ISSUES

1. Whether the claimant has established by a preponderance of the evidence that he is entitled to permanent total disability (PTD) benefits;

2. If so, whether the respondents have established by a preponderance of the evidence that any offsets should be deducted from the PTD benefits;

3. Whether the respondents have overcome by clear and convincing evidence Dr. Sandell's finding that the claimant's right hip symptoms and diagnosis of "ectopic bone" were a direct result of claimant's work injury[1]; and,

4. Whether the respondents have established by a preponderance of the evidence that the doctrine of waiver bars claimant's claim.

At the start of hearing, the parties agreed on the record that the claimant had timely and properly objected to prior final admissions of liability and that the foregoing issues were preserved for hearing. The parties previously stipulated that claimant's average weekly wage is $1084.08.

FINDINGS OF FACT

1. The claimant was born and raised in Leadville, Colorado. He is 66 years old. The claimant is married and he and his wife have two children, a son Steven and a daughter Melissa. The claimant did poorly in school. In sixth and seventh grades, the claimant received D's and F's in arithmetic, geography, language, reading, science, and spelling. In high school, he received mostly C's and D's, with an occasional B or F. Despite his poor grades, on May 20, 1962, a teacher commented, "[The claimant] can learn, but is quite slow. He especially needs help in writing. (He always tries)"

2. Following high school, the claimant commenced employment with the Climax Mine near Leadville where he worked for seventeen years from 1969 to 1986. Following a layoff from Climax Mine in 1986, the claimant worked for a goldmine in

[1] On April 25, 2014, insurance adjuster Marjorie H. Kelly issued a letter to Dr. Hess stating that the respondent-insurer was not liable for the claimant's right hip problems.

Nevada for two years as a mechanic. In 1988 the claimant returned to work for the Climax Mine and worked there another four years until 1992 when the mine closed. After his layoff from Climax Mine in 1992, the claimant commenced employment with the respondent-employer where he continued to work until around May 2006. The claimant has not worked since he left employment with the respondent-employer.

3. The claimant worked as a mechanic at the respondent-employer's bus barn. He performed maintenance and repaired damage to the respondent-employer's buses. The claimant's schedule was four days per week. He would leave by 3:15 or 3:30 a.m., and drive to East Vail, where the bus barn was located. His workday commenced around 4:00 o'clock or 4:30 a.m. He worked a ten-hour shift and then returned home. The claimant was the first person at the bus barn on the days that he worked. The claimant rarely, if ever, missed work because of illness.

4. On July 20, 2000, the claimant was on a ladder removing a window from a bus. He fell backwards off the ladder, and the window came down on top of his knee. The claimant suffered a comminuted severe tibia plateau fracture involving the proximal tibia. The claimant underwent emergency repair of this fracture. The repair included an external fixator. Following surgery, he stayed in the hospital for twelve days. The claimant had the external fixator until October 23, 2000 when some of the hardware was surgically removed.

5. On January 9, 2001 the claimant underwent a third surgery to remove scar and meniscus tissue. On June 5, 2001, Dr. Bradley operated on the claimant again. Dr. Bradley again removed some scar tissue. He noted that the claimant's knee was 5° short of full extension. Dr. Bradley also performed further hardware removal.

6. In April 2002, the claimant was referred to surgeon Gary Hess, MD of Denver-Vail Orthopedics, P.C. On July 10, 2002, Dr. Hess performed a right total knee arthroplasty. On September 27, 2002, Dr. Hess noted that the claimant was struggling with his rehabilitation and recovery and recommended that the claimant be provided with a "double upright hinged brace that he can lock in full extension for ambulation to avoid falling episodes." On March 14, 2006 Dr. Hess noted that the claimant had developed pain in his right hip as well as arthritis. On April 13, 2005 the claimant underwent a revision right total knee arthroplasty, correction of flexion contracture in the right knee, and a repair of his infrapatellar tendon in his right knee. The claimant's previous total knee arthroplasty (replacement) had failed and needed to be redone.

7. Dr. Kathy McCranie examined the claimant on November 8, 2005 for a pain management consultation. Her impressions were chronic right knee pain. She

noted that the claimant had undergone multiple right total knee replacements. She prescribed Ibuprofen, Ultram, and Lidoderm patches. Dr. McCranie placed claimant at MMI and gave him a 14 percent whole person impairment rating.

8. On May 26, 2006 the claimant underwent a functional capacity evaluation with Keith McCarroll, P.T. McCarroll noted that there were no inconsistencies with the claimant's effort. McCarroll noted that the claimant was at risk for falls if working on uneven surfaces, or on ice, snow, or stepladders. McCarroll also noted that the claimant had pain in his right knee and hip, and that he should be on his feet no more than two to three hours per day. McCarroll also noted that the claimant was at a "significantly increased risk for back injury because of his poor body mechanics with lifting, which are a direct result of his inability to use his right knee to squat or kneel."

9. On May 30, 2006, Dr. Hess again examined the claimant and again assigned a restriction of no work. Per Dr. Hess, these restrictions were permanent.

10. On August 17, 2006, Dr. Allison Fall examined the claimant on behalf of the respondents. She assigned a lower extremity impairment rating of 44%, converted to 18% whole person. Dr. Fall remarked that her objective examination did not demonstrate pathology consistent with the claimant's ongoing complaints of pain. Nonetheless, she recommended at least one year of Darvocet and Lidoderm patches for pain management. Dr. Fall also issued work restrictions of "40 hours of work with no squatting, kneeling, climbing ladders or work at unprotected heights." She declined to limit the claimant's standing or walking.

11. On September 1, 2006 the respondent-employer formally discharged the claimant, effective August 28, 2006. On November 2, 2006 Dr. Hess answered a questionnaire and reported that, with respect to the claimant's right hip, the claimant had suffered a tear of the muscles with bleeding around his right hip. Dr. Hess noted that the claimant's right hip injury arose when he fell from the ladder at work on July 20, 2000. Dr. Hess stated that he had last treated the claimant's hip on September 2, 2006 and that the claimant was not at MMI for his right hip. Dr. Hess suggested that the claimant would likely need the excision of the ectopic bone in his right hip, as well as a hip replacement at some point in time. Dr. Hess also noted that the claimant was at MMI for his right knee as of September 26, 2006, although he was not at MMI for the right hip.

12. On November 26, 2006, the claimant began receiving long-term disability (LTD) benefits of $2537.73 per month from Sun Life Financial (Sun Life), continuing until June 15, 2015. Sun Life asserted a subrogation interest against the claimant's

workers' compensation recovery for the full amount of the LTD benefits. As of July 15, 2015, the claimant started receiving Social Security retirement benefits in the amount of $1,674.00 per month.

13. On December 14, 2006, Dr. Fall issued an opinion stating that the claimant had no "internal derangement of the right hip joint," although she did confirm that there had been some muscular injury around the right hip. On December 29, 2006 the claimant underwent an Independent Medical Examination with Dr. James Bachman. Dr. Bachman noted that the claimant had undergone six right knee surgical procedures and two right knee replacements. Dr. Bachman stated that the claimant had suffered a right hip injury that occurred on July 20, 2000 and was "solely due to this work related injury." Current diagnosis is "bone chip." Dr. Bachman noted that the claimant suffered a lumbar spine injury due to his abnormal gait, and that the claimant also suffered insomnia "directly and solely due to his pain and stiffness." Dr. Bachman stated that the claimant still had "severe right knee pain" and that the claimant walked "with a distinct and abnormal gait and his severe limitation in his right knee [range of motion]."

14. Dr. Bachman stated that the claimant needed pain management care. Dr. Bachman stated that the claimant should lift no more than 10 pounds and should drive no more than 1 ½ hours per day. Dr. Bachman disagreed with Dr. Hess' "no work" restrictions. Dr. Bachman determined that claimant had a 35% whole person impairment rating. He noted that the claimant would need quarterly pain management and yearly orthopedic evaluations for the rest of his life. Although Dr. Bachman noted that the claimant had insomnia caused by pain, his report contains no discussion as to how that insomnia would affect the claimant on a day-to-day basis if the claimant were working. At the time of Dr. Bachman's examination, the claimant had not worked for a period of some months.

