this time is indicated.”

15. The claimant’s CT scan of July 4, 2015 showed that his lumbar spine was stable in curvature and alignment. There was no new fracture or significant subluxation.

The surrounding soft tissues were unremarkable. The claimant's lumbar x-ray of July 4, 2015 showed "no acute findings."

16. On August 4, 2015, the claimant went to Urgent Care, where he was treated by his original authorized treating provider, Steve Quackenbush, PA-C. Mr. Quackenbush did not impose any work restrictions. He did not note that any other provider had imposed work restrictions. He did state that the claimant was no longer at maximum medical improvement.

17. The claimant had a new MRI taken on September 17, 2015. At L3-L4, he had, "Mild disk bulge. No significant spinal canal or neural formanial stenosis." The report does not include the annular tear that the claimant had in March, 2014.

18. The claimant also sought private treatment with Parkview Neurological Services. Micah Johnson, PA, noted that the claimant reported he had had "lower back pain and radiating pain into the legs for about 1 year." Mr. Johnson noted that the claimant had a back injury "that never got better."

19. Mr. Johnson ordered a spine-lumbar x-ray with bending. It demonstrated no abnormal motion, and unremarkable soft tissues.

20. The claimant testified that since his worsening, he does "nothing" around the house, as far as chores. When asked if he helps out with the house at all, he stated, "I can't." He reiterated that his wife does all chores. "Everything, sir. I do nothing."

21. The claimant testified that he has been paid by the respondent-employer his full wages since his alleged worsening.

22. The respondent retained Dr. Primack for an independent medical evaluation (IME). Dr. Primack was admitted as an expert in physical rehabilitation and occupational medicine. He is triple board certified and is Level II accredited. He stated that 40-45% of his practice deals with industrial injuries.

23. Dr. Primack explained that the claimant's work related diagnosis was a lumbosacral sprain/strain, or a muscle strain. This is based on the records, clinical examination, and the claimant's response to treatment, in particular the trigger point injections. The prognosis for that muscle strain is excellent.

24. Dr. Primack stated that he would expect to find objective findings of a worsening if the claimant experienced his self-described symptoms from July 4, 2015.

25. Dr. Primack explained that the only difference between the claimant's MRI's before and after his alleged worsening is that the latter MRI does not show the annular tear. Annular tears can be a component of pain, but they get better because of blood flow, time, and muscle control. Dr. Primack stated that the claimant's MRI after the alleged worsening actually showed improvement.

26. Dr. Primack stated it was significant to him that the claimant's former ATP, Mr. Quackenbush, declined to impose work restrictions after the alleged worsening.

27. Dr. Primack conducted a clinical examination of the claimant. The claimant reported sensory loss in multiple levels that did not correlate with the objective findings on his MRI.

28. Dr. Primack conducted the Hoover's test on the claimant's legs, which tests for submaximal effort. He found the claimant's response to be non-physiological, and that he was giving sub-maximal effort.

29. Dr. Primack explained that the claimant displayed multiple nonphysiologic findings, which are "findings that we see on clinical examination or a non-clinical examination which don't correlate with what we know of how the neuro-muscular-skeletal system works."

30. The claimant's nonphysiologic findings included, "The gait which, again, didn't make any sense. I haven't seen a gait like that in a while. The significant pain with minimal palpation on the skin. Palpating the skin isn't going to get into any deep levels of the spine. The Hoover test." He explained that he simultaneously pushed and pulled on the claimant's foot, creating no load. The claimant reported pain going up the spine. "Doesn't make sense. There's nothing I know of that would cause that type of effect."

31. Dr. Primack stated that with the claimant's post-MMI self-reported symptoms that approach paralysis, he would expect severe pathology. Yet, the MRI showed his pathology was better than in June 2014. Additionally, his high level of symptoms did not correlate with the clinical examination.

32. Dr. Primack stated he disagrees with Dr. Hall's opinion that the claimant is no longer at MMI, because he is more symptomatic today. "That's not what MMI means, within the medical treatment guidelines. MMI means when you've reached a stable and stationary level of function. It's not symptom-based. That's why impairment ratings are not symptom-based. It's pathology based…You can't reopen a case purely based upon symptoms."

33. Dr. Primack explained: “What’s the pathology that begets the alteration in function? I mean, someone can say they have an alteration in function and they’re in pain...You don’t have a diagnosis to correlate with the symptoms to correlate with the loss of function.”

34. Dr. Primack disagreed with Dr. Hall’s assessment that the claimant should have referrals to specialists and injections. “I don’t know what you would inject.”

35. Dr. Primack gave his medical opinion regarding the claimant’s assertion of a worsening. “I do not believe he has suffered a worsening of his work injury—that injury being—and here’s the diagnosis—a lumbosacral strain—or muscle strain—and perhaps, an annular tear, which has clearly healed…”

36. Dr. Primack opined that the claimant is not restricted from work in any way.

37. Dr. Primack stated that it is not appropriate to reopen the claimant’s claim based on his complaints alone. He stated he agreed with obtaining imaging after the claimant complained of his symptoms, but “you have to respect the imaging study that you get.”

38. Dr. Primack stated that the claimant’s reported new symptom of left leg radiculopathy was based solely on his subjective complaints. There are no clinical findings that support him having left leg pain or numbness.

39. The claimant retained Dr. Hall for an IME. The claimant stated that his condition was very different that day compared to when he saw Dr. Primack. He stated he did not have a gait that day.

40. Dr. Hall agreed that in the claimant’s exam, there were no abnormalities that were completely objective and not subject to the claimant’s physical control.

41. Dr. Hall stated that “there didn’t seem to be any significant changes between the two studies” taken before the claimant’s MMI date and after his alleged worsening.

42. Dr. Hall stated, “I don’t think there’s been any dramatic change in whatever his particular pathology is.”

43. Dr. Hall’s opinion regarding the claimant’s MMI status is, “he is very much more symptomatic today than he was then. He is, therefore by definition, not at maximum medical improvement.”

44. The ALJ finds the analyses and opinions of Dr. Primack to credible and more persuasive than medical evidence to the contrary.

45. The ALJ finds that the claimant has failed to establish that it is more likely than not that his claim should be reopened.

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. Pursuant to section 8-43-303(1), C.R.S., at any time within six years after the date of injury, an administrative law judge may reopen any award on the ground of change in condition. Change of condition refers to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury. *Chavez v. ICAO,* 714 P.2d 1328, 1330 (Colo. App. 1985). A claimant has the burden of proof in seeking to reopen a claim for a worsened condition. *Richards v. ICAO,* 996 P.2d 756, 758 (Colo. App. 2000). The worsened condition must warrant further benefits. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Richards v. ICAO*, 996 P.2d 756 (Colo. App. 2000).

7. The ALJ concludes that Dr. Primack's analyses and opinions concerning the claimant's medical conditions are credible and more persuasive than medical evidence to the contrary.

8. The ALJ concludes there is a lack of substantial objective evidence to support a reopening.

9. The ALJ concludes that the claimant has failed to establish a worsening of his condition subsequent to MMI.

10. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that his claim should be reopened for a worsening of condition.

ORDER

It is therefore ordered that:

1. The claimant's request to reopen his workers' compensation claim 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 17, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-963-474-02

ISSUES

- Whether Vikki Farrow, as the surviving spouse ("spouse"), is "wholly dependent" for purposes of section 8-41-501(1)(a), C.R.S.?
- Whether Vikki Farrow is entitled to a percentage of her dependency?
- How shall death benefits be allocated as between the surviving spouse and C.F., a minor child of the decedent?

STIPULATIONS

- Decedent died on October 9, 2014, while in the course and scope of his employment from injuries he suffered that same day.
- Spouse and decedent were married at the time of decedent's death.
- C.F., a minor whose date of birth is August 10, 2016, was wholly dependent upon decedent at the time of his death per section 8-41-501(1)(b) because he was a minor child of the deceased under the age of eighteen.

FINDINGS OF FACT

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

1. At the time of decedent's death, he and spouse were living separately.
2. The two began living separately on February 1, 2013, when spouse asked decedent to leave the marital residence because of his excessive alcohol consumption and her concern for their son in that environment. Decedent began drinking excessively when spouse was diagnosed with cancer in 2009. His alcohol consumption increased when his brother died and he lost his job in 2011. His alcohol consumption increased even further in January of 2012 when spouse's cancer diagnosis became terminal.
3. Upon separating, decedent moved into a condominium owned by the couple. The condominium went into foreclosure because the couple was unable to make payments, and at some point during the foreclosure proceedings, decedent became unable to live there.
4. The record contains references to a bankruptcy proceeding involving decedent.

5. On June 19, 2013, spouse filed a petition for divorce. Decedent filed as a co-petitioner. However, neither spouse nor decedent wanted to terminate their marriage.

6. Spouse credibly testified that she filed for dissolution not because she wanted a divorce, but rather to obtain an enforceable obligation to compel decedent's financial support because she "couldn't get a penny out of him otherwise."

7. On October 28, 2013, spouse and decedent entered into a Memorandum of Understanding in the dissolution matter. Per that agreement, decedent was obligated to pay spouse $1,100 per month in "family support." Spouse's testimony and a pleading decedent filed in the dissolution matter clarify that of that amount, $775 was for spousal maintenance, and $325 was for child support.

8. This division was in part determined by spouse's income as of October 28, 2013. However, spouse indicated at hearing that her current income was lower than at that time.

9. No persuasive evidence supports a finding that the parties took further actions to finalize their divorce proceedings.

10. Spouse testified that decedent "knew that the court was watching his payments." From this testimony the ALJ reasonably infers that decedent made some actual payment(s) to spouse.

11. Spouse testified further that neither she nor decedent wanted to finalize the divorce and that was why they had not done so. She wanted decedent "to get clean and come home."

12. Spouse had not invited decedent to return to the marital home because he had not been sober for longer than a period of approximately two weeks. However, decedent had stayed at the marital home for periods of approximately one week, the last time being during the winter prior to his death.

13. While spouse testified that it was "voluntary" on her part that she and decedent live separately, it was clear from the context that her use of the term was not as a legal term of art defined by statutory and case law, and thus does not establish voluntariness as fact.

14. Decedent began dating another woman two months after the February 1, 2013 separation and continued to see her through the time of his death. Decedent began living with the other woman two months prior to his death.

15. No persuasive evidence was offered from which the ALJ can discern what motivated decedent's conduct in doing so.

16. Decedent took no steps towards finalizing his divorce.

17. Based on the totality of the evidence, the ALJ finds it more likely than not that spouse and decedent were not voluntarily living separately at the time of decedent's death.

18. No other dependants were identified.

19. Neither spouse nor the minor child has received any benefits as beneficiaries of life insurance policies.

20. Neither spouse nor the minor child has received any benefits from the Social Security Administration.

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. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Respondents bear the burden of overcoming the presumption that spouse is wholly dependant. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201.

Section 8-41-501(1)(a), C.R.S 2014, provides:

> For the purposes of articles 40 to 47 of this title, 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 she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependant in whole or in part on the deceased for support.

Thus, to overcome the presumption that the spouse is wholly dependent, Respondents must present competent evidence that either: (1) the spouse was voluntarily separated and living apart from the spouse at the time of the injury or death; or alternatively (2) the spouse was not dependant in whole or in part on the deceased for support. Competent

evidence satisfying either one of the clauses defeats the presumption of a spouse being wholly dependent.

Voluntarily Living Separately

Whether a wife is voluntarily separated and living apart from her husband is a question of fact. *Gold Mines Consol., Inc. v. Simmons*, 112 P.2d 555 (Colo. 1941). The evidence is uncontroverted: decedent and spouse were living separately at the time of decedent's death. However, Respondents must establish that decedent and spouse were doing so voluntarily. On this point, case law is instructive.

In *Michalski v. I.C.A.O.*, 781 P.2d 183 (Colo. App. 1989), a division of the court of appeals held that a decedent and spouse who lived separately during the week because they worked in different cities were not voluntarily separated. The division looked at factors including whether there was a pending divorce proceeding; whether the spouse and decedent were estranged; whether they intended to maintain their marital relation. The division instructed that the focus of inquiry in determining whether living separately was voluntary turned, "upon the nature and character of the absence and the intention of the parties respecting it." *Michalski v. I.C.A.O.*, citing *Latting v. Broadmoor Hotel, Inc.*, 105 Colo. 386, 98 P.2d 857 (1940).

Thus, *Michalski* provides certain factors to consider in determining voluntariness, and further instructs that we look to the nature and character of the absence and the intentions of *both* the decedent and spouse regarding living separately.

In *Latting v. Broadmoor Hotel, Inc.*, *supra*, over the course of the decedent and spouse's thirty-seven year marriage, the decedent lived separately from the spouse over the course of several years because his life insurance sales job required extensive travel. In addition, the decedent worked seasonally in Colorado Springs and Phoenix, Arizona at hotels in those states. At the time of his death, decedent's Colorado Springs employer required that he live near the hotel. The decedent "consorted with another woman during the last period of his service in Phoenix, and upon his return to the Broadmoor the same woman came also and shared with him the small quarters which he occupied near the hotel." The spouse only learned that decedent was living with another woman after his death. The division focused on other aspects of the couple's relationship, including their devotion to one another, and that "not a note of domestic discord, at any time, so far as appears, marred their lives." The division found determinative that no divorce or legal separation or estrangement existed, and regardless of decedent's "moral lapses," there was no showing that either party wished to sever the marriage.

As found, spouse and decedent began living separately due to decedent's alcoholism and her concern for their minor child. She filed the petition for dissolution in order to establish decedent's enforceable financial support obligations. Although the petition for dissolution contains spouse and decedent's affirmation that the marriage was irretrievably broken, she did not believe that to be the case. And, in fact, neither party took steps towards finalizing a divorce. Rather, spouse was waiting for decedent

to stop drinking at which time she would invite him to return to the marital home. This was her stated intention even though she was aware decedent was dating another woman and began living with her two months before his death.

The fact that parties have filed a petition for the dissolution of their marriage can support a finding that they were voluntarily living separately. *See City of Aurora v. Claimant in Matter of Death of Corr*, 689 P. 2d 659 (Colo. App. 1984) (finding hearing officer's conclusion that parties were voluntarily living separately was supported by finding that spouse had filed a petition for the dissolution of marriage).

However, the filing of a petition is not necessarily determinative. For example, in *Gold Mines Consol., Inc. v. Simmons*, 112 P.2d 555 (Colo. 1941), the spouse and the decedent were married and lived together for eight years when the spouse left the decedent "because of his habit of frequent intoxication." The couple did not live together again and a year after separating the spouse filed for divorce without contest. Three months later an interlocutory decree of divorce was granted. The following month, the decedent was killed in a work related accident. The supreme court ultimately affirmed the underlying order finding there was support in the record to uphold the commission's finding that the spouse was voluntarily separated and living apart from the decedent at the time of his death. However, the opinion provides, "[F]rom our consideration of the record, we are of the opinion that the commission could have found either way on this issue." Thus, even after an interlocutory decree of divorce had been granted, the court advised that the finder of fact could have found the spouse and decedent were not voluntarily living separately.

Spouse testified that decedent did not want to file the petition for dissolution. She also testified that there were times decedent stayed with her for a week at a time until six to nine months before his death.

The ALJ's ability to determine decedent's intent is somewhat hindered as his testimony, obviously, was not available. Additionally, the intent of his conduct is ambiguous. For example, decedent's living with another woman two months before his death and his failure to financially support his wife and child in the absence of a court order could have been motivated by financial necessity. This interpretation is supported by (1) spouse's testimony that decedent lost jobs because of his alcoholism, (2) the condominium that decedent moved into after the couple separated was foreclosed on because the couple was unable to make payments, and (3) references in the record to a bankruptcy proceeding involving decedent. Based on the totality of the evidence, the ALJ is unable to find or conclude that decedent's intention was to voluntarily live separately from spouse.

Accordingly, where no order of dissolution was issued, and spouse intended for decedent to return, the ALJ reasonably infers that spouse and decedent were not voluntarily living separately at the time of decedent's death.

Spouse Dependant in Whole or in Part on Deceased for Support

Respondents may overcome the presumption that a spouse is wholly dependent by establishing that spouse "was not dependant in whole or in part on the deceased for support." Decedent here had a legally enforceable obligation to support spouse. Earlier cases have found that an obligation, issued by the marital court, to provide support was sufficient to establish that the spouse was dependant on decedent in whole or in part for support. For example, in *Broadmoor*, the court held, "Dependency rests upon an obligation of support, and not upon the question as to whether that obligation is being discharged." Similarly, in *Empire Zine Co. v. Industrial Comm'n*, 71 Colo. 251, 206 P. 158 (Colo. 1922), the court found the spouse was dependant on the decedent for support despite uncontroverted evidence that decedent had not provided any support to spouse for the last six years of the marriage. This position was again stated by a division of the court of appeals as recently as 1974 in *Tilley v. Bill's Sinclair*, 524 P.2d 314 (Colo. App. 1974). In *Tilley*, the respondents argued that where there is no evidence of actual support, the Commission must find that a wife is not dependent. The division disagreed, holding that if, "a wife demonstrates a need for support, then, under C.R.S.1963, 81--11--1(2), the decedent's legal obligation to support his wife, whether or not that duty is being discharged, is sufficient to establish dependency."

However, more recent decisions issued by divisions of the court of appeals have shifted to requiring a showing of actual support. These cases interpret the current version of section 8-41-501 which is stated disjunctively and requires overcoming a presumption. Prior to the 1975 amendment, the statute required proof that the married couple be voluntarily separated, *and* living apart, *and* that the wife was not dependant in whole or in part on her husband for support. In addition, the presumption that the wife was wholly dependent under the prior version of the statute was "conclusive."

This issue appears to have been most recently addressed by a division of the court of appeals in 1989 in *Michalski*. There, the division held that a spouse need only prove that decedent contributed to her support. "Although the [spouse] may have other substantial sources of support, any contribution of the decedent is sufficient to meet the dependency requirements." *Michalski.* The presumption afforded by the statute "is overcome only by a finding that the widow receives no support from the deceased." *Diamond Industries v. Claimants in the Matter of the Death of Crouse*, 589 P.2d 1383, 41 Colo. App. (1978).

Spouse's testimony that the domestic court was watching his payments of spousal maintenance and child support established that spouse received some support from decedent. The ALJ concludes that Respondents have not offered persuasive, competent evidence that spouse received no support from the deceased. Thus, Respondents have not rebutted the statutory presumption that spouse is wholly dependent.

Beneficiaries

Section 8-41-501(1)(b), C.R.S., provides that "minor children of the deceased under the age of eighteen years" are "presumed to be wholly dependent." The ALJ concludes that C.F. is wholly dependent because C.F. was a minor child of the decedent on the date of his death.

Section 8-41-501(1)(a), C.R.S. provides a presumption that a spouse is wholly dependent unless "it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support." The ALJ concludes spouse is wholly dependent.

There is no credible evidence of any other potentially dependent person.

Apportionment

Section 8-42-121, C.R.S., provides for apportionment of death benefits between multiple dependents "in such manner as the director may deem just and equitable." Upon review of the evidence the ALJ concludes that a distribution of benefits should be made between spouse and C.F. C.F. is relatively young and will require substantial expenditures for food, shelter, education and other necessities throughout the remainder of his minority. No persuasive evidence was offered that C.F. has any special needs or health concerns. There is persuasive evidence that spouse has special health factors which favors an unequal distribution of death benefits. No credible or persuasive evidence was presented that either C.F. or spouse has access to other sources of income or wealth that might favor a different apportionment of benefits.

Based on the totality of the evidence, the ALJ apportions the death benefits provided for by section 8-42-114 at 70% to spouse and 30% to C.F.

Payment of Benefits

Payment of benefits allocated to spouse shall be made to an account she designates for such purpose.

Section 8-42-122, C.R.S. provides that for the "purpose of protecting the rights and interests of any dependents whom the director deems incapable of fully protecting their own interests," death benefits may deposited in federally insured state or national banks or savings and loan associations, or credit unions insured by the national credit union share insurance fund." Further the director may "otherwise provide for the manner and method of safeguarding the payments due such dependents in such manner as the director sees fit."

The ALJ concludes that for the purpose of protecting the death benefits allocated and owed C.F., spouse should be directed to open a trust account within fourteen days of the date of this order into which the apportioned death benefits shall be paid. The trust account should be opened at one of the types of financial institutions described in section 8-42-122.

The ALJ concludes that spouse should be appointed trustee with authority to withdraw funds from the account and to spend the funds in a manner that protects the health and welfare of C.F. and provides for the education of him. The ALJ concludes that spouse, as parent, is the appropriate trustee for the account.

The ALJ retains jurisdiction to modify this arrangement should it prove inadequate to protect the interests of the dependents. The ALJ further retains jurisdiction over all related and ancillary matters concerning the payment of death benefits.

ORDER

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

1. Insurer shall pay spouse 70% of the death benefit into an account designated or opened by spouse within fourteen days of the date of this order for such purpose.

2. Insurer shall pay C.F. 30% of the death benefit into a trust account opened by spouse within fourteen days of the date of this order at one of the types of financial institutions described in section 8-42-122 for such purpose.

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

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

5. The ALJ retains jurisdiction to modify this arrangement should it prove inadequate to protect the interests of the dependents. The ALJ further retains jurisdiction over all related and ancillary matters concerning the payment of death benefits.

6. 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, 2016

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

ISSUES

- Pursuant to § 8-42-103(1)(f), C.R.S., are Respondents entitled to offset their liability for temporary total disability benefits by Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 5 were admitted into evidence. Respondents' Exhibits A through G were admitted into evidence.

2. Claimant sustained an admitted industrial injury on September 5, 2014. However, the Claimant continued working for the Employer at light duty.

3. On December 12, 2014 the Employer terminated Claimant from his modified employment. A dispute then arose as to whether Claimant was entitled to temporary total disability benefits of the period December 13, 2012 through March 29, 2015. The Respondents took position that Claimant was "responsible" for the termination from employment and was not entitled to TTD benefits for the disputed period of time.

4. On April 29, 2015 ALJ Cannici conducted a hearing to determine Claimant's entitlement to TTD benefits. The precise issue for hearing was whether Respondents established by a preponderance of the evidence that Claimant was precluded from receiving TTD benefits because he was responsible for his termination from employment. At the April 29 hearing the parties stipulated that if Claimant was not responsible for the termination he was entitled to TTD benefits for the period December 13, 2014 through March 29, 2015.

5. On May 26, 2015 Respondents filed a General Admission of Liability admitting liability for medical benefits and TTD benefits commencing March 30, 2015.

6. In Findings of Fact, Conclusions of Law, and Order dated June 8, 2015, ALJ Cannici determined that Respondents failed to prove by a preponderance of the evidence that Claimant was legally responsible for his termination from employment. Consequently, ALJ Cannici ordered Respondents to pay Claimant TTD benefits from December 13, 2014, through March 29, 2015 "subject to any statutory offset for the receipt of unemployment compensation benefits." The undersigned ALJ infers from ALJ Cannici's FFCL that the issue of Respondents' right to take an offset for Claimant's

receipt of unemployment insurance (UI) benefits was not actually litigated or determined.

7. On September 4, 2015, Claimant filed an Application for Hearing on various issues including TTD benefits, UI benefits and "repayment" of UI benefits.

8. By letter dated December 1, 2015, the Colorado Department of Labor and Employment Division of Unemployment Insurance (Division) notified Claimant he had been "overpaid" UI benefits in the amount of $3,454.00 and was required to repay this amount to the Division. The letter warns Claimant that if "we do not hear from you, you may be subject to a 25 percent collection fee and further legal action. If necessary, we may **intercept your State and/or Federal tax refund** to pay back your overpayment." (Emphasis in original.)

9. At Hearing on December 16, 2015 Claimant's counsel represented that the only issue remaining for determination was Respondents' right to take an offset for the UI benefits. Claimant's counsel requested entry of an order determining that Respondents justifiably took the offset for the UI benefits and are not required to "repay" Claimant any of the $3,454.00.

10. At the hearing on December 16, 2015 the parties stipulated that for the period of December 13, 2014 through March 29, 2015 Claimant is entitled to $13,315.14 in TTD benefits. The parties further stipulated that during the same period of time Claimant received $3,454 in UI benefits. Thus, when factoring in the UI offset the total amount due Claimant from Respondents was $9,861.14.

CONCLUSIONS OF LAW

In pertinent part § 8-43-103(1)(f), C.R.S., provides as follows:

> In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received, unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount and except that the temporary total disability shall not be reduced by unemployment insurance benefits received pursuant to section 8-73-112.

In *Pace Membership Warehouse v. Axelson*, 938 P.2d 504 (Colo. 1997), involving facts very similar to those present here, the court noted that the purpose of § 8-43-103(1)(f) is to prevent double recovery of wage loss benefits. In the face of an equal protection challenge the court upheld the right of respondents to offset UI benefits against TTD benefits despite the fact that the offset reduced the claimant's overall entitlement to UI benefits payable under § 8-73-112, C.R.S. The court reasoned that "section 8-42-103(1)(f) is rationally related to the legitimate state interest of preventing

double recover and therefore does not violate the equal protection guarantees of the United States and Colorado Constitutions."

Based on the plain language of § 8-43-103(1)(f) as well as the holding in *Pace Membership Warehouse v. Axelson*, *supra*, the ALJ concludes that Respondents are legally entitled offset their liability for TTD benefits during the period December 13, 2014 through March 29, 2015 ($13,315.14) by the amount of UI benefits paid to Claimant ($3,454) during this same period of time.

ORDER

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

1. For the period December 13, 2014 through March 29, 2015 Respondents are entitled to offset their liability for temporary total disability benefits by the amount of UI benefits paid to Claimant..

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 4, 2016

DIGITAL SIGNATURE:

David P. Cain

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-964-182-02 & 4-970-092

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 2, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/2/16, Courtroom 4, beginning at 1:30 PM, and ending at 5:30 PM).

W.C. No. 4-964-182-02 involves a fully contested claim for an alleged head injury by virtue of a slip and fall incident on October 3, 2014. W.C. No. 4-970-092 involves a fully contested claim for an alleged head injury of November 26, 2014 by virtue of a bucket falling on and hitting the Claimant's head.

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection, with the exception of Claimant's Exhibits 8, 9, 10 and 11, wherein Respondents' objections were sustained and the Exhibits were rejected as hearsay lacking in foundation. Therefore, these Exhibits were rejected. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement for the preparation of a written decision, which is hereby issued.

ISSUES

The issues to be determined by this decision concern compensability of both claims (W.C. No. 4-964-182-02 and W.C. No. 4-970-092) and, if compensable; medical benefits, average weekly wage (AWW), and entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

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

1. The Claimant (dob 5-2-67), began working for the Employer in August 2014, based on a work week of 35 hours per week at minimum wage ($8.00 an hour), with no fringe benefits. Respondents' Exhibit F-36 an Employer "Wage Verification" of August 5, 2015, lists aggregate wages of $3,127.73 from August 9, 2014 through February 21, 2015. Because of sporadic and erratic listed earnings during several two-week pay periods, the ALJ hereby finds that Exhibit F-36 does not fairly reflect a reliable indicator of the Claimant's AWW or loss of temporary earning capacity. The ALJ finds that the fairest and most equitable way to calculate the Claimant's AWW should be according to statute and the contract of hire, which is as follows: $8.00 X 35 hours = $280.00, which the ALJ hereby finds is the Claimant's AWW. This AWW yields a TTD benefit rate of $186.66 per week, or $26.67 per day.

W.C. No. 4-964-182-02 --- October 3, 2014 Incident

2. On October 3, 2014, while working for the Employer, the Claimant slipped and fell, hitting his back but not his head. His undisputed testimony at hearing is that he did not hit his head. This is corroborated by histories that he gave to medical providers.

3. After reporting the incident of October 3, 2014 to his Employer, the Employer gave the Claimant a list of two unrelated medical providers (Respondents' Exhibit F-29) and the Claimant selected Advanced Urgent Care, where he was first seen by Adam Bonner, PA-C (Physician's Assistant). At Advanced Urgent Care, the Claimant came under the care and treatment of Anthony G. Easer, D.O. On October 6, 2014, and Dr. Easer became the Claimant's authorized treating physician (ATP) as of that date. From the beginning, Dr. Euser indicated a tentative diagnosis of a work-related "post-concussive syndrome." or work-related traumatic brain injury, which the ALJ takes administrative notice and infers and finds that these diagnoses are of an organic brain injury, a physical condition which differs from the strict **mental impairment** contemplated by § 8-41-301 (2) (a), C.R.S.

4. At his first visit to Advanced Urgent Care, the Claimant reported that he thought "he has a concussion, feels not present, has mild headaches." The Claimant stated that "he wants to be taken off work (Respondents' Exhibit C-21). Heather Roth, PA-C, indicated "this is not necessary—he has no focal neurological deficits, no difficulty with ataxia or speech impairment, and no trouble with memory." Forms completed by Dr. Euser on October 6 and October 20 indicate that the Claimant "was working." The Claimant failed to show up for an appointment on November 3, 1014. On November 19, 2014, the form indicates that the Claimant was **not** working, however, Dr. Euser indicated that the Claimant was "**able to return to full duty."**

5. At the October 6, 2014, visit, the Claimant was complaining of headaches. It is undisputed that the Claimant did not hit his head in slip-and-fall of October 3. On October 20, 2014, Dr. Euser noted that he wanted a "neurocognitive consult." On November 19, 2014, Dr. Euser reiterated his work-related medical diagnosis as "post-concussive syndrome," and he released the Claimant to return to full duty as of November 19, 2014.

6. As found herein above, the Claimant's medical care and treatment at Advanced Urgent Care was an authorized selection. All referrals emanating from Advanced Urgent Care were within the chain of authorized referrals and, therefore, authorized Dr. Euser was a physician with Advanced Urgent Care. The medical care and treatment through November 26, 2014 was causally related to the slip and fall incident of October 3, 2014 and reasonably necessary to diagnose and treat the symptoms thereof.

7. On December 5, 2014, the Claimant told Dr. Euser that he was "going to fix his problems with a gun," which triggered a referral by Dr. Euser to Platte Valley Medical Center for a psychiatric evaluation. This referral was within the authorized chain of referrals. The Claimant was seen at the emergency room (ER) of Platte Valley Medical Center, but there is no indication that the Claimant had a psychiatric evaluation there. At hearing, the Claimant expressed regret for making this impulsive statement about a gun, which he did not mean.

8. The Claimant has failed to prove, by preponderant evidence that he sustained any temporary disability from October 3, 2014 through November 25, 2014.

<u>The Incident of November 26, 2014 –W.C. No. 4-970-092</u>

9. In approximately seventeen subsequent form reports completed by Dr. Euser [forms furnished by the Division of Workers' Compensation (DOWC)], from December 2014 through November 16, 2015, Dr. Euser consistently checked off Box No. 3, that his objective findings were consistent with a history of a **work-related mechanism of injury**. On November 16, 2015, Dr. Euser ultimately diagnosed a

"traumatic brain injury," and on that date, Dr. Euser placed the Claimant at maximum medical improvement (MMI), without rating the Claimant's permanent medical impairment. Regardless of the noted "date of injury" in the upper left hand corner of Dr. Euser's November 16, 2015 MMI Report (Claimant's Exhibit 1-49), and all of his other reports, the ALJ infers and finds that Dr. Euser erroneously perpetuated and listed the October 3, 2014 date to encompass the November 26, 2014 bucket incident. Indeed, when all the reports after November 26, 2014 are read *in pari materia,* the ALJ finds that the reports subsequent to November 26, 2014 were intended to refer to the November 26, 2014 bucket incident.

10. Upon referral from Dr. Euser, the Claimant was seen by Suzanne Kenneally, Psy.D., for a neuropsychological evaluation. Dr. Kenneally saw the Claimant on June 23, 2015 and July 8, 2015, and after testing and observing the Claimant, she arrived at diagnostic impressions of: (1) schizotypal personality disorder; and, (2) status 8 months post workplace injury. Dr. Kenneally's opinions were that the Claimant had no residual cognitive impairments as a result of the October 3 and November 26, 2014 incidents. After reviewing Dr. Kenneally's report, dated July 15, 2015, the Claimant's ATP, Dr. Euser, nonetheless continued to diagnose "traumatic brain injury." The ALJ takes administrative notice and finds and infers that Dr. Kenneally had no opinion concerning "traumatic brain injury" and even if she did, she would lack the requisite expertise to render a medical opinion concerning a physical injury, *i.e.,* "traumatic brain injury."

11. In light of the fact that the Claimant did **not** hit his head in the slip-and-fall incident of October 3, 2014 and the fact that Dr. Euser did not restrict the Claimant from work, the ALJ infers and finds that Dr. Euser based his initial diagnosis of work-related post-concussive syndrome as a result of the October 3, 2014 incident [W.C. No. 4-964-182-02], on the history given by the Claimant whereby the Claimant had said that he thought he had a concussion as a result of the October 3 fall. Dr. Euser, however, appropriately diagnosed "traumatic brain injury" as a result of the bucket-hitting-the-head incident of November 26, 2014, and the ALJ accepts his opinion as it relates to the November 26, 2014 incident.

Independent Medical Examination (IME) by Eric K. Hammerberg, M.D.

12. On June 25, 2015, Dr. Hammerberg performed an IME at the behest of the Respondents (Respondents' Exhibit A). Dr. Hammerberg's report is dated July 30, 2015. He had the benefit of Dr. Kenneally's opinion at the time of issuance of his report. His impression was essentially the same as Dr. Kenneally's impression: "schizotypal personality disorder." He added "with somatization and anxiety." Dr. Hammerberg is not a psychiatrist. He is a neurologist and electromyographist. Therefore, his opinions by virtue of credentials have no added weight beyond the opinions of another medical doctor or doctor of osteopathic medicine. The ALJ finds that the opinions of the ATP, Dr. Euser, who was seeing the Claimant for a long period of time for the purpose of

treatment, are entitled to more weight and credence than the one-time opinion of IME Dr. Hammerberg, who was not treating the Claimant and had no physician-patient relationship with the Claimant.

Average Weekly Wage

13. Respondents' Exhibit F-36, the Employer's Wage verification for the Claimant shows sporadic and erratic pay for different two-week pay periods, between August 9, 2014 and February 21, 2015. For this reason, the ALJ determines that the document is not a fair and/or reliable indicator of the Claimant's AWW, or of any subsequent wage loss after the November 26, 2014 bucket incident. On the other hand, no one contradicted the Claimant's testimony that he worked 35 hours per week at $8.00 an hour, thus, yielding an AWW of $280.00, which the ALJ hereby finds is the Claimant's AWW. Indeed, the ALJ infers and finds that the Claimant's testimony reasonably reflects the contract of hire, which is the best measure of loss of temporary earning capacity under the circumstances herein.

Temporary Disability

14. The Claimant failed to prove entitlement to TTD benefits as a result of the October 3, 2014 slip and fall incident (W.C. No. 4-964-182-02)..

15. It was the Claimant's undisputed testimony that he last worked on December 8, 2014 and since that time has earned **no** wages. As of December 8, 2014, the Claimant's ATP, Dr. Euser, released the Claimant to return to **restricted** work, from December 8, 2014 through December 29, 2014. There is no evidence that the Employer offered modified work to the Claimant during this period of time. On January 6, 2015, Dr. Euser took the Claimant off work altogether through January 26, 2015, pending a neurology referral. On January 26, February 27, and March 27, 2015, Dr. Euser kept the Claimant off work. From March 27, 2015 through November 15, 2015 (Claimant's Exhibits 1-49 through 1-60), Dr. Euser kept the Claimant off work. ATP Dr. Euser continuously kept the Claimant off work from January 6, 2015 through November 15, 2015, the day before Dr. Euser declared the Claimant to be at MMI.

16. The ALJ finds that on account of the November 26, 2014 bucket-on-the-head injury, the Claimant was temporarily and totally disabled from December 8, 2014 through December 29, 2014, both dates inclusive, a subtotal of 29 days; and, from January 6, 2015 through November 15, 2015, both dates inclusive, a subtotal of 314 days, for a grand total of 343 days. The Claimant failed to prove entitlement to temporary disability benefits from December 30, 2014 through January 5, 2015.

17. The Claimant's ATP. Dr. Euser, determined that the Claimant reached MMI on November 16, 2015, without giving the Claimant a permanent medical impairment rating.

Ultimate Findings

18. The ALJ finds the opinions of the Claimant's ATP, Dr. Euser, more credible and persuasive than the opinions of IME Dr. Hammerberg and Psychologist Dr. Kenneally insofar as she implies that there is nothing wrong with the Claimant.

19. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Euser, and to reject the opinions of IME Dr. Hammerberg, Psychologist Dr. Kenneally and any other opinions contrary to the opinions of ATP Dr. Euser.

20. The Claimant has proven, by a preponderance of the evidence that he suffered a compensable injury on October 3, 2014 when he slipped and fell at work (W.C. No, 4-964-182-02).

21. The Claimant has proven, by preponderant evidence that he suffered a compensable head injury at work when a bucket hit him on the head (W.C. No 4-970-092).

22. The Claimant has proven, by preponderant evidence that all of his medical care and treatment for the October 3, 2014 and the November 26, 2014 injuries was authorized, within the chain of authorized referrals, causally related to the work-related injuries, and reasonably necessary to cure and relieve the effects of those injuries.

23. The Employer's "wage Verification" (Respondents' Exhibit F-36) does not accurately or fairly reflect the Claimant's temporary wage loss. Therefore, the orthodox statutory provision dealing with hourly wages is the fairest method of determining the Claimant's AWW. The Claimant's AWW is, therefore, $280.00, which yields a TTD benefit rate of $186.66 per week, or $26.67 per day.

24. The Claimant failed to prove entitlement to TTD benefits from October 3, 2014 through December 7, 2014, for either claim; and, from December 30, 2014 through January 5, 2015.

25. The Claimant was temporarily and totally disabled from December 8, 2014 through December 29, 2014, both dates inclusive, a subtotal of 29 days; and, from January 6, 2015 through November 15, 2015, both dates inclusive, a subtotal of 314 days, for a grand total of 343 days.

26. The Claimant's ATP, Dr. Euser, declared the Claimant to be at MMI as of November 16, 2015. Therefore the Claimant is **not** entitled to additional temporary disability benefits after that date.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of the Claimant's ATP, Dr. Euser, are more credible and persuasive than the opinions of IME Dr. Hammerberg and Psychologist Dr. Kenneally insofar as she implies that there is nothing wrong with the Claimant.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Euser, and to reject the opinions of IME Dr. Hammerberg, Psychologist Dr. Kenneally and any other opinions contrary to the opinions of ATP Dr. Euser.

Compensability of Both Claims

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7,** which essentially implies that there is a presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has proven, by a preponderance of the evidence that he suffered a compensable injury on October 3, 2014 when he slipped and fell at work (W.C. No, 4-964-182-02); and, that he suffered another compensable injury at work, specifically a head injury, when a bucket hit him on the head (W.C. No 4-970-092).

Medical

d. Because these matters are compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of the industrial injuries. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942

P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, on reporting the work-related nature of the October 3, 2014 injury, the Employer furnished the Claimant a list of at least two separate and unrelated medical providers, Advanced Urgent Care in Brighton and Exempla Healthcare in Thornton (Respondents' Exhibit F-29).

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals from Advanced Urgent Care/ATP Dr. Euser were within the chain of authorized referrals and, therefore, authorized.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the temporary injury of October 3, 2014 and the head injury of November 26, 2014. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his injuries.

Average Weekly Wage (AWW)

g. As found, the Employer's "wage Verification" (Respondents' Exhibit F-36) does not accurately or fairly reflect the Claimant's temporary wage loss. Therefore, the orthodox statutory provision dealing with hourly wages is the fairest method of determining the Claimant's AWW. § 8-42-102 (2) (d), C.R.S., indicates that AWW for hourly employees should be calculated by multiplying the hourly rate times the number of hours worked per week. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the

Claimant's AWW IS $280.00, which yields a TTD benefit rate of $186.66 per week, or $26.67 per day.

Temporary Total Disability

h. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no persuasive evidence, nor was "responsibility for termination" designated as an issue, that the Claimant's separation from employment in this case was in any way his fault. Indeed, his ATP, Dr. Euser, had restricted the Claimant from employment.. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant failed to prove entitlement to TTD benefits from October 3, 2014 through December 7, 2014, for either claim; and, from December 30, 2014 through January 5, 2015.

i. As further found, the Claimant was temporarily and totally disabled from December 8, 2014 through December 29, 2014, both dates inclusive, a subtotal of 29 days; and, from January 6, 2015 through November 15, 2015, both dates inclusive, a subtotal of 314 days, for a grand total of 343 days (W.C. No. 4-970-092). As found, the Claimant's ATP, Dr. Euser, declared the Claimant to be at MMI as of November 16, 2015. Therefore the Claimant is **not** entitled to additional temporary disability benefits after that date.

j. Once the prerequisites for TTD are met (*e.g.,* there has beenno release to return to full duty, MMI has not been reached, modified employment has not been made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant had not been released to return to work without restrictions; he did not work or earn wages; and, he had not been declared to be at MMI until November 16, 2015. During the 343 days of TTD, the Claimant was sustaining a 100% temporary wage loss. Based on his AWW IS $280.00, a TTD benefit

rate of $186.66 per week, or $26.67 per day, is yielded. Aggregate TTD benefits for all periods between December 8, 2014 and November 15, 2015 (the period from December 30, 2014 through January 5, 2015 is excluded) equal $9,147.81.

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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 on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all the costs of causally related and reasonably necessary medical care and treatment for the compensable injuries of October 3, 2014 and November 26, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all claims for temporary disability benefits through November 25, 2014 (W.C. No. 4-964-182-02) are hereby denied and dismissed.

C. The Respondents shall pay the Claimant temporary total disability benefits of $186.66 per week, or $26.67 per day, from December 8, 2014 through November 15, 2015 (December 30, 2014 through January 5, 2015 excluded), a total of 343 days, in the aggregate amount of $9,147.81, which shall be paid retroactively and forthwith.

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

DATED this_____day of February 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2016, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

The issues addressed in this decision concern Claimant's entitlement to medical benefits, specifically reimbursement to Claimant for out of pocket expenses associated with prescription medication used to control his migraine headaches and a trial of Botox injections. The questions to be answered are whether a recommended trial of Botox injections and Claimant's continued use of Propranolol are reasonable, necessary, and related to Claimant's admitted October 10, 2014 industrial injury.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a construction worker at the Dillon Reservoir Dam.

2. Claimant had an admitted work related accident on October 10, 2014, while he was running an air line into an elevator shaft. Claimant was approximately 245 feet underground when he got ill, complaining of headache, nausea and vomiting. The initial diagnosis was exposure to chemical inhalation.

3. Claimant had blood tests (Chem 7, LFT, lead, mercury, zinc, manganese, Protoporphyrin and Cholinesterase), all levels were normal.

4. Claimant continued to experience headaches following his exposure. He was tried on a number of medications, including Ketorolac, Ultram, Imitrex, Vicodan, and Flexeril. He was also treated with occipital nerve blocks. The aforementioned medications were either ineffective or caused untoward side effects.

5. Given Claimant's persistent symptoms an MRI of the brain and a neurology consultation was requested.

6. Claimant's MRI was interpreted as normal; however, he was determined to have left maxillary sinusitis. On December 22, 2014, Claimant was evaluated by Dr. Rawat a neurologist, who provided a probable diagnosis of "atypical migraine." Dr. Rawat recommended checking Claimant's oxygen levels at night and a trial of Depakote.

7. Continued symptoms lead to a referral to Dr. Hoyte, a toxicologist at the University of Colorado Hospital. Dr. Hoyte evaluated Claimant on January 13 and January 16, 2015. Following his evaluation, Dr. Hoyte noted that Claimant was possibly

exposed to carbon monoxide on the date of injury. As noted above, laboratory tests were performed shortly after Claimant's exposure; however, there is no indication that the blood work performed included a carboxyhemoglobin level to test for exposure to carbon monoxide.

8. Claimant returned to Dr. McCurry, the authorized treating physician (ATP) designated in this case, on March 20, 2015 where, based upon the evaluation of Dr. Hoyte, it was presumed that Claimant had been exposed to carbon monoxide. Due to ongoing headaches and cognitive decline, Dr. McCurry referred Claimant for neuropsych testing. Dr. McCurry also added Nortriptyline and Fioricet to the medications used to treat Claimant's ongoing headaches.

9. On March 23, 2015 Claimant saw Dr. Wodushek for the requested neuropsych testing. Repeat MRI of the brain completed April 3, 2015, showed normal brain but left maxillary sinus disease. Records from Dr. Wodushek indicate that Claimant was likely exposed to several chemicals including Phenol and Propylene Glycol. Claimant's neuropsychological testing results demonstrated a normal neurocognitive profile.

10. On April 21, 2015, Claimant reported to Dr. McCurry that the Fioricet prescribed was not effective in abating his headaches and that the Nortriptyline was only partially effective in increasing his sleep. Consequently, Dr. McCurry increased Claimant's Nortriptyline dosage and added Zanaflex and Propranolol to Claimant's medication regimen.