15. On January 16, 2007 Dr. Hess wrote a letter "To Whom It May Concern" that as of September 26, 2006 the claimant was "permanently disabled and I do not expect him to return to work activities."

16. On January 26, 2007 the claimant underwent a Division independent medical examination (DIME) with Dr. Timothy Sandell. Dr. Sandell determined that the claimant's right hip symptoms were a direct result of the claimant's work injury. On April 4, 2007 Dr. Sandell issued an addendum stating that the claimant's final impairment rating was 60% of the lower extremity, or 24% whole person. Dr. Sandell found no reason to apportion the claimant's rating to any cause other than the claimant's July 20, 2000 work injury.

17. Dr. Sandell also determined that the claimant's date of MMI was May 30, 2006. On February 17, 2007 Dr. Hess noted that the claimant required chronic pain management.

18. On July 17, 2007, Dr. Hess completed a questionnaire for Sun Life. He noted that the claimant could "never" squat, climb, twist, push, pool, balance, kneel, or crawl. He also noted that the claimant could "occasionally" drive, walk, stand, bend at the waist, lift up to 25 pounds and carry up to 25 pounds. Dr. Hess commented that the claimant was "permanently disabled & not able to return to work."

19. On May 24, 2007 Dr. J. Randall Burris examined claimant. Dr. Burris noted that the claimant had 25° of extension lag and 90° of flexion in his right knee, and he would need to review 2 1/2 inches of medical records and issue an addendum. There is insufficient evidence that any addendum was ever issued.

20. On August 17, 2007, vocational evaluator Ronald Brennan, M.A., C.D.M.S. evaluated the claimant with regards to the claimant's ability to earn any wages. Mr. Brennan opined that the claimant was "unable to earn any wage from his past employment ... and unable to earn any wage from other jobs existing in his commutable labor market."

21. On June 17, 2008, Dr. Hess noted that the claimant's right knee would flex to 95° and extend to -5°. Dr. Hess noticed some concerns about claimant's right hip. Dr. Hess again noted that the claimant's right hip symptoms were work-related.

22. On August 27, 2008, the claimant underwent a functional capacity evaluation with Gail Gerig, M.Ed., PT, CHT-retired. Ms. Gerig noted that the claimant had "severe loss of right knee extension and flexion," some atrophy of his right calf musculature, approximately 3 cm of right leg shortening, a severe discrepancy between the right and left iliac crest levels with the right much lower than the left, and the claimant "does not stand and bear weight on the right." Ms. Gehrig noted that the claimant's test results were valid. She also noted the claimant's true work level was "less than sedentary."

23. On April 13, 2009 the claimant underwent another employability assessment with Louis C Phillips, B.S., Q.R.C. At that time, the claimant was 59 years old. Mr. Phillips agreed with Mr. Brennan that the claimant was unable to earn any wages within his commutable labor market. Mr. Phillips also noted that the respondents' vocational evaluator Gail Pickett had determined that the claimant was able to work, but that she had based her conclusions entirely on Dr. Allison Fall's opinions of work restrictions. Mr. Phillips noted that Dr. Fall had imposed no restrictions on the claimant's ability to "sit,

stand, walk or lift." Mr. Phillips noted with disapproval the contrast between the restrictions assigned by Dr. Fall and the restrictions assigned by numerous other physicians that had treated claimant.

24. On June 4, 2009, Dr. Fall conducted another independent examination of the claimant. She noted that the claimant had current symptoms of, "Pain is aggravated by standing, walking, or sitting for a prolonged period of time." She noted that the claimant lacked 15° from neutral extension in his right knee when standing and when lying down, and she also noted that the claimant had active flexion of the right knee of 100°. Dr. Fall again affirmed that the claimant could work 40 hours a week with no squatting, kneeling, climbing ladders, or work at unprotected heights, and she again declined to issue any limitations for standing or walking.

25. From July 8, 2009 until February 4, 2014 the claimant continued follow-up with Dr. Hess, who noted that the claimant complained of pain in his hip, his right hip, knee, and low back, while also noting the claimants continued inability to work.

26. On September 15, 2015, the claimant underwent another IME with Dr. Fall. Dr. Fall reaffirmed her previous work restrictions, again declining to issue any limitations upon the claimant with respect to walking or standing. Dr. Fall never addressed in any of her reports the impact of the claimant's inability to sleep because of pain.

27. On October 27, 2015, vocational evaluator Gail Pickett issued a report stating that the claimant could perform work. Ms. Pickett suggested that the claimant could: drive a bus school (assist wheelchair bound students to get on and off the bus; requires CDL license), work at Taco Bell as a cashier (stand entire shift); work as a bakery Café service staff (stand entire shift); or be a part-time driver guard in Leadville (must lift 50 pounds). Ms. Pickett's report also states there was a Gate Keeper job in Summit County.

28. On October 12, 2015 the claimant was examined by O.T. Resources, Inc., for evaluation of functional capacity as well as ability to earn wages. Occupational therapist Marie Andrews, OTR/L, BCG, MSW administered the functional capacity evaluation. Doris Shriver, OT/L. FAOTA, QRC, CLCP, reviewed the results of the functional capacity evaluation and completed the employability assessment portion of the report. On November 2, 2015 Ms. Andrews and Ms. Shriver issued a report finding that the claimant had numerous significant physical limitations. They included no floor to waist lifting, a maximum of one hour of sitting at one time with the ability to alternate between sitting, standing, walking and lying down throughout the day. Limitations also included significant standing restrictions, the avoidance of all climbing of ropes, ladders

or scaffolds, kneeling, crouching or squatting, crawling, and reaching overhead. The report noted marked limitations in the claimant's ability to maintain attention and concentration for extended periods, as well as moderate difficulty with 2 to 3 step directions. The report also noted moderate difficulty with dressing, feeding, bathing, hygiene, cooking, cleaning, and local travel. It noted extreme difficulty with distance travel. The report advised that the claimant should totally avoid unprotected heights, being around moving equipment, and driving machinery. It noted moderate limitations with respect to exposure to extreme heat, cold and wetness. It noted moderate difficulty with the claimant driving an automobile.

29. Ms. Shriver and Ms. Andrews also noted that the claimant read at grade level 3.7, spelled at grade level 2.1, performed math at grade level 4.5 and had sentence comprehension of grade level 5.5**.** The report also noted that the claimant had clinically observed severe chronic pain as well as sleep disturbance due to pain. He also had impaired tolerance for sitting, standing, walking.

30. The claimant had to stop working for the respondent-employer because of his pain. He has difficulty sleeping because of the pain and he has to prop his knee on a pillow, and he often needs to nap during the day to catch up on his rest. The claimant tries to avoid ice and snow in order not to fall. The claimant returned to work with the respondent-employer numerous times between his surgeries. The claimant now lives in constant pain, and his pain is quickly exacerbated to severe and intolerable levels by too much walking, sitting or activity. The claimant has lost the ability to participate in many enjoyable family activities such as hiking, biking, fishing, helping his daughter with sponsoring and organizing local foot races, helping his daughter open up the recreation center in Leadville, traveling, and doing things with his son, who was approximately 13 years old when the claimant was injured. The claimant testified to restrictions that were essentially in accord with those found by Marie Andrews and Doris Shriver of O.T. Resources, Inc. He also testified as to his poor school performance and his lack of experience running a cash register or a computer. He also stated that he did not have a CDL license. He also stated that it took him approximately 45 minutes under the best of circumstances to get from his home in Leadville to Vail.

31. The claimant testified that had never sent any document or expressed or communicated any intent to waive his workers' compensation claim. He stated that there had been some delay in his claim because, as he understood it, his attorney had been ill.

32. The claimant's wife and his daughter Melissa affirmed in their testimony the claimant's restrictions and difficulties with activities of daily living. The claimant's

wife related that the claimant was a hard and conscientious worker who would go to work even when he was sick. The claimant's daughter Melissa stated that her family had been a family that loved to play together in the outdoors, and that her father's injury had inflicted a very large loss not only on him but also on all other members of the family.