11. Claimant persuasively testified that Propranolol helps keep his headaches "at bay". The ALJ credits Claimant's testimony to find that the use of Propranolol helps cure and relieve him of the ongoing effects of his migraine headaches. Currently, Claimant uses Propranolol two times a day.

12. Claimant's headaches persisted. Consequently, he was referred to a headache specialist at University of Colorado Hospital. On June 22, 2015 Dr. Birlea, a neurologist, recommended repeat occipital nerve block and Botox injection. Additionally, Dr. Birlea recommended the addition of Indocin.

13. On August 5, w2015 Dr. McCurry placed Claimant on Indocin.

14. Respondents denied authorization of continued Propranolol and denied the request for a trial of Botox injections. Claimant testified and the records submitted at hearing support that he is paying out of pocket for continued Propranolol prescribed by Dr. McCurry. According to Claimant's testimony, he has paid $190.00 out of pocket for the necessary Propranolol.

15. Respondents retained Hua Judy Chen, M.D. (neurologist) to complete a medical records review of Claimant's treatment, and to give medical opinions regarding whether ongoing prescription medications, i.e. Propranolol were reasonable, medically

necessary and related to Claimant's October 10, 2014 injury, and whether the request for Botox injections are causally related to the October 10, 2014 injury.

16. Dr. Chen opined that she did not believe that the request for migraine treatment, including Botox injections, is related to the October 10, 2014 injury. Further, Dr. Chen found that: "*after 10 months of treatment for headache and normal tests, I do not think the treatment is reasonable or medically necessary for the accident occurred on 10/2014 anymore*".

17. Dr. McCurry testified by deposition on December 17, 2015. Dr. McCurry testified that Claimant failed "every medicine that we routinely use for migraine headaches, as well as just headache prevention". According to Dr. McCurry they were "not working, or we would have a secondary complication or side effect". Later under cross examination Dr. McCurry would testify that Claimant failed four classes of medication used to treat migraine headaches, including: tricyclic antidepressants, narcotics, beta blockers, and calcium channel blockers. He had also failed to respond effectively to anti-emetics (phenothiazine derivatives).

18. Dr. McCurry also addressed lifestyle changes that Claimant appeared committed to in order to effectively treat his migraine headaches.

19. The ALJ infers from Dr. McCurry's deposition opinions that he believes that Claimant was probably exposed to carbon monoxide and that his current migraine headaches are directly related to the long term effects of such exposure. Consequently, because Claimant continues to experience symptoms, Dr. McCurry believes that the treatment including ongoing medications and a trial of Botox injections are reasonable, necessary and related to Claimant's October 10, 2014 carbon monoxide exposure.

20. Regarding the use of Botox to treat headaches, the Medical Treatment Guidelines (MTGs) (Rule 17, Exhibit 10, Traumatic Brian Injury Medical Treatment Guidelines Section G (7)(b)), state: "*No longer generally recommended for cervicogenic or other headaches based on good evidence of lack of effect. There is good evidence that botox is not more effective than placebo for reducing the frequency of episodic migraines*….". Nonetheless, the MTGs go on to state that Botox injections "*may be considered in a very small subset of patients with chronic migraines 12-15 days/month who have failed all other conservative treatment, including trials of at least three drug classes, and who have committed to any life style changes related to headache triggers".* Based on the evidence presented, including the opinions expressed by Dr. McCurry during his deposition, the ALJ finds that Claimant falls into this subset of patient for whom the use of Botox injections to treat headache complexes is indicated.

21. Dr. McCurry's reasoning and recommendations are supported by the totality of the medical record as a whole. Accordingly, the ALJ credits Dr. McCurry's testimony to find that Claimant's migraine headaches are industrially based, i.e. related to his probable exposure to carbon monoxide on October 10, 2014. The opinions of Dr. McCurry are credible and more persuasive than the contrary opinions of Dr. Chen.

22. Claimant has proven by a preponderance of the evidence presented, that the continued use of Propranolol and a trial of Botox injections is reasonable, necessary and causally related to his October 10, 2014 industrial injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding his ongoing symptoms and current need for treatment is consistent with the content of the medical records submitted at hearing. Furthermore, Claimant's testimony is generally supported by testimony of Dr. McCurry. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. 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).

E. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

F. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. The MTGs addresses the criteria necessary for accepted use of Botox to treat cervicogenic or other headaches in workers compensation cases. As found, the ALJ is persuaded that Claimant fits into the subset of patients for whom the use of Botox injections is indicated. Even if, Claimant did not meet the identified criteria for use of Botox exactly, the Court is not bound by the guidelines when deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable,

necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

G. In this case, the totality of the evidence supports a conclusion that Claimant suffers from work related migraine headaches as a long term consequence of likely exposure to carbon monoxide. The record evidence establishes that Claimant's headaches have been recalcitrant to management efforts and he has failed multiple classes of medications used to treat the condition. Moreover, Claimant has made lifestyle changes and remains committed to treating his condition, as demonstrated by his out of pocket payment for Propranolol, the medication that Claimant persuasively testified helps cure and relieve him from the symptoms of his ongoing migraines.

H. As noted above, the ALJ has considered the MTGs and the opinions of Dr. Chen and McCurry regarding their application to the injury in this case. In this case, the ALJ finds and concludes that the evidence supports Dr. McCurry's opinions that Claimant's need and suitability for continued medications and a trial of Botox injections are reasonable, necessary and directly related to Claimant's compensable work injury. Dr. Chen's contrary opinions are not persuasive. Consequently, Claimant has proven by a preponderance of the evidence that the recommended treatment, including continued prescription medication is reasonably necessary and related to his compensable October 10, 2014 work related injury. Accordingly, Respondents are obligated to pay for it.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of his industrially based migraine headaches including, but not limited to, ongoing prescriptions for Propranolol and a trail of Botox injections as recommended/requested.

2. Respondents shall reimburse Claimant for his out-of –pocket expenses for his continued payment for Propranolol.

3. All issues not expressly decided 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 11, 2016

/s/ Richard M. Lamphere_____

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he is entitled to reopen his case based upon a worsening of his condition pursuant to Section 8-43-303?

- If claimant has proven that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") commencing March 16, 2015 and continuing?

- If claimant has proven that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $715.56 after December 22, 2014.

FINDINGS OF FACT

1. Claimant was employed as a moderate needs teacher at Orchard Avenue Elementary School. Claimant began his employment with employer in August 2012. Claimant's job duties included working with groups of students on math or literacy. Generally, claimant's students are two or more years behind in their grade level contemporaries or have behavioral issues.

2. Claimant testified that on December 1, 2014, he was called into a classroom as part of a crisis team to deal with a disruptive student who was throwing chairs and upending tables. Claimant testified he was holding down the chair and the student tried to bit claimant. Claimant testified he attempted to restrain the child using a one-person restraint and the child proceeded to lash out at claimant and kicked him in the head. Claimant testified he did not lose consciousness when he was kicked. Claimant testified he got a headache after getting kicked.

3. Claimant testified he went back to the classroom and started vomiting after the incident.

4. Claimant sought treatment with the Community Hospital Urgent Care on December 4, 2014. Claimant noted he had been kicked in the head by a student's foot and later that day developed a headache, nausea, and vomiting. Claimant reported he had taken over the counter migraine medications and a Percocet that belonged to his

wife. Claimant was diagnosed with nausea and vomiting and a possible mild concussion.

5. Claimant's medical records document that claimant has reported to his medical providers that he has periodically taken his mother's Xanax prior to his work injury. The records further provide that claimant was seeking medical treatment on November 7, 2014 from Community Hospital for complaints of anxiety.

6. Claimant returned to Community Hospital Urgent Care on December 8, 2014 with continued complaints of headache that had not improved. Claimant reported that lights and computers bother him and noted he was unable to concentrate on tasks. Dr. Lykke noted that his levels of symptoms had not improved since the time of the injury and recommended claimant go to the emergency room ("ER") for urgent head imaging.

7. Claimant was seen in the Community Hospital ER on December 8, 2014. The ER reports a history of claimant being involved in martial arts and being kicked in the head one week ago. Claimant was diagnosed with post-concussive syndrome and taken off or work for 3 days. Claimant underwent a computed tomography ("CT") scan of his head that was noted to be unremarkable. Claimant was instructed to avoid television and reading and to follow up with his primary care physician.

8. Claimant was evaluated by Dr. Sofish with Grand Valley Occupational Medicine on December 11, 2014. Claimant reported that he was kicked by a student on December 1, 2014 after which he experienced a headache, blurred vision, sensitivity to lights and a halo effect while watching television. Dr. Sofish noted claimant had undergone a CT scan that was negative. Dr. Sofish diagnosed claimant with postconcussive syndrome and recommended claimant remain off of work through at least December 15, 2014.

9. Claimant returned to Dr. Sofish on December 15, 2014. Dr. Sofish noted claimant was not working and continued to complain of a frontal headache that would pass to the parietal area, with nausea, no vomiting and sensitivity to lights. Dr. Sofish continued claimant's medications and instructed claimant to return on December 22, 2016.

10. Respondents filed a general admission of liability admitting for medical benefits and wage continuation benefits on December 16, 2014. Claimant testified at hearing that he remained off of work through the Winter Break.

11. Claimant was seen in the ER on December 18, 2014 with complaints of vomiting, diarrhea and epigastic abdominal pain that began at 4:00 that morning. Claimant was diagnosed with a concussion and anxiety. Claimant was noted to have normal mood/affect with no motor/sensory deficits. Claimant treatment focused on a possible viral etiology for these complaints.

12. Claimant was re-evaluated by Dr. Sofish on December 22, 2014. Claimant was noted to have flu symptoms on December 18, 2014 for which he sought treatment. Dr. Sofish noted that claimant was in no acute distress, was neurologically intact and was able to toe and heel and squat with no difficulties whatsoever. Dr. Sofish provided a diagnosis of postconcussive syndrome and closed claimant's case returning claimant to work without restrictions.

13. Respondent filed a final admission of liability ("FAL") on December 26, 2014 admitting for a 0% whole person impairment rating based on Dr. Sofish's December 22, 2014 medical reports. Claimant did not object to the FAL and his claim was closed as a matter of law.

14. Claimant testified he returned to work for employer after the Winter Break in early January 2015. Claimant testified he experienced headaches when looking at computer screens when he returned to work and over the course of time in January 2015, his headaches returned along with increased anxiety, nausea and vomiting at work. Claimant testified he would also experience crying at work, along with retching or shaking while working with students.

15. Claimant sought additional treatment with Community Hospital on February 18, 2015 where he was examined by Physician's Assistant Blunk. Mr. Blunk noted claimant was complaining of recent worsening of anxiety/panic with migraine headaches worsening as his anxiety worsens. Claimant reported that his anxiety has been gradual and has been occurring in an intermittent pattern for years with symptoms including breathlessness, chest pain, dry mouth, headache, migraine, palpations, and sweating. Claimant reported a history of migraine headaches that began six years earlier (at age 31) and occurring yearly and then in December 2014 he had a closed head injury with a concussion and following his recovery, his headaches have become more frequent. Mr. Blunk recommended medications, including Omeprazole and Paxil and noted claimant could consider counseling if his symptoms continued. Mr. Blunk instructed claimant to follow up in one year.

16. Claimant returned to Mr. Blunk on March 11, 2015 with continued complaints associated with anxiety that had been increasing in frequency and severity. Mr. Blunk noted that claimant was interested in psychiatry.

17. Claimant returned to Mr. Blunk on March 23, 2015 and noted his anxiety was still a real problem. Claimant noted he had physical "shakes" and some retching from time to time. Mr. Blunk noted that claimant was unable to carry on at work and a substitute had been signed on to do his teaching for him late last week and this week.

18. Claimant testified at hearing that he last worked for employer on March 16, 2015 and had not returned to work.

19. Claimant was seen for psychological examination by Mr. Flinn with Behavioral Health and Wellness on referral from Mr. Blunk on April 2, 2015. Claimant testified this is a program that provides free counseling sessions through the employee

assistance program ("EAP") provided by employer. Claimant reported a history of prior concussions when he was 18, 19 and 20 years old. Claimant reported he had another concussion in December from a behavioral student kicking him the forehead. Claimant reported he was treated with his primary care physician following his last concussion and was diagnosed with post concussion syndrome. Claimant reported he had violent headaches, vomiting and sensitivity to light and other issues for three weeks after the December concussion followed by a week where he felt amazing. Claimant reported that since that week, his anxiety levels have consistently risen to maladaptive ends. Claimant admitted to using medicinal marijuana to help him sleep occasionally on the weekends.

20. Claimant was seen on April 6, 2015 by Mindsprings due to suicidal ideations. Claimant's wife reported claimant's work injury as an inciting event for his current psychological issues. Claimant reported he had been retching, vomiting and shaking and crying. Claimant reported a history of a prior suicide attempt remote in time to when he was 17 years old. Claimant reported a history of significant problems with his family (sister, brother-in-law, mother and father) and was noted by his wife to be the rock of the family, the one everyone else relied on. Claimant reported his use of marijuana had increased since being kicked. Claimant was diagnosed with post-traumatic stress disorder and anxiety disorder.

21. Claimant was evaluated on April 7, 2015 by Dr. Sammons at Mesa Behavioral Medicine Clinic. Dr. Sammons noted claimant reported his anxiety as being "over the top". Claimant reported he had a concussion in December with headaches and blurred vision and after going back to work after the headaches got better, the computer gave him headaches that increased his anxiety. Dr. Sammons noted claimant's history of 3 concussions between the ages of 18-20 and provided claimant with a current medical diagnosis of multiple concussions. Dr. Sammons prescribed Alprazolam.

22. Claimant returned to Dr. Sofish on April 9, 2015. Dr. Sofish noted claimant's recent medical treatment and his complaints of severe anxiety, intrusive thoughts, retching and vomiting, and some suggestion of possible audio and visual hallucinations. Dr. Sofish noted claimant presented with postconcussive syndrome and seemed to be symptom-free when he was discharged, but has had continuing symptoms of severe anxiety. Dr. Sofish recommended claimant return to Mindspring to consider being admitted. Dr. Sofish noted in his WC164 form that claimant remained at MMI.

23. Claimant returned to Mr. Flinn on April 20, 2015 and noted he had six straight days of headache with anxiety levels that make him contract or retch, hot flashes and panic tremors. Mr. Flinn focused his session with claimant on indentifying and addressing the areas on ongoing difficulty including increasing his coping skills and improving his stress management.

24. Claimant returned to Mr. Blunk on April 21, 2015. Mr. Blunk noted claimant continued to treat for anxiety and reported having trouble sleeping with

troublesome nightmares. Claimant was continued on medications and instructed to follow up.

25. Claimant was evaluated by Dr. Young with the EAP program on April 21, 2015. Claimant reported he sustained a concussion while trying to restrain a student in December 2014. Dr. Young noted claimant had a prior history of 3 concussions when he was 18-20 years old. Claimant reported he was currently on medical leave and noted that some of his symptoms had improved. Dr. Young noted claimant reported a long history of anxiety and social phobia, which was both exacerbating and exacerbated by his concussion. Dr. Young instructed claimant on activity pacing and instructed claimant to follow up in one month. Dr. Young performed "impact testing" in connection with his examination and provided a diagnosis of having post concussion syndrome.

26. Claimant returned to Mr. Flinn on April 29, 2015 and reported another hard week, but did have some progress. Mr. Flinn focused on increasing claimant's coping skills and stress management.

27. Dr. Young referred claimant to Dr. Mistry on June 1, 2015 for further examination. Dr. Mistry examined claimant initially on June 10, 2015 and noted claimant's complaints of blurred vision, tinnitus, and bilateral cervical radicular pain. Dr. Mistry recommended a brain MRI to evaluate for occult structural pathology and to rule out Chiari malformation. Dr. Mistry also recommended claimant undergo speech therapy for cognitive retraining, a cervical spine MRI, and a referral to an ear, nose and throat ("ENT") specialist for evaluation of claimant's tinnitus along with a referral to an ophthalmologist for evaluation of claimant's blurred vision.

28. Claimant returned to Dr. Sofish on June 11, 2015. Dr. Sofish noted in his June 11, 2015 report that claimant's post concussive syndrome was a direct result of the trauma from December 1, 2014.

29. Claimant returned to Dr. Mistry on July 22, 2015 Dr. Mistry noted claimant's MRI of his brain was normal and recommended claimant continue with his ongoing therapies, including his speech therapy with Ms. Beach.

30. Claimant returned to Dr. Mistry on August 21, 2015 and reported he believed the speech therapy had helped reduce the intensity of his symptoms. Dr. Mistry recommended claimant continue with his therapies and discussed potential additional treatment including neurological consultation, in-patient rehabilitation, and possible soft tissue massage.

31. Claimant underwent an independent medical examination ("IME") with Dr. Kleinman on October 28, 2015. Dr. Kleinman performed a psychiatric evaluation and reviewed claimant's medical records in connection with his IME. Dr. Kleinman issued an IME report dated November 6, 2015 in which he discussed his findings. Dr. Kleinman noted that claimant had sought treatment for anxiety shortly before his work injury and opined that the claimant likely had a generalized anxiety disorder that pre-

dated claimant's work injury for which Dr. Lykke had recommended counseling and medications, which claimant had not accepted.

32. Dr. Kleinman further opined in his report that while he was kicked in the head, there was no loss of consciousness, no amnesia and claimant was not dazed. Dr. Kleinman noted that the symptoms of blurry vision and headaches resolved, according to Dr. Sofish by December 22, 2014. Dr. Kleinman opined that there would be little basis to consider persisting post concussive syndrome since claimant's injury was not of the severity that he would be expected to have symptoms almost a year later. Dr. Kleinman opined that claimant's diagnosis would be anxiety, unrelated to the occupational injury.

33. Dr. Kleinman testified at hearing consistent with his report. Dr. Kleinman testified that claimant is receiving treatment for a neurocognitive disorder, but opined that claimant did not present with evidence of a neurocognitive disorder, as claimant would need a loss of consciousness and post-traumatic amnesia according to the DSM V. Dr. Kleinman testified that while claimant had undergone "impact testing" with Dr. Young, this data is not necessarily reliable.

34. Dr. Kleinman testified that claimant's concussion was not severe enough to cause a post concussive neurological disorder and opined that claimant's condition was related to his pre-existing anxiety and not his work injury.

35. The ALJ credits claimant's testimony at hearing along with the opinions expressed by Dr. Mistry and Dr. Sofish in their medical reports over the contrary opinions expressed by Dr. Kleinman in his report and testimony and finds that claimant has established that it is more likely true than not that he has suffered a worsening of his condition related to the December 1, 2014 work injury. The ALJ credits claimant's testimony at hearing along with the medical records entered into evidence at hearing and finds claimant has proven that it is more likely true than not that his claim should be reopened based on a worsening of his condition.

36. The ALJ credits the medical records entered into evidence at hearing along with claimant's testimony and finds that claimant has established that the medical treatment he received, including claimant's treatment after December 22, 2014, including claimant's treatment from Dr. Sofish and Dr. Mistry was reasonable and necessary to cure and relieve claimant from the effects of his work injury.

37. Claimant testified at hearing that he was paid his wages by employer through the end of his contract year in August 2015. The ALJ credits claimant's testimony at hearing along with the medical records entered into evidence and finds that claimant has established that it is more probable than not that he is entitled to an award of TTD benefits beginning March 16, 2015 and continuing.

38. The issue of offsets and credits was reserved by the parties at hearing, but respondents may be entitled to an offset against the award of TTD benefits for continuation of wages pursuant to Section 8-42-124, C.R.S. as noted in the FAL.

39. The wage records entered into evidence establish claimant was paid a monthly salary of $3,100.77. Taking claimant's monthly salary multiplied by 12 and divided by 52 equates to an AWW of $715.56.

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., 2014. 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, the ALJ credits the testimony of claimant at hearing along with the medical opinions expressed by Dr. Sofish and Dr. Mistry in their medical reports and determines that claimant has established by a preponderance of the evidence that he has sustained a worsening of his condition related to his work injury that entitles claimant to reopen his claim pursuant to Section 8-43-303, C.R.S.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury.

Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant's medical treatment after December 22, 2014, including his treatment from Dr. Mistry and Dr. Sofish is found to be reasonable and necessary to cure and relieve claimant from the effects of his work injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found, based on claimant's credible testimony at hearing, claimant stopped working for employer on March 16, 2015 due to his ongoing problems related to his December 1, 2014 work injury. As found, claimant is entitled to TTD benefits beginning March 16, 2015 and continuing until terminated by law.

9. 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).

10. As found, based on the wage records entered into evidence at hearing, claimant was paid a monthly salary of $3,100.77 by employer. As found, claimant's appropriate AWW is determined to be $715.56.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury.

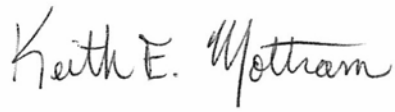
2. Respondent shall pay claimant TTD benefits commencing March 16, 2015 and continuing based on an AWW of $715.56. Respondent may be entitled to an offset pursuant to Section 8-42-124, C.R.S.

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

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

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

DATED: February 9, 2016



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

ISSUES

- Pursuant to the Order of Remand, the court is instructed to review the evidence and enter an Order in which the ALJ shall issue further findings and a new order on the difference between the claimant's pre-injury average weekly wage ("AWW") and the wages claimant earned in his modified employment.

- The parties stipulated at the prior hearing that claimant's AWW with employer was $1,601.47.

FINDINGS OF FACT

1. As found at the prior hearing, and as set forth in the prior Findings of Fact, Conclusions of Law and Order, claimant was employed with employer as a Systems Operator I on December 27, 2014. Claimant testified his job duties included operating a fork lift and a front end loader. Claimant testified that through his work with employer, he would work shifts from 5:30 p.m. to 6:00 a.m.

2. Claimant testified that he was working on a drilling site in Wyoming on December 27, 2014 when at approximately 9:00 p.m., he slipped and fell on an icy ramp and landed on his right shoulder. Claimant testified he called his supervisor, Mr. Hansen and informed him that he fell. Claimant testified Mr. Hansen told him he would tell Mr. Chambers, the direct supervisor for the area, of claimant's fall. Claimant testified he continued working and took it easy and was going to see how he felt in the morning.

3. Claimant testified that following his fall, he continued to work, but would use his left arm to lift. Claimant testified he finished his shift with employer and his shoulder was numb and throbbing.

4. Claimant testified that following his shift, he was scheduled to return to work on December 28, 2014 at 5:30 p.m., but was woken up at approximately 2:00 p.m. by Mr. Hansen and was told to pack up because he was going to another job site where he would catch a ride back to his home in Colorado. Claimant testified Mr. Hansen helped him load his belongings, including his tools and a cooler.

5. Claimant testified that while he was in the car with Mr. Hansen, he again mentioned that he hurt his shoulder. Claimant testified Mr. Hansen told him to sleep on it and that he had reported the injury to Mr. Chambers and someone would be getting back to him. Claimant testified he went to the new job site and operated a loader with his left hand. Claimant testified he was at the new job site for approximately 12-13 hours, before leaving the job site on December 29, 2014 at approximately 6:00 a.m.

6. Claimant testified he got a ride back to Colorado with Mr. Rotta and arrived at his home late in the afternoon on December 29, 2014. Claimant testified he did not receive a referral from employer to a physician between December 29, 2014 and January 2, 2015. Claimant testified that during this time, his pain began getting worse.

7. Claimant testified he was advised that he was terminated by employer on January 2, 2015. Claimant testified he then made a medical appointment with his personal physician, Dr. Smith with Roaring Fork Family Physicians.

8. Claimant was examined by Dr. Smith on January 2, 2015. Dr. Smith noted claimant reported he fell and landed on his right shoulder on December 27, 2014. Dr. Smith noted claimant had pain since his fall and documented "a little bruising down into the proximal upper arm". Claimant reported pain with overhead activity. Dr. Smith diagnosed claimant with a likely injury to the rotator cuff and provided claimant with restrictions of no lifting over 10 pounds. Claimant testified at hearing that he had not had an injury to his right shoulder before December 27, 2014.

9. Claimant testified that after his appointment with Dr. Smith, he called Axiom, a medical service provided by employer that allows the employees to call with medical questions involving work related injuries and speak to a nurse. Claimant testified he knew to call Axiom from a co-worker. Claimant testified he spoke with "Jan" at Axiom and asked her if a report had been filed. Claimant testified he was not referred to a physician by Axiom or employer after reporting the injury.

10. Claimant returned to Dr. Smith on January 14, 2015. Claimant noted continued pain in his right shoulder and Dr. Smith recommended claimant obtain a magnetic resonance image ("MRI") of his right shoulder. Claimant was referred by Dr. Smith to Dr. Adams.

11. Dr. Adams evaluated claimant on January 21, 2015 and noted claimant's accident history of slipping at work, landing on the right shoulder. Dr. Adams referred claimant for an MRI of the right shoulder.

12. Claimant returned to Dr. Smith on February 11, 2015. Dr. Smith noted that it was evident that claimant had a torn rotator cuff, but that insurer had denied the request for the MRI. By March 30, 2015, Dr. Smith was noting that claimant had a known rotator cuff tear and would likely need surgery.

13. Mr. Norwood, claimant's co-worker, testified at hearing that he was working with claimant on December 27, 2014 and witnessed claimant fall when he slipped on iron. Mr. Norwood testified claimant was talking on the phone and walking away from him when he stepped on iron, slipped and fell, landing on his right side. Mr. Norwood testified he walked over to claimant and asked him if he was OK, to which claimant replied that he was OK. Mr. Norwood testified he asked claimant several times through the day if he was OK, to which claimant responded that he was OK. Mr. Norwood testified he did not notice any difference in how claimant performed his work.

14. Mr. Norwood testified that he did not work with claimant anymore after the shift in which claimant fell (the shift ending December 28, 2014). Mr. Norwood testified he later saw claimant and his supervisor loading claimant's belongings. Mr. Norwood testified he did not hear claimant complain of right arm pain following his fall.

15. Mr. Hansen testified at hearing in this matter that he had spoken with claimant in December 2014 regarding a tire claimant had blown on the loader. Mr. Hansen confirmed that claimant had told him that he had fallen. Mr. Hansen testified he asked claimant if he was OK, and claimant replied that he was OK. Mr. Hansen testified he did not interpret this as claimant reporting a work related injury.

16. Mr. Hansen testified that the next day he removed claimant from the rig he was working on because of complaints employer had received from the rig owner about claimant. Mr. Hansen testified he moved claimant to a different rig and helped claimant move some of his belongings. Mr. Hansen testified that in the drive to the new rig, claimant did not complain of shoulder pain. Mr. Hansen testified he did not tell Mr. Chambers of claimant having fallen at work.

17. The ALJ credited the testimony of claimant and Mr. Norwood and found in the prior order that claimant had established that on December 27, 2014 he slipped and fell on ice at work and landed on his right side. The ALJ credited the medical records from Dr. Smith that document claimant had bruising on his right shoulder on examination on January 2, 2014 and diagnosed claimant with a possible torn rotator cuff and found that claimant had proven that it was more likely than not that claimant sustained an injury at work when he slipped and fell on December 27, 2014.

18. As noted in the prior Order, claimant was placed on restrictions by Dr. Smith on January 2, 2015. The ALJ found in the prior Order that the claimant had demonstrated that it was more likely true than not that the medical restrictions were a result of his December 27, 2014 slip and fall when he landed on his right side and resulted in claimant's subsequent wage loss. The ALJ found that the wage loss continued until February 24, 2015 when claimant returned to work for a new employer. The ALJ therefore awarded TTD benefits for the period of January 2, 2015 through his return to work on February 24, 2015. The ALJ noted that the evidence at hearing established that claimant was off of work beginning December 29, 2014 due to his normal scheduled time off, and therefore, awarded claimant TTD benefits beginning on January 2, 2015.

19. With regard to the issue of temporary partial disability ("TPD") benefits, the ALJ originally found that claimant failed to establish that his wage loss after returning to work for another employer was related to his work injury with employer. Claimant timely appealed this decision and the Industrial Claim Appeals Panel issued an Order remanding the case to the ALJ to review the evidence and make additional findings ordering respondents to pay TPD benefits based on the difference between the claimant's AWW and the actual earnings claimant had from his post-injury employment.

20. Claimant entered into evidence two pay stubs from his subsequent employer that establish claimant was paid year to date amounts of $6,500.30 for the period ending April 30, 2015 and $7,774.39 for the period ending May 15, 2015. Based on claimant's testimony that he started working on February 24, 2015, this represents a period of 11 4/7 weeks.

21. Based on claimant's stipulated AWW of $1,601.47, claimant would have earned $18,531.30 in those 11 4/7 weeks. This equates to a difference of $10,756.91 and TPD benefits of $7,171.27.

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. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once the claimant establishes the injury has caused "disability" in the sense that the injury impairs the claimant's ability to perform his regular duties, the right to temporary disability benefits is measured by the claimant's wage loss. This is true because the physical restrictions caused by the injury affect the claimant's prospects for finding alternative employment. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989).

3. In the prior Order, entered on July 31, 2015, the court found claimant established he sustained a compensable injury and awarded claimant TTD benefits for the period of January 2, 2015 through February 23, 2015. Because claimant has not been placed at MMI and is earning less wages in his new employment, claimant is entitled to an award of TPD benefits commencing February 24, 2015.

4. As found, based on the wage records entered into evidence, claimant's TPD benefits amount to $7,171.27. The ALJ further orders that TPD benefits shall continue until terminated by law or statute.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TPD benefits in the amount of $7,171.27 for the period of February 24, 2015 through May 15, 2015.

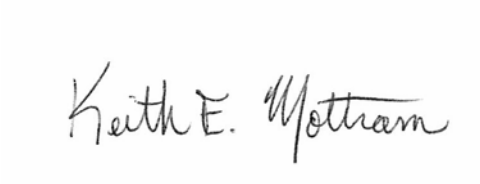
2. Respondents shall continue TPD benefits until terminated by law or statute.

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

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

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

DATED: February 16, 2016



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his bilateral knees.

2. If compensable, whether Claimant has established by a preponderance of the evidence that he is entitled to an award of authorized medical benefits that are reasonable and necessary to treat his bilateral knees.

3. If compensable, whether Respondents have established by a preponderance of the evidence that causation should be apportioned.

FINDINGS OF FACT

1. Claimant works for Employer as a trailer mechanic and has been employed in this position by Employer for approximately eighteen years. Claimant was employed by Employer from 1990 until 1997 as a mechanic. In 1997, and for a period of approximately nine months, Claimant worked as a fuel tank and gas pump installer for a separate employer before returning to work for Employer later in 1997.

2. As a trailer mechanic and for the past eighteen years, Claimant's duties include manual labor involving jacking up trailers, installing bumpers and beds, and changing tires and his duties involve repetitive kneeling, crawling, crouching, squatting, carrying, and lifting and carrying heavy items including tire rims and tires. Claimant often works on his knees.

3. Claimant has suffered from bilateral knee pain for several years. Claimant first mentioned occasional complaints of joint pain in his knees during an annual physical examination with Thomas Motz, D.O. in March of 2009. Claimant began treating with Western Orthopedics & Sports Medicine for knee pain in early 2012. Claimant has used bilateral knee braces and has received several injections during the course of his treatment. Claimant has continued to work throughout this period of time.

4. On February 7, 2012 Claimant was evaluated at Western Orthopedics & Sports Medicine by Mitchell Copeland, D.O. Claimant reported right knee pain that started without any known injury two months ago and constant symptoms exacerbated by walking, kneeling, and squatting. Dr. Copeland assessed osteoarthritis of the knee and x-rays were performed in the clinic and reviewed. *See* Exhibit 6.

5. On February 17, 2012 Claimant was evaluated by Dr. Copeland and Dr. Copeland performed a Synvic ONE injection in Claimant's right knee. *See* Exhibit 6.

6. On August 10, 2012 Claimant was evaluated by Dr. Copeland. Claimant reported left knee pain without known injury that began years ago and worsened in the last two weeks. X-rays performed in the office showed complete joint space collapse of the medial compartment and Dr. Copeland assessed end-stage osteoarthritis of the left knee. Dr. Copeland performed a corticosteroid injection of Claimants left knee. *See* Exhibit 6.

7. On September 28, 2012 Claimant was evaluated by Dr. Copeland. Claimant reported no relief from the injection seven weeks prior. Dr. Copeland performed another injection. *See* Exhibit 6.

8. On March 22, 2013 Claimant was evaluated by Dr. Copeland. Dr. Copeland assessed osteoarthritis of the right knee and left knee. Dr. Copeland noted Claimant's continued pain and that the left knee was tolerating use of an unloader brace well. Dr. Copeland recommended Claimant continue with the brace until he is ready to pursue more definitive treatment in terms of joint replacement. Dr. Copeland recommended an injection for the right knee which was performed. *See* Exhibit 6.

9. On September 3, 2013 Claimant was evaluated by Dr. Copeland. Claimant reported pain in the left knee without known injury with onset of symptoms several years ago. Dr. Copeland noted that Claimant had osteoarthritis of the left knee and that Claimant had returned for a repeat injection. Dr. Copeland provided a corticosteroid injection. *See* Exhibit 6.

10. On December 6, 2013 Claimant was evaluated by Dr. Copeland, who noted continued symptoms of intermittent knee pain. Dr. Copeland noted recurrence of left knee pain and provided a corticosteroid injection in Claimant's left knee. *See* Exhibit 6.

11. On March 13, 2014 Claimant was evaluated by Dr. Copeland and reported his right unloader brace was broken at the thumbwheel. A new unloader brace was provided for his right knee osteoarthritis. *See* Exhibit 6.

12. On April 4, 2014 Claimant was evaluated by Dr. Copeland. Claimant requested a new left knee unloader brace for treating his medial compartment osteoarthritis. Dr. Copeland noted that the brace provided to Claimant in 2012 had worn out and that the brace was good conservative treatment and noted they would order Claimant a new brace. *See* Exhibit 6.

13. On October 8, 2014 Claimant was evaluated by Dr. Copeland. Claimant reported pain in the bilateral knees with symptoms that began several years ago and included pain, popping, and decreased range of motion. Dr. Copeland assessed

bilateral osteoarthritis of the knees. Dr. Copeland provided bilateral corticosteroid injections. *See* Exhibit 6.

14. By October of 2014, Claimant's bilateral knee pain while at work was constant and was making it difficult to perform his job duties. Claimant decided to report his bilateral knee pain as a work injury and reported it to his Employer on October 28, 2014.

15. After reporting the bilateral knee pain, Claimant was referred by Employer for treatment.

16. On November 6, 2014 Claimant was evaluated by Korrey Klein, M.D. Claimant reported bilateral knee pain and that he had significant arthritis on the inside of his knees. Claimant was wearing bilateral unloading braces and reported that one month ago he had bilateral cortisone injections that helped the left knee but not the right. Claimant reported 25 years of on the job requirements of bending, lifting, and crawling. Dr. Klein noted that the bilateral knee pain had been an ongoing problem for Claimant who was already seeing orthopedic specialty care. Dr. Klein noted that Claimant had been treating on his own but after discussion with his employer and the job demands over the years was now looking to change it to a workers' compensation injury. Dr. Klein noted that Claimant's job requirements and activities certainly impacted his knees over time. Dr. Klein noted that the injury was not caused by a specific day but that Claimant's symptoms had a very slow progressive course which is expected with osteoarthritis. Dr. Klein opined that while the evidence was not overwhelming that the causation was related to employment, that there was a 51% or greater chance that the bilateral knee pain was causally related to Claimant's job duties over the years. Dr. Klein recommended work restrictions of no kneeling, crawling, or using ladders, a 25 pound weight lifting restriction, and noted that Claimant was to wear unloading braces at all times while at work and he referred Claimant back to Dr. Copeland. *See* Exhibit 5.

17. On December 10, 2014 Claimant was evaluated by Dr. Klein. Dr. Klein noted Claimant's bilateral knee pain and noted that x-rays showed osteoarthritis. Dr. Klein opined that it was unclear if the pain is all arthritis or if there was some other underlying pathology related to his work that was contributing to the pain. Dr. Klein recommended bilateral knee MRIs for further evaluation to help clarify whether Claimant had meniscal or ligamentous injury and opined that may help clarify the work related status of the injuries. *See* Exhibit 5.

18. On December 22, 2014 Claimant underwent MRIs of his right and left knees that were interpreted by Michael Neste, M.D. The impression for the right knee was: severe degenerative changes of the medial compartment of the right knee, similar to the correlative left knee with a chronic degenerative tear of the entire medial meniscus with displacement of the meniscus medially, just deep to the medial collateral ligament and severe cartilaginous denudation of the medial compartment with bone on bone articulation; chronic partial tear of the anterior cruciate ligament; and prepatellar bursitis. The impression for the left knee was: complex chronic degenerative tear of the

medical meniscus with near complete absence of the normal meniscus and a large fragment of abnormal meniscus displaced posteriorly near the posterior cruciate ligament; severe degenerative changes of the medical joint compartment with cartilaginous denudation and near bone on bone articulation of the medial femoral condyle and medial tibial plateau; and intra-articular osteochondral loose bodies posterior to the knee. *See* Exhibit 10.

19. On January 7, 2015 Claimant was evaluated by Dr. Klein. Claimant reported bilateral knee pain and that corticosteroid injections did not help. Dr. Klein reviewed the MRIs with Claimant. Dr. Klein opined that the MRI of the right knee showed a right ACL tear and medial meniscal tear with severe underlying osteoarthritis. Dr. Klein noted that it could have started with an ACL tear/meniscal tear which if left untreated could have caused the arthritis. Given the severity on the right knee MRI, Dr. Klein opined that further injections would not likely be helpful. Dr. Klein also opined that the MRI of the left knee showed a medial meniscal tear with severe underlying osteoarthritis. Dr. Klein noted that it could have started with a meniscal tear which if untreated could have caused the arthritis but also noted that severe arthritis may have eroded and damaged the meniscus. Dr. Klein again opined that further injections would not likely be helpful. *See* Exhibit 5.

20. On January 14, 2015 Claimant was evaluated by Dr. Copeland. Dr. Copeland noted that Claimant had very significant arthritic changes in both knees and that the MRI showed torn menisci, but that the torn menisci were small components of Claimant's overall situation. Dr. Copeland noted that Claimant felt the knees had worn out due to his work and that nevertheless medically Claimant's only treatment was palliative treatment and eventually knee replacements. Dr. Copeland noted he had counseled Claimant for years regarding treatment options and that Claimant had decided it was time to proceed with knee replacements. *See* Exhibit 6.

21. On February 6, 2015 Claimant was evaluated by Dr. Klein. Claimant reported continued bilateral knee pain and that he could not walk without his braces due to severe pain. Dr. Klein reviewed Claimant's MRIs and noted Claimant's activities of daily living and ability to perform at work was very limiting and painful. Dr. Klein recommended proceeding with knee replacement surgery. *See* Exhibit 5.

22. On June 22, 2015 John Hughes, M.D. issued an Independent Medical Examination report. Claimant reported working in multiple capacities for Employer for 25 years and described work involving pressure on the knees. Claimant reported continued bilateral knee pain alleviated somewhat by rest and use of knee braces and reported that aggravating factors included bending and moving and particularly squatting and kneeling. Dr. Hughes noted on examination bilateral fusiform swelling of the knees without effusion. Dr. Hughes assessed bilateral knee osteoarthritis with bone on bone articulation in the bilateral medial compartments; a-traumatic right anterior cruciate ligament insufficiency and medial meniscus tear; a-traumatic left medial meniscus tear; de-conditioning and obesity; hypertension well controlled; restless leg syndrome; and lumbar spondylosis. Dr. Hughes noted that Claimant's weight, family

history and idiopathic knee osteoarthritis are independent risk factors for development of end stage osteoarthritis of the knees at 55 years old. As a result of his consideration, Dr. Hughes opined that he could not state with a reasonable degree of medical probability that knee pain is a direct and proximate result of Claimant's work related occupational stresses and strains due to his work as a mechanic for approximately 25 years. However, Dr. Hughes opined that the work tasks substantially contributed to and worsened Claimant's bilateral knee osteoarthritis and other conditions and that Claimant's work was the proximate cause for his need for total knee arthroplasty at this point in time. Dr. Hughes opined that Claimant's work did aggravate, accelerate, exacerbate, and worsen his pre-existing osteoarthritis and made Claimant become symptomatic prior to what would have occurred absent the job induces physical stressors. *See* Exhibit 3.

23. Dr. Hughes opined that Claimant's work caused a substantial and permanent aggravation of his bilateral knee osteoarthritis and that the proximate cause of Claimant's need for total knee arthroplasty at this point in time is Claimant's work. *See* Exhibit 3.

24. On August 31, 2015 Tashoff Bernton, M.D. issued an Independent Medical Examination (IME) report. Dr. Bernton assessed severe bilateral knee osteoarthritis, symptomatically worse on the left than on the right. Dr. Bernton noted that Claimant had fairly diffuse osteoarthritis in many parts of his body and that Claimant was also overweight which were both independent predictors of osteoarthritis in the knee. Dr. Bernton opined that it was clearly evident to and beyond a reasonable degree of medical probability that, given Claimant's independent risk factors, Claimant would have had osteoarthritis of the knees if he were not in his current job, the occupational history of repeated lifting and squatting over the years is sufficient to meet the standard in the Colorado Workers' Compensation Treatment Guidelines for aggravation of the condition on a work related basis. Dr. Bernton opined that bilateral knee replacement was most likely indicated and would be necessary at some point. *See* Exhibit 4.

25. Dr. Bernton opined that the work activities were not a necessary precondition to the development of knee problems and that Claimant would have osteoarthritis in both of his knees whether or not he had his current job duties, although the job duties aggravated his osteoarthritis. *See* Exhibit 4.

26. Claimant testified credibly at hearing. Claimant is 55 years old and admitted arthritis in his hands, neck, and back that he has received past treatment for. Claimant admitted significant bilateral knee pain surfaced approximately 5 years prior. Claimant also admitted that approximately 12.5 years ago he quit smoking and his weight went up and he has been overweight since.

27. Dr. Bernton testified at hearing consistent with his IME report. Dr. Bernton opined that Claimant has a degenerative condition in both of his knees with no specific injuries and worsening symptoms that gradually increased over time. Dr. Bernton opined that the tears shown by the MRI of the left knee were degenerative tears and

that Claimant's level of degenerative change took years or decades to develop. Dr. Bernton opined similarly regarding the right knee. Dr. Bernton noted four basic risk factors for osteoarthritis included genetics, weight/body mass index, age, and activity. Dr. Bernton opined that Claimant was obese, that Claimant had the genetic marker of osteoarthritis in both sides and in multiple body parts, and that Claimant had three of the basic risk factors before even looking at activity. Dr. Bernton noted that Claimant's work activity will aggravate osteoarthritis but that even without the work activity Claimant would still have osteoarthritis. Dr. Bernton opined that work was not a necessary pre-condition to the development of osteoarthritis and that even without work Claimant would have osteoarthritis and would need bilateral knee replacements.

28. Dr. Bernton opined that the percentage of cause due to work activities would be at most 1/3 and the cause due to non work related activities would be 2/3. Dr. Bernton considered weight bearing activities outside of work. Dr. Bernton noted that Dr. Hughes' opinion was similar in that Dr. Hughes couldn't say that the osteoarthritis was a direct result of work activities. Dr. Bernton disagreed that work activities made Claimant symptomatic and opined that Claimant would have become symptomatic even without his current work activities.

29. The opinion of Dr. Bernton is found credible and persuasive and is consistent with medical records as well as the opinion of Dr. Hughes regarding cause of the bilateral osteoarthritis not being a direct and proximate cause of Claimant's work but that the work aggravated Claimant's conditions.

CONCLUSIONS OF LAW

Generally

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

Occupational disease

An injury or occupational disease "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer in connection with the contract of employment. *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). For an injury to arise out of employment, “the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.” *Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). C.R.S. § 8-40-201(14) defines “occupational disease” as: “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment.”

A claimant seeking benefits for an occupational disease must first establish the existence of the disease and that it was directly and proximately caused by claimant’s employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims*, 989 P.2d 251 (Colo. App. 1999); *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The

conditions of employment need not be the only cause of the disease and a claimant is entitled to compensation if the hazards of employment cause, intensify, or aggravate to some reasonable degree the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). If the occupational exposure is not a necessary precondition to the development of a disease then the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

Here, claimant contends that his bilateral knee osteoarthritis was caused by an occupational disease which he developed as the result of repetitive activities during his work at employer. Claimant has established that he suffers from a compensable occupational disease to his bilateral knees and has established that the hazards of his employment intensified or aggravated his bilateral osteoarthritis. However, the hazardous conditions of Claimant's employment are not the sole cause for his disease or his need for treatment. Respondents have established that the industrial exposure was not a necessary precondition to the development of Claimant's bilateral knee osteoarthritis and that Claimant would, more likely than not, have developed bilateral knee osteoarthritis regardless of whether or not claimant had a job or any occupational exposure. The opinion of Dr. Bernton is persuasive that the occupational exposure was not a necessary precondition to Claimant developing bilateral knee osteoarthritis given Claimant's genetic predisposition, several body areas with arthritis, Claimant's age and weight, as well as Claimant's activity outside of work. Similarly, the opinion of Dr. Hughes is consistent and persuasive that Claimant's knee pain cannot be said within a reasonable degree of medical probability to be a direct and proximate cause of Claimant's work.

Claimant's bilateral knee osteoarthritis was not caused by his occupational exposure and Claimant would have bilateral knee osteoarthritis whether or not he worked. However, the bilateral knee osteoarthritis was aggravated, intensified, and accelerated by his work with Employer that involved significant use of his knees as found above. Given the aggravation of his underlying disease caused by his employment, Claimant has established that he is entitled to compensation to the extent that the employment and occupational exposure contributed to his disability. Here, Respondents have established significant non-occupational causes of Claimant's bilateral knee osteoarthritis and Respondents have established that they are entitled to apportionment between the work related and non work related causes of Claimant's bilateral knee osteoarthritis.

As found above, both Dr. Bernton and Dr. Hughes agree that Claimant's bilateral knee pain was not directly and proximately caused by Claimant's work, but that the cause is multi-factorial in nature. However, both medical experts opine that Claimant's work aggravated and contributed to his knee pain. Respondents have established that Claimant's age, weight, and genetics have contributed to the development of his severe bilateral knee osteoarthritis. The opinion of Dr. Bernton is credited that 2/3 of the development of Claimant's bilateral knee osteoarthritis was due to Claimant's genetic predisposition combined with Claimant's age and weight. Dr. Bernton's opinion that

Claimant's work for Employer accelerated the development of his bilateral knee osteoarthritis to the extent of 1/3 is also found credible and persuasive. The MRIs of Claimant's bilateral knees support Dr. Bernton's overall opinions and his opinion overall is consistent with the opinion of Dr. Hughes who could not state that the knee pain was directly and proximately caused by employment but that the employment contributed to and aggravated the condition. Dr. Hughes did not provide an apportionment, but like Dr. Bernton, he noted there were multi-factorial causes of Claimant's condition. As found above, Claimant is 55 years old and has been overweight for the past 12.5 years. Claimant also has arthritis not only in his bilateral knees but also in his neck, back, right shoulder, and right hand. Claimant's age, weight, and arthritis throughout his body was noted by Dr. Bernton in providing his opinion.

Dr. Klein's opinions, overall, are not helpful or persuasive in a causation analysis. Dr. Klein initially opined that causation of Claimant's condition was more likely than not related to Claimant's job duties over the years but noted that the evidence was not overwhelming. Dr. Klein also noted that Claimant's x-rays showed osteoarthritis and that it was unclear if the pain was all due to arthritis or if there was some work related underlying pathology contributing to the pain and recommended MRIs to further clarify the work related status. After the MRIs were performed, Dr. Klein did not provide a further opinion as to whether or not the MRIs showed any work related underlying pathology. Additionally, Dr. Copeland has provided no opinon on causation or work relatedness of the bilateral knee osteoarthritis.

The opinion of Dr. Bernton is found credible and persuasive and consistent with the medical records and medical history. Claimant has established that he suffers from a compensable occupational injury, however, Respondents have also established an apportionment of any medical treatment and payment of disability benefits and that Claimant's employment contributed to 33.33 percent of the bilateral knee osteoarthritis and that Respondents are liable for payment of 33.33 percent of any compensation due to Claimant and 33.33 percent of any medical benefits awarded to Claimant.

Compensability

Respondent's argument that Claimant has failed to establish a compensable injury has been considered and rejected. Claimant's injury is disabling, he is currently under work restrictions, and Claimant has established the need for significant medical treatment and time off work following bilateral knee replacement surgeries recommended by his surgeon. Although disability indemnity is not yet payable to Claimant because he has not established any lost time from work, Claimant has established that he suffers from an occupational disease, that his work has aggravated his bilateral knee osteoarthritis, and has caused him significant physical disability at this time that will require significant time off work to undergo recommended knee surgeries.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his bilateral knees.

2. Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits to treat his bilateral knees. The treatment received by Claimant on or after October 28, 2014 for his bilateral knees and provided by Dr. Klein and any provider to whom Dr. Klein referred Claimant is authorized.

3. All medical benefits shall be paid in accordance with the Division medical fee schedule.

4. Respondents are liable for 33.33 percent of all medical benefits and any compensation awarded in this claim as a result of Claimant's work activities and contribution of his work activities to his occupational disease.

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 4, 2016 /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. 4-973-619-01

ISSUES

- Did Claimant establish by a preponderance of the evidence that she is entitled to Temporary Total Disability benefits from January 29, 2105 and continuing until terminated by law?

- If so, did Respondents establish that Claimant was responsible for her termination as an affirmative defense to the claim for TTD benefits?

PROCEDURAL STATUS

The undersigned ALJ issued Findings of Fact, Conclusions of Law and Order on February 5, 2016. Claimant filed a Motion for Corrected Order on or about February 10, 2016 regarding the TTD rate specified in the Order. No opposition was filed to the Motion for Corrected Order.

The ALJ finds good cause exists for the issuance of the Corrected Findings of Fact, Conclusions of Law and Order as the Findings of Fact reflected the correct TTD rate, but an inadvertent typographical error was present in the Order. Section 8-43-302(1)(a), C.R.S.

STIPULATION

1. The parties stipulated that Claimant's average weekly wage (AWW) was $255.42 per week.

FINDINGS OF FACT

1. Claimant began working for Employer on September 30, 2014[1]. She performed various job duties, including cashier, making pizzas, delivery and cleaning the store. Claimant worked at the Boulder store and her normal shift was 10:00 a.m. to 5:00 p.m.

2. The parties stipulated Claimant's average weekly wage (AWW) at the time of her injury was $255.42 per week. The stipulation was accepted by the ALJ. Based upon this stipulation, Claimant's TTD rate was $170.28 per week.

3. Claimant suffered an admitted industrial injury on January 12, 2015, when she slipped and fell on ice in the parking lot of Employer. Claimant testified she heard a pop when she injured her right knee.

[1] This was documented in the timecard records (Exhibit K, page 165), as well as Claimant's testimony.

4. Claimant advised her manager on duty that day (Lowell Hines) she had been injured. She was initially able to work after the injury, but felt pain in her knee. When she came into work the next day, Claimant reiterated to her manager on duty (Scott) she had been injured and Misty Holden (area supervisor) called her later that day.

5. Claimant was evaluated by Felix Meza, M.D. at Concentra Medical Center (Boulder) on January 14, 2015. Dr. Meza was the ATP for Employer. Claimant told Dr. Meza she slipped on the ice, after which she heard a popping noise and experienced immediate pain in her knee. She had pain along the medial aspect of the right knee. On examination, Claimant's right knee had swelling, but no deformity. Dr. Meza's assessment was right knee injury and he prescribed Ibuprofen, gentle exercises and RICE (Rest, ice and elevation).

6. Dr. Meza issued the following restrictions on 1/14/15: must use crutches (100% of the time); no squatting or kneeling; may not walk on uneven terrain; no climbing stairs; sitting duty only; unable to drive company vehicle. Dr. Meza completed an M-164 form documenting those restrictions. The ALJ infers that Dr. Meza's restrictions were provided to Employer, as Claimant was put on light duty.

7. Claimant testified she worked light duty after her injury, which included answering phones and folding pizza boxes. She said she had to move between two (2) work stations, which were approximately 5-6 feet apart.

8. On January 15, 2015, Claimant returned to Dr. Meza and had continued complaints of right knee pain. Swelling was noted, along with limited range of motion in all planes. Diffuse tenderness was appreciated along the anteromedial aspect and medial joint line. No crepitus was found. Dr. Meza's assessment and limitations were the same as the 1/14/15 appointment. Claimant was given a prescription for Vicodin and an MRI was ordered.

9. Claimant was next seen by Dr. Meza on January 20, 2015. She continued to have pain along the medial aspect of the knee. Dr. Meza observed reduced swelling and point tenderness along the medial aspect of the knee joint line and the anteromedial aspect of the knee, along with limitations in full flexion. Claimant had diminished straight leg raise and the McMurray's test caused pain along the medial aspect. Dr. Meza's assessment was right knee injury and he once again recommended an MRI to evaluate for MCL tear or possible meniscal injury. As part of the Physician Work Activity Status Report, Dr. Meza continued Claimant's restrictions, including must use crutches 100% of the time; no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); unable to drive company vehicle.

10. Dr. Meza examined Claimant on January 26, 2015, at which time she was complaining of right knee medial pain, as well as symptoms of stiffness and locking. Dr. Meza found limited ROM in all planes, but no crepitus. He prescribed Vicodin for Claimant and she was to begin physical therapy ("PT"). Dr. Meza continued Claimant's

restrictions, which were the same as the 1/20/15 appointment and also included the additional restriction: may not walk on uneven terrain.

11. Claimant testified she brought a copy of the reports from the doctor's office to Employer and gave these to her supervisor. She thought Ms. Vaughn received copies of the reports by fax from Concentra. The ALJ finds the Concentra Physician Work Activity Status Report listed upcoming appointments by date and time. The 1/20/15 and 1/26/15 Physician Work Activity Status Reports listed the appointment for 1/30/15 at 9:30 a.m.[2] The ALJ further finds Employer had notice of the date and time of Claimant's appointments

12. Employer's Reliability and Attendance Policy was admitted into Evidence. This policy provided in pertinent part:

> "There is a 90 day probationary period that commences the day an employee is hired-any call in (unavailability for a scheduled shift) or no call no shows during this period **WILL** result in termination. During this time it is vital that all employees report to work scheduled shifts as it determines the future of their employment.
>
> Ozark Pizza Company, LLC expects all team members to be reliable. Following the 90 day probationary period, it is still important that employees report to work when scheduled. When an employee is late or calls in, it hurts other employees as well as our customers. If you are unable to work your scheduled shift, **YOU** (not the manager) are responsible to find a suitable replacement. HotSchedules has features that facilitate this-speak with you GM or AM for details.
>
> **If you repeatedly fail to work your scheduled shifts (even shifts that were covered), you may be terminated.** [Emphasis in original.]

13. The ALJ finds Employer's Reliability and Attendance Policy applied to Claimant's employment.

14. Kaitlyn Vaughn testified (via telephone) on behalf of Employer. She was the Payroll/HR Director during the time Claimant was employed. She held this position for four (4) years. In that capacity, she oversaw the payroll function for the stores. However, Ms. Vaughn was not involved in the day-to-day operations of the stores. Her main contacts were the managers and supervisors of the stores.

15. Ms. Vaughn's other responsibility concerned work-related accidents. She reported injuries to the insurer. She would also work with managers when an employee was hurt and put the injured employee on light duty after a work injury. She had never met Claimant, but knew Claimant slipped and fell in the parking lot. Ms. Vaughn communicated with the claims representative, who in this case was Tiffany Johnson. Ms. Vaughn was aware Claimant was on light duty after her injury.

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[2] Exhibit 4, page 20, 24; Exhibit B, page 63, 67.

16. Claimant testified she had a PT appointment on 1/30/15, which she thought was scheduled at 9:30 a.m.[3] Claimant said Concentra would tell her the dates and times available and she would pick the time for her appointments. She did not believe she could change these appointments. Claimant testified she notified the manager at the Boulder store (Lowell) she had a PT appointment two days before this appointment. She also told the manager at the Lafayette store (Nick). Claimant testified that at this time she was moving from the Boulder store to the Lafayette store.

17. Claimant testified that after her therapy session ended at 10:45, she waited with the physical therapist. It was her understanding that a treatment plan was being developed. She then left Concentra at approximately 12:30 p.m.[4] She went to work at the Lafayette store. Claimant's explanation regarding why she remained after the PT session was not particularly persuasive and hurt her credibility somewhat. However, there was no evidence before the ALJ that Claimant was repeatedly late for her shifts after medical appointments or on other occasions.

18. When she arrived at work, Claimant was told that she was being suspended indefinitely. Claimant testified she discussed the fact that she had an appointment with Ms. Holden and they were developing a treatment plan. Claimant said Ms. Holden said she was not being truthful. She has not returned to work for Employer.

19. Ms. Vaughn testified regarding Claimant's termination. She stated she could compare the hours worked by an employee with the schedule on the Employer's system. However, Ms. Vaughn did not have a specific recollection that she made this comparison concerning Claimant in this case. The ALJ notes no testimony was elicited from Ms. Vaughn concerning the specific provisions of the Reliability and Attendance Policy which concerned non-probationary employees. In particular, no testimonial or documentary evidence was before the ALJ as to whether Claimant "repeatedly" failed to work her scheduled shifts.

20. Ms. Vaughn testified she was generally familiar with the Concentra Physician Work Activity Status Report. She had copies of those reports available to her. Ms. Vaughn stated Claimant was required to tell her manager about her appointment. However, Ms. Vaughn had no information whether Claimant told either manager, Lowell Hines (Boulder) or Nick (Lafayette) about her appointment. There was no evidence that Ms. Vaughn took steps to try to verify this fact when the decision to terminate Claimant was made. Ms. Vaughn was less credible because she failed to articulate a cogent explanation for Claimant's termination and why it comported with Employer's policies.

21. Claimant was terminated on January 30, 2015. At the time of her termination, Claimant was no longer a probationary employee.

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[3] The records for this PT session were admitted into evidence. Sarah Coughlin, PT was the therapist for Claimant. Claimant's vital signs were recorded at 9:42 a.m. that day.

[4] Although, Ms. Coughlin's therapy note was dictated at 12:33 p.m., there was no notation which documented when the PT session was finished.

22. A letter was sent to Claimant by Ms. Vaughn which stated Claimant was "no call, no show" for her scheduled 10-2 light duty shift. This was characterized as a terminable offense. Ms. Vaughn's letter stated Claimant's failure to appear for her shift or to call in violated Employer's Reliability and Attendance Policy and her employment was terminated. The letter was sent by certified mail. The ALJ infers Claimant was terminated under the "no call, no show" provision of the policy and this portion of the policy was relied upon by Employer when the decision to terminate Claimant was made. By the express terms of this policy, it was unclear whether one occurrence of a "no call, no show" subjected non-probationary employees like Claimant to immediate termination.

23. At the time of her termination, Claimant's restrictions from Dr. Meza included: must use crutches 100% of the time no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); may not walk on uneven terrain, unable to drive company vehicle. The ALJ infers Claimant could not perform her regular job duties, particularly the requirement that she use crutches 100% of the time and was required to sit 100% of the time.

24. On February 4, 2015, Dr. Meza examined Claimant at which time he noted swelling but no deformity in her knee. Diffuse tenderness was found at the anteromedial aspect, medial joint line. There was a positive medial McMurray test. Dr. Meza's assessment was right knee injury. More particularly, he suspected meniscal tear v. MCL injury. Dr. Meza once again recommended an MRI and kept Claimant's work restrictions[5] in place.

25. Claimant returned to Concentra on February 12, 2015 and was seen by Jeffery Winkler, M.D. At that time, she still had pain across the medial line and described a catching/locking feeling in the knee. Dr. Winkler noted that an MRI was ordered and made a referral to an orthopedic surgeon.

26. Insurer filed a General Admission of Liability ("GAL") on or about February 17, 2015. This was a medical only GAL, which stated Claimant was being provided modified duty.

27. Claimant was evaluated by Dr. Meza on February 19, 2015. Diffuse tenderness was noted at the anteromedial aspect and medial joint line. Claimant had limited ROM in all planes. Positive laxity was found on the valgus stress test, along with positive medial and lateral McMurray test. Claimant was going to be seen by an orthopedic surgeon and her work restrictions of no squatting or kneeling, unable to drive company vehicle, sitting 50% of time, limited stairs were continued.

28. On February 23, 2015, Claimant was examined by Joseph Hsin, M.D. to whom she was referred by Dr. Meza. Claimant had dull, throbbing pain in the right knee

[5] This report noted Claimant apparently had a non-work injury of her upper extremity (rotator cuff) and had restrictions from the treating provider after surgery in 2015. Claimant confirmed this in her testimony. However, the ALJ had no further information regarding these restrictions and was unable to determine what impact, if any, these would have on Claimant's wage loss.

and failed conservative management. On examination, Dr. Hsin noted mild swelling, positive medial McMurray test and limitations in range of motion. Dr. Hsin recommended an MRI.

29. Claimant continued to receive physical therapy at Concentra through February 25, 2015. The physical therapy records documented continued symptoms in her right knee.

30. An MRI was done of Claimant's right knee on March 6, 2015. The films were read by Craig Stewart, M.D. Dr. Stewart noted thickening along the tibial collateral ligament, as well as a small joint effusion. Dr. Stewart's impression was Grade II MCL sprain; thickening and low signal within and adjacent to the tibial collateral ligament; intact medial meniscus. He recommended radiographic correlation.

31. Dr. Hsin saw Claimant in follow-up on March 10, 2015 and reviewed the results of the MRI scan. Claimant had a grade 2 MCL sprain, but no meniscus tear. She had mild chondromalacia in the lateral plateau. Dr. Hsin did not recommend a surgical procedure and recommended Claimant return to PT for MCL protocol.

32. On March 16, 2015, Dr. Meza saw Claimant at which time she was complaining of moderate pain, particularly with activity. Dr. Meza observed swelling in the right knee, but no deformity. Tenderness was found at the medial joint line and medial collateral ligament. Positive laxity was noted, but there was a negative Lachman's test and negative patellar grind. Dr. Meza's assessment was knee MCL sprain and right knee injury.

33. The ALJ credits Dr. Meza's opinion regarding Claimant's restrictions, as he had the opportunity to evaluate her on multiple occasions from 1/14/15 through 3/16/15. Dr. Meza recorded objective findings with regard to Claimant's right knee on several occasions (including swelling, positive McMurray test, positive valgus stress tests etc.) at various examinations during this period. Dr. Meza's findings established Claimant was disabled during the time he was treating her.

34. Claimant's care was transferred to Sander Orent, M.D. at Arbor Occupational Medicine, who evaluated her on April 1, 2015. After a review of Claimant's history, Dr. Orent found looseness in the MCP, which was minimal. She had an effusion in the joint, which was tender to palpation. Dr. Orent thought she had an undisclosed meniscal tear creating impingement. He referred Claimant for a second orthopedic opinion. Dr. Orent issued a 10 lb. lifting restriction and limited Claimant to sedentary work.

35. Claimant was examined by Eric McCarty, M.D. at the University of Colorado on April 23, 2015 to whom she was referred by Dr. Orent. Claimant reported feelings of instability along with catching and locking. Dr. McCarty noted pain on the valgus stress test and opined that some of her symptoms were related to the MCL injury, which was Grade II as shown by the MRI. Dr. McCarty also thought she could have intraarticular issues, including a cartilage issue, which was why arthroscopy would

be reasonable. Dr. McCarty discussed that it could take time for her symptoms to resolve, as well as the risks/benefits of the arthroscopy.

36. Claimant returned to Dr. Orent on April 29, 2015 after seeing Dr. McCarty, who was planning to perform surgery. Claimant's MCL was relatively tight and an effusion was once again noted. Dr. Orent sent a letter, dated June 2, 2015, appealing the denial of the surgery.

37. After missing a couple of appointments, Claimant returned to Dr. Orent on August 12, 2015 after a pain management referral was denied. Dr. Orent found a positive patellar grind, along with a possible effusion in the joint. Dr. Orent's impression was patient with significant knee issues with a probable torn meniscus. Dr. Orent prescribed pain medication.

38. Mark Failinger, M.D. performed an IME at the request of Respondents on August 17, 2015. Claimant's history was reviewed, including the fact that she had no history of prior injury, treatment or surgery to the right knee. Claimant advised Dr. Failinger she typically would deliver anywhere from 10-15 pizzas, as well as assisting in making pizzas and clean-up. Claimant reported she had pain, popping and catching in the knee since her fall. Dr. Failinger found no crepitus or effusion upon examination, nor was there instability. Dr. Failinger's impression was right knee strain of the MCL with chondromalacia of the lateral femoral condyle.

39. Dr. Failinger opined arthroscopic surgery was not medically necessary as it had a low probability of helping the patient with multiple risk factors. Claimant was morbidly obese and he did not see any obvious lesions which would be improved by surgery. Dr. Failinger stated the medial collateral ligament would heal on its own and there was no surgery for that. He opined that Claimant's chondromalacia was pre-existing and her pain was dramatically out of proportion to her MRI findings. Dr. Failinger believed reasonable treatment would include a cortisone injection and possibly viscosupplementation.

40. Claimant returned to Dr. Orent on September 2, 2015 after the IME with Dr. Failinger. Dr. Orent was in agreement with the recommendations for injection and viscosupplementation as initial therapy, which he was going to implement. He disagreed Claimant was a poor surgical candidate. Dr. Orent once again noted pain in the medial aspect of the knee and marked patellar grind. Dr. Orent reiterated his opinion that Claimant required pain management, given the fact that she continued to require narcotic pain medications. Claimant's work restrictions included 10 lb. lifting restriction; no crawling, kneeling squatting or climbing; and seated work.

41. Dr. Orent evaluated Claimant on September 23, 2015 and noted she had been approved for intraarticular injections. He also found Claimant was experiencing substantial anxiety and opined she needed to be evaluated by a psychiatrist and counselor, including a Dr. Moe. Dr. Orent continued Claimant's work restrictions.

42. Claimant was examined by Peter Mars, M.D. on October 7, 2015, after receiving a cortisone injection administered by Dr. McCarty. As found by Dr. Mars, Claimant had a normal gait, but limitations in right knee ROM, as well as mild crepitus. The McMurray test was equivocal. Dr. Mars' diagnosis was right knee injury and anxiety. He refilled diazepam and recommended a follow-up for treatment of her anxiety.

43. On October 28, 2015, Claimant was seen by Dr. Orent, who noted Claimant was approved to see Dr. Moe. Dr. Orent found there was an interaction between Cymbalta and the narcotics she was taking. The goals were to stabilize her pain, reduce the narcotics and to address the anxiety issue. Dr. Orent stated Claimant was not working and opined she was not capable of working. This was due to high doses of narcotics which precluded her driving, operating machinery or being around the public. The ALJ credits Dr. Orent's opinion that Claimant's high dose narcotics would have prevented from doing her job at Employer.

44. Claimant had work restrictions related to her right knee through 10/28/15 and there was no evidence before the ALJ that these have been lifted.

45. None of Claimant's treating physicians put her at MMI with regard to her right knee.

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

CONCLUSIONS OF LAW

Generally

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

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

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

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

Temporary Total Disability Benefits

Claimant seeks an award of TTD benefits from December 29, 2015 and continuing until terminated by law. The ALJ concluded Claimant was entitled to this award of benefits. In order to come to this conclusion, a two-part analysis was applied by the ALJ; first, did Claimant prove her entitlement to TTD benefits. Second, the question of whether Respondents established their affirmative defense was evaluated.

Claimant argued she was entitled to TTD benefits because she was on light duty and had work restrictions as a direct result of her work injury. She claimed she sustained a wage loss as a direct result of her industrial injury and she has not returned to work. Claimant also disputed Employer's version of events leading to her termination.

Claimant had the burden of proving that she was entitled to TTD benefits by a preponderance of the evidence. Section 8-42-103(1)(a), C.R.S. This provision required Claimant to establish a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). 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). In this case, Claimant established a disability directly related to her industrial injury.

As of January 30, 2015, the effects of the industrial injury precluded the Claimant from performing her job duties for Employer. As found, Claimant sustained an injury to her right knee, which resulted in work restrictions. With these restrictions, Claimant could not perform various aspects of her job. Her work restrictions (as of 1/30/15) precluded her from making pizzas, delivery, and cleaning. Dr. Meza documented these restrictions. (Findings of Fact Nos. 6, 8, 9,10). Dr. Orent also issued work restrictions. (Findings of Fact Nos. 34, 40, 41). In addition to the restrictions, Dr. Orent opined the narcotics Claimant was taking prevented her from returning to work. (Finding of Fact No. 43).

Respondents did not dispute that Drs. Meza, Orent and other authorized treating physicians issued work restrictions, nor that these restrictions were related to the work injury. Therefore, Claimant proved her injury caused a disability lasting more than three shifts and her disability caused an actual wage loss.

The inquiry then turned to whether Respondents established the affirmative defense of Claimant's responsibility for her termination. Respondents contended Claimant was responsible for her termination because she failed to contact her manager to advise that she had the PT appointment on January 30th and would be late for her shift. Respondents submitted the testimony of Ms. Vaughn to support the argument that Claimant violated company policy and was subject to termination. Respondents argued Claimant's testimony was inconsistent and pointed to several medical appointments where she did not appear as scheduled as evidence that she failed to call in as required.

This defense is governed by the termination statutes, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) and its progeny. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Sections 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. 2013. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.;* See also *Apex Trans., Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 631 (Colo. App. 2014)

In *Anderson*, the Colorado Supreme Court construed § 8-42-105(4), C.R.S., holding that a termination for cause may bar temporary disability benefits. More particularly, the Court noted the statute bars "TTD wage loss claims when voluntary or for-cause termination of modified employment causes wage loss, but not when the worsening of a prior work-related injury causes wage loss." *Anderson v. Longmont Toyota, supra*, 102 P.3d at 325-326.

Anderson was followed by *Grisbaum v. ICAO,* 109 P.3d 1055 (Colo. App. 2005). In *Grisbaum*, Claimant suffered a compensable back injury in June 2001, but continued to work with no restrictions until he voluntarily resigned in January 2002. In May 2002, the Claimant was completely restricted from working due to his June 2001 injury and because he underwent two surgeries. The ALJ determined that § 8-42-105(4) barred Claimant from receipt of TTD benefits, which was affirmed by the Industrial Claims Appeals Office and that decision was initially affirmed by the Colorado Court of Appeals. However, the opinion was vacated after the issuance of *Anderson v. Longmont Toyota*. The Colorado Court of Appeals held that *Anderson* applied equally to scenarios involving regular or modified employment when there is "a worsening of condition or the development of a disability after the termination." *Grisbaum v. ICAO, supra, 109 P.3d 1056.* Accordingly, the Court remanded the case for an appropriate award of TTD benefits.

Most recently, the Colorado Court of Appeals decided *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 630. In *Apex*, Claimant worked as a truck driver for Apex for five and a half years before sustaining an injury to his shoulder. Claimant initially did not receive medical treatment for this injury, but self-medicated by obtaining a pain pill from his brother. After Claimant's symptoms persisted, he reported the injury and went to the ATP for the employer. Claimant initially had no restrictions and could return to work. Claimant was then terminated for a violation of the employer's "zero tolerance" drug policy, as he had a positive drug test (from the pain pill he got from his brother). Subsequently, a physician took Claimant off work. Claimant requested a hearing, seeking TTD benefits.

The ALJ found that Claimant's termination from employment was volitional (violation of the drug policy) and Claimant failed to establish that his condition had worsened after he was terminated. On appeal, the Panel reversed the decision, concluding that the ALJ's factual findings would support the conclusion that Claimant's condition had worsened and he would be entitled to TTD. The Panel remanded the case and on remand, the ALJ awarded TTD benefits. The Court of Appeals then reviewed the Final Order and concluded that the Panel exceeded its authority by re-weighing the evidence. The Court concluded that factual determinations were within the purview of the ALJ and substantial evidence supported the ALJ's findings in the case. The Court reversed and ordered that the ALJ's original findings be reinstated. *Apex Trans. Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 633.

In order to establish this defense, Respondents must prove the Claimant was responsible for her separation from employment. This requires a finding of fault on the part of Claimant. A finding of fault requires a volitional act or some degree of control by a Claimant of the circumstances that led to her termination. *Gilmore v. Indus. Claims Appeals Office,* 187 P.3d 1129, 1132 (Colo. App 2008) [employee smoked cannabis 4 days before accident which was deemed a volitional act].

In the case at bar, Respondents failed to prove that Claimant's volitional conduct led to her termination or that she was responsible for the circumstances which led to her termination. Although Claimant's explanation as to why she stayed at Concentra on 1/30/15 was not completely clear, the reason Claimant was late for work was directly related to her industrial injury and the concomitant medical treatment. Also, Claimant's testimony that she did not have a lot of flexibility with regard to PT appointments at Concentra was credible. (Finding of Fact No. 16). There was insufficient evidence that Claimant had more than a modicum of control over her modified duty and her PT appointments. Therefore, it cannot be said that Respondents proved that Claimant engaged in volitional conduct that caused her termination or controlled the circumstances that resulted in her termination.

Furthermore, there was no evidence that Claimant violated company policy or a directive from her managers (or Ms. Holden or Ms. Vaughn) related to the PT

appointment and her late arrival on 1/30/15. (Finding of Fact No. 22). In fact, Ms. Vaughn's testimony failed to delineate what Claimant's obligations were under the Employer's policies. The evidence concerning a potential violation of the Reliability and Attendance Policy was ambiguous at best and did not prove Claimant's conduct was voluntary.

Also, there was no direct evidence Claimant was required to inform management of upcoming appointments. Thus, while it is true that Ms. Vaughn could not be expected to know each appointment Claimant had, the inquiry does not end there. At the time she was involved in the termination decision, there was no evidence Ms. Vaughn determined what the store managers were told by Claimant or whether the stores got a copy of the Physician Work Activity Status Reports. Ms. Vaughn did not talk to Claimant. Without this evidence, Respondents' quantum of proof fell short of what was required.

In addition, since Claimant was no longer a probationary employee, Respondents were required to show that she engaged in volitional conduct and repeatedly failed to work her shifts (or was tardy for her shifts). There was no evidence before the ALJ that this was the case.

Finally, Ms. Vaughn's testimony did not provide a link between the stated reason for termination ("no call, no show"), Employer's policies and Claimant's conduct. As found, Ms. Vaughn did not talk directly with Claimant, nor did she discuss an attendance issue with either manager. (Finding of Fact No. 20). Ms. Vaughn's testimony did not elucidate whether she had considered that portion of the policy which seemed to require repeated violations after the employee was no longer considered probationary or whether an employee was subject to immediate termination for failing to appear for a shift or call beforehand. As Employer's sole management witness, Ms. Vaughn's testimony needed to establish that Claimant volitionally violated company policy or was subject to immediate termination for being late on January 30th. Without this evidence, Respondents failed to establish a crucial element of the termination defense. Therefore, Respondents failed to meet their burden of proof.

This case is factually distinct from *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra* and *Gilmore v. Indus. Claims Appeals Office, supra,* where Respondents were able to adduce clear evidence of volitional conduct and the resulting termination. Respondents were not able to make such a showing in the instant case. Without evidence linking the two, Claimant is entitled to TTD benefits despite the fact she was terminated. Claimant is entitled to TTD from January 30, 2015[6] until terminated by law.

[6] Since 1/30/15 was the date of termination and there was no evidence Claimant was paid for work that day, the ALJ determined this as the date TTD benefits should commence.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits at the rate of $170.28 per week from January 30, 2015 and continuing until terminated by law.

2. Respondents 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, 2016

Digital signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-973-619-01

ISSUES

- Did Claimant establish by a preponderance of the evidence that she is entitled to Temporary Total Disability benefits from January 29, 2105 and continuing until terminated by law?

- If so, did Respondents establish that Claimant was responsible for her termination as an affirmative defense to the claim for TTD benefits?

STIPULATION

1. The parties stipulated that Claimant's average weekly wage (AWW) was $255.42 per week.

FINDINGS OF FACT

1. Claimant began working for Employer on September 30, 2014[1]. She performed various job duties, including cashier, making pizzas, delivery and cleaning the store. Claimant worked at the Boulder store and her normal shift was 10:00 a.m. to 5:00 p.m.

2. The parties stipulated Claimant's average weekly wage (AWW) at the time of her injury was $255.42 per week. The stipulation was accepted by the ALJ. Based upon this stipulation, Claimant's TTD rate was $170.28 per week.

3. Claimant suffered an admitted industrial injury on January 12, 2015, when she slipped and fell on ice in the parking lot of Employer. Claimant testified she heard a pop when she injured her right knee.

4. Claimant advised her manager on duty that day (Lowell Hines) she had been injured. She was initially able to work after the injury, but felt pain in her knee. When she came into work the next day, Claimant reiterated to her manager on duty (Scott) she had been injured and Misty Holden (area supervisor) called her later that day.

5. Claimant was evaluated by Felix Meza, M.D. at Concentra Medical Center (Boulder) on January 14, 2015. Dr. Meza was the ATP for Employer. Claimant told Dr. Meza she slipped on the ice, after which she heard a popping noise and experienced immediate pain in her knee. She had pain along the medial aspect of the right knee. On examination, Claimant's right knee had swelling, but no deformity. Dr. Meza's

[1] This was documented in the timecard records (Exhibit K, page 165), as well as Claimant's testimony.

assessment was right knee injury and he prescribed Ibuprofen, gentle exercises and RICE (Rest, ice and elevation).

6. Dr. Meza issued the following restrictions on 1/14/15: must use crutches (100% of the time); no squatting or kneeling; may not walk on uneven terrain; no climbing stairs; sitting duty only; unable to drive company vehicle. Dr. Meza completed an M-164 form documenting those restrictions. The ALJ infers that Dr. Meza's restrictions were provided to Employer, as Claimant was put on light duty.

7. Claimant testified she worked light duty after her injury, which included answering phones and folding pizza boxes. She said she had to move between two (2) work stations, which were approximately 5-6 feet apart.

8. On January 15, 2015, Claimant returned to Dr. Meza and had continued complaints of right knee pain. Swelling was noted, along with limited range of motion in all planes. Diffuse tenderness was appreciated along the anteromedial aspect and medial joint line. No crepitus was found. Dr. Meza's assessment and limitations were the same as the 1/14/15 appointment. Claimant was given a prescription for Vicodin and an MRI was ordered.

9. Claimant was next seen by Dr. Meza on January 20, 2015. She continued to have pain along the medial aspect of the knee. Dr. Meza observed reduced swelling and point tenderness along the medial aspect of the knee joint line and the anteromedial aspect of the knee, along with limitations in full flexion. Claimant had diminished straight leg raise and the McMurray's test caused pain along the medial aspect. Dr. Meza's assessment was right knee injury and he once again recommended an MRI to evaluate for MCL tear or possible meniscal injury. As part of the Physician Work Activity Status Report, Dr. Meza continued Claimant's restrictions, including must use crutches 100% of the time; no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); unable to drive company vehicle.

10. Dr. Meza examined Claimant on January 26, 2015, at which time she was complaining of right knee medial pain, as well as symptoms of stiffness and locking. Dr. Meza found limited ROM in all planes, but no crepitus. He prescribed Vicodin for Claimant and she was to begin physical therapy ("PT"). Dr. Meza continued Claimant's restrictions, which were the same as the 1/20/15 appointment and also included the additional restriction: may not walk on uneven terrain.

11. Claimant testified she brought a copy of the reports from the doctor's office to Employer and gave these to her supervisor. She thought Ms. Vaughn received copies of the reports by fax from Concentra. The ALJ finds the Concentra Physician Work Activity Status Report listed upcoming appointments by date and time. The 1/20/15 and 1/26/15 Physician Work Activity Status Reports listed the appointment for

1/30/15 at 9:30 a.m.[2] The ALJ further finds Employer had notice of the date and time of Claimant's appointments

12. Employer's Reliability and Attendance Policy was admitted into Evidence. This policy provided in pertinent part:

> "There is a 90 day probationary period that commences the day an employee is hired-any call in (unavailability for a scheduled shift) or no call no shows during this period **WILL** result in termination. During this time it is vital that all employees report to work scheduled shifts as it determines the future of their employment.
>
> Ozark Pizza Company, LLC expects all team members to be reliable. Following the 90 day probationary period, it is still important that employees report to work when scheduled. When an employee is late or calls in, it hurts other employees as well as our customers. If you are unable to work your scheduled shift, **YOU** (not the manager) are responsible to find a suitable replacement. HotSchedules has features that facilitate this-speak with you GM or AM for details.
>
> **If you repeatedly fail to work your scheduled shifts (even shifts that were covered), you may be terminated.** [Emphasis in original.]

13. The ALJ finds Employer's Reliability and Attendance Policy applied to Claimant's employment.

14. Kaitlyn Vaughn testified (via telephone) on behalf of Employer. She was the Payroll/HR Director during the time Claimant was employed. She held this position for four (4) years. In that capacity, she oversaw the payroll function for the stores. However, Ms. Vaughn was not involved in the day-to-day operations of the stores. Her main contacts were the managers and supervisors of the stores.

15. Ms. Vaughn's other responsibility concerned work-related accidents. She reported injuries to the insurer. She would also work with managers when an employee was hurt and put the injured employee on light duty after a work injury. She had never met Claimant, but knew Claimant slipped and fell in the parking lot. Ms. Vaughn communicated with the claims representative, who in this case was Tiffany Johnson. Ms. Vaughn was aware Claimant was on light duty after her injury.

16. Claimant testified she had a PT appointment on 1/30/15, which she thought was scheduled at 9:30 a.m.[3] Claimant said Concentra would tell her the dates and times available and she would pick the time for her appointments. She did not believe she could change these appointments. Claimant testified she notified the manager at the Boulder store (Lowell) she had a PT appointment two days before this

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[2] Exhibit 4, page 20, 24; Exhibit B, page 63, 67.

[3] The records for this PT session were admitted into evidence. Sarah Coughlin, PT was the therapist for Claimant. Claimant's vital signs were recorded at 9:42 a.m. that day.

appointment. She also told the manager at the Lafayette store (Nick). Claimant testified that at this time she was moving from the Boulder store to the Lafayette store.

17. Claimant testified that after her therapy session ended at 10:45, she waited with the physical therapist. It was her understanding that a treatment plan was being developed. She then left Concentra at approximately 12:30 p.m.[4] She went to work at the Lafayette store. Claimant's explanation regarding why she remained after the PT session was not particularly persuasive and hurt her credibility somewhat. However, there was no evidence before the ALJ that Claimant was repeatedly late for her shifts after medical appointments or on other occasions.

18. When she arrived at work, Claimant was told that she was being suspended indefinitely. Claimant testified she discussed the fact that she had an appointment with Ms. Holden and they were developing a treatment plan. Claimant said Ms. Holden said she was not being truthful. She has not returned to work for Employer.

19. Ms. Vaughn testified regarding Claimant's termination. She stated she could compare the hours worked with the schedule on the Employer's system. However, Ms. Vaughn did not have a specific recollection that she made this comparison. The ALJ notes that no testimony was elicited from Ms. Vaughn concerning the specific provisions of the Reliability and Attendance Policy which concerned non-probationary employees. In particular, no testimonial or documentary evidence was before the ALJ as to whether Claimant "repeatedly" failed to work her scheduled shifts.

20. Ms. Vaughn testified she was generally familiar with the Concentra Physician Work Activity Status Report. She had copies of those reports available to her. Ms. Vaughn stated Claimant was required to tell her manager about her appointment. However, Ms. Vaughn had no information whether Claimant told either managers, Lowell Hines (Boulder) or Nick (Lafayette) about her appointment. There was no evidence that Ms. Vaughn took steps to try to verify this fact when the decision to terminate Claimant was made. Ms. Vaughn was less credible because she failed to articulate a cogent explanation for Claimant's termination and why it comported with Employer's policies.

21. Claimant was terminated on January 30, 2015. At the time of her termination, Claimant was no longer a probationary employee.

22. A letter was sent to Claimant by Ms. Vaughn which stated Claimant was "no call, no show" for her scheduled 10-2 light duty shift. This was characterized as a terminable offense. Ms. Vaughn's letter stated Claimant's failure to appear for her shift or to call in violated Employer's Reliability and Attendance Policy and her employment was terminated. The letter was sent by certified mail. The ALJ infers Claimant was terminated under the "no call, no show" provision of the policy and this portion of the policy was relied upon by Employer when the decision to terminate Claimant was made.

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[4] Although, Ms. Coughlin's therapy note was dictated at 12:33 p.m., there was no notation which documented when the PT session was finished.

By the express terms of this policy, it was unclear whether one occurrence of a "no call, no show" subjected non-probationary employees like Claimant to immediate termination.

23. At the time of her termination, Claimant's restrictions from Dr. Meza included: must use crutches 100% of the time no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); may not walk on uneven terrain, unable to drive company vehicle. The ALJ infers Claimant could not perform her regular job duties, particularly with the requirement that she use crutches 100% of the time and was required to sit 100% of the time.

24. On February 4, 2015, Dr. Meza examined Claimant at which time he noted swelling but no deformity in her knee. Diffuse tenderness was found at the anteromedial aspect, medial joint line. There was a positive medial McMurray test. Dr. Meza's assessment was right knee injury. More particularly, he suspected mescal tear v. MCL injury. Dr. Meza once again recommended an MRI and kept Claimant's work restrictions[5] in place.

25. Claimant returned to Concentra on February 12, 2015 and was seen by Jeffery Winkler, M.D. At that time, she still had pain across the medial line and described catching/locking feeling in the knee. Dr. Winkler noted that an MRI was ordered and made a referral to an orthopedic surgeon.

26. Insurer filed a General Admission of Liability ("GAL") on or about February 17, 2015. This was a medical only GAL, which stated Claimant was being provided modified duty.

27. Claimant was evaluated by Dr. Meza on February 19, 2015. Diffuse tenderness was noted at the anteromedial aspect and medial joint line. Claimant had limited ROM in all planes. Positive laxity was found on the valgus stress test, along with positive medial and lateral McMurray test. Claimant was going to be seen by an orthopedic surgeon and her work restrictions of no squatting or kneeling, unable to drive company vehicle, sitting 50% of time, limited stairs were continued.

28. On February 23, 2015, Claimant was examined by Joseph Hsin, M.D. to whom she was referred by Dr. Meza. Claimant had dull, throbbing pain in the right knee and failed conservative management. On examination, Dr. Hsin noted mild swelling, positive medial McMurray test and limitations in range of motion. Dr. Hsin recommended an MRI.

29. Claimant continued to receive physical therapy at Concentra through February 25, 2015. The physical therapy records documented continued symptoms in her right knee.

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[5] This report noted Claimant apparently had a non-work injury of her upper extremity (rotator cuff) and had restrictions from the treating provider after surgery in 2015. Claimant confirmed this in her testimony. However, the ALJ had no further information regarding these restrictions and was unable to determine what impact, if any, these would have on Claimant's wage loss.

30. An MRI was done of Claimant's right knee on March 6, 2015. The films were read by Craig Stewart, M.D. Dr. Stewart noted thickening along the tibial collateral ligament, as well as a small joint effusion. Dr. Stewart's impression was Grade II MCL sprain; thickening and low signal within and adjacent to the tibial collateral ligament; intact medial meniscus. He recommended radiographic correlation.

31. Dr. Hsin saw Claimant in follow-up on March 10, 2015 and reviewed the results of the MRI scan. Claimant had a grade 2 MCL sprain, but no meniscus tear. She had mild chondromalacia in the lateral plateau. Dr. Hsin did not recommend a surgical procedure and recommended Claimant return to PT for MCL protocol.

32. On March 16, 2015, Dr. Meza saw Claimant at which time she was complaining of moderate pain, particularly with activity. Dr. Meza observed swelling in the right knee, but no deformity. Tenderness was found at the medial joint line and medial collateral ligament. Positive laxity was noted, but there was a negative Lachman's test and negative patellar grind. Dr. Meza's assessment was knee MCL sprain and right knee injury.

33. The ALJ credits Dr. Meza's opinion regarding Claimant's restrictions, as he had the opportunity to evaluate her on multiple occasions from 1/14/15 through 3/16/15. Dr. Meza recorded objective findings with regard to Claimant's right knee on several occasions (including swelling, positive McMurray test, positive valgus stress tests etc.) at various examinations during this period. Dr. Meza's findings established Claimant was disabled during the time he was treating her.

34. Claimant's care was transferred to Sander Orent, M.D. at Arbor Occupational Medicine, who evaluated her on April 1, 2015. After a review of Claimant's history, Dr. Orent found looseness in the MCP, which was minimal. She had an effusion in the joint, which was tender to palpation. Dr. Orent thought she had an undisclosed meniscal tear creating impingement. He referred Claimant for a second orthopedic opinion. Dr. Orent issued a 10 lb. lifting restriction and limited Claimant to sedentary work.

35. Claimant was examined by Eric McCarty, M.D. at the University of Colorado on April 23, 2015 to whom she was referred by Dr. Orent. Claimant reported feelings of instability along with catching and locking. Dr. McCarty noted pain on the valgus stress test and opined that some of her symptoms were related to the MCL injury, which was Grade II as shown by the MRI. Dr. McCarty also thought she could have intraarticular issues, including a cartilage issue, which was why arthroscopy would be reasonable. Dr. McCarty discussed that it could take time for her symptoms to resolve, as well as the risks/benefits of the arthroscopy.

36. Claimant returned to Dr. Orent on April 29, 2015 after seeing Dr. McCarty, who was planning to perform surgery. Claimant's MCL was relatively tight and an effusion was once again noted. Dr. Orent sent a letter, dated June 2, 2015, appealing the denial of the surgery.