33. Vocational evaluator Doris Shriver testified that she had 40+ years of experience in vocational evaluation and had occupied a number of board and officer positions in national occupational therapy and vocational associations. Ms. Shriver detailed the methodology and procedure employed by O.T. Resources to ensure safety, validity and lack of bias in testing. Ms. Shriver stated that the battery of tests administered to the claimant were largely based on the McCarron-Dial system introduced to the field of rehabilitation in 1973 and generally regarded as one of the most extensively validated vocational evaluation systems. There was insufficient evidence to directly dispute the reliability of the McCarron-Dial system. She testified the claimant's work level was less than sedentary. Ms. Shriver also testified that the claimant would miss an unacceptable (from an employer's point of view) number of days from work if he tried to return to work.

34. The respondents' vocational evaluator Gail Pickett stated that the claimant's commutable labor market was approximately 30 miles from home. The claimant testified that Buena Vista, Frisco, and Vail were beyond the distance of his commutable labor market as determined by Ms. Pickett. Ms. Pickett stated that if the vocational restrictions determined by O.T. Resources, Inc. were valid, that the claimant was unable to earn any wages. Ms. Pickett also admitted that the claimant's work history indicated that he was a reliable and hard-working employee. Ms. Pickett also admitted that chronic lack of sleep causes approximately the same effect on driving ability as driving under the influence.

35. Dr. Fall testified essentially in accordance with her reports. She again stated that she could find no reason for the claimant to have pain in his right knee, despite the many surgeries he had undergone. She stated that even though the claimant could not straighten his knee, it would require no more effort for the claimant to stand on his right leg than if his knee worked be able to extend completely straight.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8- 43-201, *supra.*

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

3. 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).

4. Under Section 8-40-201(16.5)(a), C.R.S., permanent total disability (PTD) means, "the employee is unable to earn any wages in the same or other employment." A claimant thus cannot obtain PTD benefits if he is capable of earning wages in any amount. Therefore, to establish a claim for PTD 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.

5. A claimant must demonstrate that his industrial injuries constitute a "significant causative factor" in order to establish a claim for PTD. *In re Olinger,* W.C. No. 4-002- 991 (ICAO, March 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and a PTD claim. *In re Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006); see *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

6. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. RE-12 v. Bymer,* 955 P.2d 550 at 556 (Colo. 1998); *Holly Nursing v. ICAO,* 992 P.2d 701 (Colo. App. 1999). As part of the determination, the ALJ may also consider whether the claimant will be able to obtain and maintain employment. *Bymer,* 955 P.2d at 556. The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer,* 905 P.2d at 557. Ultimately, the determination of whether a claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In re Selvage,* W.C. No. 4-486-801 (ICAO, Oct. 9, 2007).

7. The ALJ concludes that the claimant's descriptions of his pain and limitations are credible. The ALJ concludes that, given the totality of the circumstances and the evidence considered as a whole, the limitations and restrictions noted and determined in the report of O.T. Resources, Inc. are the most accurate and credible. The evidence in the record indicates that the claimant was hard-working and conscientious and dependable. Even though the claimant had significant difficulties with subjects such as math, reading and spelling, he worked hard to overcome these limitations and made a successful career for himself as a mechanic and a miner. The claimant's orthopedic surgeon Dr. Gary Hess has treated claimant from 2002 through the present time. Dr. Hess has consistently maintained for over nine years that the claimant is permanently disabled from work. Further, the claimant and his wife and his daughter and vocational expert Doris Shriver were credible and consistent in their description of the claimant's condition, restrictions, limitations and work ethic.

8. The ALJ concludes that the functional capacity evaluation performed by O.T. Resources, Inc. employed appropriate processes to minimize bias and/or invalid findings. In contrast, the work restrictions imposed by Dr. Fall are inconsistent and not credible.

9. The respondents' vocational evaluator Gail Pickett admitted that the claimant's commutable labor market was very limited as well as that the claimant would be unable to earn any wages if the O.T. Resources, Inc. restrictions were valid.

10. As found, the claimant has demonstrated by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. The claimant is permanently totally disabled.

11. As to the claimant's hip symptoms, Sections 8-42-107(8)(b)(III) and (c), *supra,* provide that the determination of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. 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,* 961 P.2d 590 (Colo. App. 1998). As is suggested by the foregoing finding of permanent total disability, the ALJ concludes that the respondents have failed to present clear and convincing evidence that would demonstrate that it is highly probable that Dr. Sandell erred in determining that claimant's hip symptoms arose from his work injury.

12. As to waiver, it is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission,* 761 P.2d 1140 (Colo. 1988); *Department of Health v. Donahue,* 690 P.2d 243 (Colo. 1984). Waiver may be explicit, or it may be implied, as where a party acts inconsistently with the known right and where that action would prejudice the other parties. *Vanderbeek v. Vernon Corp.,* 25 P.3d 1242 (Colo. App. 2000); *Norden v. E.F. Hutton and Co Inc.,* 739 P.2d 914 (Colo. App. 1987); *Klein v. State Farm Mutual Automobile Ins. Co.,* 948 P.2d 43 (Colo. App. 1987); *Red Sky Homeowners Assoc. v. The Heritage Company,* 701 P. 2d 603 (Colo. App. 1984). Determination of whether there has been a waiver is generally a factual issue to be resolved by the ALJ. *Johnson v. Industrial Commission, supra.* "We must uphold the ALJ's findings if supported by substantial evidence in the record." Section 8-43-301(8), C.R.S. 2006. In applying this standard, "we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence." *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

13. The ALJ concludes that the respondents have failed to prove by a preponderance of the evidence that the claimant waived his workers' compensation claim for permanent total disability benefits. The respondents offered insufficient evidence of any explicit intent on the part of the claimant to waive PTD. Nor have respondents shown any prejudice. The respondents could have availed themselves of the provisions of C.R.S. § 8-43-207(l)(n) to seek closure of the claimant's claim, but they never did.

14. As to offsets, the respondents are entitled to deduct from any permanent total disability benefits owed to the claimant an amount equal to 50% of the claimant's initial Social Security retirement benefits. C.R.S. § 8-42-103(1)(c)(II). As the claimant

began receiving Social Security retirement benefits as of July 2015 in the amount of $1,674.00 per month, the respondents are entitled to claim an offset of $837.00 per month as of July 1, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay permanent total disability benefits to the claimant commencing May 30, 2006.

2. The respondents' claim to overcome Dr. Sandell's finding that the claimant's hip symptoms are related to and caused by the injury of July 20, 2000 is denied and dismissed.

3. The respondent-insurer may claim an offset of $837.00 per month commencing July 1, 2015.

4. The respondents' claim that the claimant waived his right to permanent total disability benefits is denied and dismissed.

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

6. All matters not determined herein, 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: January 15, 2016

/s/ original signed by:

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

ISSUES

1. Whether the respondents have established by clear and convincing evidence that the claimant's need for an amputation is not work related due to the claimant's diagnosis of Munchhausen's Syndrome.

2. Whether the respondents have established by a preponderance of the evidence that the claimant is no longer entitled to Grover medicals for his October 16, 2003 admitted injury.

3. Whether the claimant has established by a preponderance of the evidence that the Stair Glide system and wheelchair ramp recommended by Dr. Robert Meier is reasonable, necessary, and related to the October 16, 2003 industrial injury.

4. Whether the October 14, 2013 emergency treatment and all subsequent treatment stemming from the October 14, 2013 incident was reasonable, necessary, and related to the October 16, 2003 industrial injury.

5. Whether the treatment the claimant received for his contralateral knee was reasonable, necessary, and related to the October 16, 2003 industrial injury.

FINDINGS OF FACT

1. The claimant sustained an admitted left knee injury on October 16, 2003 while working as a plumber when his knee became infected.

2. The respondent-insurer filed a General Admission of Liability (GAL) on October 28, 2003. Multiple amended GALs were filed from 2004-2007.

3. Dr. Scott Primack placed the claimant at maximum medical improvement (MMI) on September 9, 2011. He assigned a 100% scheduled impairment rating for the claimant's left lower extremity.