37. After missing a couple of appointments, Claimant returned to Dr. Orent on August 12, 2015 after a pain management referral was denied. Dr. Orent found a positive patellar grind, along with a possible effusion in the joint. Dr. Orent's impression was patient with significant knee issues with a probable torn meniscus. Dr. Orent prescribed pain medication.

38. Mark Failinger, M.D. performed an IME at the request of Respondents on August 17, 2015. Claimant's history was reviewed, including the fact that she had no history of prior injury, treatment or surgery to the right knee. Claimant advised Dr. Failinger she typically would deliver anywhere from 10-15 pizzas, as well as assisting in making pizzas and clean-up. Claimant reported she had pain, popping and catching in the knee since her fall. Dr. Failinger found no crepitus or effusion upon examination, nor was there instability. Dr. Failinger's impression was right knee strain of the MCL with chondromalacia of the lateral femoral condyle.

39. Dr. Failinger opined arthroscopic surgery was not medically necessary as it had a low probability of helping the patient with multiple risk factors. Claimant was morbidly obese and he did not see any obvious lesions which would be improved by surgery. Dr. Failinger stated the medial collateral ligament would heal on its own and there was no surgery for that. He opined that Claimant's chondromalacia was pre-existing and her pain was dramatically out of proportion to her MRI findings. Dr. Failinger believed reasonable treatment would include a cortisone injection and possibly viscosupplementation.

40. Claimant returned to Dr. Orent on September 2, 2015 after the IME with Dr. Failinger. Dr. Orent was in agreement with the recommendations for injection and viscosupplementation as initial therapy, which he was going to implement. He disagreed Claimant was a poor surgical candidate. Dr. Orent once again noted pain in the medial aspect of the knee and marked patellar grind. Dr. Orent reiterated his opinion that Claimant required pain management, given the fact that she continued to require narcotic pain medications. Claimant's work restrictions included 10 lb. lifting restriction; no crawling, kneeling squatting or climbing; and seated work.

41. Dr. Orent evaluated Claimant on September 23, 2015 and noted she had been approved for intraarticular injections. He also found Claimant was experiencing substantial anxiety and opined she needed to be evaluated by a psychiatrist and counselor, including a Dr. Moe. Dr. Orent continued Claimant's work restrictions.

42. Claimant was examined by Peter Mars, M.D. on October 7, 2015, after receiving a cortisone injection administered by Dr. McCarty. As found by Dr. Mars, Claimant had a normal gait, but limitations in right knee ROM, as well as mild crepitus. The McMurray test was equivocal. Dr. Mars' diagnosis was right knee injury and anxiety. He refilled diazepam and recommended a follow-up for treatment of her anxiety.

43. On October 28, 2015, Claimant was seen by Dr. Orent, who noted Claimant was approved to see Dr. Moe. Dr. Orent found there was an interaction

between Cymbalta and the narcotics she was taking. The goals were to stabilize her pain, reduce the narcotics and to address the anxiety issue. Dr. Orent stated Claimant was not working and opined she was not capable of working. This was due to high doses of narcotics which precluded her driving, operating machinery or being around the public. The ALJ credits Dr. Orent's opinion that Claimant's high dose narcotics would have prevented from doing her job at Employer.

44. Claimant had work restrictions related to her right knee through 10/28/15 and there was no evidence before the ALJ that these have been lifted.

45. None of Claimant's treating physicians put her at MMI with regard to her right knee.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Total Disability Benefits

Claimant seeks an award of TTD benefits from December 29, 2015 and continuing until terminated by law. The ALJ concluded Claimant was entitled to this award of benefits. In order to come to this conclusion, a two-part analysis was applied

by the ALJ ; first, did Claimant prove her entitlement to TTD benefits. Second, the question of whether Respondents established their affirmative defense was evaluated.

Claimant argued she was entitled to TTD benefits because she was on light duty and had work restrictions as a direct result of her work injury. She claimed she sustained a wage loss as a direct result of her industrial injury and she has not returned to work. Claimant also disputed Employer's version of events leading to her termination.

Claimant had the burden of proving that she was entitled to TTD benefits by a preponderance of the evidence. Section 8-42-103(1)(a), C.R.S. This provision required Claimant to establish a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). 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). In this case, Claimant established a disability directly related to her industrial injury.

As of January 30, 2015, the effects of the industrial injury physically precluded the Claimant from performing her job duties for Employer. As found, Claimant sustained an injury to her right knee, which resulted in work restrictions. Her work restrictions (as of 1/30/15) precluded her from making pizzas, delivery, and cleaning. Dr. Meza documented these restrictions. (Findings of Fact Nos. 6, 8, 9,10). Dr. Orent also issued work restrictions. (Findings of Fact Nos. 34, 40, 41). In addition to the restrictions, Dr. Orent opined the narcotics Claimant was taking prevented her from returning to work. (Finding of Fact No. 43).

Respondents did not dispute that Drs. Meza, Orent and other authorized treating physicians issued work restrictions, nor that these restrictions were related to the work injury. Therefore, Claimant proved her injury caused a disability lasting more than three shifts and her disability caused an actual wage loss.

The inquiry then turned to whether Respondents established the affirmative defense of Claimant's responsibility for her termination. Respondents contended Claimant was responsible for her termination because she failed to contact her manager to advise that she had the PT appointment on January 30th and would be late for her shift. Respondents submitted the testimony of Ms. Vaughn to support the argument that

Claimant violated company policy and was subject to termination. Respondents argued Claimant's testimony was inconsistent and pointed to several medical appointments where she did not appear as scheduled as evidence that she failed to call in as required.

This defense is governed by the termination statutes, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) and its progeny. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Sections 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. 2013. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.;* See also *Apex Trans., Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 631 (Colo. App. 2014)

In *Anderson*, the Colorado Supreme Court construed § 8-42-105(4), C.R.S., holding that termination for cause may bar temporary disability benefits. More particularly, the Court noted the statute bars "TTD wage loss claims when voluntary or for-cause termination of modified employment causes wage loss, but not when the worsening of a prior work-related injury causes wage loss." *Anderson v. Longmont Toyota, supra*, 102 P.3d at 325-326.

Anderson was followed by *Grisbaum v. ICAO,* 109 P.3d 1055 (Colo. App. 2005). In *Grisbaum*, Claimant suffered a compensable back injury in June 2001, but continued to work with no restrictions until he voluntarily resigned in January 2002. In May 2002, the Claimant was completely restricted from working due to his June 2001 injury and because he underwent two surgeries. The ALJ determined that § 8-42-105(4) barred Claimant from receipt of TTD benefits, which was affirmed by the Industrial Claims Appeals Office and that decision was initially affirmed by the Colorado Court of Appeals. However, the opinion was vacated after the issuance of *Anderson v. Longmont Toyota*. The Colorado Court of Appeals held that *Anderson* applied equally to scenarios involving regular or modified employment when there is "a worsening of condition or the development of a disability after the termination." *Grisbaum v. ICAO, supra, 109 P.3d 1056.* Accordingly, the Court remanded the case for an appropriate award of TTD benefits.

Most recently, the Colorado Court of Appeals decided *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 630. In *Apex*, Claimant worked as a truck driver for Apex for five and a half years before sustaining an injury to his shoulder. Claimant initially did not receive medical treatment for this injury, but self-medicated by obtaining a pain pill from his brother. After Claimant's symptoms persisted, he reported the injury and went to the ATP for the employer. Claimant initially had no restrictions and could return to work. Claimant was then terminated for a violation of the employer's "zero tolerance" drug policy, as he had a positive drug test (from the pain pill he got from his brother). Subsequently, a physician took Claimant off work. Claimant requested a hearing, seeking TTD benefits.

The ALJ found that Claimant's termination from employment was volitional (violation of the drug policy) and Claimant failed to establish that his condition had worsened after he was terminated. On appeal, the Panel reversed the decision, concluding that the ALJ's factual findings would support the conclusion that Claimant's condition had worsened and he would be entitled to TTD. The Panel remanded the case and on remand, the ALJ awarded TTD benefits. The Court of Appeals then reviewed the Final Order and concluded that the Panel exceeded its authority by re-weighing the evidence. The Court concluded that factual determinations were within the purview of the ALJ and substantial evidence supported the ALJ's findings in the case. The Court reversed and ordered that the ALJ's original findings be reinstated. *Apex Trans. Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 633.

In order to establish this defense, Respondents must prove the Claimant was responsible for her separation from employment. This requires a finding of fault on the part of Claimant. A finding of fault requires a volitional act or some degree of control by a Claimant of the circumstances that led to her termination. *Gilmore v. Indus. Claims Appeals Office,* 187 P.3d 1129, 1132 (Colo. App 2008) [employee smoked cannabis 4 days before accident which was deemed a volitional act].

In the case at bar, Respondents failed to prove that Claimant's volitional conduct led to her termination or that she was responsible for the circumstances which led to her termination. Although Claimant's explanation as to why she stayed at Concentra on 1/30/15 was not completely clear, the reason Claimant was late for work was directly related to her industrial injury and the concomitant medical treatment. Also, Claimant's testimony that she did not have a lot of flexibility with regard to PT appointments at Concentra was credible. (Finding of Fact No. 16). There was insufficient evidence that Claimant had more than a modicum of control over her modified duty and PT appointments. Therefore, it cannot be said that Respondents proved that Claimant engaged in volitional conduct that caused her termination or controlled the circumstances that resulted in her termination.

Furthermore, there was no evidence that Claimant violated company policy or a directive from her managers (or Ms. Holden or Ms. Vaughn) related to the PT appointment and her late arrival on 1/30/15. (Finding of Fact No. 22). In fact, Ms. Vaughn's testimony failed to delineate what Claimant's obligations were under the Employer's policies. The evidence concerning a potential violation of the Reliability and Attendance Policy was ambiguous at best and did not prove Claimant's conduct was voluntary.

Also, there was no direct evidence Claimant was required to inform management of upcoming appointments. Thus, while it is true that Ms. Vaughn could not be expected to know each appointment Claimant had, the inquiry does not end there. At the time she was involved in the termination decision, there was no evidence Ms. Vaughn determined what the store managers were told by Claimant, whether the stores

got a copy of the Physician Work Activity Status Reports and she did not talk to Claimant. Without this evidence, Respondents' quantum of proof fell short of what was required.

In addition, since Claimant was no longer a probationary employee, Respondents were required to show that she engaged in volitional conduct and repeatedly failed to work her shifts (or was tardy for her shifts). There was no evidence before the ALJ that this was the case.

Finally, Ms. Vaughn's testimony did not provide a link between the stated reason for termination ("no call, no show"), Employer's policies and Claimant's conduct. As found, Ms. Vaughn did not talk directly with Claimant , nor did she discuss an attendance issue with either manager. (Finding of Fact No. 20). Ms. Vaughn's testimony did not elucidate whether she had considered that portion of the policy which seemed to require repeated violations after the employee was no longer considered probationary or whether an employee was subject to immediate termination for failing to appear for a shift or call beforehand. As Employer's sole management witness, Ms. Vaughn's testimony needed to establish that Claimant volitionally violated company policy or was subject to immediate termination for being late on January 30th. Without this evidence, Respondents failed to establish a crucial element of the termination defense.

This case is factually distinct from *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra* and *Gilmore v. Indus. Claims Appeals Office, supra,* where Respondents were able to adduce clear evidence of volitional conduct and the resulting termination. Respondents were not able to make such a showing in the case at bar. Without evidence linking the two, Claimant is entitled to TTD benefits despite the fact she was terminated. Claimant is entitled to TTD from January 30, 2015[6] until terminated by law.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits at the rate of$10.28 per week from January 30, 2015 and continuing until terminated by law.

2. Respondents 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.

[6] Since 1/30/15 was the date of termination and there was no evidence Claimant was paid for work that day, the ALJ determined this as the date TTD benefits should commence.

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, 2016

Digital signature

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

STIPULATIONS

Prior to the commencement of hearing, the parties reached the following stipulations:

1. Claimant withdrew her request for TPD benefits.

2. Respondents also requested that, if the claim was deemed compensable, any medical benefits awarded be paid in accordance with the Colorado Division of Workers' Compensation medical fee schedule. Claimant voiced no objection.

These stipulations were accepted and approved by the ALJ.

REMAINING ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a traumatic injury to her neck, back and arms arising out of and in the course and scope of her employment on February 16, 2015, and if so;

II. Whether Claimant has proven has proven by a preponderance of the evidence that the medical benefits requested are causally related to her alleged work injury on February 16, 2015, and;

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits for the following time periods: February 25, 2015 - March 11, 2015; March 24, 2015 - April 1, 2015, and May 11, 2015 and ongoing;

IV. Whether, TTD should be paid beyond June 29, secondary to Respondents' assertion that Claimant refused to accept a physician-approved modified job offered to claimant by employer pursuant to C.R.S. Section 8-42-105 (3) (d) (I).

V. Whether, Claimant's AWW is $476.56.

Because the ALJ finds that Claimant failed to establish that she sustained a compensable injury on February 16, 2015, this order does not address the remaining issued outlined above.

FINDINGS OF FACT

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

1. On February 16, 2015, the date of the alleged injury in this case, Claimant was employed by as a commercial driver for Employer.

2. Claimant began working for Employer as a commercial driver on July 27, 2014.

3. On February 16, 2015, Claimant was to drive a transit bus from the area of Vail and Avon, Colorado to Colorado Springs, Colorado after the 2015 World Alpine Skiing Championships had concluded. The weather was snowy, and all busses were to be fitted with either tire chains or snow socks for traction. The transit bus Claimant was to drive was to be fitted with snow socks. Mike Clark, a company mechanic, began installing the snow socks on the transit bus Claimant was assigned to drive. To install a snow sock, Mr. Clark needed to fit his hand and arm between a wheel guard or "mud flap." To assist Mr. Clark's effort to get his hand and arm between the wheel guard or "mud flap" on one of the transit bus's tires, Claimant pulled "mud flap" away from the bus and tire to widen the space between the wheel's tire and the mud flap. Based upon the evidence presented, the ALJ credits the testimony of Mr. Clark to find that Claimant assisted in this fashion on only one tire for a couple of minutes only.

4. The ALJ finds Claimant did not engage in activity, i.e. pulling on the wheel guard or "mud flap," that required prolonged, sustained isometric contraction of the muscles of the hands, wrists, forearms, periscapular area and low back as suggested by Dr. Timothy Hall, Claimant's medical expert. Since Dr. Hall's causation analysis is based upon the assumption that Claimant engaged in activity sufficient to cause muscular hypoxia secondary to prolonged sustained isometric contraction which, as noted above is unconvincing, the ALJ finds that Dr. Hall's causation analysis is also fatally flawed. Consequently, Dr. Hall's testimony that Claimant sustained a compensable sprain/strain of the ligaments, tendons and muscles of the arms, periscapular area and low back because she exceeded the capacity of these tissues to respond to such isometric activity is found unpersuasive.

5. The totality of the credible evidence presented persuades the ALJ that Claimant's symptoms, including the numbness and tingling in her hands in addition to her arm pain is, as Dr. Larson credibly testified, a likely consequence of pre-existing carpal tunnel syndrome, confirmed by EMG/NCV study and probably due to non-occupational factors such as Claimant's weight and her sex. Moreover, the evidence presented, including Dr. Larson's testimony convinces the ALJ that Claimant's cubital tunnel syndrome is not explained by the mechanism of injury in this case. To the contrary the ALJ credits Dr. Larson's testimony to find that the mechanism of injury, even assuming the description provided by Claimant was accurate, is unlikely to cause Claimant's asserted upper extremity complaints and conditions. Considering that Claimant was likely involved in using her hands, arms and back in the pulling on the mud flap for a "couple of minutes", the suggestion that her current complaints are all related to that activity is even more

unbelievable. Finally, the ALJ finds claimant's low back pain is probably due to the natural progression of pre-existing degenerative disc disease at L1-L2 and L5-S1 as demonstrated on x-ray obtained May 22, 2015 or persistent pain as a consequence of a fall Claimant had at work in 2014 as documented in a February 19, 2014 office visit noted from Peak Vista Community Health Centers.

6. Claimant's contention that her conditions/injuries are compensable because she was not actively seeking treatment for her back, neck, or bilateral upper extremities prior to February 16, 2015 and that her symptoms arose after the claimed incident in this case is not persuasive. Here, Claimant's medical records establish that she experienced symptoms in her right hand diagnosed as carpal tunnel syndrome that required her to seek medical care and wear a wrist splint in October 2013. She sought treatment for this condition from Peak Vista Community health Centers on November 4, 2013 (Resp. Ex. G, pg. 71). Moreover, the aforementioned prior fall resulted in low Claimant obtaining low back treatment for at least four months. Although her condition stabilized, her pain occurred "persistently". Claimant was given medication, referred to physical therapy, and excused from work as a consequence of her back pain.

7. The ALJ finds Dr. Wallace Larson's analysis and opinions, that Claimant's work activities during the installation of one snow sock did not cause any injury, to be credible and more persuasive than the opinions of Dr. Hall to the contrary.

8. The ALJ finds that claimant has failed to establish that it is more probable than not that on February 16, 2015, she suffered an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

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

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. ; *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) 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); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43 201, C.R.S.

B. 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).

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

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically pulling on a "wheel guard" in order to assist another employee in installing a snow sock on a tire as part of her duties as a bus driver for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" her employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while, or in this case shortly after performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a

finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

G. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

H. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between Claimant's work and her symptoms exists in this case does not mean there is a causal connection between Claimant's injury and her work duties.

I. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

J. As found, the ALJ conclues that the expert opinions of Dr. Larson regarding the

cause of Claimant's upper extremity and low back symptoms are credible and more persuasive than contrary opinion of Dr. Hall. As presented, the evidence does not support that Claimant sustained any injury to her hands, wrists, arms, neck or back in this case. Rather, Claimant's complaints of severe total body pain, inability to move, trouble walking, and progression of symptoms over time, when combined with her pre-existing carpal tunnel syndrome and degenerative disc disease supports a conclusion that she did not sustain an injury while pulling on a mud flap and that social factors are at play in this case, as testified to by Dr. Larson. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between her employment and the resulting condition for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish she suffered a compensable "injury" as defined by the aforementioned legal opinions, her claim is denied and dismissed. Accordingly, her claims for medical and temporary disability benefits need not be addressed.

ORDER

It is therefore ordered that:

Claimant's February16, 2015 claim for work related injuries to her low back, neck and upper extremities, including her hands, wrists and arms is denied and dismissed.

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 5, 2016

/s/ Richard M. Lamphere

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

ISSUE

Whether Claimants Rachel Archer-Reid and Ariel Dalton worked for Pace Joint Interests-Denver LLC or Chiropractic Healthcare Solutions LLC at the time of their February 3, 2015 Motor Vehicle Accident (MVA).

STIPULATIONS

The parties agreed to the following:

1. Claimants' cases should be heard at the same time because there is an identity of facts, legal issues and witnesses. It would be in the interest of judicial efficiency to consider the cases simultaneously.

2. Claimants were both injured in a MVA on February 3, 2015. They were traveling in Rachel Archer-Reid's vehicle when it was rear-ended by another vehicle.

3. Rachel Archer-Reid injured her neck, back, left knee and shoulders in the MVA.

4. Ariel Dalton injured her head, neck and back in the MVA.

5. Claimants were in the course and scope of employment when they were injured in the MVA on February 3, 2015.

6. Hanover Insurance Company was the insurance carrier for Pace Joint Interests-Denver LLC at the time of the MVA.

7. Travelers Indemnity Company was the insurance carrier for Chiropractic Healthcare Solutions LLC at the time of the MVA.

8. Both insurance carriers have denied liability for Claimants' injuries and chosen not to designate four providers as required by Workers' Compensation Rule of Procedure 8.

9. Hugh Macaulay, M.D. is designated as the primary Authorized Treating Physician (ATP) for Claimants.

FINDINGS OF FACT

1. The Joint is a franchisor of numerous chiropractic clinics operating in multiple states.

2. Phil and Erin Davis are franchisees of The Joint. They own and operate multiple chiropractic clinics located in Texas, Nevada and Colorado. The Colorado chiropractic clinics function under a separate limited liability company named Pace Joint Interests-Denver, LLC.

3. As of February 3, 2015 Pace Joint Interests-Denver LLC maintained six chiropractic clinics established as separate limited liability companies. The clinics were: Pace Joint Interests-Lakewood LLC, Pace Joint Interests-Highlands Ranch LLC, Pace Joint Interests-Southwest Plaza LLC, Pace Joint Interests–Southglenn LLC, Pace Joint Interests–Tech Center LLC and Pace Joint Interests–Parker LLC.

4. Phil and Erin Davis owned the franchised chiropractic clinics in Texas and Nevada. However, Colorado requires a licensed chiropractor to have an ownership interest in the clinical aspects of the business.

5. Chiropractic Healthcare Solutions LLC is an entity established by licensed Colorado chiropractor Dr. John Lloyd. Dr. Lloyd created the entity to satisfy the Colorado requirement that a chiropractic clinic must be owned by a licensed chiropractor.

6. Fees generated for chiropractic services are deposited into an account under Chiropractic Healthcare Solutions LLC. The fees are then placed in six separate accounts for each clinic under Pace Joint Interests-Denver, LLC. Chiropractic Healthcare Solutions LLC then receives a flat monthly fee of $400.00 per clinic for operating each facility. Each of the six clinics' operating accounts is also used to pay for Chiropractic Healthcare Solutions LLC's monthly fees and clinician salaries. After all clinical operating expenses are paid any remaining funds are placed in Pace Joint Interests-Denver, LLC.'s account.

7. Kaitlin Ko worked for Pace Joint Interests-Denver LLC to manage the six Denver Metropolitan area clinics. Ms. Ko ceased working for Pace Joint Interests-Denver LLC in September 2014. Dr. Lloyd, through Chiropractic Healthcare Solutions LLC, assumed some of her duties in exchange for an increased flat monthly fee.

8. Claimants initially worked for Pace Joint Interests-Denver LLC as Wellness Coordinators. The duties of wellness coordinators involve receptionist and front desk work at a specific clinic under the Pace Joint Interests-Denver LLC umbrella. They are paid out of the general accounts maintained by each clinic. Wellness coordinators are hired and paid by Pace Joint Interests-Denver LLC.

9. Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. executed a Management Agreement effective October 15, 2012. There are no written Management Agreements between Chiropractic Healthcare Solutions LLC and any of the other five clinics under the Pace Joint Interests-Denver LLC umbrella.

10. Under the Management Agreement, Pace Joint Interests-Lakewood, LLC is identified as the "Company" and Chiropractic Healthcare Solutions LLC, is identified

as the "P.C." In the Management Agreement the company is obligated to provide furnishings, equipment and management services to the PC for the PC to operate a chiropractic clinic. The company has the responsibility for the day-to-day administration and management of the operations of the PC excluding clinical matters. The company's management services include virtually all aspects of operating a chiropractic clinic outside of four delineated areas under article 3.2(c). These delineated areas involve clinical matters. Under article 3.3 the company is required to:

> "… employ or engage and make available to the clinic, on a non-exclusive basis, sufficient non-clinical personnel and administrative staff (collectively, Administrative Staff). The hiring, firing, disciplining and determination of compensation and benefits of the administrative staff shall be within the sole discretion of the company…."

The Management Agreement memorializes the operational accounts identified by the witnesses and the payment arrangements between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Denver, LLC.

11. The Agreement between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Denver, LLC establishes a relationship between the two entities that was confirmed by the testimony of Dr. Lloyd, Erin Davis and Dean Davenport. Mr. Davenport was associated with Pace Joint Interests-Denver LLC as the manager of clinical staff. He did not manage the chiropractors. Chiropractic Healthcare Solutions LLC, is identified as the "owner" of the six clinics under Pace Joint Interests-Denver LLC.

12. Article 18.4 of the Management Agreement specifies that the Agreement is complete and may not be changed orally but can only be amended by an agreement in writing executed by the parties. None of the witnesses identified any ambiguity in the Agreement. In fact, Mr. Davenport identified the Agreement as an accurate, clear representation of the rights and responsibilities between the parties.

13. Although the Management Agreement specifies the duties and obligations of the parties, it is a contract only between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. Mr. Davenport explained that no written management agreements have been executed between Chiropractic Healthcare Solutions LLC and any of the other Denver Metropolitan area chiropractic clinics under Pace Joint Interests-Denver LLC. He simply remarked that the agreements had never been completed. Part-owner of Pace Joint Interests-Denver LLC Ms. Davis agreed that there are no management agreements in place for the other five Denver Metropolitan area chiropractic clinics because there was "simply a paperwork oversight."

14. Mr. Davenport acknowledged that the Management Agreement specifically states that the obligations of the parties are limited to the four corners of the Agreement. Nevertheless, he maintained that the Management Agreement functions as the exact agreement between Chiropractic Healthcare Solutions LLC and the other five

Denver Metropolitan area chiropractic clinics under the Pace Joint Interests-Denver LLC umbrella.

15. Mr. Davenport testified that, after Ms. Ko ceased employment with Pace Joint Interests-Denver LLC in September 2014, Pace Joint Interests-Denver LLC entered into a verbal agreement with Chiropractic Healthcare Solutions LLC through Dr. Lloyd. Essentially the verbal modification provided that Chiropractic Healthcare Solutions, LLC would assume marketing duties and wellness coordinator training duties as well as handle the clinical components of operating the six Pace Joint Interests-Denver, LLC clinics. Dr. Lloyd agreed that Chiropractic Healthcare Solutions, LLC assumed marketing duties and wellness coordinator training duties after Ms. Ko ceased working. In exchange for assuming the marketing duties, Pace Joint Interests-Denver LLC paid Chiropractic Healthcare Solutions LLC an additional $200.00 per month. Pace Joint Interests-Denver, LLC also increased the fees it paid to Chiropractic Healthcare Solutions LLC from $400.00 to $500.00 each month for assuming the wellness coordinator training duties. Ms. Davis also agreed that there was a verbal agreement between Pace Joint Interests-Denver LLC and Chiropractic Healthcare Solutions LLC. Dr. Lloyd would assume some marketing and management services that had been performed by Pace Joint Interests-Denver LLC before the departure of Ms. Ko. Ms. Davis also acknowledged that Chiropractic Healthcare Solutions LLC received an additional fee for assuming the marketing and management duties.

16. In consultation with part-owner of Pace Joint Interests-Denver LLC Phil Davis, Dr. Lloyd decided to hire Claimants to perform the management duties and wellness coordinator training duties that Chiropractic Healthcare Solutions LLC had assumed pursuant to the verbal agreement. Claimants reduced their hours as Wellness Coordinators for Pace Joint Interests-Denver LLC so that they could assume the additional responsibilities for Chiropractic Healthcare Solutions LLC. Claimants became marketers and managers for all six clinics under the Pace Joint Interests-Denver LLC umbrella. They received a higher hourly wage for their additional duties than they had in their roles of Wellness Coordinators. While working as Wellness Coordinators at individual clinics Claimants were paid by Pace Joint Interests-Denver LLC. However, while performing marketing and management duties Claimants were paid by Chiropractic Healthcare Solutions LLC. Dr. Lloyd specified that he subsequently decided that Ms. Archer-Reid would focus on the management and training of wellness coordinators and Ms. Dalton would concentrate on marketing for the six Denver metropolitan area chiropractic clinics. He noted that Ms. Archer-Reid and Ms. Dalton would sometimes assume both duties as requested.

17. On February 3, 2015 Claimants were involved in a MVA at approximately 1:00 p.m. Claimants were coming from a promotional lunch meeting for employees of Eye Maxx. Claimants provided pizza and supplies for the marketing event. The promotional lunch meeting was designed to develop new patients for the six Pace Joint Interests-Denver LLC clinics and promote “The Joint” brand generally. While conducting the promotional presentation at Eye Maxx, Claimants wore “The Joint” shirts and “The Joint” was printed on the marketing materials. Chiropractic Healthcare Solutions LLC paid for the pizza and supplies.

18. At the time of the MVA Claimants were traveling to the Pace Joint Interests-Southwest Plaza LLC clinic to train another wellness coordinator. Chiropractic Healthcare Solutions LLC paid Claimants for marketing and training the wellness coordinator as part of its management responsibilities.

19. Claimants received reasonable and necessary medical care from providers Mountain View Pain Center and Injury Solutions after the MVA. Rachel Archer-Reid injured her neck, back, left knee and shoulders in the MVA. Ariel Dalton injured her head, neck and back in the MVA. Neither Claimant lost any time from work after the accident. However, Claimants require additional medical treatment as a result of the February 3, 2015 MVA.

20. Claimants worked for Chiropractic Healthcare Solutions LLC at the time of their February 3, 2015 MVA. Initially, a Management Agreement exists between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. The Agreement provides that Pace Joint Interests-Lakewood, LLC will provide furnishings, equipment and management services to Chiropractic Healthcare Solutions LLC. so that it can operate a chiropractic clinic. Pace Joint Interests-Lakewood LLC. is essentially responsible for the day-to-day administration and management functions of Chiropractic Healthcare Solutions LLC except for clinical matters. Article 18.4 of the Management Agreement specifies that the Agreement is complete and may not be changed orally, but can only be amended by an agreement in writing executed by the parties. None of the witnesses identified any ambiguities in the Agreement. The Management Agreement between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC establishes a relationship between the two entities that was confirmed by the testimony of Dr. Lloyd, Ms. Davis and Mr. Davenport. In fact, Mr. Davenport identified the Agreement as an accurate, clear representation of the rights and responsibilities between the parties. Considering the plain and generally accepted meanings of the words in the Agreement it is unambiguous and thus cannot be altered by extrinsic evidence.

21. However, the Management Agreement is a contract only between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. Mr. Davenport explained that no written management agreements have been executed between Chiropractic Healthcare Solutions LLC and any of the other Denver Metropolitan area chiropractic clinics under Pace Joint Interests-Denver LLC. He simply remarked that the agreements had never been completed. Part-owner of Pace Joint Interests-Denver LLC Ms. Davis agreed that there are no management agreements in place for the other five Denver Metropolitan area chiropractic clinics because there was "simply a paperwork oversight." Nevertheless, Mr. Davenport maintained that the Management Agreement functions as the exact agreement between Chiropractic Healthcare Solutions LLC and the other five Denver Metropolitan area chiropractic clinics under the Pace Joint Interests-Denver LLC umbrella. Despite Mr. Davenport's representation that the Management Agreement applies between Chiropractic Healthcare Solutions LLC and all six of the Denver Metropolitan area Pace Joint Interests-Denver LLC clinics, the four corners of the Agreement are limited to the Pace Joint Interests-Lakewood, LLC location. The February 3, 2015 MVA did not involve the

Pace Joint Interests-Lakewood, LLC clinic. Claimants were driving from Eye Maxx to the Pace Joint Interests-Southwest Plaza LLC clinic to train another wellness coordinator. Accordingly, in the absence of a written contract, the parol evidence rule is inapplicable and extrinsic evidence is admissible to determine the obligations of the parties in this matter.

22. After Ms. Ko ceased employment with Pace Joint Interests-Denver LLC in September 2014, Pace Joint Interests-Denver LLC entered into a verbal agreement with Chiropractic Healthcare Solutions LLC through Dr. Lloyd. Essentially the verbal modification provided that Chiropractic Healthcare Solutions, LLC would assume marketing responsibilities and wellness coordinator training duties as well as handle the clinical components of operating the six Pace Joint Interests-Denver, LLC clinics. Dr. Lloyd agreed that Chiropractic Healthcare Solutions, LLC assumed marketing duties and wellness coordinator training duties after Ms. Ko ceased working. In exchange for assuming the marketing duties, Pace Joint Interests-Denver LLC paid Chiropractic Healthcare Solutions LLC an additional $200.00 per month. Pace Joint Interests-Denver LLC also increased the fees it paid to Chiropractic Healthcare Solutions LLC from $400.00 to $500.00 each month for assuming the wellness coordinator training duties. Ms. Davis agreed that there was a verbal agreement between Pace Joint Interests-Denver LLC and Chiropractic Healthcare Solutions LLC that Dr. Lloyd would assume some marketing and management services that had been performed by Pace Joint Interests-Denver LLC before the departure of Ms. Ko. Ms. Davis also acknowledged that Chiropractic Healthcare Solutions LLC received an additional fee for assuming the marketing and management duties.

23. In consultation with part-owner of Pace Joint Interests-Denver LLC Phil Davis, Dr. Lloyd hired Claimants to perform the management duties and wellness coordinator training duties that Chiropractic Healthcare Solutions LLC had assumed pursuant to the verbal agreement. Claimants reduced their hours as Wellness Coordinators for Pace Joint Interests-Denver LLC so that they could assume the additional responsibilities for Chiropractic Healthcare Solutions LLC. Claimants became marketers and managers for all six clinics under the Pace Joint Interests-Denver LLC umbrella. They received a higher hourly wage for their additional duties than they had in their roles of Wellness Coordinators. While working as Wellness Coordinators at individual clinics Claimants were paid by Pace Joint Interests-Denver LLC. However, while performing marketing and management duties Claimants were paid by Chiropractic Healthcare Solutions LLC.

24. On February 3, 2015 Claimants were involved in a MVA while performing the marketing and management duties pursuant to the verbal agreements. Chiropractic Healthcare Solutions LLC paid Claimants for marketing and training the wellness coordinator as part of its management responsibilities. The February 3, 2015 MVA occurred while Claimants were performing their marketing and management duties for Chiropractic Healthcare Solutions, LLC and not while they were acting as Wellness Coordinators. Accordingly, Chiropractic Healthcare Solutions LLC was the employer of Claimants at the time of the MVA.

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 general rules of contract interpretation provide that when the contract terms are clear and unambiguous the contract must be enforced as written. *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117, 119 (Colo. App. 1993). "When a contract is unambiguous, the court must give the effect to the contract as written, unless the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, or unless the result would be an absurdity." *Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007). Conversely, contracts "…containing ambiguities or unclear language must be construed in accordance with the intent of the parties, and relevant extraneous evidence may be considered to resolve the factual question of the parties' intent." *Chambliss/Jenkins Assocs. v. Forste*r, 650 P.2d 1315, 1318 (Colo. App. 1982). Parol evidence can only be considered if the contract is so ambiguous that the intent of the parties is unclear. *Janick v. Obsideo*, LLC, 271 P.3d 1133, 1138 (Colo. App. 2011). In determining whether a contract is ambiguous "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fibreglas Fabricators, Inc. v. Kylberg,* 799 P.2d 371, 374 (Colo. App. 1990). Evidence that the parties ascribe different meanings to contract terms does not compel the conclusion that the contract is ambiguous. *Dorman v. Petrol Aspen, Inc.* 914 P.2d 909, 912 (Colo. 1996).

5. As found, Claimants worked for Chiropractic Healthcare Solutions LLC at the time of their February 3, 2015 MVA. Initially, a Management Agreement exists between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. The Agreement provides that Pace Joint Interests-Lakewood, LLC will provide furnishings, equipment and management services to Chiropractic Healthcare Solutions LLC. so that it can operate a chiropractic clinic. Pace Joint Interests-Lakewood LLC. is essentially responsible for the day-to-day administration and management functions of Chiropractic Healthcare Solutions LLC except for clinical matters. Article 18.4 of the Management Agreement specifies that the Agreement is complete and may not be changed orally, but can only be amended by an agreement in writing executed by the parties. None of the witnesses identified any ambiguities in the Agreement. The Management Agreement between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC establishes a relationship between the two entities that was confirmed by the testimony of Dr. Lloyd, Ms. Davis and Mr. Davenport. In fact, Mr. Davenport identified the Agreement as an accurate, clear representation of the rights and responsibilities between the parties. Considering the plain and generally accepted meanings of the words in the Agreement it is unambiguous and thus cannot be altered by extrinsic evidence.

6. As found, however, the Management Agreement is a contract only between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. Mr. Davenport explained that no written management agreements have been executed between Chiropractic Healthcare Solutions LLC and any of the other Denver Metropolitan area chiropractic clinics under Pace Joint Interests-Denver LLC. He simply remarked that the agreements had never been completed. Part-owner of Pace Joint Interests-Denver LLC Ms. Davis agreed that there are no management agreements in place for the other five Denver Metropolitan area chiropractic clinics because there was "simply a paperwork oversight." Nevertheless, Mr. Davenport maintained that the Management Agreement functions as the exact agreement between Chiropractic Healthcare Solutions LLC and the other five Denver Metropolitan area chiropractic clinics under the Pace Joint Interests-Denver LLC umbrella. Despite Mr. Davenport's representation that the Management Agreement applies between Chiropractic Healthcare Solutions LLC and all six of the Denver Metropolitan area Pace Joint Interests-Denver LLC clinics, the four corners of the Agreement are limited to the Pace Joint Interests-Lakewood, LLC location. The February 3, 2015 MVA did not involve the Pace Joint Interests-Lakewood, LLC clinic. Claimants were driving from Eye Maxx to the Pace Joint Interests-Southwest Plaza LLC clinic to train another wellness coordinator. Accordingly, in the absence of a written contract, the parol evidence rule is inapplicable and extrinsic evidence is admissible to determine the obligations of the parties in this matter.

7. As found, after Ms. Ko ceased employment with Pace Joint Interests-Denver LLC in September 2014, Pace Joint Interests-Denver LLC entered into a verbal agreement with Chiropractic Healthcare Solutions LLC through Dr. Lloyd. Essentially the verbal modification provided that Chiropractic Healthcare Solutions, LLC would assume marketing responsibilities and wellness coordinator training duties as well as handle the clinical components of operating the six Pace Joint Interests-Denver, LLC

clinics. Dr. Lloyd agreed that Chiropractic Healthcare Solutions, LLC assumed marketing duties and wellness coordinator training duties after Ms. Ko ceased working. In exchange for assuming the marketing duties, Pace Joint Interests-Denver LLC paid Chiropractic Healthcare Solutions LLC an additional $200.00 per month. Pace Joint Interests-Denver LLC also increased the fees it paid to Chiropractic Healthcare Solutions LLC from $400.00 to $500.00 each month for assuming the wellness coordinator training duties. Ms. Davis agreed that there was a verbal agreement between Pace Joint Interests-Denver LLC and Chiropractic Healthcare Solutions LLC that Dr. Lloyd would assume some marketing and management services that had been performed by Pace Joint Interests-Denver LLC before the departure of Ms. Ko. Ms. Davis also acknowledged that Chiropractic Healthcare Solutions LLC received an additional fee for assuming the marketing and management duties.

8. As found, in consultation with part-owner of Pace Joint Interests-Denver LLC Phil Davis, Dr. Lloyd hired Claimants to perform the management duties and wellness coordinator training duties that Chiropractic Healthcare Solutions LLC had assumed pursuant to the verbal agreement. Claimants reduced their hours as Wellness Coordinators for Pace Joint Interests-Denver LLC so that they could assume the additional responsibilities for Chiropractic Healthcare Solutions LLC. Claimants became marketers and managers for all six clinics under the Pace Joint Interests-Denver LLC umbrella. They received a higher hourly wage for their additional duties than they had in their roles of Wellness Coordinators. While working as Wellness Coordinators at individual clinics Claimants were paid by Pace Joint Interests-Denver LLC. However, while performing marketing and management duties Claimants were paid by Chiropractic Healthcare Solutions LLC.

9. As found, on February 3, 2015 Claimants were involved in a MVA while performing the marketing and management duties pursuant to the verbal agreements. Chiropractic Healthcare Solutions LLC paid Claimants for marketing and training the wellness coordinator as part of its management responsibilities. The February 3, 2015 MVA occurred while Claimants were performing their marketing and management duties for Chiropractic Healthcare Solutions, LLC and not while they were acting as Wellness Coordinators. Accordingly, Chiropractic Healthcare Solutions LLC was the employer of Claimants at the time of the MVA.

ORDER

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

1. Claimants suffered compensable injuries during the course and scope of their employment with Chiropractic Healthcare Solutions LLC when they were involved in a MVA on February 3, 2015.

2. Chiropractic Healthcare Solutions LLC and its Insurer Travelers Indemnity Company shall reimburse Claimants for all out-of-pocket expenses for medical

treatment as a result of the February 3, 2015 MVA from providers Mountain View Pain Center and Injury Solutions.

3. Hugh Macaulay, M.D. is designated as the primary Authorized Treating Physician (ATP) for Claimants.

4. Chiropractic Healthcare Solutions LLC and its Insurer Travelers Indemnity Company shall pay for all authorized, reasonable, necessary and related medical treatment provided by Dr. Macaulay.

5. Any issues not resolved in this Order are reserved for future determination.

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

DATED: February 3, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015.

2. Whether Respondent has proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on March 14, 2015.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $398.45.

2. If the claim is compensable, Claimant is entitled to receive Temporary Total Disability (TTD) benefits from March 24, 2015 through August 23, 2015.

3. If the claim is compensable, Respondent will be financially responsible for Claimant's reasonable, necessary and related medical expenses.

4. The issue of Claimant's Temporary Partial Disability (TPD) benefits from August 24, 2015 until terminated by statute is reserved for future determination.

FINDINGS OF FACT

1. Employer is a Colorado ski resort. Claimant worked for Employer as a Ski Lift Operator. On March 14, 2015 he was descending the ski hill from his lift tower when he struck a tree and suffered serious injuries. Claimant's injuries included a C1/2 fracture, a rib fracture, a scapular fracture, a spleen laceration, a pelvic fracture and a comminuted fracture of the left scapula.

2. Employer designated routes for employees to follow when leaving the mountain after work. Employer's Senior Specialist of Health and Safety Koby Kenny explained that the policy existed to minimize the risk to employees and ensure they all safely reached the bottom of the mountain after work. He noted that Employer always selected the easiest possible route down the mountain. Generally, the route was a trail designated as either a blue or green run.

3. Lift Operations Supervisor Chris Mills explained that employees who violated the policy for leaving the mountain after work received discipline ranging from a verbal warning to termination. Discipline was predicated on the level of the infraction.

Claimant's immediate supervisor Team Lead Kevin Crittenden commented that he would issue verbal warnings or refer lift operators who did not follow the designated route down the mountain to his supervisor for discipline.

4. Claimant testified that he received and read Employer's Handbook and Lift Operation Manual. Both of the publications outlined Employer's designated route policy. The Handbook stated that: "If the employee deviates from the applicable designated route, he or she will be considered 'free skiing' and not covered by Workers' Compensation. In addition, employees disregarding designated ski and snowboard routes may be subject to disciplinary action up to and including termination." The Manual provided that "[t]he recommended ski/ride routes to and from all ski lift facilities are restricted to more difficult (blue) and easiest (green) runs that are the most direct route to and from said ski lift facility . . . ." The Manual further specified that "[i]n the event that an employee deviates from the recommended ski/ride-down routes, such employee shall be considered to be participating in a recreational activity and at such time is relieved of and is not performing any prescribed duties . . . ."

5. Claimant testified that he read and signed both Employer's Handbook and Lift Operation Manual. He acknowledged that the designated route policy required him to use either blue or green runs to descend the mountain.

6. On March 14, 2015 Claimant was working at the top of lift three. The Manual designated a specific route down the mountain from his position. The lift operator would ski down Hunkey Dory to the bottom of lift three and meet up with the other operators of lift three. They would then ski down Upper Lion's Way until taking Avanti to the bottom of lift two. They would meet more lift operators and descend the mountain along Gitalong Road to Bear Tree. Lift Operators would then ski down Bear Tree to the locker rooms. The accident occurred on Gitalong Road shortly after the lift operators joined the trail at the bottom of lift two.

7. Gitalong Road is a catwalk or a road used by Employer's snow grooming equipment in winter to traverse the mountain. In the summer months Employer's work vehicles also use the road for access to the mountain. Over the series of switchbacks where Claimant's accident occurred, Gitalong Road is relatively flat from side to side and about 32 feet across with a 6 degree grade. The switchbacks' design diminishes the grade and reduces the rate of dissent so vehicles can use the road to access the mountain. Claimant testified that Gitalong Road was a green, slow zone, agreeing it was "as slow as it goes."

8. Between the switchbacks there is an area of steep, ungroomed snow with a 40 degree grade. Both Mr. Crittenden and Mr. Kenny acknowledge that they were familiar with this steep section because they had skied the area while off-duty. Mr. Crittenden testified that the ungroomed section was significantly more challenging than the flat catwalk. He explained that the steep section was not part of Gitalong Road because it contained ungroomed moguls, ice and obstacles lurking beneath the snow. Mr. Crittenden had verbally warned lift operators for skiing or boarding down the steep section instead of following the switchback. Mr. Kenny testified that the steep portion

would have been categorized as a black run because it was ungroomed, there were moguls and the 40 degree grade was consistent with other black runs on the mountain.

9. Claimant testified about the accident. He explained that on March 14, 2015 he was following the designated descent route down the mountain with other lift operators including Mark Smith. Claimant acknowledged that he took a minor deviation from the designated route by cutting the corner of the switchback at Gitalong Road. Nevertheless, Claimant maintained that he remained on a green or blue slope at all times during his descent. When Claimant returned to Gitalong Road he carved back and forth for approximately 20 yards, struck some ice and lost control. Claimant careened off the trail through a rope closure and struck a tree. He sustained severe injuries as a result of the accident.