4. The respondent-insurer filed a Final Admission of Liability (FAL) consistent with Dr. Primack's report on February 22, 2012. The claimant had already exceeded the statutory cap and received no additional indemnity benefits as a result. The respondent-

insurer also asserted an overpayment of $61,402.30 to be offset against any future indemnity payments owed. The respondent-insurer admitted to reasonable, necessary, and related post-MMI benefits.

5. The claimant objected to the FAL on February 22, 2012 and simultaneously requested a Division Independent Medical Examination (DIME).

6. Dr. Jade Dillon was selected to conduct the examination, which occurred on June 7, 2012. Dr. Dillon's June 9, 2015 report found the claimant not to be at MMI.

7. Dr. Dillon, however, issued an addendum to her report on September 21, 2012 following receipt of Dr. Primack's report, which concluded the claimant suffers from Factitious Disorder and also found the claimant reached MMI on September 9, 2011.

8. The claimant's medical history is extensive. It began in October 2003, when the claimant went to Dr. Hansen with a fever and complaints his knee was "throbbing." Dr. Hansen opined the claimant likely suffered from a septic prepatellar bursitis. A six centimeter incision was made and mildly turbid bursal fluid was extracted.

9. On October 27, 2003, the claimant attended a follow-up appointment with Dr. Hansen. The incision was showing good granulation tissue and the claimant was returned to work so long as he refrained from kneeling.

10. The claimant's wound inexplicably failed to heal by February 2004. The claimant underwent multiple procedures in an attempt to facilitate healing.

11. In February 2004, cultures from swabs taken from the claimant's left knee wound indicated the presence of enterococcus. Enterococcus is a bacterium which is found in feces.

12. The claimant was ultimately referred to Dr. Primack. Dr. Primack first examined the claimant on November 30, 2005. The claimant still had a wound on his left knee the size of a fifty-cent piece.

13. On March 7, 2007, the Dr. Schnur opined the claimant was doing well. His wound was healing and showing good tissue granulation. Tissue granulation occurs as new connective tissue is produced by the body during the healing process.

14. Dr. Schnur reported continued improvement on July 2, 2007 and stated the claimant's wound looked "much better."

15. On August 29, 2007, only six weeks later, the claimant's wounds were infected. Dr. Schnur opined he was "unsure of the etiology of [the claimant's] wound problems at this point."

16. On October 31, 2007, despite indications of prior healing earlier in the year, Dr. Schnur found the claimant's wounds "did not look good from a healing standpoint." Dr. Schnur questioned whether a vitamin C deficiency was the cause of the claimant's continued failure to heal. Dr. Schnur discussed the possibility of amputation if the wound did not heal.

17. On January 2, 2008, the claimant was admitted to the hospital due to increased pain, swelling and pain in the left leg. Dr. Schnur reported amputation was becoming a strong consideration.

18. On January 8, 2008, almost five years after the claimant's soft tissue injury, which involved only an inflamed and infected bursa sac, the claimant underwent a left leg amputation at four inches above the knee. The claimant began to recover and slowly began the use of a prosthesis.

19. On March 19, 2008, two weeks after surgery, Dr. Schnur reported the claimant "has overall been getting better."

20. On July 9, 2008, Dr. Schnur reported the claimant's leg wounds were smaller, but the claimant also suffered from multiple ulcerations throughout the stump. Dr. Schnur could attribute some of the ulcerations to the pressure of the prosthesis, but the claimant also suffered from ulcerations where Dr. Schnur would not expect pressure. The cause of those ulcerations was simply unknown.

21. On October 15, 2008, Dr. Schnur reported the claimant was not feeling well and was suffering from low-grade fevers. An MRI revealed fluid collection next to the bone and Dr. Schnur opined the fluid would need aspirated.

22. Dr. Schnur reported on February 18, 2009 the claimant presented with "excoriations along many, many areas" of the left stump. Dr. Schnur was the second doctor to note excoriation. He again stated the claimant is suffering from wounds of "unknown etiology."

23. On March 18, 2009 Dr. Meier examined the claimant. Dr. Meier noted, "I continue to be frustrated by the lack of healing of these lesions and do worry whether he is displaying findings compatible with Munchhausen's."

24. On March 18, 2009, Dr. Meier also noted wounds on the claimant's right leg. Dr. Meier states, "I have always believed that the right leg lesions were factitious in nature."

25. Dr. Meier's April 9, 2009 reported the claimant had two wounds on his left stump. One measured 6 centimeters in diameter and the other measured 8 centimeters. Dr. Meier also noted most of the prior open areas on the right leg appear to have healed.

26. On May 6, 2009, the claimant's left residual stump only had superficial lesions and did not appear infected, but the claimant was again suffering from multiple lesions on the right leg.

27. On May 11, 2009, Dr. Arbuckle reported his frustrations with the claimant's failure to heal in an appropriate period of time. Dr. Arbuckle was the third doctor to note excoriation marks. Dr. Arbuckle wrote, "[i]t is unclear to me at this time why [the claimant] will not heal. Many of the skin lesions that we see on examination are excoriation, but patient denies any history of self-inflicted trauma. I would recommend that we work [the claimant] up for a micro vascular coagulopathy…If this work up is negative I would highly suspect that patient might has {*sic*} some secondary gain for current condition and that there are other factors playing a role in these non-healing wounds." Testing revealed the claimant did not suffer from a microvascular disease or coagulopathy."

28. On November 4, 2009, the claimant reported to Dr. Schnur that his wounds were getting smaller. Dr. Schnur reported good granulation. The wound on the left residual leg which measured 1.5 centimeters. Otherwise, the stump "looked relatively good."

29. Just three months later, on February 24, 2010, the claimant's wound had grown and he reported "pus" coming from his stump. Dr. Schnur ordered an MRI to look from osteomyelitis or a deeper infection. The MRI revealed deeper infection.

30. The claimant underwent his first amputation revision in March 2010.

31. The claimant presented to Dr. Ronald Hugate for an urgent visit on August 9, 2010. Dr. Hugate reviewed an MRI and found no signs of osteomyelitis. He opined surgery was not a good option as each time a portion of the leg is removed, the infection returns. Dr. Hugate opined the claimant suffered from an unusual condition and he was not sure "what caused it." Dr. Hugate theorized the claimant suffered from Munchhausen's.

32. The claimant's second amputation revision was conducted on December 16, 2010.

33. By March 23, 2011, the claimant's left residual stump wound was 8-10 millimeters deep. Dr. Schnur opined "The claimant continues to have wound problems, which are worsening."

34. The claimant was admitted to Presbyterian/St. Luke's Medical Center on April 20, 2011. He complained of chills, fever, and pain in the left residual leg. His wound was deeper and blood tests demonstrated an elevated white blood cell count.

35. On August 19, 2011, Dr. Primack conducted a comprehensive consultation and medical record review. The claimant's wound was not fully closed and some granulation tissue was present.

36. Dr. Primack concluded "The claimant likely suffers from Munchhausen's syndrome." Dr. Primack based this diagnosis on the claimant's extensive medical treatment despite objective findings to explain his failure to heal. Dr. Primack cited medical records which demonstrate "e-coli/feces found within the residual limb," "negative biopsies for osteomyelitis but he still has had extensive surgery," extensive issues with healing and concerns of self-harm. Dr. Primack wanted to approach the claimant following discussions with the claimant's other treating providers.

37. Dr. Primack discussed his concerns regarding Munchhausen's with Drs. Schnur and Meier in mid-August 2011.

38. It was agreed Dr. Primack would inform the patient of the diagnosis. According to Dr. Primack, Dr. Meier told Dr. Primack, "You tell him, I'll be there to support him." Dr. Primack informed the patient due to the probability of the diagnosis having a significant compromising effect on the physician-patient relationship between the claimant and Dr. Meier.

39. On September 9, 2011, Dr. Primack placed the claimant at MMI. Dr. Primack informed the claimant his placement at MMI is because he suffers from Munchhausen's syndrome.

40. On September 14, 2011, Dr. Schnur reported the claimant was distressed due to his recent diagnosis of Munchhausen's by Dr. Primack. On examination, the claimant was showing good granulation with no signs of infection. His wound measured 3 x 5 centimeters at the surface. Dr. Schnur reported the claimant continued to heal on his November 16, 2011 and December 14, 2011 visits.

41. On April 17, 2012, another swab culture yielded results indicative of fecal bacteria in the stump. Swab cultures collected from the claimant's residual left leg wound reflected "heavy growth of e-coli."

42. On June 3, 2012, Dr. Schnur noted the claimant's wound was about 3.8 centimeters deep and also found "[the claimant's] wound is improving; although I'm not seeing much healing."

43. Dr. Schnur noted on September 12, 2012, "[the claimant's] wound is not showing significant signs of healing." Dr. Schnur found a "brownish discharge on the dressing and some foul odor." The depth of the wound was 4-5 centimeters.

44. Swab cultures from the claimant's left stump on September 18, 2012 and October 10, 2012 again showed the presence of enterococcus and e-coli.

45. On March 6, 2013, Dr. Meier reported the claimant was finally showing signs of healing. The claimant agreed the open area on his stump was "really closing." The wound measured 2 centimeters in length and 1.5 centimeters deep. The claimant had been infection free for over a year.

46. By May 13, 2013, Dr. Meier was ready to work towards fitting the claimant for a micro-processor knee. He noted the "open area on [the claimant's] stump has decreased in size. It did not expand or worsen with use of prosthesis."

47. The claimant still had a relatively small wound on July 10, 2013 when he met with Dr. Meier. The claimant's wound measured 1 centimeter wide and 2 centimeters deep. Dr. Meier opined it was "much smaller than before."

48. Five months later the claimant's wound worsened again. An August 7, 2013 record shows the claimant's wound had again began to grow and was "slightly larger." A Q-tip went in approximately ¾ of an inch.

49. By September 11, 2013, the claimant reported to Dr. Schnur his wound was again getting larger. The claimant's wound grew deeper and now measured 4 centimeters deep, which was four times deeper than the wound was 2 months earlier.

50. Despite the apparently worsening condition, the medical records are void of any documentation showing the claimant sought medical treatment between September 11, 2013 and October 14, 2013.

51. The claimant's condition continued to worsen and, on October 14, 2013, he was transported to St. Mary Corwin Hospital via ambulance. He complained of chills,

pains and fever. He was released the same day after treating providers recommended admission, but the claimant and his wife declined.

52. Later that day, the claimant's family again called 9-1-1 and reported the claimant was unconscious. The claimant was transported by Flight for Life to Parkview Hospital due to possible sepsis.

53. On October 21, 2013, swab cultures from the claimant's left stump wounds again revealed the presence of e-coli. This was the fifth swab culture to indicate the presence of fecal bacteria in the wound site.

54. On October 28, 2013, Dr. Schnur opined the claimant again had osteomyelitis in his stump and ordered a third revision, which was performed in November 2013.

55. Dr. John Raschbacher performed a medical records review to determine whether the Stair Glide recommended by Dr. Schnur was reasonable, necessary and related to the claimant's original 2003 knee injury. The Stair Glide was requested due to the claimant's self-reported incidences of falling and an inability to wear a prosthesis. Dr. Raschbacher recommended against authorizing the Stair Glide. It was his opinion the claimant's amputations were not work related. He also opined the claimant's reports of falling were not reliable due to Munchhausen's.

56. On January 23, 2014, Dr. Raschbacher conducted a second medical review regarding a requested prosthetic socket. Dr. Raschbacher opined the claimant's limb treatment was not work related due to the claimant's Munchhausen's diagnosis.

57. Dr. Raschbacher performed a third medical records review on October 9, 2014. The request was for wheelchair repairs. He opined the repairs were not work-related due to the claimant's Munchhausen's syndrome.

58. On October 24, 2014, the claimant reported to treating providers at Heart of the Rockies Regional Medical Center that he hurt his right knee "when he fell while on crutches." This is the only record regarding the claimant's right knee condition. The record is void of medical opinions relating the right knee condition to the admitted left knee injury. No testimony was provided regarding this issue at hearing. When asked about the claimant's right knee issues, Dr. Meier testified, "I don't have any notes to that effect in my records." Dr. Raschbacher had insufficient records to opine on the claimant's right knee condition."

59. Dr. Raschbacher conducted a respondent-insurer's Independent Medical Examination (RIME) on January 5, 2015. Dr. Raschbacher physically examined the claimant and reviewed the opinions of his treating physicians in addition to the claimant's extensive medical records. He ultimately concluded the claimant's left leg amputation and subsequent treatment were a result of the claimant's Munchhausen's syndrome and not a result of his October 2003 knee injury. Dr. Raschbacher, therefore, opined all treatment related to the claimant's amputation is not work-related.

60. The claimant, Dr. Stephen Moe, and Dr. Raschbacher testified at hearing on October 23, 2015. The depositions of Drs. Primack and Meier were entered into evidence in lieu of live testimony.

61. Dr. Meier was ultimately unable to explain how the leg continuously became infected.

62. Dr. Meier continues to treat the claimant and at the time of the hearing had last seen the claimant on April 15, 2015. He reported the claimant's wound is fully healed.

63. Dr. Primack testified the ongoing need for treatment that he's had since February 2010 would look different had he not had Munchhausen's. "I think he'd already be in a prosthesis and hopefully having a better quality of life."

64. Dr. Primack was asked whether the claimant would ever admit to self-injury. Dr. Primack testified "There's no way after knowing [the claimant] that he's going to say I put feces in my wound, I scratched out of it, and I infected. It's not going to happen."

65. Dr. Raschbacher testified consistently with Dr. Primack's conclusions at hearing. He credibly testified: "I think you can see a – I hesitate to call it a narrative, but you can see certain items that appear to be recurring wounds and excoriations, bafflements on the part of the physicians, many different physicians, with respect to why these wounds don't heal, why they break down, why they became infected, why they had certain types of bacteria in the wounds, etc. And if you retroactively go back, with the idea that is there Munchhausen's here? Is this a likely diagnosis? Then it seems to support that diagnosis and fit the pattern if you will."

66. In response to the claimant's testimony he never scratched or picked at his wounds, Dr. Raschbacher testified, "No, I think [the claimant's testimony] is actually controverted by the medical evidence…Again, the devil's in the details, but there are multiple episodes where physicians have raised this." "Dr. Hansen found that he had neurotic excoriations – or likely neurotic excoriations – meaning that – his not indicated

that he had pre-patellar, -- that means front of the knee – skin defects….and he was urged from scratching the areas." "The other thing that is suggestive of that pattern is—are Dr. Schnur's records, which you have already kind of gone through. Improvement, deterioration, improvement, deterioration."

67. Dr. Raschbacher also testified regarding the claimant's notable history of certain types of bacteria in the wound site and testified, "[The claimant] had multiple episodes of cultures, biopsies, etc. There were in some cases the usual bugs – or I should say the usual skin bug. But there was also evidence for what's called the bowel bugs, or gastrointestinal bugs—meaning bugs you find in feces, such as enterococcus. Those don't live on the skin."

68. When asked about whether the claimant's use of a prosthesis is the cause of the claimant's healing/non-healing pattern, Dr. Raschbacher opined, "I don't think it provides an adequate explanation. That's really a gray area. If he does, in fact, scratch this area or inoculate himself with fecal bugs, then certainly the prosthetic would not be necessary to cause skin breakdown and recurrent infection."

69. When asked whether a Vitamin C deficiency could be the cause of the claimant's failure to heal, Dr. Raschbacher responded, "Vitamin C deficiency does cause problems with healing body-wide. It is not a focal thing" "He had other wounds at other locations which – for example, the donor site for the flap. Those appeared to heal. I'm not aware of evidence for vitamin C deficiency."

70. At hearing, Dr. Raschbacher was asked if the claimant's failure to heal could simply be bad luck. "I don't think I would ascribe luck to it. I think you have a situation where – I might be oversimplifying, but is there some rational medical or scientific explanation – coagulopathy, microvascular problems, immune system disorder, metabolic – is there something that's been missed, something that could be causing this? Well those have been pretty much ruled out." "Could he just have bad luck? Well, that – I don't think that's a good explanation. And I think that you have, particularly in retrospect – a diagnosis that would explain it."