10. Claimant acknowledged that Employer showed him the specific route down the mountain from his position as a Lift Operator. He noted that he followed the route on a daily basis and had not been disciplined for failing to abide by Employer's regulations or deviating from the route.

11. Claimant explained that it was his understanding that areas that were not roped off constituted parts of the trail. He thus assumed that the area of his deviation was part of Gitalong Road. Claimant maintained that, after his brief deviation, he was skiing along Gitalong Road in a controlled and safe manner before he struck ice and lost control.

12. Mr. Kenny produced an accident report in compliance with OSHA regulations. It contained a summary of the accident, witness statements, a diagram of the accident and a series of photos of Gitalong Road taken the day after the accident. Mr. Kenny testified that the report showed the probable trajectory of Claimant's travel based on where he struck the tree and the force of the impact. As summarized in the report, Claimant left Gitalong Road at the top of one of the switchbacks and cut through the steep section. His momentum carried him across the lower switchback. Claimant then passed through a six rope closure separating Gitalong Road from the wooded terrain below and struck a tree a few feet from the rope closure. Ultimately, Claimant came to rest eight feet from the tree. Claimant was unconscious for approximately two minutes following the accident. The emergency room report reflects that Claimant struck the tree with the left side of his torso and the impact broke his ski helmet.

13. Mr. Smith authored two written statements regarding the March 14, 2015 accident. He initially wrote that Claimant "was coming down cross cut and went down the steeper incline instead of the catwalk. I was behind him and watched him slip on ice, go through the yellow ropes, and into a tree. Found him face down unconscious. Out for a good 2 – 5 minutes." The next day Mr. Smith provided a slightly different account in which he stated Claimant "took the steep part on cross cut, took a hard left on the catwalk and slid out. Went through yellow ropes and wrapped himself around a tree. Unconscious for, 3 – 6 minutes, face down."

14. Claimant objected to the admission of Mr. Smith's statements as hearsay. The ALJ overruled Claimant's objection based on §8-43-210, C.R.S. and CRE 803(6). Section 8-43-210 C.R.S. authorizes the admission of employer records without foundation and C.R.E. 803(6) provides an exception to the hearsay rule for admission of records of regularly conducted business activities. Mr. Kenny testified that it was Employer's regular business practice to produce an accident report under such circumstances and that Mr. Smith was a witness to the incident. Mr. Smith's statements are consistent with Claimant's testimony that Claimant cut through the steep section. Although Claimant contends he left the trail in a different location than suggested in the accident report, neither statement by Mr. Smith specifies where Claimant left Gitalong Road and therefore could not have provided a basis for determining the location. Rather, Claimant's path of travel, as Mr. Kenny testified, was derived from where he hit the tree and the forces involved in the accident.

15. Mr. Kenny testified that Claimant's account of the accident would have been impossible. Although Mr. Kenny was not in the courtroom when Claimant testified, he reviewed Claimant's demonstrative exhibit and received details of Claimant's account of the accident. Mr. Kenny testified that Claimant's account was not consistent with the trajectories shown in the accident report. He explained that, because the terrain where the accident occurred was closed off by ropes, the only tracks were from the emergency extraction of Claimant. There were no tracks suggesting Claimant skied into the enclosure by the path shown in Claimant's Exhibit 8. Mr. Kenny testified that it would have been "difficult if not impossible" to generate enough speed on the path of travel suggested by Claimant "to cross those ropes, hit the tree, and end up eight feet beyond that tree." The switchback would have scrubbed Claimant's rate of decent. The gentle slope of Gitalong Road would not have significantly increased Claimant's speed in the 20 yards he purportedly traveled before hitting ice.

16. Claimant has established that it is more probably true than not that he suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015. On March 14, 2015 Claimant was following the designated descent route down the mountain with other lift operators at the conclusion of his work shift. Claimant credibly explained that he took a slight deviation from the prescribed route by cutting the corner of the switchback at Gitalong Road. He maintained that he remained on a green or blue slope at all times during his descent. When Claimant returned to Gitalong Road he carved back and forth for approximately 20 yards, struck some ice and lost control. Claimant careened off the trail through a rope closure and struck a tree.

17. Claimant's activity of descending the mountain was part of his job function for Employer. His credible account reflects that he engaged in a minor deviation from the prescribed route that was neither serious nor complete. Claimant's slight deviation from the prescribed route did not remove his activity from the employment relationship. His deviation was simply not significant enough to sever his activities from the course and scope of employment for Employer on March 14, 2015.

18. In contrast, Mr. Kenny produced an accident report that contained a summary of the accident, witness statements, a diagram of the accident and a series of photos of Gitalong Road taken the day after the accident. Mr. Kenny testified that the report showed the probable trajectory of Claimant's travel based on where he struck the tree and the force of the impact. He testified that it would have been "difficult if not impossible" to generate enough speed on the path of travel suggested by Claimant "to cross those ropes, hit the tree, and end up eight feet beyond that tree." Moreover, Mr. Smith's statement reflects that Claimant may have cut off a steeper section of the switchback than Claimant acknowledged.

19. Despite the testimony of Mr. Kenny and Mr. Smith, it is ultimately unclear exactly where Claimant deviated from the prescribed descent route. Claimant's act of descending the prescribed route, deviating and returning to Gitalong Road for some period of time does not constitute a significant deviation from his duties to render his activity unrelated to his job. Claimant's presence on Gitalong Road had a sufficient connection to the circumstances under which he usually performs his job duties to be considered incidental to employment. Employer's prescribed descent routes regulated Claimant's conduct while he was descending the mountain but did not limit the sphere of his employment. Claimant simply did not substantially deviate from his job duties so that he was acting for his sole benefit. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on March 14, 2015.

20. Respondent has failed to prove that it is more probably true than not that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on March 14, 2015. Claimant testified that he read and signed both Employer's Handbook and Lift Operation Manual. He acknowledged that the designated route policy required him to use either blue or green runs to descend the mountain. However, Claimant credibly maintained that it was his understanding that areas that were not roped off constituted parts of the trail. He thus presumed that the area of his deviation was part of Gitalong Road. Claimant maintained that, after his brief deviation, he was skiing along Gitalong Road in a controlled and safe manner before he struck ice and lost control.

21. Claimant did not act with deliberate intent by deviating from the prescribed descent route and crashing into a tree on March 14, 2015. After he cut off the corner of the switchback at Gitalong Road, Claimant slipped on ice, lost control and crashed into a tree. The record reflects that Claimant did not receive any prior warnings about his descent routes, the risk of slipping on ice was not obvious and there was little evidence of any deliberation in deviating from the descent route. In fact, Claimant reasonably believed he had returned to the designated descent route when he struck the ice on Gitalong road. Claimant's action was therefore not willful, but rather resulted from thoughtlessness or negligence. Accordingly, Claimant did not commit a safety rule violation on March 14, 2015 warranting a 50% reduction in benefits.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. Regardless of the theoretical framework that is applied, the issue is whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an

obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

6. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). However, ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00.

7. In *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo.App. 1995), the court announced the following four part test to analyze whether an activity constitutes a deviation or horseplay: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Id.*

8. As found, Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015. On March 14, 2015 Claimant was following the designated descent route down the mountain with other lift operators at the conclusion of his work shift. Claimant credibly explained that he took a slight deviation from the prescribed route by cutting the corner of the switchback at Gitalong Road. He maintained that he remained on a green or blue slope at all times during his descent. When Claimant returned to Gitalong Road he carved back and forth for approximately 20 yards, struck some ice and lost control. Claimant careened off the trail through a rope closure and struck a tree.

9. As found, Claimant's activity of descending the mountain was part of his job function for Employer. His credible account reflects that he engaged in a minor deviation from the prescribed route that was neither serious nor complete. Claimant's slight deviation from the prescribed route did not remove his activity from the employment relationship. His deviation was simply not significant enough to sever his activities from the course and scope of employment for Employer on March 14, 2015.

10. As found, in contrast, Mr. Kenny produced an accident report that contained a summary of the accident, witness statements, a diagram of the accident

and a series of photos of Gitalong Road taken the day after the accident. Mr. Kenny testified that the report showed the probable trajectory of Claimant's travel based on where he struck the tree and the force of the impact. He testified that it would have been "difficult if not impossible" to generate enough speed on the path of travel suggested by Claimant "to cross those ropes, hit the tree, and end up eight feet beyond that tree." Moreover, Mr. Smith's statement reflects that Claimant may have cut off a steeper section of the switchback than Claimant acknowledged.

11. As found, despite the testimony of Mr. Kenny and Mr. Smith, it is ultimately unclear exactly where Claimant deviated from the prescribed descent route. Claimant's act of descending the prescribed route, deviating and returning to Gitalong Road for some period of time does not constitute a significant deviation from his duties to render his activity unrelated to his job. Claimant's presence on Gitalong Road had a sufficient connection to the circumstances under which he usually performs his job duties to be considered incidental to employment. Employer's prescribed descent routes regulated Claimant's conduct while he was descending the mountain but did not limit the sphere of his employment. Claimant simply did not substantially deviate from his job duties so that he was acting for his sole benefit. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on March 14, 2015.

Safety Rule Violation

12. Section 8-42-112(1)(b) C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including "evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct." *Id.*

13. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* W.C. No. 4-561-352 (ICAP, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

14. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b)

C.R.S. on March 14, 2015. Claimant testified that he read and signed both Employer's Handbook and Lift Operation Manual. He acknowledged that the designated route policy required him to use either blue or green runs to descend the mountain. However, Claimant credibly maintained that it was his understanding that areas that were not roped off constituted parts of the trail. He thus presumed that the area of his deviation was part of Gitalong Road. Claimant maintained that, after his brief deviation, he was skiing along Gitalong Road in a controlled and safe manner before he struck ice and lost control.

15. As found, Claimant did not act with deliberate intent by deviating from the prescribed descent route and crashing into a tree on March 14, 2015. After he cut off the corner of the switchback at Gitalong Road, Claimant slipped on ice, lost control and crashed into a tree. The record reflects that Claimant did not receive any prior warnings about his descent routes, the risk of slipping on ice was not obvious and there was little evidence of any deliberation in deviating from the descent route. In fact, Claimant reasonably believed he had returned to the designated descent route when he struck the ice on Gitalong road. Claimant's action was therefore not willful, but rather resulted from thoughtlessness or negligence. Accordingly, Claimant did not commit a safety rule violation on March 14, 2015 warranting a 50% reduction in benefits.

ORDER

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

1. Claimant suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015.

2. Respondent shall be financially responsible for Claimant's reasonable, necessary and related medical expenses.

3. Claimant earned an AWW of $398.45.

4. Claimant shall receive TTD benefits from March 24, 2015 through August 23, 2015.

5. Claimant did not commit a safety rule violation on March 14, 2015 warranting a 50% reduction in benefits.

6. All issues not resolved in this Order are reserved for future determination.

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

by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 16, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that he suffered a compensable injury on February 24, 2015, arising out of and in the course of his employment with the respondent-employer; and,

2. If the claimant did suffer a compensable injury, whether he established by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not address the remaining issue.

FINDINGS OF FACT

1. The respondent-employer provides public school transportation. The claimant has been a mechanic/technician for the respondent-employer since September 23, 2013. His regular job duties included maintaining the school buses.

2. On a normal work day the claimant was required to be available when the school bus drivers began their morning routes at 5:30 a.m. and 9:15 a.m., and when the drivers returned from their afternoon routes at 2:00 p.m. and 5:30 p.m.

3. February 24, 2015, was not a normal work day for the claimant. Corporate representatives were at the Woodland Park facility to investigate reports that they had from drivers about unsafe buses and their complaints about the new general manager. There were driver meetings with the school bus drivers to discuss and address their issues.

4. Krista Koster, Operations Manager, John Kemblowski, Human Resources Regional Manager, and Steve Kim, General Manager, were visiting from out of state. Koster and Kemblowski were based in the Chicago, Ill. area and Kim was based in Washington state.

5. The claimant testified that he was worried that Koster, Kemblowski, and Kim would get elevation sickness. He encouraged them numerous times to stay

hydrated. The claimant testified that there was not enough water in the refrigerator in the drivers' room or in the office and therefore he offered to get water for them numerous times. The claimant admitted that there was a water faucet in the break room.

6. Koster testified that the claimant was present before the driver meeting and periodically during throughout the day. Some of the issues addressed concerns by the drivers' regarding the maintenance of the school buses which the claimant was responsible for, such as bald tires and other maintenance issues.

7. When the claimant offered water to Koster, she told the claimant that they did not need water and kept at her tasks.

8. John Kemblowski testified that the claimant asked him if he wanted water. The claimant told him that he was going to run out and get cigarettes, and asked if anyone else wanted anything. The claimant admitted that he bought cigarettes when he went to the store.

9. The claimant left the premises to go to the convenience store. While there the claimant purchased cigarettes and two cases of bottled water at approximately 2:00 p.m. on February 24, 2015. He purchased the water at 2:15:11 p.m. The claimant was returning to work when he was in a motor vehicle accident. He was making a left turn when his car was struck in the rear, causing him to spin 180 degrees and strike a third vehicle.

10. The ALJ finds that the claimant was never asked or ordered to leave the premises to purchase water for the respondent-employer.

11. The ALJ finds that the claimant's testimony is not credible or persuasive.

12. The ALJ finds Koster's testimony is credible and persuasive.

13. The ALJ finds Kemblowski's testimony is credible and persuasive.

14. The ALJ finds Hatfield's testimony is credible and persuasive.

15. The ALJ finds the testimony of testimony Koster, Kemblowski, and Hatfield to be consistent.

16. The ALJ finds that the claimant was on a personal errand when he was injured on February 24, 2015.

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

CONCLUSIONS OF LAW

1. A claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. The claimant has must show that he sustained an injury while "performing service arising out of and in the course of employment." § 8-41-301(1)(b), C.R.S. An injury happens in the "course of employment" if it occurs within the time and place limits of the employment, during an activity having some connection with the employee's job functions. The "arising out of" element requires the claimant to prove the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

2. Whether the claimant has sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan* 939 P.2d 496 (Colo. App. 1997).

3. The ALJ is not required to cite or discuss every piece of evidence before crediting evidence to the contrary. *Crandall v. Watson-Wilson Transporation System, Inc.* 171 Colo. 329, 467 P.2d 48 (1970). Rather, evidence not cited is implicitly rejected as unpersuasive. *Magnetic Engineering v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

4. The general rule is that "going to and coming from" work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba,* 423 P.2d 2 (1967); *Perry v. Crawford & Co.,* 677 P.2d 416 (Colo. App. 1983).

5. Injuries sustained during off premises lunchtime travel usually fall within the "going to and coming from rule," and are not compensable. *Perry v. Crawford & Co., supra.* There is an exception to this rule where special circumstances demonstrate a nexus between the lunchtime travel and the circumstances of employment. Special circumstances have been found where the travel was at the behest of the employer, where the employer receives some special benefit from the travel, or where the employer provided the means of travel. *City and County of Denver School District No. 1 v. Industrial Commission,* 581 P.2d 1162 (1978); *Berry's Coffee Shop Inc. v. Palomba, supra; National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992).

6. In the present matter, the claimant's travel to the convenience store was not at the behest of the employer. He was never asked or ordered to leave the premises to purchase water for the employer. Purchasing water was not incidental to the claimant's position as a mechanic/technician and did not provide a benefit to the employer. The claimant was on a personal errand when he was involved in the motor vehicle accident. There is insufficient evidence that the injury had its origin in the claimant's work-related functions.

7. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

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 2, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right wrist on March 6, 2015, arising out of and in the course of her employment with the respondent-employer;

2. If so, whether she proved by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related medical treatment;

3. If so, whether the claimant is entitled to temporary partial benefits from March 8, 2015 to March 19, 2015; and,

4. If so, whether the claimant is entitled to ongoing temporary total benefits from March 19, 2015.

PRELIMINARY MATTERS

1. During the hearing the recording equipment failed and there is no transcript of the proceedings.

2. The Hearing began with the parties stipulating that if the claim was compensable that the authorized treating physician would be Dr. Annamarie Meeuwsen of Gunnison Valley Health Family Medicine Clinic and that the claimant's average weekly wage is $243.75.

3. Subsequent to the hearing the ALJ reconstructed the testimony of the witnesses with input from the parties. This reconstructed testimony was provided by separate Order dated December 29, 2015.

FINDINGS OF FACT

1. The claimant is a 28 year old woman with a birth date of September 12, 1987. She was 27 years old on March 6, 2015, when she sustained an injury on that day.

2. On March 6, 2015, the claimant was at work for the respondent-employer. The claimant was working as a housekeeper. As a housekeeper, the claimant would routinely clean rooms, clean bathrooms, and make beds, among other duties.

3. At around 9:00 to 9:30 am that morning, the claimant was cleaning one of the 22 rooms she had assigned to her that day. As the claimant was removing sheets from a bed, she felt a pop in her right wrist. She felt pain from her wrist to her mid-arm at that time.

4. The claimant previously had injuries to her right mid-arm and her right elbow, but never to her right wrist. In March of 2015, the claimant was not having any problems with her arm until this injury.

5. The claimant looked for her immediate supervisor, Deborah Rhoades, but was unable to locate her. She continued to work. Susana Beltran Simental was the claimant's supervisor that day. Ms. Rhoades was not working on March 6, 2015, but was working on March 7, 2015.

6. The claimant had a previously scheduled meeting on the morning of March 6, 2015 at her daughter's school. The claimant left work, with permission, to go to that meeting. The meeting lasted about an hour and the claimant returned to work.

7. Upon returning to work, the claimant told her supervisor about her injury. Ms. Simental then reminded the claimant that the claimant had two warnings, and asked her to finish work. The claimant, despite being in pain, continued work for the rest of the day because she was afraid of losing her job.

8. After finishing her 22 rooms, the claimant started to have pain traveling up towards her elbow. The claimant then asked Ms. Simental if she could go to a doctor. Ms. Simental told the claimant that if the claimant was still having pain in her wrist to come back in the morning and tell Ms. Rhoades.

9. The following day, March 7, 2015, the claimant returned to work. In accordance with what Ms. Simental told her, the claimant told Ms. Rhoades about her wrist pain.

10. The claimant then met with Ms. Rhoades and Tyler Newman, the hotel's general manager. According to the claimant, Mr. Newman implied that the claimant needed to get back to work, despite the claimant telling him she was in pain.

11. The claimant does not usually work with anyone else. On this day, March 7, the claimant worked with another employee, Suzy.

12. The claimant continued to have wrist pain, but she was also having pain in her shoulder.

13. The claimant asked Ms. Rhoades around lunchtime on this date if she could go home, but Ms. Rhoades told her the claimant couldn't leave until all of her rooms were cleaned.

14. Together with Suzy, the claimant completed 30 to 35 rooms.

15. Another employee, Teresa Barrientos, confirmed that the claimant informed her that day, March 7, 2015, that the claimant's wrist was hurting. In fact, when Ms. Barrientos came to work that morning, she heard people "in the boss's office…commenting that [the claimant] wasn't feeling well."

16. The claimant again asked Ms. Rhoades if she could go to a doctor. The claimant was told that Mr. Newman said she could go to a clinic on Monday. The claimant told Ms. Rhoades that she couldn't wait that long, and Ms. Rhoades told her that if she went to the hospital on that date, she would have to pay for it herself.

17. Despite this warning, the claimant went to Gunnison Valley Hospital that evening and was seen by Dr. William Gattis in the emergency room. In his initial evaluation, Dr. Gattis checked "yes" to the question: Are your objective findings consistent with history and/or work related mechanism of injury/illness? The claimant was given a note off work until she saw Dr. Meeuwsen.

18. Dr. Gattis further noted that the claimant "has had swelling, tingling, and weakness. There is diffuse muscular swelling of the extensor muscles in the right arm, and up into the triceps muscles. Pain with rom." Dr. Gattis believed the claimant had "an overuse injury, and then did multiple similar action with work today in changing sheets and has [now] gotten significant swelling in the muscles causing pain."

19. The claimant then saw Jodi Bauer, N.P. on March 9, 2015. Ms. Bauer found objective evidence of "decreased range of motion note in: right fingers, unable to make a fist due to pain and numbness, pt unable to touch first digit to the palm due to pain; pain with range of motion in: right wrist flexion, extension, ulnar deviation, and radial deviation; right hand with pain with movement of fingers and thumb, states they feel numb." The claimant was given a note off work from March 9, 2015 until March 16, 2015.

20. Ms. Bauer checked “yes” to the question: Are your objective findings consistent with history and/or work related mechanism of injury/illness?

21. The claimant had an appointment with Amy Sandusky at Alpine Orthopaedics and Sports Medicine, P.C. on March 17, 2015. Ms. Sandusky writes in her report that the “injury is work related.” The claimant was diagnosed with carpal tunnel syndrome. She was given an injection during this visit for her carpal tunnel.

22. The claimant saw Ms. Bauer on March 18, 2015, and continued to have both subjective and objective findings consistent with her work injury.

23. The claimant then treated with John Miller on March 19, 2015 after having a negative reaction to the medication she was prescribed. After speaking with the claimant, Mr. Miller checked “yes” to the question: Are your objective findings consistent with history and/or work related mechanism of injury/illness?

24. The claimant had an appointment with Ms. Bauer on March 24, 2015. During that appointment, Ms. Bauer noted that the claimant’s “employer calls her and told her they are going to fire her if she is not returning to work. The caller was Tyler, main manager.” The claimant continued to have both objective and subjective symptoms associated with her work injury.

25. The claimant also had multiple physical therapy appointments in March and April.

26. When the claimant saw Dr. Gattis on March 7, 2015, he gave her a note to be off work from that date until after she has seen Dr. Meeuwsen on March 9, 2015. He further wrote in his report that the claimant should not return to work until after she had seen Dr. Meeuwsen’s office. The claimant was seen by Dr. Meeuwsen’s office on March 9, 2015, when she was given a note to be off work until March 16, 2015. According to her time card, the claimant went to work on March 18 for half an hour, and then again on March 19 for two and a quarter hours. After both unsuccessful days at work, the claimant went and saw a medical provider.

27. The claimant was off work and then returned to work on light duty as her doctor advised. As such, she is entitled to temporary partial disability benefits for the time she was not working due to her injury.

28. After attempting to go to work on March 19 and not having success, the claimant was seen by John Miller on that same day. Mr. Miller wrote in a work note

"[The claimant] was seen here at our clinic on 3/9, 3/18 and 3/19 for her right arm/wrist. She is scheduled for follow up on 3/23. She is to go to physical therapy today (3/22) and has an appointment with the orthopedist on Tuesday 3/31. If pain not controlled over this weekend (Friday 3/20, Saturday 3/21, Sunday 3/22), then please excuse. She is having problems taking pain medication due to reaction." Further, the claimant was given work restriction of not using her right hand.

29. In a conversation with Ms. Rhoades, Ms. Rhoades told the claimant that she could only go back to work in housekeeping and that she needed the use of both of her hands. Since the claimant did not have those restrictions, she was unable to comply with the respondent-employer's request. The claimant has not returned to work since, and the respondent-employer has not provided the claimant with a suitable job that was within her work restrictions. As a result, the claimant is entitled to ongoing temporary total disability payments from March 19, 2015.

30. The ALJ finds the claimant to be credible.

31. The ALJ finds the opinions of Dr. Gattis, Jodi Bauer, Amy Sandusky, and John Miller to be more credible than medical evidence to the contrary.

32. The ALJ finds that the claimant has established that it is more likely than not that on March 6, 2015 she sustained an injury to her right upper extremity that arose out of and occurred in the course of her employment with the respondent-employer.

33. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to all reasonable, necessary and related medical treatment to cure or relieve her from the effects of her injury.

34. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to temporary total disability benefits from March 8, 2015 through March 17, 2015 and from March 20, 2015 and ongoing until terminated by operation of law.

35. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to temporary partial disability benefits on March 18, 2015 and March 19, 2015.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an

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

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

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

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

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

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

7. Because this matter is compensable, the respondent-insurer is liable for medical treatment which is reasonably necessary to cure or relieve the claimant from the effects of her industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim*

Appeals Office, 942 P.2d 1337 (Colo. App. 1997). All of the medical treatment the claimant received for her industrial injury, from March 6, 2015 and onward, was reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

8. To prove entitlement to temporary partial disability benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Here, as a result of the injury the claimant experienced an unspecified partial wage loss on March 18 and March 19, 2015.

9. 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 she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. The ALJ concludes that the claimant was unable to work from March 8, 2015 through March 17, 2015 and from March 20, 2015 and ongoing.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that on March 6, 2015 she sustained an injury to her right upper extremity that arose out of and occurred in the course of her employment with the respondent-employer.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant is entitled to all reasonable, necessary and related medical treatment to cure or relieve her from the effects of her injury.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from March 8, 2015 through March 17, 2015 and from March 20, 2015 and ongoing until terminated by operation of law.

14. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary partial disability benefits on March 18, 2015 and March 19, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical treatment to cure or relieve the claimant from the effects of her injury.

3. The respondent-insurer shall pay the claimant temporary partial disability benefits for March 18, 2015 and March 19, 2015 to be determined by the parties.

4. The respondent-insurer shall pay the claimant temporary total disability benefits for the period from March 8, 2015 through March 17, 2015.

5. The respondent-insurer shall pay the claimant temporary total disability benefits for the period from March 20, 2015 and ongoing until terminated by operation of law.

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

7. All matters not determined herein, 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 8, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

CERTIFICATE OF MAILING OR SERVICE

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

Gregory B. Cairns Esq.
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Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: **2/23/2016** **Gabriela Chavez**
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-980-714-02

ISSUE

The following issue was raised for consideration at hearing:

1. Whether Claimant's temporary total disability benefits (TTD) should be reduced by 50% because he willfully violated a safety rule or willfully failed to use a safety device within the meaning of Section 8-42-112(1) (a) and (b), C.R.S., respectively.

FINDINGS OF FACT

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

1. Claimant was born June 11, 1979, and was 36 years old at time of hearing. Claimant has a high school education. Claimant was hired by Employer on July 11, 2014. Claimant is right hand dominant. He originally served as a dishwasher and busser. In September 2014, Claimant was promoted to the position of line chef. This position required him, among other tasks, to cut vegetables and to slice and grind meat.

2. Claimant suffered an industrial injury to his right hand on April 16, 2015, when in the course and scope of his employment for Employer he stuck his right hand in a meat grinder, amputating five fingers and a portion of the hand. On the date of his injury, Claimant reported to work at his regular time, about 7:45 a.m. Claimant was well rested and fed, and he was not under the influence of any medication or drug.

3. Respondents admitted liability for this industrial accident and have paid TTD from April 17, 2015, ongoing. Respondents took a 50% reduction of TTD benefits due to a "Safety Rule violation."

4. Respondents have provided conservative medical care as directed primarily by Bret C. Peterson, M.D. Claimant was provided care by the authorized treating physician, including surgeries, physical therapy, counseling, and pain management. Claimant receives care for his emotional issues from Dr. Edmonds, his therapist, Dr. Roberta Anderson-Oeser, his pain management specialist, and Dr. Joel Cohen, his psychologist. Since his injury, Claimant has undergone five surgeries to correct his condition.

5. According to Dr. Peterson in a report dated December 8, 2015, Claimant has essentially a transmetacarpal amputation with some additional length over the ulnar side of the hand. The wounds are completely healed and he has a viable soft padded flap on the palm of his hand. Claimant has a devastating, life altering, and debilitating injury that will permanently impair both his functionality and his ability to gain livelihood

6. On the day of Claimant's injury, he was supervised by Brent Jackson and Dryden Goss, both *sous* chefs or assistant chefs. Mr. Jackson trained Claimant in the use and cleaning of the meat grinder. He trained Claimant to use a white plastic plunger to push meat into the grinder feed chute. Mr. Jackson pointed to the prominent sign on the side of the grinder which stated "WARNING! INJURY HAZARD KEEP FINGERS OUT OF FEED CHUTE!" and warned Claimant to heed the sign.

7. Mr. Jackson's verbal warning was the only formal safety training that Claimant received from any management member about use of the meat grinder. Mr. Jackson warned Claimant of the danger of the meat grinder and cautioned him to use the plunger.

8. Mr. Jackson credibly testified that the purpose of the warning was to keep Claimant from injury and that the consequence of not heeding the warning was injury to the hand. There were no written statements published by the Employer pertaining to the use of the meat grinder or the consequences of placing one's fingers into the chute.

9. Mr. Jackson testified that the warning sign on the grinder was probably placed there by the manufacturer or distributor. There was a smaller warning on the grinder in yellow and black which began with the word "Caution!". Both Claimant and Mr. Jackson were unaware of the exact wording of this smaller warning label.

10. Claimant testified that he often used the plunger, but sometimes the plunger was not present at the machine. If he could not find the plunger, to save time, he would use his hand to push lamb meat into the grinder chute. He did this multiple times without injury. Claimant was never reprimanded or punished for failing to use the plunger at work.

11. On April 16, 2015, at about 9:00 a.m., Claimant began the task of grinding lamb meat. There were between 4 and 6 employees in the kitchen area at any given time, and at times the pace of work was hectic. Claimant could not find the plunger, so he searched for it for a few minutes. He then tried to find the *sous* chef on duty that day, Dryden Goss, to ask him what to do. He failed to find Mr. Goss, so he put the lamb meat on the grinder tray and moved it into the grinder chute with his bare hand. The first grinding did not grind the meat sufficiently to make lamb burgers, so he placed the partially ground meat on the grinder tray, and once again guided the meat into the grinder chute with his right hand. This time, his hand followed the meat deeply into the shaft, causing his injury.

12. Claimant testified about cleaning and storage of the meat grinder and plunger. Claimant's point being the machinery was cumbersome and was stored out of the way of kitchen staff in a back hall way. This information was determined not to have bearing on the issue for consideration here.

13. Both Mr. Goss and Mr. Jackson testified that Claimant was a good and dependable worker. Claimant was convicted of a felony and was incarcerated at the Canon City, Colorado penitentiary where he worked in the kitchen and canteen services. Claimant has worked as a line cook at other employers. At least one of Claimant's previous employers had a meat grinder which Claimant used.

14. Claimant has not returned to work since his injury.

15. Dryden Goss, *sous* chef, testified that he never saw Claimant or any other kitchen worker fail to use the plunger. He credibly testified that if he'd seen them fail to use the plunger, he would have reprimanded them.

16. Mr. Jackson also testified that he never saw Claimant or any other kitchen worker fail to use the plunger. And, he also credibly testified that if he had seen them fail to use the plunger, he would have reprimanded them.

17. Both Mr. Goss and Mr. Jackson testified that manufacturer's warning signs constituted the Employer's "safety rule." Employer did not maintain or publish a separate written safety rule related to the use of the meat grinder and plunger.

18. Employer established by a preponderance that Claimant intended to violate the safety rule and intended not to use the Employer's safety device.

CONCLUSIONS OF LAW

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

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 litigation. *See* Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* 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. *See 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. *See* Section 8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. *See* Section 8-43-201, C.R.S. The judge's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the judge 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. *See Magnetic Engineering, Inc. v. Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

3.Considering the facts of this case, the ALJ concludes that Claimant should be penalized 50% of his TTD benefits for violation of a safety rule. Respondents proved that they are entitled to an order reducing Claimant's benefits pursuant to Section 8-42-112(1), C.R.S. That section provides for a reduction of Claimant's TTD benefits where the injury results from the employee's willful failure to obey a reasonable rule adopted by the employer for the safety of the employee or fails to use a safety device provided by the employer. In this case, Respondents sustain their burden of proof to establish by a

preponderance of the evidence that Claimant willfully violated a safety rule and willfully failed to use a safety device.

4. Respondents contend that it maintained a safety rule regarding use of the plunger in meat grinding. Respondents argue they adopted the rule which appeared on the meat grinder at the time of sale and then further enunciated their rule when in conversation Claimant's supervisor showed Claimant the meat grinder with cautionary sign prominently affixed to it and told him to use the plunger in grinding the meat.

5. The meaning and content of a safety rule must be specific. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App. 1988. It is generally held that oral warnings, prohibitions and directions meet the safety requirement for the protection of both employer and employee if given by someone generally in authority and known to be heard and understood by the employee. *Industrial Commission v. Golden Cycle Corp.*, 246 P.2d 902 (Colo. 1952). Respondents in this case had a safety rule requiring workers to utilize the plunger to force meat into the grinder. It was credibly established that this rule was communicated to Claimant by Claimant's supervisor, Brent Jackson.

6. A safety rule violation is only applicable if the violation is willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant intentionally did the forbidden act. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Stockdale v. Industrial Commission*, 232 P. 669 (Colo. 1925); *Brown v. Great Peaks, Inc.,* W.C. No. 4-368-112 (Industrial Claim Appeals Office, July 29, 1999). A violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). The record evidence indicates that Claimant intentionally failed use the meat plunger. The evidence established that Claimant knew of the safety rule and knew of the safety device and that he intentionally proceeded to grind the meat without the plunger. The ALJ considered the evidence that the kitchen was hectic and that the plunger was sometimes hard to locate. Neither consideration changes the judgment that Claimant intended to violate a safety rule about using the plunger with the meat grinder and intended not to use the safety device. Consequently, Respondents are entitled to a 50% reduction in indemnity benefits.

ORDER

It is therefore ordered that:

Respondents shall reduce Claimant's TTD benefits by 50% for violation of Section 8-42-112(1)(a) and (b).

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 23, 2016_

DIGITAL SIGNATURE:

Margot W. Jones

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

STIPULATION

1. The parties stipulated that, should the claim be found compensable and the Claimant proves she is entitled to temporary disability benefits, the Claimant's average weekly wage (AWW) is $591.11 which corresponds to a temporary total disability (TTD) rate of $394.07 per week.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder arising out of and in the course of her employment with Employer on December 6, 2014.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits and that treatment she received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits in this claim from December 7, 2014 ongoing.

FINDINGS OF FACT

1. The Claimant is a bakery clerk for Respondent, with a date of birth of May 4, 1965. She has been employed by Employer for approximately 16 years, since 2009 as a baker and pastry icer. The Claimant's normal work hours are from 4:00 AM to 11:00 AM on her work days. Her job duties included baking and icing donuts and cakes. The job duties were physical and fast paced. The trays on which the donuts and cakes were placed are approximately 3 feet by 2 feet. The screens for icing the donuts and cakes fit on the tray below the donuts and cakes. The screens were also 3 feet by 2 feet. After icing the donuts and cakes, and stacking them, she had to package them, place them out on the display racks, and do clean-up. Clean-up included placing the icing screens and trays into hot soapy water and letting them soak, then moving them to hot water to rinse, and then to a further sink for sanitation. Then the screens are moved again to dry. The Claimant typically would pick up 3 screens at a time as she moved them, holding them with her arms outstretched.

2. The Claimant was experiencing pain in her right shoulder while performing her work in the months before December 6, 2014. She testified credibly that her right shoulder had begun to bother her in September or October, 2014. She testified that in November, 2014 her Employer had a large holiday event attended by multiple employees and management from other Employer shops so they can see what will be available in stores over the holidays. In preparation for this event, the Claimant had to ice up to 3,000 donuts and 160 cakes per day. The Claimant testified that her shoulder pain increased beginning in November and that she had to work multiple days in a row with only a single break day in between, instead of her usual two-day break.

3. The Claimant testified credibly that, on December 6, 2014 while lifting three icing screens from one sink to the next that she felt and heard a pop in her right shoulder. A co-worker, Carmalita Tsosie, who was a baker and is currently one of Employer's assistant managers, corroborated the Claimant's testimony, testifying at the hearing that she was standing behind the Claimant and also heard the Claimant's shoulder make a "weird popping sound" when the Claimant was lifting some screens from the sink.

4. The Claimant testified that after her shoulder popped, her shoulder felt weaker than before. The Claimant testified that before her shoulder popped she had been able to lift 3 of the icing screens at a time from one sink to the next, but after her shoulder popped that she was only able to lift 1 at a time. Likewise, before her injury the Claimant had been able to lift buckets full of icing by herself, but afterwards she needed the help of her co-worker, Ms. Tsosie. Ms. Tsosie testified that she had to help the Claimant lift the icing buckets that day, and had previously only helped her every now and then with icing buckets, never consistently.

5. The Claimant testified that she continued working until the end of her shift on December 6, 2014 and then went home. She did not report a work injury during her shift before she left work that day. She noticed that her shoulder was swollen and that it felt weaker. She iced it before going to bed. While in bed on the night of December 6, 2014, the Claimant attempted to rollover in bed and the pain in her right shoulder increased (Respondent's Exhibit G). The pain was so intense after this that the Claimant decided to go to the emergency room on December 7, 2014.

6. The Claimant went to the North Suburban Emergency room on December 7, 2014. The medical record on that date indicates that the Claimant reported that "she was reaching forward yesterday and then felt a pop and pain in her right shoulder. Then while sleeping last night she rolled over it and aggravated the right shoulder more." An x-ray was done, which did not identify any "acute significant abnormalities"(Respondent's Exhibit J). The Claimant was diagnosed with a shoulder strain, was given a prescription for Norco, and advised to "follow-up with PCP in two to three days" (Respondent's Exhibits J and L).

7. Also on December 7, 2014, the Claimant engaged in a series of text messages with her immediate supervisor at work. The text messages from this day were,

Claimant: Hey, I'm gonna have to go to the er when Rachel gets off work. Woke up last night in a lot of pain. The bone in my shoulder is sticking way out and I can't move any of my shoulder without crying. I need an exray [sic] for sure.
12/7/2014, 2:43 PM

Supervisor: Hopefully everything is okay I know the shoulder has been hurting you for a while now just let me know and good luck.
12/7/2014, 4:31 PM

Claimant: Waiting for the exrays [sic] to come back. They just gave me a shot for the pain. It never hurt this bad. All I did was try to roll over in my sleep.
12/7/2014, 7:00 PM

Claimant: Nothin [sic] broken, yet but definitely ligament issues. Can't use my arm for a few days. It's really swollen! She gave me a note for work.
12/7/2014, 7:44 PM

Supervisor: Get some rest and try to see a doctor as soon as you can because they're going to want a doctors release for you to come back to work. Have a good night.
12/7/2014, 9:08 PM

(Claimant's Exhibit 1)

8. The Claimant testified that she initially did not want to claim the injury as a Workers Compensation injury since she had some sick leave that she could use as well as private medical insurance and the potential for short term disability. She believed, initially, based on the initial medical records that she would be able to return to work in a relatively short period of time.

9. From the Emergency Room, the Claimant was referred to Dr. Eric Keahey. Claimant testified that she elected to go to Dr. Eric Keahey at the Westminster Internal Family Medicine Clinic, because that clinic was convenient and was covered by her private medical insurance. Dr. Keahey's records reflect that he saw the Claimant for an initial evaluation on December 9, 2014. The medical record reports "…onset of right shoulder pain over the weekend, 3 days previously. She works in a bakery, pouring, stirring and lifting frequently. She denies any acute injury, but pain that began rather abruptly while at work" Claimant's Exhibit 4, p. 27; Respondent's Exhibit K, p. 25). Dr. Keahey testified in his deposition that he also asked for an x-ray at this visit "because shoulder separation is often missed on plain films. She reported to me that they were normal and sure enough ours showed the AC separation" (Tr. of Deposition of Dr. Keahey Deposition, p.17). Dr. Keahey gave the Claimant a diagnostic injection which caused a significant improvement in symptoms (Claimant's Exhibit 4, p. 29; Respondent's Exhibit K, p. 29). Dr. Keahey testified in his deposition that if a person has "increasing shoulder pain for months before but it abruptly worsens on particular day at work that that

would indicate an acute incident." He further testified that in his records when he says: "That she denies acute injury, I am stating that she did not have a fall or something fall on her or some serious injury of that sort. I'm not – that does not mean there was not an abrupt on-set of pain in my nomenclature" (Tr. of Deposition of Dr. Keahey Deposition, pp. 25- 27).

10. On December 9, 2014 the Claimant engaged in another series of text messages with her supervisor, advising her supervisor that she had injured herself at work on December 6, 2014. Previous text messages between Claimant and her supervisor were suggestive of a work injury but were not as definitive as the December 9, 2014 text message. The text messages from this day were,

Claimant: Just gotta [sic] back from the doc. I will be out till released. Took more exrays [sic] will go over them Thursday am. He is leaning towards a separated shoulder. Has me in a sling and not allowed to move my arm.
12/9/2014, 2:13 PM

Claimant: Yes he said as of now I can't work. Said he wouldn't eve [sic] want me to check. It's definitely messed up! I will know more Thursday morning. He said I could be out awhile.
12/9/2014, 2:26 PM

Supervisor: Sorry you're going through this. I hope it's not too bad. I hope work knows they are going to have to hire someone until you're [sic] back or we'll be screwed for Christmas [sad face emoji] don't feel bad though you need to take care of yourself and get better. It's been bothering you for a while now. Please keep me informed. Thanks.

Claimant: Doc called, yep my arm fell off [crying sad face emoji] have an ac separation.
12/9/2014, 3:53 PM

Supervisor: Oh no I'm sorry but that's horrible that probably means you need surgery and at least two months off work? Ouch that must really hurt.
12/9/2014, 3:54 PM

Supervisor: Just out of curiosity do they know what caused it
12/9/2014, 4:09 PM

Claimant: What I do at work. He said there are two ways for it to happen, to have it yanked out or the slow way, (like mine) till it comes apart. I felt a snap when I was reaching in the sink before I left work Sat.
12/9/2014, 4:14 PM

(Claimant's Exhibit 1)

11. The Employer did not provide the Claimant with a list of designated providers within seven (7) days of this text message exchange on December 9, 2014 although the Claimant had advised that her supervisor that her shoulder injury was work related.

12. On or about December 10, 2014, the Claimant filed for non-occupational short-term disability. The Claimant had Dr. Keahey fill out the Employer's Sick Pay Request (Respondent's Exhibit I, p. 21). In the December 11, 2014 report submitted in support of that Sick Pay Request, Dr. Keahey stated that the injury was not related to the patient's employment. He had initially checked that the condition was due to the patient's employment, but then he crossed it out and checked that it was not related to the patient's employment (Claimant's Exhibit 2, p. 16; Respondent's Exhibit I, p. 22). The Claimant testified that she asked Dr. Keahey to not list it as a Workers Comp claim since she would handle it on her own insurance. Dr. Keahey testified in his deposition that he had originally marked this injury as "Due to injury" but that he scratched that out and indicated that it was not. Dr. Keahey testified that he had a specific recollection that the Claimant asked him to change it from a work related injury to a non-work related injury (Tr. of Deposition of Dr. Keahey Deposition, pp. 16-17).

13. On December 22, 2014 pursuant to the referral from Dr. Keahey, Claimant was seen by Dr. Michael Bagley at Cornerstone Orthopedic and Sports Medicine. Dr. Bagley noted in his report that the Claimant had a "mild to moderate AC joint separation per x-ray… This is not surgical" (Claimant's Exhibit 5, p. 53; Respondent's Exhibit G). The Claimant testified that she told Dr. Bagley that she did not want to claim this as a work injury and Dr. Bagley commented in his medical note of 12/22/2014 that "We did discuss that this is not a Work Comp situation" (Claimant's Exhibit 5, p. 53; Respondent's Exhibit G). Dr. Bagley also issued a report in support of the Claimant's request for non-occupational sick pay. Dr. Bagley signed off on the request for non-occupational leave and indicated that the Claimant's condition was not work-related (Respondent's Exhibit H).

14. The Claimant next saw Dr. Bagley at Cornerstone a month later on January 22, 2015. At that time Dr. Bagley noted "Rotator cuff tear. Certainly, within the differential diagnosis to the right-sided rotator cuff tear given the fact that [the Claimant] temporarily did well with the cortisone shot and she has rotator cuff weakness." Dr. Bagley referred the Claimant for an MRI of the right shoulder (Claimant's Exhibit 5, p. 57).

15. On January 31, 2015, the Claimant texted her supervisor: "…as you may have guessed my shoulder is still messed up. I get my MRI on the 5th and see the doc on the 12th. He thinks it is the rotator cuff. I think it all came apart in there [pain face emoji]" (Claimant's Exhibit 1, p. 14).

16. On February 12, 2015 Dr. Bagley notes that the Claimant's right shoulder pain "occurs constantly and is worsening….the pain is aggravated by lifting and movement. The pain is relieved by rest and sling." He further noted that the Claimant

“cannot work at all as a baker. This really is a disabling type of injury including both pain and weakness” (Claimant’s Exhibit 5, p. 60; Respondent’s Exhibit F, p. 11).

17. The Claimant testified that when it became likely that she was going to need surgery and would be disabled for a prolonged period of time that she consulted an attorney in February 2015, to initiate a workers’ compensation claim. She filled out a Worker’s Claim for Compensation dated February 12, 2015 which had been provided to her by the initial attorney that she consulted. The actual Claim for Compensation was not received by the Division of Workers’ Compensation, according to the date stamp on Respondent’s Exhibit D until May 13, 2015. The Claimant testified that she had retained an attorney on or about February 12, 2015 and left the Claim for Compensation to be filed by him (Claimant’s Exhibit 3, p. 25; Respondent’s Exhibit D, p. 8). The Claimant testified that the initial attorney she consulted in February had not done anything for her. Consequently she hired her current attorney in May 2015. The current attorney filed the Worker’s Claim for Compensation on May 13, 2015.