71. Dr. Stephen Moe, a psychiatrist also testified the medical evidence supports a psychological diagnosis of Munchhausen's. It is a diagnosis based on elimination.

72. He testified, "Factitious Disorder is deeply rooted in psychopathology that developed long before, and which is wholly unrelated to, an acute physical injury that occurs in adulthood."

73. Dr. Moe explained the methodology of diagnosing an individual with Munchhausen's. "There's a lot of medical conditions at the interface of medical and psychiatry, and you really need a team approach. You need the physical medicine doctors to say this, really, does not fit with any known medical problem. And then the psychiatrist or psychologist comes in and says how do we then understand it, and what are the accessory features that allow us to classify it and – as best we can – treat it." "The pure psychiatric database is by itself too ambiguous to make a diagnosis of Factitious Disorder. You have to start with a medical database and determine if there is good evidence that there's not a medical explanation for the condition."

74. "The diagnosis of Factitious Disorder is a diagnosis of exclusion. So – I mean if someone has got a medical problem that is unusual, challenging, destructive, what have you – they're often going to present kind of odd psychiatrically."

75. Dr. Moe credibly testified a psychologist cannot simply rely upon the psychological profile to make a Munchhausen's diagnosis. Dr. Evans opined the claimant's psychological test results suggest the claimant did not suffer from Munchhausen's. Dr. Moe testified, however, "I think for the question that he and we all are facing, he did not use the type of methodology -- the way to get to the answer – that is called for." There were two fundamental flaws with Dr. Evans' report. Dr. Moe found, "One is he did not really incorporate the physical database, which is – at the end of the day – the fundamental basis on which you diagnose Factitious Disorder. And then secondly, his evaluation was much more narrowed on the patient's – or at that time presentation, and maybe a little bit previously. But did not take into consideration, you know, the comprehensive assessment."

76. Dr. Moe testified about his experience with patients who suffer from psychological issues as a result of protracted treatment. He testified they are quick to seek treatment when their condition worsens: "Day after day I see patients who are injured or ill. And almost all of them greatly despair of their losses. They exhibit a tremendous amount of anxiety about their condition….Whereas, in contrast, [the claimant] – in both his – as emerges from his medical records and as evidenced in his presentation with me, was not that commensurate level of feelings that, you know, to take a downturn after the doctor says he's making great progress – the best I've ever seen him. And then to come back six weeks later and, oh my god, we – he's as bad as he's ever been. What was missing was he's extremely distressed about this, he wants a second opinion, he's – he needs to see a psychiatrist. There was none of that."

77. Dr. Moe testified there are two pieces of medical history that impacted his opinion the most: "The two that jump to mind are the roller coaster of his condition that I

thought was best displayed in Dr. Schnur's records. Dr. Schnur was seeing him very frequently. And each time he met, there'd be like about a, you know, four-, five-, six-line paragraph. And it was just striking how there'd be a notation, he's doing very well, he's improving. And then, what, two weeks later, four weeks later– he's doing very poorly, the wound is much bigger. And then it's not big again. I will have to defer to Dr. Raschbacher, but my experience of infections is much more of a predictable pattern. You're either getting on top of it, or you're losing the game. But not this up and down piece. Secondly is get back to the modal patient that we have. I mean, when a person – they're suffering from, you know, a slow to recover back problem. And then they're getting better, and then they take a turn for the worse – they twist suddenly, you know picking something up at a grocery store. And it's just striking how – I mean, they call the doctor, they're calling me. They move on that change, because damn it, they were – you know, they thought they were almost better, and it's just devastating to suffer with a condition for a long time, and then feel that you suddenly had the, you know, chair pulled out from under you. And I saw [the claimant's] history, where he would go from doing extremely well, and then the next time he's back to his doctor, six weeks have elapsed, and his wound is huge – like from one millimeter to five times- six centimeters. So that's, you know the size of thumbtack. So those two features."

78. Dr. Moe explained the claimant would not admit to self-injury. He testified: "[Factitious Disorder] is abnormal illness behavior – a person wants to be in the illness role. He wants to mislead his doctors. "[A] patient is not going to cop to this unless he's, you know, almost caught red-handed…a person is not going to confess to it."

79. Per the Diagnostic and Statistical Manual (DSM IV), the diagnosis of Factitious Disorder requires that features suggestive of a medical or psychiatric condition are judged to meet the following criteria:

1. The signs or symptoms are not the result of the medical condition.

2. The signs or symptoms are intentionally produced by the patient.

3. The motive for intentionally producing the signs or symptoms is to adopt or maintain the illness role for the gratification that comes from this role.

80. Given the first two criteria of Factitious Disorder require medical expertise, this condition is one of several psychiatric diagnoses that in fact must be primarily diagnosed by physical medicine doctors.

81. The ALJ finds the claimant was primarily diagnosed with factitious disorder by physical medicine doctors who include Drs. Primack, and Raschbacher. Drs. Hugate,

Arbuckle, Schnur, and even Meier also questioned the claimant's failure to heal and opined Munchhausen's provided a diagnosis and explanation.

82. The ALJ finds that the DIME physician Dr. Dillon diagnosed the claimant with factitious disorder. Dr. Dillon found the factitious disorder arose after the date of MMI as can be inferred by the fact that she provided an impairment rating for the amputation.

83. Dr. Primack likewise inferred that the factitious disorder arose after the date of MMI by providing an impairment rating for the amputation.

84. The ALJ finds that Dr. Raschbacher's opinion that the need for the amputation was not work-related is a difference of opinion between him and Dr. Dillon and thus does not overcome Dr. Dillon's DIME opinion that the cause of the claimant's amputation was work-related.

85. This ALJ is persuaded by the testimony of Dr. Moe who states a proper determination of whether an individual suffers from Factitious Disorder is made following an analysis of medical records in addition to the use of psychiatric evaluation.

86. This ALJ is unpersuaded by the testimony of Dr. Meier who states the claimant does not suffer from Factitious Disorder. Dr. Meier continues to treat the claimant. Despite considerable evidence to the contrary, which includes the conclusions of multiple physicians, including his own at one time, Dr. Meier opines the claimant does not suffer from Munchhausen's. The ALJ finds that Dr. Meier has a difference of opinion with Dr. Dillon and this mere difference of opinion is insufficient to overcome Dr. Dillon's finding of Factitious Disorder or Munchhausen's.

87. The ALJ is persuaded by Dr. Meier that the claimant's need for home modifications and a Stair Glide are reasonable, necessary, and related to the claimant's initial industrial injury.

88. This ALJ finds the claimant's Munchhausen's syndrome is the cause of the claimant's need for ongoing treatment of infections to the left stump since the date of MMI, September 9, 2011.

89. The ALJ finds that the claimant has failed to establish that it is more likely than not that treatment for ongoing infections to the left leg after September 9, 2011 are related to the original industrial injury.

90. The ALJ finds that the claimant has established that it is more likely than not that he continues to be in need of post-MMI medical treatment to treat the effects of his industrial amputation.

91. The ALJ finds that the claimant has established that it is more likely than not that home modifications and a Stair Glide, are reasonable, necessary, and related to the claimant's original industrial injury.

92. This ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant's need for right knee treatment is related to his original October 2003 industrial injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this ALJ enter the following conclusions of law.

Self- Injury-Munchhausen's Syndrome

1. Self-inflicted injuries are not compensable under the Colorado Workers' Compensation Act. Section 8-41-301(1)(c), C.R.S; *Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991).*

2. Whether a claimant intentionally injured himself is a question of fact to be determined by the ALJ. *See Industrial Commission v. Peterson, 151 Colo. 289, 377 P.2d 542 (1962)*.

3. In this case, there is persuasive evidence that establishes the claimant self-injured by introducing infectious disease into his body. Dr. Dillon, the DIME physician determined that the claimant had a diagnosis of Munchhausen's Syndrome and that this was not work related. However, Dr. Dillon provided for an impairment rating for the claimant's amputation of the left leg; thus, the ALJ concludes that the effects of the claimant's non-work related Munchhausen's Syndrome arose after the date of MMI. The ALJ concludes that the claimant's Munchhausen's Syndrome is limited to the introduction of infectious disease.

4. The ALJ concludes that the respondent-insurer is responsible for all medical care of the claimant's left leg up to MMI; however, the ALJ concludes that all treatment of the left leg arising after the date of MMI and involving infectious disease is not the responsibility of the respondent-insurer as it is not work related.

Medical Benefits

5. Respondents are only liable for medical treatment reasonably necessary to cure or relieve an employee from the effects of a work injury. C.R.S. §8-42-101 (2015).

6. The claimant suffers from a Factitious Disorder, which caused the claimant to self-injure and necessitated the treatments to which the claimant asserts entitlement. The ALJ concludes that the respondents proved, by a preponderance of the evidence, the claimant's ongoing need for medical treatment since September 9, 2011, and involving an infectious process, is a direct result of the claimant's self-injurious practices. The respondents, therefore, are not liable for any of the specifically requested medical treatment involving an infectious process occurring after September 9, 2011, including the third revision surgery of November 2013.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the need for home modifications and the provision of a Stair Glide is reasonable, necessary, and related to the original industrial injury.

Right Knee Treatment

8. To recover workers' compensation benefits, the claimant must prove he suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. C.R.S. §841-301(1)(b).

9. The "arising out of" test is one of causation. It requires 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. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968).

10. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. C.R.S. §8-43-201. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

11. The "threshold question" regarding compensability of an injury is one of fact for the ALJ to determine under the preponderance of the evidence standard as set forth in cases such as *Leprino Foods v. Industrial Claim Appeals Office,* P.3d (Colo. App. No.

04CA1379, Dec. 1, 2005). *Moore v. Cobb Mechanical Contractors and American Ins.*, W.C. No. 4-599-920 (April 12, 2006).

12. The determination of whether there is a sufficient "nexus" or causal relationship between the 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).

13. In this case, the record is nearly void of medical documentation or credible testimony which links the claimant's right knee issues to his original October 2003 work injury. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that there is a causal connection between the original October 2003 injury and the need for the right knee treatment.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to establish that the claimant's amputation was not work related and was caused by his underlying Munchhausen's Syndrome is denied and dismissed.

2. The respondents request to terminate all post-MMI medical benefits is denied and dismissed.

3. The respondent-insurer is not responsible for Post-MMI medical treatment of the claimant's left leg involving an infectious process, including the October 14, 2013 emergency treatment and all subsequent treatment stemming from the October 14, 2013 incident including the third revision surgery in November 2013.

4. The respondent-insurer shall provide the claimant with the home modifications and Stair Glide as recommended.

5. The claimant's request for treatment of his right leg as being work related is denied and dismissed.

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: January 20, 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

W.C. No. 4-765-705-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for February 9, 2016, in Denver, Colorado. On January 4, 2016, Respondents filed a Motion for Partial Summary Judgment on the issues of costs under § 8-42-101 (5), C.R.S; maintenance care; and, penalties pursuant to §§ 8-43-304 and 8-43-305, C.R.S. On January 11, 206, the Claimant filed an Objection to Respondents' Motion for Partial Summary Judgment, alleging that there were contested issues of fact concerning maintenance care and penalties, and withdrawing his claim for costs. The Motion and the Objection are supported by attached documents.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there are genuine issues of disputed material fact concerning costs; maintenance medical care; and, penalties versus the Respondents.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant suffered an injury to his right shoulder on June 5, 2008. On January 16, 2012, the parties entered into a full and final settlement of the indemnity portion of the Claimant's claim. Medical benefits were left open. The issue of penalties concerning aspects of the claim other than indemnity benefits was not contemplated by the settlement agreement.

2. The Claimant concedes, and the ALJ finds, that costs under the provisions of § 8-42-101 (5) applies to claims with a date of injury on or after July 1, 2010. The Claimant was injured on June 5, 2008.

3. The Claimant's Objection to the Respondents' Motion for Partial Summary Judgment details specific contested issues of disputed material fact concerning maintenance medical care and penalties, whereby the Claimant indicates that he will call specific witnesses and present specific evidence at an evidentiary hearing to dispute the allegations made in the Respondents' Motion.

Ultimate Findings

4. There is **no** genuine issue of disputed material fact concerning the inapplicability of claims for costs in the Claimant's case.

5. There are genuine issues of disputed material fact concerning maintenance medical benefits and penalties for alleged violation of the settlement agreement and the order approving the same.

CONCLUSIONS OF LAW

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

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Partial Summary Judgment and the Claimant's Objection thereto are supported by documents.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the Claimant was injured prior to the effective date of § 8-42-101 (5), C.R.S. Therefore, there is no genuine issue of disputed material fact concerning the inapplicability of the "costs" provision.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Claimant's Objection to the respondents' Motion for Partial Summary Judgment sets forth specific facts that reveal there are genuine issues o disputed material fact concerning maintenance care and penalties. Consequently, the Respondents are **not** entitled to summary judgment on these issues.

Burden of Proof

d. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Respondent sustained its burden that there is no genuine issue of disputed material fact on the issue of "costs." The Respondents, however, have failed to sustain their burden that there is **no** genuine issue of disputed material fact regarding maintenance benefits and penalties.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Partial Summary Judgment is granted with respect to costs. Any and all claims for costs are hereby denied and dismissed.

B. The Respondents' Motion for Partial Summary Judgment with respect to maintenance benefits and penalties is hereby denied and dismissed.

C.. The hearing of February 9, 2016 stands and the evidentiary hearing shall proceed on the issues of maintenance benefits and penalties.

DATED this_____day of January 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

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 Granting Partial Summary judgment in Favor of Respondents** on this_____day of January 2016, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.sjord

ISSUES

1. A determination of whether Division Independent Medical Examination (DIME) physician Joseph Fillmore, M.D. concluded that Claimant reached Maximum Medical Improvement (MMI) on September 2, 2014.

2. Whether the party challenging Dr. Fillmore's DIME determination has produced clear and convincing evidence to overcome the opinion.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period September 5, 2014 until terminated by statute.

4. Whether Claimant has demonstrated by a preponderance of the evidence that surgical intervention in the form of an ulnar shortening osteotomy is reasonable, necessary and causally related to his August 5, 2011 right wrist injury.

FINDINGS OF FACT

1. Employer is an Italian restaurant and bakery located in Aurora, Colorado. Claimant began working as the Head Chef for Employer on May 23, 2011. He prepared both Italian meals and pastries.

2. On August 5, 2011 Claimant was carrying an industrial-sized pan of lasagna on his left shoulder when he tripped over a kitchen mat. As he tripped, the lasagna fell to the ground and Claimant extended his left hand to prevent him from striking an industrial-sized mixer. His left hand made contact with the mixer, slipped off and his left shoulder then struck the mixer. Claimant's extended right arm ended up in the mixing bowl attached to the mixer. The mixer was operating at the time with dough hooks affixed to the paddles After Claimant felt a dough hook twist his right arm he fell backwards into a table.

3. On August 6, 2011 Claimant visited Michael Schuett, M.D. at the Parker Adventist Hospital Emergency Department. Dr. Schuett documented that Claimant had limited left shoulder range of motion because of swelling. Claimant's right hand was also swollen and tender. He received a right wrist splint.

4. On August 10, 2011 Claimant visited Vernon Maas, M.D. at HealthONE for an evaluation. Claimant reported that on August 5, 2011 he fell forward and his right hand became stuck in a mixer after his left shoulder struck a cabinet. Dr. Maas documented soft tissue swelling and limited right wrist range of motion. He took Claimant off of work. Dr. Maas recommended continued use of a right hand splint and left shoulder sling.

5. On August 30, 2015 Claimant underwent an MRI of his right wrist. The MRI revealed spotty areas of edema in several carpal bones with the most prominent edema in the lunate. The abnormalities were likely the result of bone bruises based on the history of trauma and a tear of the articular disc of the Triangular Fibrocartilage Complex (TFCC). An MRI of the left shoulder reflected a rotator cuff tear and a posterior labral injury.