18. On that same date, February 12, 2015, the Claimant filled out an additional Employer three day or more sick pay request. In this request, for the first time, she did not designate, one way or the other whether or not her injury was occupational. Likewise, Dr. Bagley signed this particular work release statement and indicated both “yes” and “no” on whether the condition was due to the patient’s employment. Dr. Bagley indicated that it was “pending review” Claimant’s Exhibit 2, p. 19-20; Respondent’s Exhibit E, pp. 9-10).

19. On March 4, 2015 Dr. Bagley performed surgery on the Claimant’s right shoulder. His post-operative diagnosis included:

1. Right shoulder partial thickness rotator cuff tear (high grade).

2. Right shoulder sub-acromial impingement syndrome.

(Claimant’s Exhibit 5, p. 64; Respondent’s Exhibit C, p. 6).

20. Dr. Bagley saw the Claimant again on April 27, 2015. At that time he commented: “Of note, I do want to clarify that [the Claimant’s] rotator cuff injury is very consistent with her line of work. The overhead lifting that she does with the heavy baking trays certainly could cause an injury such as [the Claimant’s]. She has a very clear cut rotator cuff tear. The biceps tendon is intact, so again, it is reasonable that she did sustain this injury at work.” Dr. Bagley restricted the Claimant from all work and completed a disability form. He restricted all lifting up to her shoulder and all overhead lifting. He noted the overhead lifting restriction will be in effect for six months from the time of surgery (Claimant’s Exhibit 5, p. 75). On June 19, 2015, Dr. Bagley reiterated his stance about overhead work, stating, “I am not going to release [the Claimant] to do any overhead work for six months following the surgery. This is non-negotiable” (Claimant’s Exhibit 5, pp. 88).

21. On July 2, 2015, Dr. Bagley notified the Claimant that he was moving out of state and that her follow up care would be with one of Dr. Bagley's colleagues. Dr. Bagley noted that he tentatively anticipated that the Claimant may be able to return to work in September, but cautioned that, "this is just an estimation" and indicated that the Claimant "may be unable to do over head work for a year following her surgery" (Claimant's Exhibit 5, pp. 96-97 and 100).

22. The Claimant continued treating with Cornerstone until she was discharged from orthopedic care. At that time, the Claimant testified that she needed to obtain another three day work release. She went to Dr. Keahey for a work release. The Claimant testified that Dr. Keahey did not do occupational medicine. Dr. Keahey confirmed in his deposition that "we don't have any occupational specialist here, so she was referred outside of our clinic." Dr. Keahey referred the Claimant to Dr. David Yamamoto on October 13, 2015 (Tr. of Deposition of Dr. Keahey Deposition, p. 22).

23. The Claimant testified that she saw Dr. Yamamoto and he provided continued work restrictions that she turned in to her Employer on October 28, 2015. The Claimant testified as of the date of the hearing, November 4, 2015 that she was still physically unable to perform her pre-injury duties as a baker or an icer.

24. Michael Busby, the Assistant Manager at the Claimant's store, testified that he was alerted in May of 2015, for the first time, that the Claimant was making a claim for workers' compensation. Mr. Busby testified that he and other supervisors and employees were aware that the Claimant had right shoulder problems and had not been able to work. However, it was his understanding that this was a non-occupational condition. Mr. Busby testified that he received a call and was yelled at because a claim was filed with the State and the Employer's store had not submitted a Report of Injury form. When he was alerted that the Claimant was making a workers' compensation claim, Mr. Busby went back through the paperwork and found that the Claimant, Dr. Keahey and Dr. Bagley had signed all forms indicating that the Claimant was suffering from a non-occupational condition. He also commenced and investigation and tried to talk to anyone who might have had knowledge of the Claimant's alleged injury. When he spoke with the Claimant's direct supervisor, she did not advise Mr. Busby about the text messages between the Claimant and her, only that the Claimant had reported her shoulder hurting. Mr. Busby also testified that he spoke with Carmelita Tsosie, but she did not tell him that she had heard anything about the Claimant's injury at that time.

25. Mr. Busby further testified that he and the Store Manager were the individuals to whom employees were to report workers' compensation claims. He noted that the Claimant had had a prior workers' compensation claim when she had been bitten by a bat. He remembered sitting down with the Claimant and explaining to her that she had to report all workers' compensation injuries to him, as the Assistant Store Manager, or to the Store Manager. Mr. Busby explained to the Claimant that an injured worker has to go see a workers' compensation physician and advised the Claimant of the panel of physicians utilized by Respondent, when they were discussing

this bat bite. He testified that he did not understand why he was not contacted before May of 2015, if the Claimant was off work and making a workers' compensation claim for an incident that happened five and a half months before.

26. Mr. Busby prepared an Employee Incident Questionable Claim Form dated May 27, 2015. In this form Mr. Busby provides a summary of the paperwork the Claimant completed to obtain medical leave and he notes that on multiple occasions the Claimant indicated her injury was "non-occupational" until changing the status to occupational on paperwork dated April 27, 2014. Mr. Busby also incorrectly noted that the Claimant had only complained to her supervisor of shoulder pain over time going on for months and that the Claimant never once mentioned that the shoulder condition was a work injury and never reported it as such to the Employer. These statements are contradicted by the series of text messages between the Claimant and her supervisor on December 7, 2014 and December 9, 2014.

27. On May 28, 2015, Respondent filed a Notice of Contest on the grounds that the Claimant's injury was not work related.

28. On cross-examination and on rebuttal, the Claimant testified about her prior worker's compensation claim which involved an incident where a bat attacked her while she was on a lunch break. The bat landed on her and attached itself to her backside. She reported this to her supervisor. A number of days later, other co-workers saw reports on TV about rabid, aggressive bats in Adams County and the Claimant went to Vista Hospital and was started on rabies shots which made her sick. Although reported as a worker's compensation claim, the Claimant didn't see worker's compensation physicians, but rather had appointment with an infectious disease doctor on referral from the ER doctors and obtained additional advice from a nurse practitioner at the Little Clinic. The Claimant testified credibly that based on that prior claim, she was not very familiar with the requirements and process of a worker's compensation claim.

29. In resolving the conflicts in testimony between the Claimant and Mr. Busby regarding the Claimant's report of an injury and when Employer should have been aware that the Claimant sustained a work related injury, the ALJ finds that Mr. Busby did not appear to have all of the pertinent information initially and at the time he prepared his May 27, 2015 report. He did not initially have access to the text messages between the Claimant and her immediate supervisor, nor did he have accurate and complete information regarding the actual knowledge of Ms. Tsosie as to the events of December 6, 2014 and Claimant's shoulder condition after an incident that day. The testimony of the Claimant as to the onset of her shoulder condition, the cause of the shoulder condition, and her reporting of the shoulder condition, is supported by the medical records, the contemporaneous text messages between the Claimant and her supervisor and the credible and persuasive testimony of Ms. Tsosie. Thus, the Claimant's testimony is found as fact on these issues. While there is evidence that the Claimant initially made efforts to keep her shoulder injury from being treated under the

worker's compensation system, this does not change the fact that the Claimant sustained a work injury on December 6, 2014 and that she reported the injury and her evolving condition to her supervisor from December 7, 2014 to December 9, 2014.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 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*, W.C. No. 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).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness 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 and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *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 293 (1951). 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*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

With respect to the factual testimony and evidence regarding the Claimant's mechanism of injury, the ALJ found the Claimant's testimony to be credible and further

found that the medical records, the text messages between the Claimant and her supervisor, and the testimony of a co-worker Ms. Tsosie support the finding that the Claimant suffered an injury to her right shoulder on December 6, 2014 while lifting and cleaning screens.

Prior to her injury, the Claimant testified credibly that her right shoulder had begun to bother her in September or October, 2014. She testified that in November, 2014 her Employer had a large holiday event attended by multiple employees and management from other Employer shops so they can see what will be available in stores over the holidays. In preparation for this event, the Claimant had to ice up to 3,000 donuts and 160 cakes per day. The Claimant testified that her shoulder pain increased beginning in November and that she had to work multiple days in a row with only a single break day in between, instead of her usual two-day break.

However, it is more likely than not that, after experiencing a worsening of her pre-existing condition over the months leading up to December 6, 2014, the Claimant sustained an acute injury while lifting icing screens from one sink to the next when she felt and heard a pop in her right shoulder. The Claimant was lifting these icing screens as part of her required job duties as a baker and icer. The Claimant reported the popping sensation to the North Suburban emergency room personnel on December 7, 2014, as well as to Dr. Keahey and Dr. Keahey's nurse on December 9, 2014. Additionally, the Claimant's witness, Carmalita Tsosie, actually heard the Claimant's shoulder pop on the date and time of the injury. After experiencing the pop in her shoulder, it felt weaker than before. The Claimant testified that before her shoulder popped she had been able to lift 3 of the icing screens at a time from one sink to the next, but after her shoulder popped that she was only able to lift 1 at a time. Likewise, before her injury the Claimant had been able to lift buckets full of icing by herself, but afterwards she needed the help of her co-worker, Ms. Tsosie.

As a result of her right shoulder injury, the Claimant was restricted from returning to work by her physicians and was restricted from any overhead work for a significant period of time. The Claimant required conservative medical care and then ultimately, underwent surgery for her right shoulder condition. The Claimant testified credibly that, as of the date of the hearing, she still would be unable to return to her full job duties.

Much has been made of the fact that the Claimant initially sought to proceed with medical treatment outside of the worker's compensation system and that in order to obtain 3-day leave approvals and short term disability benefits, she and her physicians checked form boxes indicating that the Claimant's right shoulder condition was not work related. However, the evidence viewed as a whole, and set forth in greater detail above in the Findings of Fact, nevertheless, supports a finding that the condition was work-related and that the Claimant sustained a compensable work injury on December 6, 2014.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on December 6, 2014 caused or

permanently aggravated, accelerated or combined with her preexisting shoulder condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits-Authorized and Reasonable & 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. 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).*

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial*

Commission, 701 P.2d 168, 170 (Colo. App. 1985); *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990); *Rogers v. Industrial Claims Appeals Office*, 746, 565 (Colo. App. 1987); *Cabela v. ICAO*, 198 P. 3d 1277 (Colo. pp. 2008); *Roybal v. University of Colorado Health Sciences Center*, 768 P .2d 1249 (Colo. App. 1988).

Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Additionally, in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 777 (Colo. App. 1990).

Awards of emergency medical treatment have been upheld where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment. See *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992). However, compensable emergency treatment is not restricted to such circumstances. *Lutz v. Western Pacific Airlines, Inc.*, W.C. No. 3-333-031 (ICAO, December 27, 1999). There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether the claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. An ALJ's determination whether there was a bona fide emergency or not will be upheld if supported by substantial evidence. *Hoffman v. Wal-mart Stores, Inc.*, W.C. No. 4-774-720 (ICAO, January 12, 2010); *Timko v. Cub Foods*, W. C. No. 3-969-031 (ICAO, June 29, 2005).

As set forth above, the Claimant's work activities of December 6, 2014 aggravated, accelerated or combined with the Claimant's pre-existing right shoulder condition and the Claimant established that a need for medical treatment was proximately caused by an acute injury on that date. The Claimant did not report an injury during that shift, but did begin a series of text messages to her supervisor on December 7, 2014 indicating that she was seeking medical care for her right shoulder

at the Emergency Department. The initial series of text messages on December 7, 2014 put the Employer on notice that the Claimant was injured, but not necessarily that the injury was work related. However, in the next series of text messages between the Claimant and her supervisor, it was clear that the injury would require medical treatment and that the injury was likely related to the Claimant's work activities on December 6, 2014. The particular part of the text message exchange that makes this clear is as follows:

> Claimant: Doc called, yep my arm fell off [crying sad face emoji] have an ac separation. 12/9/2014, 3:53 PM
> Supervisor: Oh no I'm sorry but that's horrible that probably means you need surgery and at least two months off work? Ouch that must really hurt. 12/9/2014, 3:54 PM
>
> Supervisor: Just out of curiosity do they know what caused it 12/9/2014, 4:09 PM
> Claimant: What I do at work. He said there are two ways for it to happen, to have it yanked out or the slow way, (like mine) till it comes apart. I felt a snap when I was reaching in the sink before I left work Sat. 12/9/2014, 4:14 PM

The Respondent did not provide the Claimant with medical treatment provider selections as set forth in the Act. Rather, on December 7, 2014 the Claimant first advised her Employer that she was seeking emergency medical treatment for her right shoulder condition. The Claimant completed her shift on December 6, 2014 in spite of an acute onset of increased weakness in her right shoulder. Then, after further aggravating the shoulder as she rolled over while sleeping the night after the shift when her shoulder popped, the Claimant made the decision to obtain emergency treatment and notified her supervisor that she intended to do so. An x-ray was done, which did not identify "acute significant abnormalities" (which were later revealed with an MRI) but the Claimant was diagnosed with a shoulder strain and given a prescription for her pain and advised to follow-up with her PCP.

The Claimant followed up with Dr. Keahey and later Dr. Bagley and was diagnosed with a rotator cuff tear and AC joint separation after further diagnostics. She ultimately underwent surgery on March 4, 2015 for her right shoulder condition.

With respect to the visit to North Suburban Emergency Department on December 7, 2014, the ALJ finds that the visit did constitute a bona fide emergency. A Claimant should not fear repercussions for obtaining emergency medical care when there is a reasonable and authentic belief that a medical condition is worsening due to an escalation of symptoms. Here, the Claimant credibly testified regarding an increase in the intensity of the pain and a further weakening of her arm and shoulder. It is reasonable that the Claimant experienced anxiety regarding how her medical condition

appeared to be progressing and the ALJ finds this presented a situation that she believed to be a true emergency. In looking at the whole picture over the course of the Claimant's treatment, seeking emergency treatment at North Suburban Emergency Department is found to be reasonable and necessary. This was the one and only emergency care visit over the course of the Claimant's treatment for this work injury and the evidence does not support an inference that the Claimant was attempting to circumvent the workers' compensation scheme to obtain inappropriate treatment or additional medications. The treatment the Claimant received at North Suburban is deemed authorized as emergency treatment under the Act.

Then, on and after December 9, 2014, the Claimant advised her Employer that she was seeking treatment from a physician through her private insurance and seeing an orthopedic specialist to whom she was referred from her private physician. The Respondent did not object to this nor did the Respondent direct the Claimant to a different choice of medical providers. By its conduct and acquiescence in this case, the Respondent gave the Claimant the impression that she was authorized to proceed with seeing her personal physicians for her shoulder condition, the onset of which occurred while performing her work duties. While the Employer may have done so under the impression that this was a private matter and not a workers' compensation matter, the Employer had some knowledge and information that the Claimant performed activities at work that contributed to the Claimant's right shoulder condition. The Respondents failed to designate a provider and they waived the right to object to Dr. Keahey and Dr. Bagley, and referrals from these physicians, as authorized treating physicians in this case.

Dr. Keahey's records reflect that he saw the Claimant for an initial evaluation on December 9, 2014. The medical record reports "…onset of right shoulder pain over the weekend, 3 days previously. She works in a bakery, pouring, stirring and lifting frequently. She denies any acute injury, but pain that began rather abruptly while at work." Dr. Keahey testified in his deposition that he also asked for an x-ray at this visit "because shoulder separation is often missed on plain films. Although the Claimant had reported to Dr. Keahey that the x-rays from the ER were normal and the x-rays requested by Dr. Keahey showed the AC separation. Dr. Keahey gave the Claimant a diagnostic injection which caused a significant improvement in symptoms. Dr. Keahey testified in his deposition that if a person has "increasing shoulder pain for months before but it abruptly worsens on particular day at work that that would indicate an acute incident." He further testified that in his records when he says: "That she denies acute injury, I am stating that she did not have a fall or something fall on her or some serious injury of that sort. I'm not – that does not mean there was not an abrupt on-set of pain in my nomenclature."

On December 22, 2014 pursuant to the referral from Dr. Keahey, the Claimant was seen by Dr. Michael Bagley at Cornerstone Orthopedic and Sports Medicine. Dr. Bagley noted in his report that the Claimant had a "mild to moderate AC joint separation per x-ray…this is not surgical." The Claimant next saw Dr. Bagley at Cornerstone a month later on January 22, 2015. At that time Dr. Bagley noted "Rotator cuff tear. Certainly, within the

differential diagnosis to the right-sided rotator cuff tear given the fact that [the Claimant] temporarily did well with the cortisone shot and she has rotator cuff weakness." Dr. Bagley referred the Claimant for an MRI of the right shoulder. On February 12, 2015 Dr. Bagley noted that the Claimant's right shoulder pain "occurs constantly and is worsening….the pain is aggravated by lifting and movement. The pain is relieved by rest and sling." He further noted that the Claimant "cannot work at all as a baker. This really is a disabling type of injury including both pain and weakness." On that same date, February 12, 2015, the Claimant filled out an additional Employer three day or more sick pay request. In this request, for the first time, she did not designate, one way or the other whether or not her injury was occupational. Likewise, Dr. Bagley signed this particular work release statement and indicated both "yes" and "no" on whether the condition was due to the patient's employment. Dr. Bagley indicated that it was "pending review."

On March 4, 2015 Dr. Bagley performed surgery on the Claimant's right shoulder. His post-operative diagnosis included: (1) Right shoulder partial thickness rotator cuff tear (high grade) and (2) Right shoulder sub-acromial impingement syndrome.

Dr. Bagley saw the Claimant again on April 27, 2015. At that time he commented: "Of note, I do want to clarify that [the Claimant's] rotator cuff injury is very consistent with her line of work. The overhead lifting that she does with the heavy baking trays certainly could cause an injury such as [the Claimant's]. She has a very clear cut rotator cuff tear. The biceps tendon is intact, so again, it is reasonable that she did sustain this injury at work." Dr. Bagley restricted the Claimant from all work and completed a disability form. He restricted all lifting up to her shoulder and all overhead lifting. He noted the overhead lifting restriction will be in effect for six months from the time of surgery. On June 19, 2015, Dr. Bagley reiterated his stance about overhead work, stating, "I am not going to release [the Claimant] to do any overhead work for six months following the surgery. This is non-negotiable."

On July 2, 2015, Dr. Bagley notified the Claimant that he was moving out of state and that her follow up care would be with one of Dr. Bagley's colleagues. Dr. Bagley noted that he tentatively anticipated that the Claimant may be able to return to work in September, but cautioned that, "this is just an estimation" and indicated that the Claimant "may be unable to do over head work for a year following her surgery." The Claimant continued treating with Cornerstone until she was discharged from orthopedic care.

At the time she was released from orthopedic care, the Claimant testified that she needed to obtain another three day work release. She went to Dr. Keahey for a work release. The Claimant testified that Dr. Keahey did not do occupational medicine. Dr. Keahey confirmed in his deposition that "we don't have any occupational specialist here, so she was referred outside of our clinic." Dr. Keahey referred the Claimant to Dr. David Yamamoto on October 13, 2015. The Claimant testified that she saw Dr. Yamamoto and he provided continued work restrictions that she turned in to her Employer on October 28, 2015. The Claimant testified as of the date of the hearing, November 4, 2015 that she was still physically unable to perform her pre-injury duties as a baker or an icer.

The ALJ finds that Dr. Keahey, Dr. Bagley (and colleagues at Cornerstone) and Dr. Yamamoto are authorized treating physicians. The conservative medical care and the surgical care that the Claimant received to date from Dr. Keahey, Dr. Bagley, and any referrals, was reasonably necessary to treat the Claimant's work-related condition. The medical records do not indicate that the Claimant's authorized treating physicians have placed the Claimant at MMI or released her to return to work without restrictions. The Claimant testified that she felt the onset of pain immediately at the time her shoulder popped on December 6, 2014 and she still does not feel good. In addition, the Claimant testified that her condition currently would prevent her from performing 100% of her job duties as a baker and icer. The Claimant has established that she is entitled to further evaluation of her right shoulder condition to determine if she requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

Temporary Disability Benefits

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); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or

- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

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).

The Claimant's testimony and the Employer records show the Claimant was absent starting December 7, 2014 and that she had not been released to return to work by a treating physician as of the date of the hearing. Her absence was directly attributable to a right shoulder condition caused by her work injury on December 6, 2014. The Claimant's work-related disability resulted in her missing more than 3 work shifts and she has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits for the entire time she missed work due to his work injury. The Claimant is entitled to TTD benefits from December 7, 2014 ongoing until one of the occurrences listed in § 8-42-105(3), C.R.S. or by order or otherwise by operation of law.

ORDER

It is therefore ordered that:

1. The Claimant proved that she suffered a compensable work injury on December 6, 2014.

2. Emergency Medical treatment provided by North Suburban Medical Center on December 7, 2014 was reasonably necessary to cure and relieve the Claimant from the effects of her December 6, 2014 work injury and is authorized as emergency medical treatment.

3. Medical treatment provided to the Claimant by Dr. Keahey, Dr. Bagley (and medical professionals at Cornerstone Orthopedics and Sports Medicine), and pursuant to referrals from Dr. Keahey and Dr. Bagley, including Dr. Yamamoto, is authorized treatment because the right to select a physician passed to the Claimant due to Respondent's failure to provide a designated list of physicians and due to Respondent's acquiescence to the Claimant proceeding with medical treatment in the manner that occurred in this case. Respondent shall be liable for payment for this medical treatment in accordance with the Medical Fee Schedule and the Act.

4. The Claimant is entitled to further medical benefits to treat her right shoulder condition and associated symptoms which are causally related to the December 6, 2014 work injury, if any, as determined by her authorized treating physicians, and the Respondent is responsible for

payment for such treatment in accordance with the Medical Fee Schedule and the Act.

5. The Claimant's AWW, per stipulation of the parties, which was approved by the ALJ, is $591.11 and her corresponding TTD rate is $394.07 per week.

6. Respondents shall pay Claimant temporary total disability benefits for the period of December 7, 2014 ongoing until one of the occurrences listed in § 8-42-105(3), C.R.S. or by order or otherwise by operation of law.

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

8. All matters not determined herein are reserved for future

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 8, 2016

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-984-303-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 13, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 1/13/16, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through Q were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. It was filed, electronically, on January 19, 2016. Claimant was given 2 working days within which to file objections. 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 the reasonable necessity of an arthroscopic decompression of the Claimant's right shoulder, originally recommended by Mark S. Failinger, M.D., the Claimant's authorized treating physician (ATP).

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant, a 55 year old male, suffered an admitted injury on May 13, 2015 when he was struck from behind by a cart stacked with bags of flour.

2. The Respondents filed a General Admission of Liability (GAL) on June 10, 2015. The GAL remains in full force and effect.

3. According to the Claimant, he has had intense pain in his right shoulder since the date of injury.

4. The Claimant stated that he wished to proceed with the arthroscopic decompression that was requested by Dr Failinger,

Reasonable Necessity, or Lack Thereof Regarding Recommended Surgery

5. On August 21, 2015, James P. McElhinney, M.D., performed a physician advisor staffing to review the surgery request. Dr. McElhinney reviewed the Claimant's MRI (magnetic resonance imaging) and noted that the Claimant had no rotator cuff tear and his biceps tendon was normal. Dr. McElhinney concluded that the surgery should be denied until Dr. Failinger was able to explain why the surgery was necessary when there was minimal pathology on the MRI.

6. Pursuant to Dr. McElhinney's opinion, surgery was denied by the insurance carrier as not being reasonable or necessary.

7. Jon M. Erickson, M.D., performed an independent medical exam (IME) of the Claimant on November 5, 2015. In his report, Dr. Erickson noted that surgery was unlikely to relieve the Claimant's pain. Specifically, Dr. Erickson noted that the Claimant's MRI showed no evidence of significant pathology and revealed no surgical lesions. Dr. Erickson stated in his report that if the Claimant had some pathology in his shoulder, the diagnostic injections performed on June 24, 2015 and July 8, 2015, should have provided him with some relief from his pain.. Instead, the Claimant received no pain reduction whatsoever, which seriously called into question the true pain generator

in the Claimant's case, according to Dr. Erickson. Dr. Erickson noted that the Claimant's formal pain presentation was not consistent with his informal pain presentation when he no longer thought that he was being evaluated. Cumulatively, Dr. Erickson stated that there were no findings suggesting that the Claimant's shoulder was the source of his pain.

8. Dr. Erickson testified at hearing, on behalf of Respondents, consistently with his report, that the arthroscopic decompression was not reasonably necessary.

9. Dr. Feininger wrote a second report on December 16, 2015 addressing the reasonableness and necessity of the arthroscopic decompression. In that report, Dr. Feininger stated:

> Surgery certainly does not have a high probability of helping the patient. The notes by Dr. McElhinney and Dr. Erickson are correct in that, if a patient receives little relief form a subacromial injection, the odds of surgery helping are significantly decreased and the patient's pain, from the beginning, has been out of proportion from one would expect given the MRI findings. There are no obvious tears that I could determine. This does not automatically preclude a patient from surgery, though, but, one would like to see some results in the immediate post-injection period following injection with an anesthetic to see if there is any improvement to determine whether or not a decompression would be of help. It is not rare that other findings are present sometimes, but, I would agree that it is NOT WITH MEDICAL PROBABILITY that any biceps pathology, major labral pathology, or rotator cuff pathology would be found.
>
> I do not see any specific lesions that would account for the patient's pain, which I believe require surgical repair. The surgical procedure is for an arthoroscopic decompression to see if that would help the patient, but, I do not expect to find biceps pathology, major labral pathology, or rotator cuff pathology that has to be 'repaired.'
>
> I do agree with Dr. Erickson that the MRI does not show a full-thickness tear as I noted in my notes as well…
>
> The patient certainly has pain out of proportion to the findings on the MRI and, therefore, a chronic pain disorder could be possible. When a patient's pain description and symptomatology far exceed that of what we see on the MRI,

> either the MRI is totally wrong, which is with low medical probability, or, the patient has a different perception of pain and I believe that is likely the case here.

10. The Claimant was not aware of Dr. Failinger's December 16, 2015 report or the opinions contained therein. The Claimant stated that the last time he spoke with Dr. Failinger was on August 5, 2015. Nonetheless, the Claimant still wanted to proceed with the surgery after being presented with Dr. Failinger's opinion from his December 16, 2015 report. Based upon Dr. Failinger's latest report, the reasonable necessity of the recommended surgery has **not** been proven by preponderant evidence.

11. Dr. Erickson stated that Dr. Failinger provided a compelling argument as to why the surgery requested by the Claimant is not reasonable or necessary. Dr. Erickson further reiterated in his testimony at hearing that the Claimant's shoulder MRI did not show any surgical lesions and that the Claimant's non-diagnostic response to shoulder injections further supported the fact that the Claimant's shoulder was not his pain generator. Dr. Erickson testified he was not sure why Dr. Failinger originally recommended surgery, but he agreed with Dr. Failinger's subsequent findings contained in the December 16, 2015 report.

12. This ALJ took administrative notice of the Division of Workers' Compensation Medical Treatment Guidelines (hereinafter "Guidelines") as they related to invasive treatment of the shoulder. Dr. Erickson testified that the Claimant does not meet the requirements of the Guidelines to qualify for an invasive shoulder procedure, and the ALJ so finds.

ULTIMATE FINDINGS

13. The ALJ finds the opinions in Dr. Failinger's December 16, 2015 report more credible and persuasive than opinions expressed in his previous reports. Further, the ALJ finds the opinions of Dr. Erickson and Dr. McElhinney credible, persuasive, and corroborative of the opinions in Dr. Failinger's December 16, 2015 report.

14. Although Dr. Failinger originally recommended the surgery, his most recent reports do not support the contention that the surgery is reasonable or necessary. Rather, the ALJ finds that Dr. Failinger has provided the Claimant with an option to proceed with surgery while taking pains to note that there is no shoulder pathology which is known, or likely to be found in an exploratory surgery --that would benefit the Claimant. Dr. Failinger clearly stated that he does not believe that surgery has a high probability of relieving the Claimant's complaints of pain, which he noted were out of proportion to objective findings. Dr. Erickson also found that the Claimant's condition is not supported by any objective findings such as surgical lesions in the MRI or positive diagnostic injections. Dr. Erickson further detailed how, in the absence of any known pathology or diagnostic response to treatment, the Claimant is not a candidate

for the requested surgery in accordance with the Division of Workers' Compensation Medical Treatment Guidelines. This is consistent with the conclusions of Dr. Failinger, as discussed in his December 16, 2015 letter. Dr. Erickson's conclusions are fully supportive of Dr. Failinger. There is no contrary medical opinion in the record that the requested surgery is medically reasonable or necessary. Indeed, the Claimant cannot have surgery on the insurance carrier's "nickel" just because he wants the surgery. Ordinarily, surgeons perform surgery that is medically warranted, and not based on the personal preferences of the patient, especially when the surgery is unlikely to offer relief.

15. Based on substantial evidence, the ALJ makes a reasonable choice to accept Dr. Failinger's latest opinions and the opinions of all other physicians, which are in evidence, and to reject Dr. Failinger's earlier opinions.

16. The Claimant has failed to prove, by a preponderance of the evidence that the arthroscopic decompression of his right shoulder is reasonably necessary.

CONCLUSIONS OF LAW

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

Credibility

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

contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions in Dr. Failinger's December 16, 2015 report were more credible and persuasive than opinions expressed in his previous reports. Further, as found, the opinions of Dr. Erickson and Dr. McElhinney were credible, persuasive, and corroborative of the opinions in Dr. Failinger's December 16, 2015 report. Indeed, in the final analysis, all opinions including Dr. Failinger's latest opinion 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.

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 reasonable choice to accept Dr. Failinger's latest opinions and the opinions of all other physicians, which are in evidence, and to reject Dr. Failinger's earlier opinions.

Reasonable Necessity of Arthrosopic Decompression

c. Section 8-42-101 (2) (a) , C.R.S., provides that Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of a compensable injury. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial injury. § 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 arthroscopic decompression is not reasonably necessary to cure and relieve the effects of the Claimant's admitted injury.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The request for authorization of the requested arthroscopic decompression, originally recommended by Mark S. Feininger, M.D., is hereby denied and dismissed.

B. The General Admission of Liability, filed on June 10, 2015, remains in full force and effect.

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

DATED this_____day of February 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2016, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on April 29, 2015.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for the April 29, 2015 injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits from April 29, 2015 through October 31, 2015.

STIPULATIONS

1. Claimant's average weekly wage is $135.63

2. The date of the alleged injury was April 29, 2015 and Claimant reported the alleged injury to Employer on May 2, 2015.

3. The parties reserve the issue of temporary disability benefits from November 1, 2015 and ongoing.

FINDINGS OF FACT

1. Claimant worked for Employer beginning March 26, 2015 in the position of part-time mover/helper.

2. Claimant reported to, called in, or was called by Employer to determine whether or not Employer needed any extra mover/helpers for a given day. If so, Claimant would work. If Employer did not need extra mover/helpers or have jobs for the day, Claimant would not work that day.

3. For the month leading up to the alleged work injury, Claimant worked on average less than 15 hours per week.

4. On April 29, 2015 Claimant was working as a mover/helper at a job site near 8th Avenue and York Street in Denver, Colorado. The job required boxes of belongings to be moved from a storage pod located outside the apartment, through an exterior apartment door into the complex, and then into the customer's apartment.

5. Claimant alleges that as he was walking into the apartment complex through the exterior door, and while carrying boxes, the door closed quickly and a metal bar on the door struck him directly in his lower back.

6. Claimant is between 6'0 and 6'1 inches tall. On the date of the alleged injury Claimant was wearing work boots with a slight heel (undetermined height). The spot where Claimant reported the bar on the door hit his lower back is approximately 40" from the ground. The height of the bar on the door that Claimant reported hit him in the back is between 36" to 37" from the ground.

7. Claimant alleges he felt immediate pain when the metal bar on the door struck his back. Claimant did not report the injury immediately to Employer. Claimant also did not report the injury to his co-worker working on site with him. Claimant's co-worker, Steven Litzinger was not aware of any potential injury to Claimant until several days later when Claimant reported it to Employer and Mr. Litzinger was interviewed.

8. Claimant did not work on April 30, 2015 or May 1, 2015 for reasons unrelated to the injury.

9. On May 2, 2015 Claimant alleges that he woke up with excruciating back pain and believed his injury had become serious. Claimant went in to work and reported his injury to Employer. Claimant was referred for treatment and a first report of injury was filled out.

10. On May 2, 2015 Claimant was evaluated at Concentra by Catherine Hunt, PA-C. Claimant reported that he was carrying a box at work when a door swung shut and the bar on the door struck his lower back. Claimant reported he did not feel any pain until 12 hours later. Claimant denied prior back injuries. Claimant reported having lower back pain with occasional pain radiating into his left thigh. A lumbar x-ray performed that day showed no evidence of acute injury or significant degenerative change. PA Hunt assessed lumbar pain and Claimant was provided work restrictions of no lifting, pushing, or pulling more than 20 pounds and was referred for physical therapy. *See* Exhibit 6.

11. On May 5, 2015 Claimant was evaluated at Concentra by Diane Adams, D.O. Claimant reported continued back pain in the left low back and left sacroiliac region with improving symptoms. Dr. Adams noted no bruising or contusions on Claimant's lumbar spine. Dr. Adams assessed lumbar pain and changed Claimant's work restrictions to allow up to up to 50 pounds of lifting and up to 30 pounds of pushing and pulling. *See* Exhibit 6.

12. On May 6, 2015 Claimant had his first physical therapy appointment. Claimant reported a bar from the door hit him in the left lower back and that he had numbness and tingling down the left lower extremity. Claimant reported having

previous right-sided sciatic nerve irritation approximately two years prior. *See* Exhibit 13.

13. On May 20, 2015 Claimant underwent an MRI of his lumbar spine that was interpreted by Charles Wennogle, M.D. Dr. Wennogle provided an impression of L2-L3, L3-L4, L4-L5, and L5-S1 disc degeneration; L3-L4 mild bilateral lateral recess and foraminal stenosis; L4-L5 moderate bilateral lateral recess and mild bilateral foraminal stenosis with contact of bilateral descending L5 nerve roots; L5-S1 broad based disc bulge and right focal paracentral annular tear causing mild right lateral recess stenosis with minimal contact of the descending right L5 nerve root; and a 6 mm cauda equine nodule. Dr. Wennogle noted no acute fracture or marrow edema. *See* Exhibit 7.

14. On May 24, 2015 Claimant worked 4 hours of modified duty within his work restrictions. Claimant also worked 4.25 hours within his restrictions on June 7, 2015. Thereafter, Claimant stopped showing up, calling in, or checking with Employer to see if work was available. Claimant did not offer a clear explanation as to why he stopped reporting to work or stopped calling in to see if work was available. Employer's general manager, Victor Davanzo reported that modified duty work remained available to Claimant and also could not explain why Claimant stopped reporting or calling in to work.

15. On May 26, 2015 Claimant was evaluated at Concentra by Allison Hedien, N.P. Claimant reported pain that was the same, mostly in the lower back with numbness in the anterior thigh. NP Hedien assessed radiculopathy and lumbar strain and referred Claimant to a physiatrist spine specialist to discuss the lumbar MRI and possible procedures. *See* Exhibit 6.

16. On June 10, 2015 Claimant underwent a follow up lumbar MRI interpreted by Dr. Wennogle. Dr. Wennogle noted the MRI was with contrast compared to the May 20, 2015 MRI without contrast to follow-up the cauda equine nodule. His impression was a 7 mm well circumscribed uniformly and avidly enhancing mass involving the right cauda equine at the L1 level, most likely schwannoma versus ependymoma or other less likely etiologies. *See* Exhibit 7.

17. On June 16, 2015 Claimant was evaluated by Scott Primack, D.O. Claimant reported carrying a box when a door swung and shut and hit him squarely on the back. Claimant reported pain with occasional symptoms down his left thigh. Claimant reported no prior problems with his lumbar spine. Dr. Primack noted that Claimant had a non work related mass at the cauda equine, that Claimant had some discogenic pain at L4-L5 and to lesser degree at L5-S1, and that Claimant had discomfort at the left lower extremity worse than on the right lower extremity. Dr. Primack explained to Claimant that he would need to see a neurosurgeon for the non work related mass at the cauda equine. Dr. Primack noted that Claimant did have work related discogenic low back pain. *See* Exhibit 11.

18. On July 16, 2016 Claimant underwent an independent medical examination performed by Anjmun Sharma, M.D. Claimant reported that while carrying a box, a door swung shut on his back, and a metal bar hit his low back. Claimant reported that he did not feel pain until 12 hours later and that he had pain and occasional tingling radiating to his left thigh. Dr. Sharma reviewed Claimant's medical records and MRI reports. Dr. Sharma opined that Claimant's current medical conditions were not a direct result and were not causally related to the work injury that occurred in April 2015. Dr. Sharma noted that Claimant's mass in the lower back needed to be evaluated by a neurosurgeon and may be the reason why Claimant was having symptoms. Dr. Sharma opined that there was no evidence suggesting that the current medical conditions Claimant had were related to a simple contusion or injury where a bar hit the lower back. Dr. Sharma did not recommend any additional treatment and noted that Claimant should follow-up with his primary doctor. Dr. Sharma noted that Claimant should limit a lot of repetitive lifting, carrying, pushing, and pulling that he had been doing over a number of years that invariably has led to Claimant's ongoing chronic medical condition and chronic degenerative disc disease presently in his back. Dr. Sharma found no evidence of causal relation or aggravation of the underlying problem as a result of the work injury. *See* Exhibit 12.

19. On August 7, 2015 Claimant underwent physical therapy at Rose Medical Center with Elizabeth Bunge, DPT. Claimant reported a work injury when he pushed back against a door to open it while carrying three boxes. Claimant reported that his symptoms began 12 hours later as low back pain and progressed to lower extremity pain.

20. On August 28, 2015 Claimant was evaluated at Western Neurological Group by Stephen Johnson, M.D. Claimant reported left low back and left leg pain after an accident at work where a bar on a door struck him in the low back area. Claimant reported that approximately 12 hours later he noted increased symptoms. Dr. Johnson noted that the MRI report from May 20, 2015 discusses some degenerative changes of discs but no clear evidence of significant stenosis or disc herniation. Dr. Johnson also noted that the MRI of June 10, 2015 noted the small tumor with differential diagnoses including schwannoma. Dr. Johnson assessed benign nerve sheath tumor at the L1 level not likely related to Claimant's recent back trauma and probably not related to Claimant's left leg pain symptoms and a history of low back and left leg pain following a work related accident. Dr. Johnson noted he was not certain as to the etiology of persistent back and left leg symptoms but did not feel that they were likely related to the intradural tumor. Dr. Johnson noted that he felt the L1 intradural tumor was likely asymptomatic and probably not related to claimant's low back and left leg pain. Dr. Johnson also noted that at present, he did not see evidence of significant disc herniation or spinal stenosis. *See* Exhibit 10.

21. On September 15, 2015 Dr. Sharma provided an updated report. Dr. Sharma noted that he had reviewed a video of the door and the bar that Claimant alleges caused his injury, interrogatories the Claimant answered, and an audio tape of conversation with Mr. Litzinger who was working with the Claimant on the alleged date

of injury. Dr. Sharma noted that Mr. Litzinger knew nothing about the alleged injury until several days later when Claimant filed a claim. Dr. Sharma noted that the bar is 36 inches from the ground and that Claimant is 6 feet tall. Dr. Sharma noted due to the door and bar height it was hard to say that Claimant would have been injured in the lumbar spine by the bar and opined that it was unlikely that the bar would have hit Claimant in the lumbar spine as Claimant alleges. Dr. Sharma opined that Claimant did not have work related discogenic back pain. Dr. Sharma did not believe that there was a work related injury. Dr. Sharma opined that discogenic pain would not even be remotely founded with result of a bar hitting the Claimant's lower back, even assuming it did hit the lower back and opined that discogenic pain is a chronic degenerative process. *See* Exhibit N.

22. On September 17, 2015 Dr. Primack provided an updated report. Dr. Primack noted that it was interesting that Mr. Litzinger knew nothing about Claimant's alleged work injury. Dr. Primack noted that with Claimant's height and the height of the bar on the door, the bar would never have hit Claimant in the back. Dr. Primack opined that after reviewing surveillance video of the door and Claimant's history, that there was an obvious discrepancy. Dr. Primack opined that the bar did not hit Claimant in the back and would not have caused work-related discogenic pain. Dr. Primack opined that Claimant's diagnoses were non work-related and were not aggravated, accelerated, intensified, or caused by a bar hitting Claimant. Dr. Primack opined that there was no specific work injury. *See* Exhibit O.

23. At hearing, Dr. Sharma testified consistent with his written reports and opinions. Dr. Sharma noted that there were no medical records indicating that Claimant had immediate pain when the bar to the door hit him. He also pointed out that there were no records indicating Claimant was bent over or hunched over when the bar hit him. Dr. Sharma agreed with Dr. Primack's opinion that the diagnoses were not work related and were not aggravated, accelerated, intensified, or caused by the bar hitting Claimant in the back. Dr. Sharma noted that in his initial report he did not believe there were work related injuries and after reviewing further information including the door height, interview of Mr. Litzinger, etc. it only reinforced his original opinion that no work related injury was suffered by Claimant.

24. Dr. Sharma's opinions are found credible and persuasive. His opinions are consistent with those of Dr. Primack and are supported by the great weight of credible evidence presented in this case.

25. Claimant's testimony, overall, is not found credible or persuasive. Claimant has presented with several inconsistencies. Claimant testified at hearing that he had immediate pain in his lower back when the bar struck him, but reported to several medical providers that he did not have pain until 12 hours later. Claimant's co-worker also was unaware of any injury or pain despite working with Claimant on the moving job where Claimant alleges the injury occurred. Claimant reported to physical therapy that he had prior right sided sciatic nerve pain in his lower back two years prior, yet denied to multiple providers that he had any prior lumbar spine issues or injuries.

There also are inconsistencies between the height of the door's bar and the spot where Claimant indicated it struck him.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the

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

An accident "arises out of" employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on April 29, 2015 that arose out of and occurred in the course of his employment. Claimant's testimony, as found above, is not credible or persuasive. Claimant provided inconsistent information as to when he first began experiencing pain following his alleged injury. He testified his pain was immediate, yet reported to various providers that it began approximately 12 hours later. His co-worker was unaware of any potential injury despite working on the same moving job with Claimant. The height of the bar on the door also would not logically have struck Claimant in the location Claimant alleges. Further, both medical experts examining the case opined credibly that Claimant did not suffer a work-related injury and provided persuasive causation analyses. In weighing all the evidence, the Claimant has failed to meet his burden to show he suffered from a work related injury on April 29, 2015.

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the

claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S.

Claimant has failed to establish a causal relationship between his current symptoms and diagnoses and any work related injury. As he has failed to establish that he suffered from a work related injury, the Respondents are not liable for medical treatment or medical benefits sought by Claimant.

Temporary disability benefits

To obtain temporary disability benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. *See* § 8-42-103(1)(a), C.R.S. As found above, Claimant has failed to establish that he suffered a work related injury. Therefore, any wage loss subsequent to April 29, 2015 is not causally related to a work injury and Claimant has failed to establish an entitlement to any temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffered a compensable injury on April 29, 2016.

2. Claimant is not entitled to medical treatment and is not entitled to any temporary disability benefits.

3. 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.

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DATED: February 24, 2016

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right upper extremity arising out of and in the course of her employment with Employer on March 23, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits and that treatment she received was reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

FINDINGS OF FACT

1. The Claimant has worked for Employer for over 15 years as a circulation clerk at one of its branch libraries. Her job duties include general clerical duties, typing, answering phones, creating library cards, faxing, checking in and checking out books, sorting and shelving holds, and working with the after school teen activities.

2. The Claimant testified that she has a prior work related injury to her right upper extremity from repetition work with returning and checking out books. She testified that the prior injury occurred in the spring of 2014, she treated with Dr. Chan, and she was placed at maximum medical improvement in the fall of 2014. She testified that she had no permanent work restrictions after being placed at MMI for the prior injury and was able to perform her regular job duties. In addition, on cross-examination, the Claimant testified that prior to her 2014 injury, she had also treated with Dr. Chan for carpal tunnel syndrome with respect to her right wrist and hand. The Claimant's testimony regarding her prior right upper extremity injury and conditions is consistent with the medical records in evidence in this case (see below), and is found as fact.

3. On April 18, 2014, the Claimant reported a work injury involving her right wrist when she felt a pop and then pain after grabbing a multiple disk audio book (Claimant's Exhibit 6; Respondent's Exhibit D).

4. The Claimant was first evaluated at Concentra for the April 18, 2014 injury on that same date. The Claimant was provided temporary work restrictions and medication was prescribed (Respondent's Exhibit G, pp. 38-39). The Claimant saw Dr. Stephen Danahey for this injury on April 29, 2014 and he noted tenderness and weakness on the right and left wrist but swelling only on the right wrist. He also noted that since her initial injury and evaluation, the Claimant was now reporting right and left wrist and elbow pain. He continued the Claimant's work restrictions and added that she was to avoid repetitive bilateral wrist motion. He also provided the Claimant with medications (Respondent's Exhibit G, pp. 36-37).

5. The Claimant was initially evaluated by Dr. Chan for the prior 2014 work injury on June 4, 2014 and he diagnosed her with tenosynovitis. He noted that he had previously treated the Claimant about six years prior and later placed her at MMI. At this visit, Dr. Chan noted no evidence of carpal tunnel syndrome or ulnar entrapment neuropathy (Respondent's Exhibit J, pp. 58-59). By July 10, 2014, Dr. Chan noted that the Claimant's pain complaints were reduced and she no longer used medications and had returned to work on a full-time, full-duty basis. He recommended only the consideration of 4 additional acupuncture sessions as medical maintenance (Respondent's Exhibit J, pp. 46-47).

6. On September 19, 2014, Dr. Danahey noted that she had treated with Dr. Davis and had received another cortisone injection to the lateral elbow 10 days prior. While the Claimant still had some hand pain with stapler use on a repetitive basis, she reported doing very well otherwise. Dr. Danahey released the Claimant from care for this claim and placed her at MMI. She received no permanent work restrictions and returned to work full duty, full time (Claimant's Exhibit 7; Respondent's Exhibit G, pp. 31-32).

7. The Claimant testified that on March 23, 2015, she and another circulation clerk were in the process of working with a large donation of fabrics that had just come in when the Claimant stopped working on that project to set up the community room where this library branch holds an after school teen program. She testified that she had to set up the tables in the room and pull chairs that were stacked on a cart down. This required grabbing the chairs, lifting them over her head and then pulling them off the rack. The Claimant then set the chairs down by the tables and around the gaming area. About half-way through taking the chairs down on March 23, 2015, the Claimant testified that her arm started really burning and getting hot. Her right elbow hurt the worst, but she also had pain in her upper back and shoulders. The Claimant completed the room set up duties from approximately 2:00pm – 2:30pm and then the kids come in after school from approximately 3:00pm – 5:00 pm. On cross-examination, the Claimant clarified that the activity of taking the chairs down actually takes 10-15 minutes but when you include the set up of the room with the tables that accounts for the additional time in the 2:00 – 2:30 time frame. The Claimant continued to work after setting up the community room for the teen program and then after the work day was over, she went home and took a Motrin and rubbed and massaged the affected areas. The Claimant's testimony regarding her work activities and mechanism of injury on March 23, 2015 is credible, consistent with her reports to medical providers and evaluators, and is found as fact.

8. The Claimant testified that she was still not feeling great, but went in to work the next morning as usual. When the Claimant realized that she was not feeling any better, she reported this to her supervisors Jennifer Frick and Lisa Cole. Ms. Frick had the Claimant call the "Ouch Line" and after providing information, the Claimant was directed to see one of the doctors and the Claimant chose to see Dr. Danahey at Concentra. The Claimant testified that in addition to treating with Dr. Danahey, she was also referred to Dr. Davis, one of the specialty doctors at Concentra, and he

recommended a platelet rich plasma (PRP) injection for her elbow. The Claimant testified that his injection recommendation was never performed and the Claimant's treatment with all physicians stopped sometime in the summer after her work injury, although none of her treating physicians placed her at MMI for this injury.

9. The Claimant saw Dr. Stephen Danahey on March 24, 2015 for evaluation after her March 23, 2015 incident. He noted that The Claimant reported that in December 2014, mild symptoms of right elbow pain had returned with her regular job duties which began to worsen. Then, Dr. Danahey noted that the Claimant reported that on the day of injury, she was pulling down 20-25 chairs from an overhead rack to set up a room for an after school program, this, in addition to sorting and ripping some donated fabric, aggravated her elbow a lot. On examination, Dr. Danahey noted, "R lateral elbow; mod TTP with mild STS and pain with resisted supination. TTP right back trap area with tight trapezius." He assessed the Claimant with lateral epicondylitis and trapezius strain and ordered physical therapy 3 times a week for 2 weeks and indicated he was considering re-evaluation with Dr. Davis who had provided 2 injections to the elbow previously. The Claimant was placed on work restrictions with lifting, pushing and pulling not to exceed 5 lbs. and to avoid repetitive right elbow motion (Claimant's Exhibit 2, pp. 12-14; Respondent's Exhibit G, pp. 28-30). At a recheck visit on April 14, 2015, the Claimant continued to report pain and discomfort in her right lateral elbow which radiates proximally. Dr. Danahey referred the Claimant for an ergonomic review and for an MRI of the right elbow (Claimant's Exhibit 2, pp. 23-26; Respondent's Exhibit G, pp. 22-24).

10. Mr. Scott Washam of Ergonomic Solutions, LLC conducted an Office Ergonomic Worksite Evaluation for the Claimant and prepared a written report dated April 17, 2015. The evaluation set forth the Claimant's job duties as working 3-4 hours at the front circulation desk, 1-2 hours in the work room and 2 hours with the teen program over the course of her work day (Respondent's Exhibit F, p. 13). In considering the Claimant's diagnosis of lateral epicondylitis, and the Medical Treatment Guidelines primary and secondary risk factors, Mr. Washam noted that none of the risk factors for cumulative trauma exist for the Claimant related to her job duties (Respondent's Exhibit F, pp. 14-16). Specifically in relation to the Claimant's job duties for the teen program, Mr. Washam recommended that the Claimant utilize the available folding chairs instead of the stackable chairs for her primary choice of chair and to request assistance for handling the stackable chairs (Respondent's Exhibit F, pp. 17-18).

11. On May 6, 2015, Dr. Danahey noted that the Claimant had an MRI showing "a low grade soft tissue contusion behind the lateral epicondyle." He also noted that the Claimant had an "ergo eval" showing no risk factors, and stated "she was injured lifting chairs at work." He continued to diagnose the Claimant with lateral epicondylitis in spite of the ergonomic evaluation results (Claimant's Exhibit 2, pp. 27-29; Respondent's Exhibit G, pp. 19-21).

12. On May 12, 2015, the Claimant was evaluated by Dr. Craig Davis, who noted that he had previously seen the Claimant about a year prior for right lateral epicondylitis and he performed a couple of injections which provided some partial relief of her symptoms such that she could function well. Dr. Davis noted the mechanism of injury moving chairs on March 23, 2015 and that the Claimant underwent an MRI on April 23, 2014. Dr. Davis noted that the MRI "demonstrated some soft tissue contusion of the posterolateral epicondyle area" and he opined that there was "a little bit of fluid in the extensor origin at the lateral epicondyle, although there is no tear." On examination, Dr. Davis noted the Claimant "is tender directly over the lateral epicondyle today and has pain with resisted wrist and finger extension and is extremely tender with resisted supination. She is minimally tender over the radial tunnel and nontender over the posterior aspect of the lateral epicondyle. She has full range of motion with pain at extremes." Dr. Davis diagnosed the Claimant with lateral epicondylitis and stated, "her symptoms are fairly well localized to the lateral epicondyle." Rather than the same injection he previously provided, Dr. Davis suggested a PRP injection which he opined "might be beneficial in her case." Dr. Davis also recommended additional therapy along with Tramadol and meloxicam to take as needed (Claimant's Exhibit 3, p. 51; Respondent's Exhibit H, p. 40).

13. The Claimant saw Dr. Danahey again on May 27, 2015 and he noted that the Claimant had seen Dr. Davis who recommended a PRP injection which was pending authorization. He further noted that if this was not authorized, she will try the steroid injection which she had in the past. Dr. Danahey noted the Claimant was "in moderate distress" and, on examination, found, "TTP right lateral elbow with very guarded motion, but full extension and flexion." Dr. Danahey continued to assess the Claimant with lateral epicondylitis. The Claimant remained on work restrictions limiting the weight she could lift, push or pull and to avoid repetitive right arm motion (Claimant's Exhibit 2, pp. 31-33). On June 17, 2015, Dr. Danahey noted that the Claimant reported her claim was under investigation but that her ongoing right elbow pain remained at an 8-9/10. Dr. Danahey noted that he would hold off on further treatment pending a decision as to whether Respondent accepted liability for the (Claimant's Exhibit 2, pp. 34-35).

14. On July 20, 2015, at Respondent's request, Dr. Douglas Scott performed an extensive review of the medical records and diagnostics in this case, including medical treatment notes, the First Report of Injury, the MRI, the Claimant's physical therapy notes, and the Office Ergonomic Worksite Evaluation. Dr. Scott opined that "as a result of her claimed 3/23/2015 grabbing, pulling and/or lifting chairs from a stack of chairs [the Claimant] aggravated her pre-existing condition of chronic lateral epicondylitis at the right elbow." He specifically concurred with the diagnosis, opining that the Claimant's "symptoms, exam and diagnostic testing findings are consistent with a diagnosis of lateral epicondylitis at the right elbow." Dr. Scott also opined that the Claimant's injuries are work related and noted, the medical documentation supported a causal link between the Claimant's undisputed work activities and the aggravation to her pre-existing condition. Based on the ergonomic evaluation, he noted that the Claimant does not have a cumulative trauma disorder. Dr. Scott noted that the

Colorado Medical Treatment Guidelines state that there is good evidence that Platelet Rich Plasma (PRP) injections in patients with symptoms lasting six months or more, result in better pain and functional outcomes after one year than steroid injections. He opined that "PRP injections should be authorized if [the Claimant's] symptoms persist past six months (Claimant's Exhibit 1, pp. 1-11).

15. Respondent next requested that Dr. Jonathan L. Sollender conduct a record review of the Claimant's claim. He prepared a written medical record review dated August 9, 2015. He noted that the Claimant's mechanism of injury involved, "no specific traumatic event" but rather repetitive elbow motion from the checking out of media, pulling 20-25 chairs from an overhead rack and sorting donated fabric. He noted that the Claimant was diagnosed with right lateral epicondylitis and trapezius strain and underwent some initial conservative treatment (Respondent's Exhibit E, p. 10). Dr. Sollender noted that he had reviewed Mr. Washam's ergonomic evaluation and that none of the Claimant's work activities that day surpassed established time thresholds to be considered occupational risk factors (Respondent's Exhibit E, p. 11). Dr. Sollender noted that an April 23, 2015 MRI showed low grade soft tissue contusion behind the right lateral epicondyle but no tear of the common extensor origin (Respondent's Exhibit E, p. 11). Dr. Sollender reviewed the treatment notes of Drs. Danahey and Davis, and the evaluation of Dr. Scott, noting there was an authorization request for steroid or PRP injections, but that this was not provided as treatment ceased pending investigation of the claim by the Insurer for causation. Dr. Sollender disputed Dr. Scott's opinion on causation that taking the stackable chairs down strained and aggravated a pre-existing right elbow condition. Dr. Sollender found it determinative that the Claimant's activities did not meet the duration requirement for the risk factors for a cumulated trauma for forceful repetitive activities. Dr. Sollender also disputes that the MRI findings are consistent with her diagnosis (Respondent's Exhibit E, p. 11). In conclusion, Dr. Sollender opined that the Claimant's pathology and activities were inconsistent with a work related injury being a cause of the Claimant's diagnosis of right lateral epicondylitis (Respondent's Exhibit E, p.12).

16. The Claimant saw Dr. Danahey again on September 4, 2015 reporting that a hearing for this claim was scheduled in November but that she did not believe any treatment was authorized at this point. On examination, Dr. Danahey noted "R elbow: TTP lateral aspect, with full motion and no swelling." Dr. Danahey provided work restrictions for the Claimant of lifting no greater than 5 lbs. occasionally, pushing/pulling up to 10 lbs. occasionally and avoiding repetitive grip and grasp with the right arm (Claimant's Exhibit 2, pp. 42-43).

17. At the hearing, the Claimant testified that since March 23, 2015, there has been an impact on her ability to perform her job due to the pain and due to work restrictions of no pushing, pulling or lifting anything over 5 pounds. The Claimant also testified that since her medical treatment stopped, her symptoms have not gone away and they have actually gotten worse. She testified that outside of work, her injury impacts her daily activities with her children, her housework activities and activities of daily living such as sleeping, combing her hair, using the restroom along with attendant

activities, and anything that activates her elbow or wrist on her right arm is painful. The Claimant's testimony regarding her symptoms and their impact on her activities of daily living is credible and is found as fact.

18. On cross-examination, the Claimant testified that she has missed work due to the March 23, 2015 work injury. She testified there were a few days that her arm was in so much pain from not being able to sleep and she needed to take a muscle relaxer the next day, so she could not work. Prior to March of 2015, the Claimant recalled only missing work due to unrelated sick days and on the day after she received a cortisone shot for her 2014 work injury prior to being placed at MMI for the 2014 work injury. She testified that it is possible that she may have missed other work days for the 2014 claim, but she is not certain and does not remember if she missed days after being placed at MMI for the 2014 claim but before the March 23, 2015 claim.

19. Mr. Washam testified at the hearing as an expert in the areas of physiology, ergonomics, work capacity evaluations, sports medicine and the Medical Treatment Guidelines. Mr. Washam testified that for the purpose of his ergonomic evaluation, he determined the Claimant's job duties by interviewing the Claimant and then observing the Claimant perform her job duties. Mr. Washam testified that the Claimant's work activity of lifting the stackable chairs to set up the teen program did not meet the Cumulative Trauma Guidelines for duration, which would be 4-6 hours of lifting 60 times per hour. On cross-examination, Mr. Washam testified that the Claimant showed him the chairs she was lifting when she alleges she injured herself. He questioned why the Claimant would be lifting the stackable chairs instead of setting out the folding chairs that would not require her to lift. Mr. Washam confirmed that he did not weigh the stackable chairs that the Claimant lifted because did not perform a force calculation to determine if a certain activity created a risk factor. His rationale was that since the Claimant's activity did not meet the duration factor for performing the activity, it was not required to perform a force calculation. On redirect examination, Mr. Washam further clarified that the force required to lift the chairs would not matter in this case because lifting 20-25 chairs for 10-15 minutes does not meet the criteria of lifting 60 times per minute for 4-6 hours under the risk factors in the Medical Treatment Guidelines.

20. Dr. Jonathan L. Sollender also testified at the hearing as an expert witness in the areas of hand surgery, upper extremity Level II accreditation matters and regarding the Cumulative Trauma Medical Treatment Guidelines. He explained that "tennis elbow" would be the layman's term for lateral epicondylitis. He further explained that the lateral epicondyle has two components, a bony component and the soft tissue component of extensor muscles that are attached to the bony prominence by way of a tendon. When that tendon is inflamed, there is epicondylitis. Dr. Sollender testified that lateral epicondylitis can be caused by a direct contusion (acute trauma) or a chronic condition where repetitive motions over an extended period of time, under a specific load, cause microscopic tearing of the tendon (cumulative trauma). For cumulative trauma, Dr. Sollender opines that a sufficient time period for repetition of an activity such that it could lead to cumulative trauma would be at least a few weeks of exposure.

Dr. Sollender testified that he had not examined the Claimant and had not met her before the hearing, having only previously conducted a record review. Based on his review of the medical records and Mr. Washam's worksite evaluation, Dr. Sollender testified that he disagrees with the Claimant's diagnosis of lateral epicondylitis. He opined that while the MRI showed some irregularities, including a low-grade soft tissue contusion behind the right lateral epicondyle, there was no evidence of an injury or pathology on the lateral epicondyle and the extensor muscles as they attach. Further, Dr. Sollender testified that although he did not examine the Claimant, he believed that Dr. Davis' medical report provided for tenderness in the area where the contusion was seen but not at the lateral epicondyle itself. Based on the Claimant's testimony and reporting of her mechanism of injury, Dr. Sollender further opines that there was no acute injury in this claim as she was not struck on the outside of the elbow with anything and the contusion is the only pathology of note. Dr. Sollender testified that he found the ergonomic evaluation in this case important since it provided specific details about the Claimant's work duties so that Dr. Sollender could make a determination as to the nature of any repetitive activities and he could assess that data in the context of the risk factors set forth in the Medical Treatment Guidelines. Dr. Sollender testified that if there is a dispute between a patient's report of their job duties and the report of from a jobsite or ergonomic evaluation, he generally sides with the evaluator as he finds this to be more objective information and he finds that a patient is more likely to overestimate job activities. In looking at the treatment of PRP injection recommended by Dr. Davis, Dr. Sollender opines that it is not reasonable because he does not believe there would be a benefit based on his opinion that there is a lack of identified pathology on the Claimant's imaging study. Dr. Sollender ultimately opined that the Claimant did not suffer a chronic or acute injury as a result of her work exposure.

21. On cross-examination, Dr. Sollender was asked to review the medical note of Dr. Davis found at Claimant's Exhibit 3, p. 51. Upon review, Dr. Sollender agreed that his prior testimony was incorrect regarding the location where Doctor Davis noted tenderness and in fact Dr. Davis did note the Claimant was tender directly over the lateral epicondyle, which would be clinically consistent with a diagnosis of lateral epicondylitis. However, Dr. Sollender pointed out that he still found a lack of pathology on the MRI and he disagrees with Dr. Davis' interpretation of the Claimant's MRI. Although, Dr. Sollender testified that he has confidence in Dr. Davis' clinical and operative skills as a board certified orthopedic surgeon with a hand surgery fellowship. Dr. Sollender also agreed that in addition to tenderness to palpation at the lateral epicondyle, a diagnosis requires reproduction of pain through one of three provocative maneuvers. He further agreed that additional studies such as plain radiographs, MRI and sonograms are not routinely ordered to establish the diagnosis of lateral epicondylitis per the Medical Treatment Guidelines, but may be used to rule out other conditions. However, Dr. Sollender opines that there is still a requirement of objective findings to properly establish the diagnosis and, as he does not agree with Dr. Davis' finding of fluid in the extensor origin at the lateral epicondyle, he still opines there are no objective findings to support the diagnosis. After a series of questions on the subject, Dr. Sollender did concede that if a patient had a preexisting, low-grade condition of lateral epicondylitis, the activity of grabbing, pulling, and lifting 20-25 chairs

off a stack where you had to lift the chair up overhead with arms extended could aggravate the preexisting condition as would any activity that irritates the muscles at issue. While Dr. Sollender reiterated that he disagrees with the assumption that the Claimant has lateral epicondylitis, he did agree that the treatment of PRP injections is reasonable for a patient with confirmed lateral epicondylitis with both clinical and objective findings where a causation analysis has been properly performed.

22. On redirect examination, Dr. Sollender was asked to look at an earlier report of Dr. Davis at Respondent's Exhibit H, p. 42 in which Dr. Davis noted diffuse tenderness that "is not really localized to any one area." Dr. Sollender testified that this note confirmed his testimony on direct examination that Dr. Davis did not note pain localized to the lateral epicondyle. Dr. Sollender also testified that it was more likely than not that he reviewed the Claimant's MRI film as opposed to simply the MRI report as this is his common business practice when he has received the film. Based on Dr. Sollender's opinion that there is a lack of objective findings in this case, he again testifies that he disagrees with the diagnosis of lateral epicondylitis for the Claimant. Ultimately, based on his causation analysis, even taking the disagreement regarding whether the Claimant meets the criteria for a lateral epicondylitis diagnosis into account, Dr. Sollender continues to opine that her work exposure is not sufficient for this condition to be work related.

23. In considering the conflicting evidence in this case with respect to both the Claimant's diagnosis of lateral epicondylitis and whether or not this condition is work related, the ALJ finds the opinion of Dr. Davis, as supported by the opinions of Dr. Danahey and Dr. Scott to be more persuasive than that of Dr. Sollender. The weight of the evidence establishes that the Claimant's work activities on March 23, 2015 permanently aggravated her pre-existing right lateral epicondylitis condition such that her condition significantly advanced and now requires medical treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 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*, W.C. No. 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).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness 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 and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *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 293 (1951). 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*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

In this case, the facts related to the Claimant's work activities on March 23, 2015 are essentially unchallenged and the ALJ found the Claimant's testimony credible and consistent with reports regarding her mechanism of injury in the medical records. It is also uncontested that the Claimant had a preexisting right upper extremity condition. Thus, the dispute in this case turns on conflicting medical opinions as to (1) the accuracy of the Claimant's diagnosis of right lateral epicondylitis; and (2) whether the Claimant's work activities on March 23, 2015 caused, aggravated, accelerated or combined with the Claimant's preexisting condition to produce the need for medical treatment.

The substantial weight of the evidence in this case establishes that the Claimant was injured on the job on March 23, 2015, while grabbing, pulling and lifting 20-25 chairs off of a rack to set up an afternoon teen program as part of her daily job duties at the Employer's library branch, her place of employment. The task took about 10-15 minutes to complete, but about half-way through she felt a burning pain in her right elbow and upper back. While there was also some discrepancy between the nature of the claim as between the Claimant and Respondent, the ALJ finds that the Claimant is seeking benefits for an acute injury she incurred performing a discrete task, which significantly aggravated a pre-existing lateral epicondylitis condition. The ALJ finds that, contrary Respondent's arguments, she is not claiming to have suffered a cumulative trauma industrial disease.

The evidence established that the Claimant reported her March 23, 2015 injury the day following the activity of grabbing, pulling and lifting the chairs from an overhead rack and she was sent to Dr. Danahey at Concentra. Dr. Danahey had treated the Claimant for right lateral epicondylitis in connection with a prior work injury in 2014. She reached MMI for the prior injury and was released to full duty on 9/19/14. Mild symptoms returned in December 2014, but they did not require treatment. The

continued to work and function well without restrictions – until she reinjured her elbow on March 23, 2015. Dr. Danahey opined that the chair lifting incident "aggravated her elbow a lot." After several weeks of conservative care with no improvement, Dr. Danahey ordered an MRI, which showed a contusion behind the right lateral epicondyle. He referred the Claimant to orthopedic surgeon, Dr. Davis, who had also treated her for the prior elbow injury. Like Dr. Danahey, Dr. Davis noted that Claimant's moving the chairs on March 23, 2015 caused a significant increase in pain directly over the Claimant's right lateral epicondyle. He found that the MRI revealed fluid on the extensor origin at the lateral epicondyle in addition to a contusion. He diagnosed lateral epicondylitis and sought approval for a series of PRP injections, which are also recommended by the Medical Guidelines for treatment of lateral epicondylitis.

Respondent retained Dr. Scott to perform a record review and give a causation opinion. Dr. Scott performed an extensive review of the records and he agreed with the treating doctors and opined that the Claimant had suffered an acute aggravation of her pre-existing, but previously manageable, right lateral epicondylitis while performing the discreet tasks of lifting the chairs for the Teen Room on March 23, 2015. He further opined that the Claimant's aggravated condition was caused by her work activities on March 23, 2015. Finally, Dr. Scott agreed that the PRP injections proposed by Dr. Davis were reasonable and necessary to treat the Claimant's work injury and that these injections were recommended by the Medical Guidelines for treatment of lateral epicondylitis.

Shortly after receiving Dr. Scott's report, Respondents' counsel requested Dr. Sollender to provide a second opinion. Dr. Sollender rejected the diagnosis of lateral epicondylitis. Dr. Sollender found that the Claimant did not suffer an acute injury on March 23, 2015 nor did she suffer a cumulative trauma disorder as a result of her work activities.

In considering the conflicting evidence in this case with respect to both the Claimant's diagnosis of lateral epicondylitis and whether or not this condition is work related, the ALJ finds the opinion of Dr. Davis, as supported by the opinions of Dr. Danahey and Dr. Scott to be more persuasive than that of Dr. Sollender. The weight of the evidence establishes that the Claimant's work activities on March 23, 2015 permanently aggravated her pre-existing right lateral epicondylitis condition such that her condition significantly advanced and now requires medical treatment.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on March 23, 2015 caused or permanently aggravated, accelerated or combined with her preexisting right elbow condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits - Reasonable & 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. 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).*

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). Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

As set forth above, the Claimant's work activities of March 23, 2015 work activities on March 23, 2015 caused or permanently aggravated, accelerated or combined with her preexisting right elbow condition producing the need for medical treatment and the Claimant established that a need for medical treatment was proximately caused by an acute injury on that date.

Prior to March 23, 2015, the Claimant was able to perform her work activities on a full time basis without work restrictions in spite of a pre-existing right elbow condition. However, since March 23, 2015, there has been an impact on the Claimant's ability to perform her job due to the pain and due to work restrictions. The Claimant also testified credibly that since her medical treatment stopped, her symptoms have not gone away and they have actually gotten worse. She testified that outside of work, her injury

impacts her daily activities with her children, her housework activities and activities of daily living such as sleeping, combing her hair, using the restroom along with attendant activities, and anything that activates her elbow or wrist on her right arm is painful. The conservative care the Claimant received from Dr. Danahey and Dr. Davis was reasonably necessary to treat the Claimant's work-related condition. The Claimant's authorized treating physicians have never placed the Claimant at MMI nor released her to return to work without restrictions. The Claimant has established that she is entitled to further evaluation of her right upper extremity condition to determine if she requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act. In addition, Drs. Danahey, Davis and Scott all concurred that PRP injections are in accordance with the Colorado Medical Treatment Guidelines for treatment of epicondylitis and have opined that the Claimant would likely benefit from this treatment. While Dr. Sollender disputed the diagnosis of lateral epicondylitis for the Claimant, he testified that PRP injections would be a reasonable medical treatment for epicondylitis.

The Claimant has shown by a preponderance of the evidence that the series of PRP injections and other treatment recommended by Drs. Davis and Danahey are reasonably necessary to cure and relieve the Claimant from the effects of her March 23, 2015 work injury. As such, Respondents must furnish and are liable for the costs of such treatment.

ORDER

It is therefore ordered that:

1. The Claimant proved that she suffered a compensable work injury on March 23, 2015.

2. The Claimant is entitled to further medical benefits to treat her right upper extremity condition and associated symptoms which are causally related to the March 23, 2015 work injury, as determined by her authorized treating physicians, and the Respondent is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act. This shall specifically include the PRP injections recommended by Drs. Davis and Danahey.

3. All matters not determined herein are reserved for future

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 25, 2016

Kimberly A. Allegretti
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 his bilateral carpal tunnel syndrome is causally related to his employment with Employer.

FINDINGS OF FACT

1. Claimant worked for Employer full time as a senior medical associate beginning in July of 2012.

2. Claimant's job duties included contacting potential clients by telephone, scheduling sales meetings with individuals who make or influence buying decisions for various medical practices to discuss products/services for sale, and documenting the results of call attempts or completions.

3. Claimant's job was sedentary in nature. Claimant sat at a computer daily and worked Monday to Friday for approximately 40 hours of work per week. Claimant used a telephone headset to make calls and used a computer with a keyboard and mouse to initiate (click) to make calls, to note the result of calls, and to perform scheduling on a computerized calendar.

4. On July 6, 2015 Claimant was terminated from his employment. On the same day, Claimant reported to Employer that he believed he had bilateral carpal tunnel syndrome that was work related.

5. On July 8, 2015 Claimant filled out a written report of injury. Claimant reported that both of his arms and hands were affected by carpal tunnel syndrome and that the injury occurred from word processing with the keyboard directly harming him. *See* Exhibit H.

6. On August 11, 2015 Claimant was evaluated by Brian Williams, M.D. Claimant reported bilateral hand numbness that began in September of 2014. Claimant reported working in sales that required lots of keyboarding and mousing and Claimant reported never having this type of problem before. Claimant reported that he did not report the injury to his employer for fear of repercussions at work but was let go in July 2015 for his declining performance that he believed was related to ADHD and what he believed was carpal tunnel syndrome. Claimant reported having numbness and tingling in both hands. Dr. Williams assessed bilateral hand numbness. *See* Exhibit C.

7. Dr. Williams noted that this was a difficult case and that he was concerned with the timing of Claimant's complaint. Dr. Williams opined that by description and

exam, Claimant had carpal tunnel syndrome and noted that he would like to formally evaluate with EMG/NCV testing through neurology. Dr. Williams opined that if positive, he would work with "ortho hand" to determine causality. *See* Exhibit C.

8. On September 2, 2015 Claimant underwent an EMG of his bilateral upper extremities performed by Frederic Zimmerman, D.O. Dr. Zimmerman concluded it was an abnormal study demonstrating bilateral median motor and sensory neuropathy at the wrists. Dr. Zimmerman opined that the findings were consistent with moderate to severe carpal tunnel syndrome. *See* Exhibit D.

9. On September 4, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams noted that the EMG testing was positive for severe carpal tunnel syndrome bilaterally. Dr. Williams encouraged Claimant to follow up with his primary care provider to rule out medical cause. Dr. Williams noted he would consider an "ortho hand" evaluation to aid causality. *See* Exhibit C.

10. On October 20, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams continued to assess bilateral carpal tunnel syndrome and noted that he would like to have Claimant evaluated by "hand surgery" to determine whether Claimant was a surgical candidate. Dr. Williams noted that Claimant had an upcoming hearing to determine the work-relatedness of the claim but that regardless of the outcome, Claimant should be ready for surgery if surgery was indicated. *See* Exhibit C.

11. On December 30, 2015 Sara Nowotny performed a physical demand evaluation for the position of senior medical associate at Employer's place of business. Ms. Nowotny noted that Claimant was no longer employed by Employer and that for the purpose of the job site evaluation she observed and interviewed an employee performing the job of senior medical associate. Ms. Nowotny provided information regarding the job tasks and physical demands of the position.

12. Ms. Nowotny noted that keyboard use was estimated at .8 hours per day and mouse used at 3.2 hours per day based on her observations. Ms. Nowotny noted that on her day of observation, call activity was at a rate of 25 calls per hour when production data suggested actual rates of 6-7 calls per hour and noted that the overall mouse/keyboard time reported y her was thus somewhat inflated. *See* Exhibits B, 1.

13. Ms. Nowotny noted that through direct interview and observation of the job tasks and working environment and after comparing to the medical treatment guidelines, there were no primary or secondary risk factors for bilateral carpal tunnel syndrome met by the job duties. *See* Exhibits B, 1.

14. On January 8, 2016 Thomas Mordick, M.D. performed a record review of Claimant's case and issued a two page report. Dr. Mordick opined that Claimant had a long history of carpal tunnel like complaints but with no prior EMG/NCV. Dr. Mordick opined that under the Colorado upper extremity guidelines for determining whether there was significant aggravation of a prior condition, it would require that Claimant's job

exposed him to awkward posture, force, or repetitive activity as defined in the guidelines. Dr. Mordick noted that none of those thresholds were met and that Claimant's bilateral carpal tunnel syndrome was not work related and should be treated through private insurance. *See* Exhibits A, 3.

15. Claimant had previously sought treatment for symptoms similar to those he is reporting exist now.

16. On March 4, 2013 Claimant was evaluated by Stanley Ginsburg, M.D. Claimant reported developing what he thought were symptoms suggesting carpal tunnel syndrome many years ago and was seen by Dr. Mechanic but did not undergo electro diagnostic studies. Dr. Ginsburg noted that Claimant had a distribution of numbness that conformed to the distribution of the right median nerve including a split ring finger with some symptomatology present on the left but not as severe. Claimant reported the symptoms were waking him up at night but that he acquired a wrist splint and the symptoms became less prominent. Dr. Ginsburg noted that he believed Claimant had carpal tunnel syndrome but that it was affecting Claimant minimally and suggested observing it, undergoing blood testing, undergoing electro diagnostics, or seeing a hand surgeon. Claimant reported he wanted to think about it. *See* Exhibit E.

17. On October 31, 2000 Claimant was evaluated by Bennet Machanic, M.D. Dr. Machanic noted Claimant came to his office for further evaluation of possible carpal tunnel syndrome. Claimant reported that three weeks prior he had planted a large number of bulbs for the spring and within a day or two developed a numb and tingling sensation involving digits one, two, and three of the right hand. Claimant reported difficulty writing and that the pain was awakening him from sleep. Dr. Machanic noted under diagnostic impression that the clinical examination and history strongly suggested right carpal tunnel syndrome. Dr. Machanic also noted that there appeared to be a component of right extensor tendinitis. Dr. Machanic recommended conservative treatment with the use of Celebrex as well as utilizing a wrist splint. Dr. Machanic also recommended vitamin B6. Dr. Machanic noted that if Claimant failed to improve or deteriorated, he would consider EMG nerve conduction studies and that if the EMG showed significant pathology, Claimant might need either local injection or surgical release. *See* Exhibit F.

18. At hearing Ms. Nowotny testified as an expert consistent with her written report. She opined that during her observation of the job that Claimant performed before his termination, she did not observe or identify any primary or secondary risk factors for carpal tunnel syndrome under the medical treatment guidelines. Ms. Nowotny did not observe Claimant as he was no longer employed by Employer, but observed an individual with the same job title. Ms. Nowotny observed the individual for one hour and noted every key stroke and mouse use to extrapolate data for an 8 hour work day which she testified was a common method. She found no primary or secondary risk factors for bilateral carpal tunnel syndrome to be present.

19. Claimant testified at hearing. Claimant reported that his job duties involved constant use of the mouse that was greater than four hours per day, that the chair he used was broken and one arm rest was higher than the other, and that to use the mouse more comfortably he made his own wooden platform that raised the mouse and that therefore the hand he used to mouse was always at greater than a forty-five degree angle. Claimant reported that in the fall of 2014 several people quit rapidly and the number of calls he made per day went up from 51 calls per day to 125 calls per day and that he had to work faster to increase the number of calls he made. Claimant reported that the report prepared by Ms. Nowotny didn't account for several factors.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

The claimant 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. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999). The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet his burden of proof to establish that his bilateral carpal tunnel syndrome was directly and proximately caused by his employment duties or his working conditions. Claimant had a history of prior bilateral carpal tunnel syndrome dating back to 2000 with a noted period of flare in 2013. The symptoms Claimant believes are causally related to his employment with Employer are just as likely the result of the natural progression of a pre-existing condition. Claimant has failed to establish that his work caused, aggravated, or accelerated the condition. As found above, Ms. Nowotny performed a jobsite evaluation and used both the job description provided by Employer as well as direct observation of an employee performing the same job duties as Claimant. She observed how the work of senior

medical associate was performed and using data extrapolation was able to determine the amount of time that the job involved keyboard and mousing functions. Claimant's position does not meet the requirements under the medical treatment guidelines for any primary or secondary risk factors. The amount of time spent mousing and keyboarding is not significant enough to cause bilateral carpal tunnel or to cause an aggravation or acceleration of bilateral carpal tunnel. No medical provider has opined that Claimant's condition is work related or that his job duties caused, aggravated, or accelerated his bilateral carpal tunnel syndrome. Although Claimant attempted to explain that the hand he uses to mouse rested against a wooden platform he build and was at a greater than 45 degree angle, the amount of time spent mousing as determined by Ms. Nowotny's evaluation was not significant enough to establish a causal relationship between Claimant's job duties and his diagnosis of bilateral carpal tunnel syndrome. Further, the use of the wooden platform only addresses the hand Claimant uses for mousing and does not address Claimant's other hand which carries the identical diagnosis. It is just as likely that Claimant's bilateral condition is the natural progression of a non-work related condition and Claimant has failed to establish a causal relationship to his employment or employment duties.

Ms. Nowotny's evaluation is found persuasive regarding the amount of time spent in each activity and although Claimant's desk and mouse may have had a different set-up than the employee observed, the amount of time spent on each activity is found credible and persuasive for the position and the duties. Dr. Mordick also is found credible and persuasive that the amount of time in each of the activities as observed by Ms. Nowotny would not bear a causal relationship between Claimant's employment and Claimant's diagnosis. Additionally, it is not credible that Claimant experienced this alleged work related injury or occupational disease yet failed to report it until the date he was terminated. The report on the day of termination is logically inconsistent with a person who believed they suffered a work related injury where you would expect more immediate reporting of the alleged injury. Further, when Claimant was first evaluated by Dr. Williams in August of 2015, Claimant reported never having had this type of problem before when the medical records suggest otherwise and point to similar problems for which Claimant sought treatment in both 2000 and 2013 Claimant's bilateral condition has not been shown, more likely than not, to be causally related to his employment.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffers from bilateral carpal tunnel syndrome causally related to his employment with Employer.

2. Claimant's 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 22, 2016

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, **2015**.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his April 7, **2015** industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 11, **2015** until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $640.00.

FINDINGS OF FACT

1. Employer builds customized storage containers used for shipping items. Randy Williams is the co-owner of Employer.

2. Claimant worked for Employer as a Builder at Employer's Longmont Colorado facility. His job duties involved constructing large crates using plywood and 2x4's. He worked the night shift from 4:30 p.m. until 2:30 a.m. four times each week. The night crew consisted of Claimant and two co-workers.

3. Claimant testified that on April 7, **2015** he was using a nail gun to build a crate base on a workbench. He noted that plywood had been lifted onto a bench and he was nailing framing 2x4's onto one side of the plywood. Claimant was then required to flip the plywood so the risers for the forklift could be applied to the bottom side.

4. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. He estimated that the nail gun weighed approximately 25 pounds. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder.

5. Claimant subsequently wrote a note on Employer's crate fabrication instructions. He remarked that he had only worked one-half of the day and would be out of work on Wednesday and Thursday because of a "bad shoulder." Claimant then left work. He did not subsequently miss three days of work but performed modified duty employment.

6. In late March **2015** Mr. Williams had accused Claimant and his coworkers on the night shift of intoxication and using marijuana while on the job. Although Employer did not conduct drug or alcohol testing of the employees, Mr. Williams sent a letter to the night crew expressing concerns that they were "pitheads" based on customer complaints. Mr. Williams explained that none of the employees denied the allegations in the letter He suspended Claimant and the other night crew employees without pay.

7. Prior to returning to work after the suspension, Claimant and his co-workers were required to meet with Mr. Williams to discuss reinstatement. During Claimant's meeting he accused other workers of various infractions. Claimant stated that marijuana use "had been going on since Dust was here." "Dust" was a prior supervisor for Employer. Claimant subsequently worked for the following two weeks without incident until the April 7, **2015** incident.

8. On April 16, **2015** Claimant visited Bruce Cazden, M.D. at Workwell Occupational Medicine for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden diagnosed Claimant with a sprain or strain of the rotator cuff capsule and assigned work restrictions including no use of the right arm and no lifting. He specifically stated that Claimant had suffered an acute right shoulder tear. Dr. Cazden ordered an MRI/arthrogram. He concluded that Claimant's work activities caused his right shoulder symptoms.

9. On April 27, **2015** Claimant completed a Vacation/Absence Request form stating that he was taking a leave of absence from April 29, **2015** until May 11, **2015**. In a separate note Claimant commented that he needed to visit his father in Arizona because his father had only two weeks to live.

10. On April 28, 2015 Claimant returned to Dr. Cazden for an evaluation. After reviewing the right shoulder MRI, Dr. Cazden diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear but no rotator cuff tear. He assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Dr. Cazden reiterated that Claimant's work activities caused his right shoulder condition.

11. Claimant subsequently visited his father in Arizona. He returned to work for Employer on May 11, 2015 and was terminated. In fact, Mr. Williams terminated the

entire night crew at Employer's Longmont facility and transferred the functions to Employer's Commerce City, Colorado operation.

12. Mr. Williams authored the termination letters on Friday, May 8, **2015** and distributed them to the night shift employees on May 11, **2015**. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. Violation of the Policy could lead to disciplinary action that included termination.

13. Claimant disagreed with the basis for his termination and testified that he never told Employer he was using marijuana on the job or admitted the infraction. He acknowledged that he has been receiving unemployment benefits in the amount of $405.00 per week since September 2015. The benefits have continued through the date of the hearing in this matter. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury.

14. On October 27, 2015 Claimant underwent an independent medical examination with James P. Lindberg, M.D. Claimant reported that, while using a nail gun to construct crates at work, he experienced a sharp twinge at the back of his right shoulder. Dr. Lindberg noted that Claimant's right shoulder MRI reflected a labral tear. He explained that lifting a nail gun and pulling the trigger would not cause a significant labral or SLAP tear and biceps tendon anchor disruption. Dr. Lindberg remarked that SLAP tears are generally caused by circumduction under force such as throwing a football or baseball. A SLAP tear is a rotational injury and "[i]t is not possible that pulling a trigger on the nail gun would have caused the lesions seen on the MRI." Dr. Lindberg thus concluded that Claimant's right shoulder condition was not caused by his work activities for Employer. Accordingly, he determined that any surgical intervention should be performed under Claimant's private health insurance.

15. Dr. Cazden testified at the hearing in this matter. He maintained that Claimant suffered a work-related injury to his right shoulder on April 7, **2015**. Dr. Cazden explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum.

16. On December 28, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Lindberg. Dr. Lindberg maintained that Claimant's work activities for Employer on April 7, **2015** did not cause his right shoulder symptoms. Claimant

described to Dr. Lindberg that he was working on a crate wall that was 40 inches by 60 inches on a bench at waist height. Dr. Lindberg testified that the described mechanism of injury was highly unlikely to have caused a SLAP tear in Claimant's right shoulder. In fact, Dr. Lindberg stated that "[b]ased on what he told me in the physical exam, I don't think that there's any way that this could have happened by the injury that he describes." Claimant was working at waist height, he never raised his arm (or anteriorly flexed) above 45 degrees, pulling the trigger involves only muscles below the elbow and no forces are exerted on the shoulder other than holding an eight pound nail gun. The nail gun is stationary against the plywood when the trigger is pulled and it is pointed downward. Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. Dr. Lindberg remarked that In his 40 years of experience, he has never seen a trivial injury cause a Type 2 SLAP lesion. SLAP tears are caused by large forces with rotational motions of the arm. Holding the gun with his right arm and depressing the trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, Dr. Lindberg concluded that it is not likely to a reasonable degree of medical probability that Claimant's work activities on April 7, **2015** caused his right shoulder injury.

17. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, **2015**. Claimant testified that on April 7, **2015** he was using a nail gun to build a crate base on a workbench. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder. On April 16, **2015** Claimant visited Dr. Cazden for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden subsequently diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear. He concluded that Claimant's work activities caused his right shoulder injury.

18. Dr. Cazden persuasively explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum. Accordingly, Dr. Cazden persuasively maintained that Claimant suffered a right shoulder injury that was caused by his industrial activities for Employer on April 7, **2015**.

19. In contrast, Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. SLAP tears are caused by large forces with rotational motions of the arm. Dr. Lindberg explained that holding the nail gun with his right arm and depressing the trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, he concluded that it

is unlikely that Claimant's work activities on April 7, **2015** caused a right shoulder injury. However, Dr. Lindberg failed to address whether Claimant's right shoulder condition was aggravated by his work activities on April 7, **2015**. Moreover, Claimant's credible testimony, the consistent medical records regarding the mechanism of injury and the persuasive opinion of Dr. Cazden reflect that Claimant's work activities on April 7, **2015** triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, **2015** aggravated, accelerated or combined with a pre-existing right shoulder condition to produce a need for medical treatment.

20. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially obtained medical treatment from Dr. Cazden at Workwell. He subsequently received additional medical treatment for his right shoulder condition. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his April 7, **2015** right shoulder injury. Respondents are thus liable for the preceding medical treatment as well as all additional treatment reasonably necessary to cure or relieve the effects of Claimant's right shoulder injury.

21. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period May 11, **2015** until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, **2015** because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, **2015** Dr. Cazden assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury. He has thus been unable to return to work due to the effects of his April 7, **2015** industrial injury. He has also not reached Maximum Medical Improvement (MMI) for his right shoulder condition.

22. Respondents have failed to demonstrate that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to the termination statutes. Mr. Williams authored termination letters on Friday, May 8, **2015** and distributed them to the night shift employees on May 11, **2015**. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. However, Claimant disagreed with the basis for his termination and testified that he never told Employer he was using marijuana on the job or admitted the infraction. Moreover, there was no drug testing or observations to confirm the allegations. Mr. Williams's allegations do not establish a volitional act by Claimant or suggest that he exercised some control over his termination under the totality of the circumstances. Claimant was

thus not responsible for his termination because he did not precipitate the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

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

symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

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

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, **2015**. Claimant testified that on April 7, **2015** he was using a nail gun to build a crate base on a workbench. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder. On April 16, **2015** Claimant visited Dr. Cazden for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden subsequently diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear. He concluded that Claimant's work activities caused his right shoulder injury.

8. As found, Dr. Cazden persuasively explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum. Accordingly, Dr. Cazden persuasively maintained that Claimant suffered a right shoulder injury that was caused by his industrial activities for Employer on April 7, **2015**.

9. As found, in contrast, Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. SLAP tears are caused by large forces with rotational motions of the arm. Dr. Lindberg explained that holding the nail gun with his right arm and depressing the

trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, he concluded that it is unlikely that Claimant's work activities on April 7, **2015** caused a right shoulder injury. However, Dr. Lindberg failed to address whether Claimant's right shoulder condition was aggravated by his work activities on April 7, **2015**. Moreover, Claimant's credible testimony, the consistent medical records regarding the mechanism of injury and the persuasive opinion of Dr. Cazden reflect that Claimant's work activities on April 7, **2015** triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, **2015** aggravated, accelerated or combined with a pre-existing right shoulder condition to produce a need for medical treatment.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

11. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially obtained medical treatment from Dr. Cazden at Workwell. He subsequently received additional medical treatment for his right shoulder condition. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his April 7, **2015** right shoulder injury. Respondents are thus liable for the preceding medical treatment as well as all additional treatment reasonably necessary to cure or relieve the effects of Claimant's right shoulder injury.

TTD Benefits

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 11, **2015** until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, **2015** because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, **2015** Dr. Cazden assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury. He has thus been unable to return to work due to the effects of his April 7, **2015** industrial injury. He has also not reached Maximum Medical Improvement (MMI) for his right shoulder condition.

Responsible for Termination

14. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

15. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to the termination statutes. Mr. Williams authored termination letters on Friday, May 8, **2015** and distributed them to the night shift employees on May 11, **2015**. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. However, Claimant disagreed with the basis for his termination and testified that he never told

Employer he was using marijuana on the job or admitted the infraction. Moreover, there was no drug testing or observations to confirm the allegations. Mr. Williams's allegations do not establish a volitional act by Claimant or suggest that he exercised some control over his termination under the totality of the circumstances. Claimant was thus not responsible for his termination because he did not precipitate the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

ORDER

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

1. On April 7, **2015** Claimant suffered a right shoulder injury during the course and scope of his employment with Employer.

2. Claimant shall receive reasonable and necessary medical treatment to cure or relieve the effects of his right shoulder injury.

3. Claimant earned an AWW of $640.00.

4. Claimant shall receive TTD benefits for the period May 11, **2015** until terminated by statute.

5. Respondents shall receive a credit or offset for unemployment benefits in the weekly amount of $405.00 from September 1, 2015 until terminated by operation of law.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve the claimant from the effects of the work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of June 19, 2015 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that employer is subject to penalties for failing to provide and maintain workers' compensation insurance pursuant to Section 8-43-408, C.R.S.?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that employer failed to timely file a notice of the injury to the Division of Workers' Compensation in violation of Section 8-43-103(1), C.R.S. for the period of June 19, 2015 through August 25, 2015 when employer filed a Notice of Contest?

FINDINGS OF FACT

1. Claimant testified at hearing that he was employed with employer in the service department starting on April 2, 2014. Claimant testified his job duties included performing the services of a mechanic. Claimant testified he was hired by Mr. Dana. Claimant testified he was paid $25 per hour for the work he performed for employer.

2. Claimant testified that on June 19, 2015 he was installing a fuel pump in a Ford Explorer with another mechanic. Claimant testified he was carrying a fuel tank when he slipped on fuel that had spilled on the floor and fell. Claimant testified that the fuel tank he was carrying landed on his chest. Claimant testified he had injured his back a few days prior to this incident when he was installing a transmission in a Volkswagon beetle, but did not seek medical treatment after that incident.

3. Claimant testified he reported both injuries to Mr. Dana, his boss. Claimant testified he took a couple of days off the first injury installing the transmission and had just returned to work on the day that he fell while installing the fuel tank. Claimant testified the pain in his back increased after the incident when he fell on June 19, 2015. Claimant testified after the incident, he left work and did not return.

4. Claimant eventually sought treatment for his low back pain at St. Mary's Hospital Emergency Room ("ER") on June 25, 2015. Claimant reported to the ER that he injured his back 9 days ago while lifting a transmission by himself when he twisted and started developing pain in his low back. Claimant further reported to the ER that he had taken a day off and rested and went back to work when 6 days ago he was helping someone lift a full gas tank and they dropped the other end cause claimant to hit into his chest and twist him. Claimant was diagnosed with a low back strain and provided with medications. Claimant was referred to Dr. Price for follow up.

5. Claimant returned to the ER on June 29, 2015 and reported his pain had improved, but he did not feel he was well enough to work. Dr. Weintraub in the ER refilled some of his prescriptions, including his Valium and Percocet and recommended that claimant remain off of work and follow up with a primary care physician.

6. Claimant was evaluated by Dr. McLaughlin at St. Mary's Occupational Medicine on July 6, 2015. Claimant reported to Dr. McLaughlin that he injured his low back when he was working on a gas tank for a Jeep Cherokee and he slipped and twisted his low back. Dr. McLaughlin performed a physical examination and diagnosed claimant with a lumbar strain consistent with his work activity from June 19, 2015. Dr. McLaughlin provided claimant with prescription medications including Percocet, Flexeril and recommended physical therapy. Dr. McLaughlin kept claimant off of work until his follow up appointment.

7. Claimant continued to treat with Dr. McLaughlin on July 9, 2015 who noted claimant was feeling significantly improved, but was not rated for full duty. Dr. McLaughlin recommended claimant continue the physical therapy and then try modified work beginning the next Monday.

8. Claimant returned to St. Mary's Occupational Medicine on July 13, 2015 and was examined by Dr. Stagg. Dr. Stagg noted claimant reported he was doing terrible with a significant amount of pain with radiation into both legs. Dr. Stagg kept claimant off of work for an additional 2 days until he was scheduled to see Dr. McLaughlin.

9. Dr. McLaughlin evaluated claimant on July 16, 2015 and noted claimant's continued problems with his low back pain. Dr. McLaughlin changed claimant's prescriptions to start Ultram, Soma and Lidoderm patches as opposed to the tramadol, Flexeril and Percocet.

10. Claimant again returned to Dr. McLaughlin on July 20, 2015. Dr. McLaughlin noted claimant was going to try to go back to work the next day for four

hours in a sedentary capacity. Dr. McLaughlin continued claimant's medications and instructed claimant to follow up 2-3 days.

11. Claimant returned to Dr. McLaughlin on July 23, 2015 and reported he had more pain with work. Dr. McLaughlin encouraged claimant to continue to increase his activity and recommended claimant undergo a magnetic resonance image ("MRI") of his lumbar spine.

12. Claimant returned to Dr. McLaughlin on July 30, 2015 and claimant reported he was doing better with the Lidoderm patches helping claimant throughout the day. Dr. McLaughlin noted that claimant's MRI was normal. Dr. McLaughlin reported claimant would like to work full hours and Dr. McLaughlin provided him with work restrictions that limited his lifting to 20 pounds. Dr. McLaughlin also recommended claimant follow up with chiropractic treatment, and referred claimant to Dr. Foote for this purpose.

13. Claimant again returned to Dr. McLaughlin on August 11, 2015. Dr. McLaughlin noted that claimant's treatment with the chiropractor, Dr. Foote, had really helped.

14. Claimant returned to Dr. McLaughlin on August 17, 2015. Dr. McLauglin noted that he had reviewed claimant's Colorado Prescription Drug Monitoring Program ("PDMP") that showed claimant had seen Dr. Reusswig for chronic pain for 7 years and was on Methadone. Dr. McLaughlin noted that he recommended no narcotics at this point and referred claimant to Dr. Price, a pain specialist.

15. Claimant was initially examined by Dr. Price on August 26, 2015. Dr. Price noted that claimant reported he was injured on June 19, 2015 while working for employer when he lifted a gas tank that weighed about 300 pounds when he slipped and fell on his back. Claimant reported to Dr. Price he felt immediate back pain following the incident. Dr. Price noted claimant was on a pain contract with Dr. Reusswig and goes to Denver each month for medications. Dr. Price noted claimant presented with three out of five Waddell's sign's and provided claimant with a diagnosis of a long history of lumbar spine pain with previous chronic opioid use. Dr. Price noted claimant had some acute exacerbation of his chronic low back pain and recommended a facet joint injection on the right at L3, L4 and L5.

16. Claimant returned to Dr. McLaughlin on September 1, 2015. Dr. McLaughlin reviewed Dr. Price's report and recommended claimant get back to physical therapy and work on a good active rehab program. Dr. McLaughlin recommended another 6 visits with Dr. Foote and wanted to hold off on the facet injection until they determined how claimant was doing with physical therapy and chiropractic treatment together. Dr. McLaughlin continued claimant's work restrictions that included no lifting over 30 pounds and no crawling, kneeling, squatting or climbing.

17. Claimant was re-evaluated by Dr. McLaughlin on September 30, 2015. Dr. McLaughlin noted that Dr. Foote was not getting paid and was therefore not willing

to schedule more visits. Dr. McLaughlin noted that claimant was also in collections from St. Mary's. Dr. McLaughlin recommended claimant continue his Lidoderm patches, ambulate as much as he can, and continue the exercises and stretches he learned in physical therapy.

18. Claimant returned to Dr. McLaughlin on October 21, 2015. Dr. McLaughlin noted claimant was not working and had ongoing lumbar pain. Dr. McLaughlin showed claimant some additional exercises and provided claimant with ongoing work restrictions that included lifting up to 25 pounds.

19. Claimant testified at hearing that he reported the injury to Mr. Dana, owner for employer. Claimant testified he took the ER records and medical bills to Mr. Dana and provided him with the medical bills and Mr. Dana said, "OK". Claimant testified he spoke to Mr. Dana regarding his missed time from work and Mr. Dana told claimant he was afraid to pay claimant until he came back to work. Claimant testified Mr. Dana eventually told him he did not have workers' compensation insurance.

20. According to the wage records entered into evidence, claimant was issued a check on July 17, 2015 for $1,000.00. Claimant testified at hearing he believed this was for his accrued vacation time and he was provided this check after speaking to Mr. Dana.

21. Claimant was issued a second check on July 29, 2015 in which he was paid $2,678.25. The check came with an accounting that showed claimant should have been paid for 220.68 hours for "missed hours". This was multiplied by 66.67% with the notation of "WC benefit %" to come to 147.13 to come to the "total hours we should pay". This amount was then multiplied by 25 (hourly rate) to come to a total of $3,678.25 and $1,000.00 was subtracted as having been "already paid".

22. Claimant presented the testimony on Ms. Doutis who was a previous employee for employer. Ms. Doutis testified she had heard of claimant's injury from a sales person and testified that at some point claimant brought in paper work from St. Mary's Hospital and gave the paperwork to Ms. Doutis. Ms. Doutis testified she then gave the paperwork to Mr. Dana. Ms. Doutis testified claimant later tried to work part time but could not continue to work. Ms. Doutis testified she recalled posters being up in the office that pertained to various OSHA and labor law rules, but did not stop to read the posters. Ms. Doutis testified that when claimant was hired, she would have had claimant sign a medical provider designation in his new hire paperwork.

23. The ALJ credits the testimony of claimant and Ms. Doutis along with the supporting medical records and determines that claimant has established that it is more probable than not that he sustained a compensable injury arising out of and in the course and scope of his employment with employer. The ALJ notes that claimant's testimony at hearing was consistent with the medical reports and was supported by the testimony of Ms. Doutis regarding his work injury. The ALJ finds that employer was aware of the work injury based on the testimony of claimant and Ms. Doutis and finds that claimant's medical treatment with the ER and Dr. McLaughlin and his referrals was

reasonable and necessary to cure and relieve claimant from the effects of his work injury.

24. The ALJ finds that claimant has established that the medical treatment from Dr. Foote, Dr. Price, and Grand Junction Therapies (physical therapy) are all within the proper chain of referrals from Dr. McLaughlin. The ALJ relies on these medical records and the reports of Dr. McLaughlin and finds that claimant has established that this treatment was reasonable and necessary to cure and relieve claimant from the effects of his work injury.

25. The ALJ further finds that although Ms. Doutis testified claimant would have been provided a list of providers when he was hired, there is no credible evidence to establish that Dr. McLaughlin would not be authorized to treat claimant where the employer does not designate the treating physician in writing up having the work injury reported to employer as required under Section 8-43-404(5)(a)(I)(A), C.R.S.

26. The ALJ credits claimant's testimony at hearing along with the medical records entered into evidence and finds that claimant has established by a preponderance of the evidence that the injury resulted in disability that prevented claimant from performing his regular job for employer. The ALJ determines that claimant has therefore established that he is entitled to an award of temporary total disability ("TTD") benefits commencing June 20, 2015 and continuing. The ALJ notes that claimant was paid by employer in July and finds that employer is entitled to an offset for those benefits paid to claimant. The ALJ finds makes no finding with regard to claimant's sick leave or accrued vacation being paid to claimant as that would have been contained in the initial $1,000.00 check issued to claimant on July 17, 2015. Employer is entitled to an offset for the entire $3,678.25. The ALJ notes that claimant was paid temporary disability benefits during the July time period and these checks were not subject to the withholding claimant's prior checks were subject to. Therefore, the ALJ determines that the checks issued on July 17, 2015 and July 29, 2015 represent temporary disability benefits and not accrued vacation or sick leave or payments for hours actually worked.

27. The ALJ credits the testimony of claimant at hearing that employer was not insured for workers' compensation benefits and finds that claimant has established by a preponderance of the evidence that he is entitled to increase his benefits by 50% pursuant to Section 8-43-408, C.R.S.

28. Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation on July 11, 2015. The form was received by the Division of Workers' Compensation on August 3, 2015. The form was filled out and completed by claimant. There was no reason given for the discrepancy between the date the form was filled out and when it was received by the Division of Workers' Compensation presented at hearing.

29. The Division of Workers' Compensation issued a letter to employer on August 5, 2015 advising employer that they had 20 days to either admit or deny liability

for the claim. An amended Workers' Clam for Compensation, completed by claimant's attorney, was filed with the Division of Workers' Compensation on August 17, 2015. Employer filed a Notice of Contest on August 25, 2015.

30. While employer did respond within 20 days of the letter from the Division of Workers' Compensation, Section 8-43-101 requires the employer to report to the Division of Workers' Compensation all injuries that result in lost time from work within 10 days of knowledge of the injury. The ALJ finds that under the facts of this case, claimant has established that employer failed to notify the Division of Workers' Compensation of the injury that resulted in claimant missing more than three shifts from work as required by Section 8-43-101, C.R.S.

31. The ALJ credits the evidence presented at hearing and finds that the evidence establishes that employer was aware of claimant missing time from work and issued two checks to claimant in July to pay claimant for the time he had missed from work related to the industrial injury. The evidence further establishes that employer did not notify the Division of Workers' Compensation of this injury within 10 days as required by the statute. Therefore, employer is subject to penalties pursuant to Section 8-43-203(2)(a), C.R.S.

32. However, the records also demonstrate that when notified by the Division of Workers' Compensation, employer timely filed a notice of contest within 20 days. Employer was notified by the Division of Workers' Compensation when the Division of Workers' Compensation received claimant's Claim for Compensation. As noted above, there is no explanation for the over three week discrepancy between when claimant dated the Claim for Compensation and when the Division of Workers' Compensation received the form filed by claimant. Regardless, the ALJ finds that the delay in reporting the injury to the Division of Workers' Compensation by claimant along with employer paying claimant temporary disability benefits in July serve as mitigating factors when determining the amount of the penalty to issue against employer.

33. The records entered into evidence at hearing establish that claimant was paid $21,926.50 for the period ending June 16, 2015. This represents a period of 23 5/7 weeks from the beginning of the year (January 1, 2015). This equates to an AWW of $924.61.

34. Claimant testified at hearing that the medical bills claimant incurred following his injury have been sent to collections. This testimony is supported by the evidence including notifications from debt collectors sent to claimant and claimant's attorney regarding the status of unpaid medical bills.

35. The ALJ hereby finds that employer is responsible for the unpaid medical bills including the medical bills from St. Mary's Hospital Emergency Room, St. Mary's Occupational Medicine (Dr. McLaughlin and Dr. Stagg), Applied Chiropractic Health Center (Dr. Foote), Dr. Price, and Grand Junction Therapies.

36. Once there has been an admission of liability or the entry of a final order that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee. Section 8-42-101(4), C.R.S. 2014. In this case, this Order finds employer liable for the cost of claimant's medical bills as referenced above.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment with employer. The ALJ credits the claimant's testimony at hearing along with the testimony of Ms. Doutis and the medical records entered into evidence and finds that claimant has proven that the incident in which he slipped while carrying a fuel

tank and injured his low back aggravated, accelerated or combined with claimant's preexisting disease or infirmity to produce his disability and need for treatment.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

7. "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, claimant reported his injury to his employer and was not instructed to see a specific physician or medical provider. Therefore, the right to select a physician was passed to claimant. Claimant exercised his right of selection and sought medical treatment with the ER and eventually Dr. McLaughlin. As found, the treatment claimant received at the St. Mary's ER and through Dr. McLauglin and his referrals, including Dr. Price, Dr. Foote, and Grand Junction Therapies, is reasonable and necessary to cure and relieve claimant from the effects of his June 19, 2015 work injury.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and

properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has proven by a preponderance of the evidence that he sustained an injury that led to a medical incapacity in his ability to work as evidenced by the work restrictions set forth by Dr. McLaughlin. As found, claimant is entitled to an award of TTD for the period of June 20, 2015 and continuing until terminated by law or statute.

11. As found, employer is entitled to an offset for the temporary disability benefits voluntarily paid to claimant on July 17, 2015 and July 29, 2015 totaling $3,678.25.

12. 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).

13. As found, the wage records entered into evidence establish that claimant is entitled to an AWW of $924.61 based on the amount claimant earned in the time period between January 1, 2015 and June 16, 2015.

14. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent.

15. As found, claimant has proven by a preponderance of the evidence that employer was not insured for workers' compensation at the time of his injury. As found, claimant's compensation and benefits shall be increased by fifty percent pursuant to Section 8-43-408(1). As found, the TTD rate will be $924.61 based on the 50% increase allowed by Section 8-43-408(1) based on employer's failure to obtain insurance in violation of the Colorado Workers' Compensation Act.

16. Section 8-43-101(1), C.R.S. provides that the employer shall provide notice to the Division of Workers' Compensation within 10 days of an injury that results in lost time in excess of three days or three calendar shifts. Sections 8-43-203(1)(a) and 8-43-203(2)(a) provides that if an employer fails to notify the Division of Workers' Compensation of an injury resulting in lost time, the insurer may be subject to penalties of up to one day's compensation, with 50% of the penalty being paid to the subsequent injury fund as required by statute.

17. As found, claimant has proven that he sustained an injury for which lost time benefits were due and payable and insurer failed to notify the Division of Workers' Compensation. Claimant was issued a check for lost time benefits from employer on July 17, 2015 and July 29, 2015, but was no admissions of liability admitting for the

indemnity benefits or alternatively, a Notice of Contest, was filed by the employer with the Division of Workers' Compensation until the notice of contest was filed on August 25, 2015.

18. The statute allows for "up to" one day's compensation to be issued as a penalty for employer's failure to notify the Division of Workers' Compensation. As found, the ALJ considers the mitigating circumstances in that employer did pay claimant lost time benefits in July and did issue a Notice of Contest in a timely manner after being advised by the Division of Workers' Compensation of the claim for compensation. The ALJ further finds that while claimant's claim for compensation was dated July 11, 2015, it was not received by the Division of Workers' Compensation until August 3, 2015. The ALJ therefore determines that while employer is subject to penalties of up to $132.09 per day ($924.61 divided by 7), the actual penalty in this case should be $10 per day for a period of 57 days (July 29, 2015, ten days after the injury, until August 24, 2015).

19. This equates to a total penalty of $570.00, 50% payable to claimant, 50% payable to the Subsequent Injury Fund as directed at the end of this Order.

ORDER

It is therefore ordered that:

1. Employer shall pay claimant TTD benefits based on an AWW of $924.61 beginning June 20, 2015. The TTD benefits are increased by 50% pursuant to Section 8-43-408, C.R.S. for employer's failure to maintain workers' compensation insurance. Therefore, the TTD rate for claimant's injury is $924.61.

2. Employer is entitled to a credit against TTD benefits owed for the wages paid to claimant in July 2015 in the amount of $3,678.25.

3. Claimant's AWW is determined to be $924.61.

4. Employer shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including claimant's treatment from St. Mary's Hospital ER, St. Mary's Occupational Medicine, Dr. Price, and Grand Junction Therapies.

5. Employer shall pay claimant an additional penalty pursuant to Section 8-43-203(2)(a) of $570.00 with 50% payable to the subsequent injury fund ($285.00) and 50% payable to claimant ($285.00).

6. Employer shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: employer shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

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

8. 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.

In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $41,000.00 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 $41,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

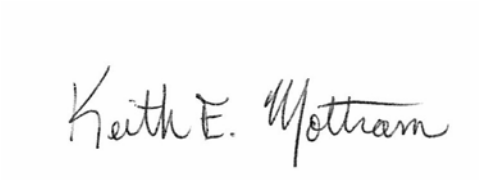
(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent-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. §8-43-408(2), C.R.S.

DATED: February 22, 2016



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

ISSUE

Whether Claimant has proven by a preponderance of the evidence that he is entitled to recover reimbursement for mileage expenses related to his trips to and from work in addition to his reimbursement for trips to attend medical and physical therapy appointments.

FINDINGS OF FACT

1. Claimant works for Employer as a Journeyman/Lineman. On March 12, 2015 Claimant suffered an admitted industrial injury to his left shoulder during the course and scope of his employment with Employer.

2. Claimant underwent conservative treatment for his left shoulder condition. He incurred mileage expenses to attend medical appointments and physical therapy sessions.

3. Claimant underwent physical therapy at Advanced Orthopedics located at 11960 Lioness Way, Parker, Colorado 80134. He received medical treatment from Authorized Treating Physician (ATP) John Sanidas, M.D. at Arbor Occupational Medicine located at 8200 Belleview, Greenwood Village, Colorado 80111. Claimant's physical therapy and medical treatment ceased when he reached Maximum Medical Improvement (MMI) on October 28, 2015.

4. Claimant submitted mileage reimbursement requests to Insurer for his physical therapy and medical appointments during the period August 10, 2015 through September 2, 2015. He sought reimbursement for 309 miles and requested a corresponding payment of $163.77. Insurer's adjuster disagreed with Claimant's calculations and reimbursed him for 220.12 miles with a corresponding payment of $116.66. Claimant thus seeks the difference of $47.11 in payment.

5. Claimant testified that every time he attended a medical appointment or physical therapy session he set the odometer in his personal vehicle to zero and when he arrived at his destination he recorded the mileage. He noted that the trips to physical therapy were approximately 35 miles. Of the 35 miles, 21-23 were from home to physical therapy while 12-14 were for the second leg of the trip from physical therapy to work.

6. Claimant explained that, if he had driven home from his medical and physical therapy appointments and then to work, he would have incurred additional mileage. Under the preceding scenario, he would have driven approximately 46 miles.

Claimant remarked that he drove directly to work from physical therapy and medical appointments in order to minimize his lost work time.

7. It is undisputed that Claimant is entitled to mileage reimbursement to attend medical appointments to and from work or home. However, Respondents are not liable for the additional mileage incurred by Claimant for simply traveling to and from work on a daily basis. The additional mileage does not constitute "travel to and from medical appointments" and is not the responsibility of Respondents.

8. Claimant suggests that it was more efficient to drive directly from physical therapy to work rather than going home first and incurring additional mileage expenses to drive the complete distance to work. However, Respondents are only liable for mileage expenses that would not have been incurred "but for" the industrial injury. Claimant sought reimbursement for trips from home to physical therapy and received reimbursement. However, Claimant also sought reimbursement for the second leg of his trips from physical therapy to work. The additional mileage reimbursement request would have been incurred regardless of his industrial injury. He would still have to travel the additional miles to go to work.

9. Claimant has failed to prove that it is more probably true than not that he is entitled to recover reimbursement for mileage expenses related to his trips to and from work in addition to his reimbursement for trips to attend medical and physical therapy appointments. Respondents are only liable for mileage expenses that would not have been incurred "but for" the industrial injury. Claimant sought reimbursement for trips from home to physical therapy and received reimbursement. However, Claimant also sought reimbursement for the second leg of his trips from physical therapy to work. The additional mileage reimbursement request would have been incurred regardless of his industrial injury. Claimant would still have to travel the additional miles to go to work. The additional mileage does not constitute "travel to and from medical appointments" and was not Respondents' responsibility. Respondents are not required to reimburse Claimant for the additional mileage incurred because it was not incidental to his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by 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 8-42-101(1)(A), C.R.S. requires respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. Moreover, Colorado Workers' Compensation Rules of Procedure 18-6 (E) specifies the reimbursement of mileage expenses to injured workers. The Rule provides:

> [t]he payer shall reimburse an injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments and reasonable mileage to obtain prescribed medications. The reimbursement rate shall be 30 cents per mile. The injured worker shall submit a statement to the payer showing the date(s) of travel and the number of miles traveled, with receipts for any other reasonable and necessary travel expenses incurred.

5. Mileage expenses for travel to and from medical appointments are recoverable as incidental medical treatment under the Workers Compensation Act. *Sigman Meat Co. v. Industrial Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). "Incidental mileage expenses are those that "would not have been incurred but for the industrial injury." *Daughty v. King Soopers, Inc.,* W.C. No. 3-837-001 (ICAP, Jan. 17, 1996); *see Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004). However, whether particular mileage expenses are reasonable, necessary and incidental to medical treatment is a question of fact for determination by the ALJ. *Krupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004).

6. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to recover reimbursement for mileage expenses related to his trips to and from work in addition to his reimbursement for trips to attend medical and physical therapy appointments. Respondents are only liable for mileage expenses that would not have been incurred "but for" the industrial injury. Claimant sought reimbursement for trips from home to physical therapy and received reimbursement. However, Claimant also sought reimbursement for the second leg of his trips from physical therapy to work. The additional mileage reimbursement request would have been incurred regardless of his industrial injury. Claimant would still have to travel the additional miles to go to work. The additional mileage does not constitute "travel to and

from medical appointments" and was not Respondents' responsibility. Respondents are not required to reimburse Claimant for the additional mileage incurred because it was not incidental to his industrial injury.

ORDER

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

Claimant's request for additional mileage reimbursement in the amount of $47.11 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 4, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left lower back on August 11, 2015.

STIPULATIONS

1. Claimant's average weekly wage is $1902.36 and if the claim is found compensable, Claimant would be entitled to the maximum compensation benefit rate of $914.27.

2. If the claim is compensable, Claimant is entitled to temporary total disability benefits from August 17, 2015 through October 7, 2015.

3. If the claim is compensable, the medical treatment Claimant received from On the Mend, Dr. Walker, and Dr. Jatana is reasonable, necessary, and related to the claim.

RESERVED ISSUES

1. The issue of temporary partial disability benefits beginning October 8, 2015 was reserved for future determination.

FINDINGS OF FACT

1. Claimant works for Employer as a firefighter and has been so employed for approximately eighteen years. Claimant has held the title of Captain for approximately the last two years.

2. On August 11, 2015 at approximately 5:50 p.m. Claimant was performing physical fitness training at work. Employees are required to perform physical fitness training for one hour of each scheduled 24 hour shift to maintain physical shape.

3. Claimant was performing a box jump exercise when he jumped onto a box with both feet and felt a tear into his left lower back and left gluteus region. Claimant was approximately two feet up on the box and in a squat type position when he felt the tearing sensation.

4. Claimant did not immediately report the injury to Employer.

5. Claimant worked a scheduled shift on August 12, 2015 and worked a trade shift on August 15, 2015. Claimant's pain was increasing during this time, but he was able to work full duty shifts.

6. On August 17, 2015 Claimant's pain had worsened and he reported the injury verbally to a supervisor. Claimant did not fill out an Accident/Injury/Incident report until August 25, 2015.

7. Claimant sought treatment on his own and underwent physical therapy on August 17, 2015, August 19, 2015, August 21, 2015, and August 25, 2015 and thought that he could rehabilitate himself. On August 17, 2015 Claimant reported to the physical therapist that he had left sided hip and leg pain that began last Wednesday maybe after doing a hard work and that it had gotten progressively worse since. *See* Exhibit 4.

8. On August 18, 2015 Claimant was evaluated by a personal care provider, William LeCoq, PA-C. Claimant reported left leg pain shooting down to his toes for the past week with symptoms starting at his left buttocks/hip and radiating to his toes. Claimant reported seeing physical therapy the day prior and that he had improved symptoms with physical therapy and home stretches. PA LeCoq assessed sciatica. *See* Exhibit C.

9. On August 24, 2015 Claimant underwent x-rays of the lumbar spine that were interpreted by Frank Crnkovich, M.D. Dr. Crnkovich noted loss of the normal lumbar lordosis with straightening, mild disc space narrowing at L5-S1, facet changes at L4-L5 and L5-S1, and mild vertebral body endplate lipping at the L3-L4 and L4-L5 levels. Dr. Crnkovich noted that if Claimant failed conservative therapy, an MRI to evaluate disc herniation could be considered. *See* Exhibit C.

10. On August 25, 2015 Claimant filled out an Accident/Injury/Incident report. Claimant reported that on August 11, 2015 while performing physical fitness training, he felt a strain on his left hip/gluteus area and minor discomfort in his lower back. Claimant reported that he had attended four physical therapy sessions and met with his PCP William LeCoq prior to filing the report. *See* Exhibit 1.

11. Claimant was referred to Sharon Walker, M.D. Dr. Walker referred Claimant for MRI testing and later referred Claimant to Sanjay Jatana, M.D.

12. On August 26, 2015 Claimant underwent an MRI of his lumbar spine that was interpreted by Samuel Scutchfield, M.D. Dr. Scutchfield noted at L5-S1 there was a broad based disc bulge with a superimposed complex disc herniation extending into the left lateral recess inferiorly, mild facet arthropathy, and impingement of the left descending S1 nerve roots secondary to complex cyst herniation, and mild bilateral neural foraminal narrowing. *See* Exhibit 8.

13. On August 31, 2015 Claimant was evaluated by Dr. Jatana. Dr. Jatana assessed degeneration of lumbar or lumbosacral intervertebral disc, displacement of

lumbar intervertebral disc without myelopathy, and spinal stenosis of lumbar region. Dr. Jatana opined that the best long-term success rates given the neurologic deficit present in Claimant's case would be with surgery, so Dr. Jatana planned to move forward with authorization for L5-S1 microdiscectomy. *See* Exhibit 10.

14. On September 8, 2015 Respondents denied the request for surgery authorization and filed a Notice of Contest. *See* Exhibit 2.

15. On September 10, 2015 Claimant underwent surgery performed by Dr. Jatana. Dr. Jatana performed a left L5-S1 laminectomy with medial facectomy and craniotomy of S1 nerve root and microscope assisted microdiscectomy with removal of a distal extruded fragment. *See* Exhibit 11.

16. Claimant has suffered prior work related injuries. On October 20, 2009 Claimant suffered an injury while performing physical fitness training. Claimant reported that injury the same day and was given a designated provider list. On December 17, 2013 Claimant suffered a back injury and reported the injury the same day and was given a designated provider list. On August 13, 2014 Claimant again reported an injury shortly afterwards and was given a designated provider list. Finally, on January 26, 2015 Claimant was bit by a combative patient while at work. Claimant reported the injury the day it occurred and was given a designated provider list. *See* Exhibits E, F, G, H.

17. Claimant is found credible and persuasive. Although Claimant did not report this injury immediately like several other injuries he suffered, this injury did not appear to Claimant to be immediately disabling or serious. Claimant is credible that he believed he could rehabilitate himself and might not need to file a claim. Claimant realized within two weeks that he could not fix it himself, and filed a claim approximately two weeks following the 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. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

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

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

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See § 8-41-301(1)(b), C.R.S.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has established by a preponderance of the evidence that he suffered a left lower back injury that arose out of and occurred in the course and scope of his employment on August 11, 2015. Claimant has established that during the course of required physical fitness training, he was performing a box jump when he had pain/pulling in his lower left gluteal area. Claimant has established that following this injury he experienced left low back pain and radiculopathy that was not present prior to the injury. Although Claimant did not immediately report this injury like he had with past injuries, Claimant is found credible and persuasive in explaining why he did not report this injury immediately and that he believed he could rehabilitate himself and would not need to file a claim. As found above, Claimant was able to work scheduled shifts on August 12, 2015 and August 15, 2015. Although he had pain immediately on August 11, 2015 while performing physical training, his immediate pain was not disabling. Unlike several of his prior work related injuries, where the seriousness of the injury was immediately recognizable, Claimant reasonably believed that this injury might not require a claim. Claimant's symptoms, however, continued to worsen and by August 17, 2015 he wasn't able to work. At this time, he verbally reported the injury to his supervisor and went on his own to physical therapy and to a primary care provider. Claimant ultimately filed a claim approximately two weeks following the injury. Although it was not an immediate same day claim, the claim was very close in time to the injury and Claimant is credible in explaining the two week delay between injury and the filing of the claim. Claimant is also credible in explaining the mechanism of injury and has been consistent in that explanation from the beginning of his treatment with physical therapy and his personal care provider.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left lower back on August 11, 2015.

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 11, 2016 /s/ Michelle E. Jones

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding medical benefits, specifically a triple-phase bone; and

2. Whether Claimant proved by a preponderance of the evidence that she is entitled a change of physician to Dr. Feldman.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following Findings of Fact.

1. Claimant was born on December 3, 1961, and is 54 years of age. Claimant suffered a work related injury on June 5, 2012. Claimant's authorized treating physician is Jeffrey Wunder, M.D. Dr. Wunder placed Claimant at maximum medical improvement (MMI) on February 3, 2014. On April 15, 2014, Claimant treated at Colorado Rehabilitation and Occupational Medicine (CROM). She initially treated with Rebekah Martin, M.D. Claimant's treatment with Dr. Martin was unauthorized. On May 5, 2014, Dr. Kristin Mason performed an independent medical evaluation and, among things, found that Claimant was not at MMI and needed further evaluation of possible complex regional pain syndrome (CRPS).

2. On June 2, 2014, Claimant was seen for a Division independent medical examination (DIME) by Karen Ksiazek, M.D. Dr. Ksiazek concluded that Claimant was not at MMI. According to Dr. Ksiazek, Claimant's work-related diagnoses are right hip labral tear status post-repair June 20, 2013, with iliotibial band windowing, femoroplasty due to acquired FAI and iliopsoas release, postoperative lateral femoral cutaneous hypaesthesia and obturator dysaesthesias; right upper extremity contusion with right SLAP lesion and known osteoarthritis with impingement symptoms; adjustment disorder with depressed and frustrated mood secondary to physical and psychosocial issues impacting career; and delayed right upper extremity onset sympathetically maintained pain with the question of possible CRPS. Dr. Ksiazek recommended workup of the right shoulder and CRPS, including clarification of the CRPS diagnosis with a triple-phase bone scan. She also suggested physical therapy to incorporate treatment of the pelvic floor obliquity and muscular recruitment would be indicated.

3. On August 5, 2014, Claimant saw Dr. Wunder. On that date, Dr. Wunder referred Claimant to Colorado Infrared Imaging Center for a stress thermogram and three-phase bone scan of the right upper extremity. Claimant requested to have her tests done at

CROM, but Dr. Wunder, aware that Claimant was seeing Dr. Martin, opined that there was a conflict of interest because Dr. Martin was a member of CROM. Dr. Wunder instructed Claimant to return to him in 3 to 4 weeks to review the additional diagnostic results, but she did not return. Records do not reflect that Claimant underwent the stress thermogram or triple phase bone scan at Colorado Infrared Imaging Center as referred by Dr. Wunder.

4. Two days after seeing Dr. Wunder, on August 7, 2014, Claimant saw Dr. Martin at CROM where the doctor reported that Claimant should undergo the triple phase bone in the northern Colorado area closer to Claimant's home and not in the Denver area as recommended by Dr. Wunder. Dr. Martin reported that her office could provide the triple phase bone scan to Claimant. Dr. Martin did not comment on the conflict of interest noted by Dr. Wunder.

5. Claimant had been seeing Dr. Martin since April 15, 2014, meeting with the doctor every month through October 2014. This treatment was unauthorized.

6. On November 25, 2014, Claimant began treating with Alicia Feldman, M.D. at CROM. Claimant's treatment with Dr. Feldman at CROM was unauthorized. Dr. Feldman left CROM and went to the Colorado Clinic. On July 1, 2015, Claimant followed Dr. Feldman to the Colorado Clinic and began treating with her there. Dr. Feldman diagnosed Claimant with chronic pain syndrome, post-herpetic neuralgia, CRPS, left knee osteoarthritis, and right hip pain. Dr. Feldman prescribed treatment including Trazadone, Norco, and mental healthcare. Claimant's treatment with Dr. Feldman at Colorado Clinic was unauthorized.

7. On October 15, 2015, Claimant was seen by Dr. Allison M. Fall, M.D., for an independent medical examination. Dr. Fall's assessment was S/P fall leading to right hip contusion/aggravation of pre-existing condition, S/P hip arthroscopic, labral reconstruction, and greater trochanteric bursectomy by Dr. White; right elbow contusion, no residual complaints or objective findings; left knee osteoarthritic changes, unrelated; chronic pelvic floor pain, unrelated; pre-existing right shoulder complaints with MRI consistent with age-appropriate changes; and doubtful CRPS, if present not work-related. In her report, Dr. Fall opined that no further treatment was reasonable and necessary to bring Claimant to MMI from any work-related injury.

8. On November 23, 2015, Claimant underwent a stress thermographic diagnostic evaluation at CROM by Tashof Bernton, M.D. Dr. Bernton determined the findings of the stress thermogram were not compatible with CRPS and it was a negative diagnostic assessment for CRPS or neuritic pain.

9. Dr. Fall is an expert in physical medicine and rehabilitation and Level II accredited. Dr. Fall credibly testified that much of the healthcare provided to Claimant by Dr. Feldman was neither reasonable, necessary nor related to the work injury of June 5, 2012. Dr. Fall explained Dr. Feldman's diagnosis of postherpetic neuralgia, CRPS upper extremity, and left knee osteoarthritis are in error as Claimant does not have CRPS and her knee osteoarthritis is not a direct and proximate result of the

industrial injury. The diagnostic tests performed at CROM by Dr. Bernton on November 23, 2015, further supports that Claimant does not have CRPS. In addition, Dr. Feldman's prescriptions of Trazodone, Norco, and pain psychology are not reasonably needed to cure and relieve Claimant from, nor related to, the effects of the industrial injury.

10. The Judge finds that Claimant sustained her burden to prove by a preponderance of the evidence that a triple-phase bone scan is a reasonable and necessary medical treatment. The evidence established that the DIME physician found that Claimant is not at MMI and recommended further work up on several conditions, including the possible CRPS. A triple phase bone scan was recommended by Dr. Ksiazek, the DIME physician. It was thereafter prescribed by Dr. Wunder, the authorized treating physician. The DIME physician indicates that it is not yet clear whether Claimant has CRPS and the triple phase bone scan will clarify this. Dr. Wunder opines that Claimant's CRPS symptoms are not work related and will likely be discovered to be psychogenic in nature. Dr. Wunder further opines that Claimant's right upper extremity problems are not work related. The recommendation and Claimant's referral by the DIME physician and the authorized treating physician for a triple phase bone scan constitutes a preponderance of the evidence to support the reasonableness and necessity of this medical benefit.

11. Claimant testified that the patient-physician relationship between herself and Dr. Wunder has deteriorated. She testified that Dr. Wunder does not appear to listen to her. She testified that Dr. Wunder inexplicably placed her at MMI when Dr. White, her Orthopedic Surgeon for her hip condition, recommended additional physical therapy.

12. Claimant testified that she wants to continue to treat with Dr. Feldman because she established a patient-physician relationship with her and to begin treating with a new physician would be detrimental to her treatment prospects.

13. The evidence of record in this matter reflects that Claimant began treating with physicians outside of the workers' compensation system in April 2014. Claimant underwent a DIME with Dr. Ksiazek in June 2014 whose assessment of Claimant's condition is that she was not at MMI. When Dr. Wunder acted on Dr. Ksiazek's DIME recommendations by referring Claimant for a triple phase bone scan and stress thermogram, Claimant ignored his referrals and began to consistently treat with Dr. Martin, seeing the doctor monthly for a six month period. Dr. Martin's notes reflect ongoing discussions with Claimant about undergoing the stress thermogram and triple phase bone scan at Dr. Martin's CROM office at Claimant's expense.

14. Dr. Feldman, the doctor to whom Claimant wants her care transferred, is a pain management specialist according to her records, who in November 2014 was also working at CROM. After Claimant's November 25, 2014, visit, Claimant saw Dr. Feldman again in February, July and September 2015. Claimant now claims she wants Dr. Feldman designated as her authorized treating physician.

15. Dr. Wunder had long standing concern about whether Claimant's right shoulder complaints were related to the June 2012 work injury. Dr. Wunder also had reservations about whether the CRPS symptoms in Claimant's right upper extremity were work related. Dr. Wunder's August 5, 2014, report expressed his concerns about Claimant's treatment and recovery. He states,

> I think this is a classic case of the patient's symptoms being shaped by her medical treatment providers. Although she reported diagnostic tests with her stellate ganglion block, I do not think her report of pain relief at all can be trusted or considered valid in light of the psychosocial problems reported and, on her physical examination, she had no evidence of CRPS today.

Despite Dr. Wunder's concerns, he followed the recommendations of Dr Ksiazek and referred her for the stress thermogram and triple phase bone scan.

16. Considering all the evidence, the Judge finds that Claimant failed to establish by a preponderance of the evidence that she is entitled to an order for a change of physician. Claimant failed to make a proper showing that her care would be improved by changing physicians or that Dr. Wunder acted in any way to cause her harm. Thus, a change of physician is not warranted.

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 litigation. *See* Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* 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. *See 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. *See* Section 8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. *See* Section 8-43-201, C.R.S. The judge's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the judge 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. *See Magnetic Engineering, Inc. v. Industrial Claims Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TRIPLE PHASE BONE SCAN

3. Respondents are liable for medical treatment reasonably necessary to cure or relieve the claimant 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 the claimant establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000).

4. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the Judge. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002). Even where they have admitted liability, respondents are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *Id.*

5. In this case, the DIME physician has determined that Claimant is not at MMI and requires additional curative treatment. The DIME indicates that Claimant requires additional diagnostic testing to clarify the diagnosis of the right upper extremity condition. Respondents did not challenge the DIME determination on MMI or on the relatedness of the right upper extremity condition.

6. Considering all the evidence, the Judge concludes that Claimant sustained her burden of proof by a preponderance of the evidence to establish that a triple-phase bone scan is a reasonable and necessary medical treatment related to her work injury. Drs. Ksiazek, Wunder, Mason and Martin opined on the necessity of further testing to clarify Claimant's CRPS diagnosis.

7. Dr. Fall's opinion on this matter was considered and it is concluded her opinion might have been more helpful in the case challenging the DIME opinion on MMI and relatedness. But, Dr. Fall's opinion is less persuasive in the case before the court at this time regarding the reasonableness and necessity of the triple phase bone scan. It is concluded that Dr. Wunder, Mason, Martin and Ksiazek's opinions regarding the need for diagnostic work up of the right upper extremity condition in order clarify whether Claimant has CRPS constitutes a preponderance of the evidence supporting this order.

CHANGE OF PHYSICIAN

8. Pursuant to Section 8-43-404(5)(a), C.R.S., the respondent has the right to select the treating physician in the first instance. Once the respondent has exercised its right of first selection, the claimant is not entitled to a change of physician but may request a change under several sections of the Act. *Vigil v. City Cab Co.*, W.C. No. 3-985-493

(ICAO May 23, 1995); *See Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 780 (Colo.App. 1990).

9. Claimant failed to make a proper showing that a change of physician to Dr. Feldman is warranted. If a claimant wants to change physicians, there is a statutory obligation to follow the prescribed procedures in Section 8-43-404(5)(a), C.R.S. *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). However, a claimant may seek a change of physician upon a "proper showing" to the division. Section8-43-404(5)(a)(VI),C.R.S.

10. The credible and persuasive evidence demonstrates Dr. Wunder has provided competent and professional medical care and that Claimant without explanation has not followed his recommendations. A change of physician is not warranted by the mere fact that a claimant has more faith in a specific doctor or lacks confidence in the employer's doctor. 5 *Larson's Workers' Compensation Law* Section 94.02[3] (1999).

11. Section 8-43-404(5)(a)(VI), C.R.S. does not define what a claimant must prove to make a "proper showing." A claimant does not have any entitlement to be treated by any particular physician. *See Colorado Compensation Insurance Authority v. Noflo,* 886 P.2d 714 (Colo. 1994). The Judge's decision should be made with a view towards insuring the claimant is being provided reasonable and necessary medical treatment as required by Section 8-42-101(1)(a), C.R.S. while protecting the respondents' legitimate interest in being apprised of the course of treatment for which it may ultimately be held liable. *See Landeros v. CF& I Steel,* W.C. No. 4-395-314 (ICAO Oct. 26, 2000). *See also Villalobos v. Spring Air Mattress*, W.C. No. 4-662-825 (ICAO Jun. 22, 2007).

12. In light of Drs. Wunder and Fall's credible opinions regarding Claimant's treatment, and the medical records regarding Claimant's treatment by the physicians at CROM, the Judge finds Claimant failed to make a proper showing that a change of physician to Dr. Feldman is warranted.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Judge orders, as follows.

1. Respondents shall be liable for a triple phase bone scan.

2.Claimant's claim for a change of physician is denied and dismissed.

3. Any issues not determined in this decision are reserved for future

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

DATED: _February 25, 2016__

DIGITAL SIGNATURE:

Margot W. Jones

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