6. Respondents denied liability for Claimant's August 5, 2011 accident. However, after a hearing, Administrative Law Judge Broniak determined that Claimant sustained compensable injuries to his left shoulder and right wrist.

7. On February 16, 2012 Claimant underwent a left rotator cuff repair.

8. In October of 2012 Claimant visited In Sok Yi, M.D. for an evaluation. After performing an injection, Dr. Yi proposed right wrist surgery. Claimant had undergone several prior injections to his right wrist within the previous year.

9. On March 15, 2013 Claimant underwent an independent medical examination with Lloyd Thurston, M.D. Dr. Thurston reviewed Claimant's medical records, conducted a physical examination and considered video surveillance. He determined that Claimant did not sustain any permanent impairment as a result of the August 5, 2011 accident. Dr. Thurston concluded that Claimant had reached Maximum Medical Improvement (MMI) and did not require additional medical treatment.

10. On March 18, 2013 Dr. Yi performed a right wrist TFCC repair and right CMC boss excision. Elizabeth Bisgard, M.D. subsequently took Claimant completely off of work. On April 19, 2013 Dr. Bisgard released Claimant to return to work with no use of his right hand.

11. On May 13, 2013 Dr. Yi documented that Claimant's range of motion was improving and he only had pain with movement.

12. On June 12, 2013 Claimant visited Dr. Bisgard for an examination. Dr. Bisgard documented that Claimant was still having significant pain in his right wrist. She explained that "I have released him to some work, so as part of his therapy, he is working on squeezing the pastry tube for decorating, but he is very weak in that right hand. He is also trying to roll dough as part of his therapy but having significant pain along the ulnar side of the wrist."

13. On July 16, 2013 Claimant visited Dr. Yi for an evaluation. Dr. Yi documented that Claimant was "having increased pain on the ulnar aspect of the wrist and he has a difficult time being able to squeeze it back to make his pastries." He recommended a repeat right wrist MRI.

14. On August 13, 2013 Claimant underwent a right wrist MRI. The MRI revealed hamate lunate abutment and ulnar carpal abutment. Dr. Yi recommended a lunar shortening osteotomy of Claimant's right wrist. Insurer authorized the proposed surgery on September 20, 2013. However, on September 25, 2013 Dr. Bisgard noted

that Claimant's left shoulder was quite symptomatic and limiting his activities. Claimant thus chose to focus on his left shoulder and the proposed right wrist surgery was postponed.

15. On December 4, 2013 Claimant sustained another injury while working for Employer. He slipped on a wet floor and struck his head and neck. He did not suffer additional injuries to his right wrist.

16. Pursuant to §8-42-107(8)(b)(II), C.R.S. Respondents requested a "24 Month" Division Independent Medical Examination (DIME) on June 5, 2014. On September 2, 2014 Joseph H. Fillmore, M.D. performed the DIME. Dr. Fillmore reviewed Claimant's medical records and conducted a physical examination. He diagnosed Claimant with the following: (1) a pre-existing history of cervical and lumbar spine pain; (2) a report of a mild traumatic brain injury; (3) a left shoulder injury, including rotator cuff and labral tears, that had been surgically repaired; (4) a right wrist injury that included arthroscopy with joint debridement and CMC boss excision; and (5) a reported history of depression. Based on his review of the medical records and considering the input of independent medical examination physicians Henry Roth, M.D. and Lloyd Thurston, D.O., Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. He determined that Claimant did not require additional medical care. Dr. Fillmore assigned Claimant a 7% right upper extremity impairment rating for his wrist flexion deficits and an additional 5% upper extremity impairment rating for his right wrist extension deficits. The combined ratings yielded a 12% upper extremity or 7% whole person impairment. Dr. Fillmore also assigned Claimant a 13% left upper extremity or 8% whole person rating for his left shoulder injury.

17. On April 23, 2014 Claimant returned to Dr. Bisgard for an examination. Dr. Bisgard modified Claimant's work restrictions to include a 15 pound lifting restriction with his right arm, minimal pinching/gripping with his right wrist minimal overhead work.

18. Over four days during November and December of 2014 Respondents conducted video surveillance of Claimant while he was working for Employer. The video depicts Claimant interacting with customers and using his injured upper extremities. While at times his right hand is out of video, the video reflects that he is using his right hand and wrist to engage in some type of repetitive activity.

19. Investigator Kathy Lam of Global Investigations conducted video surveillance of Claimant on December 20, 2014 and December 23, 2014. Ms. Lam observed Claimant interacting with customers, kneading dough and lifting pots. She specifically detailed that on December 23, 2014 Claimant worked an "eight hour shift performing the duties of a cook and manager." He utilized both upper extremities to "knead dough, carry a large white box above his head, stir a pot using a long stick" and close the restaurant. Claimant was not wearing a brace and did not exhibit pain behaviors.

20. On February 11, 2015 Claimant underwent a neuropsychological evaluation with David Zierk, PhD. Dr. Zierk performed multiple screening tests and examined Claimant. He highlighted the following eight clinical impressions of Claimant: personality disorder; symptom magnification; pursuit of narcotics; history of domestic violence; history of motor vehicle violations; drug seeking behavior; desire for secondary gain and maladaptive avoidance. Dr. Zierk concluded that Claimant's testing results reflected that he was inconsistent and failed to provide a valid effort. Claimant had abnormal recovery patterns and engaged in over-reporting of cognitive difficulties. Dr. Zierk concluded that Claimant had reached MMI for his 2013 head injury.

21. On May 14, 2015 the parties conducted the post-hearing evidentiary deposition of In Sok Yi, M.D. Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Yi detailed the cause of the abutment:

> So, well, the thing is that his first injury, if you look at the spectrum of injury, he had a TFC tear with edema within the lunate with the first injury. And as that progresses, then now you're going to get edema within the ulna, because the ulna is hitting -- the ulna is hitting the TFC which in turn cushions the lunate. But with the TFC torn, then all of a sudden the force is going to be imparted onto the lunate because the TFC is no longer there to act as a bushing or a cushion to pad it. And then we go and debride that, and then also now when you start moving your wrist from side to side and put weight on it, then you have the ulna hitting the lunate directly because the bushing for the TFC is gone.

Dr. Yi remarked that the anatomical variations caused by the first surgery created additional anatomical changes requiring the second surgery. He explained that "is the reason why when people have an ulnar positive variance or an ulnar neutral variance, when you debride the TFC, it does not -- the surgery does not have as high a success rate. So there are some guys in town where -- when they have an ulnar positive variance with a TFC tear, no matter what the MRI shows, they'll just go ahead and shorten the ulna to begin with."

22. On May 22, 2015 the parties conducted the post-hearing evidentiary deposition of Barry A. Ogin, M.D. Dr. Ogin agreed with Dr. Yi that patients who undergo TFCC debridement surgery frequently require a subsequent ulnar shortening surgery. Moreover, he also acknowledged that some surgeons will perform both procedures during the same surgery. Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury.

23. On May 20, 2015 the parties conducted the post-hearing evidentiary deposition of Henry Roth, M.D. Dr. Roth disagreed with Dr. Yi that the proposed ulnar shortening osteotomy was reasonable and necessary to cure or relieve the effects of

Claimant's August 5, 2011 right wrist injury. Instead, he agreed with Dr. Fillmore that Claimant had reached MMI. Dr. Roth explained that it was not reasonable to expect that Claimant would benefit from additional medical treatment. He detailed that the proposed surgery would not improve Claimant's work circumstances, "personal behavioral deficiencies" or drug tendencies. Dr. Roth concluded that Dr. Fillmore had based his opinion on the totality of the available information including medical records and surveillance videos. He summarized that Dr. Fillmore's opinion was consistent with the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*).

24. On July 29, 2015 the parties conducted the post-hearing evidentiary deposition of Lloyd Thurston, D.O. Dr. Thurston agreed with Dr. Fillmore that Claimant had reached MMI. He disagreed with Dr. Yi's recommendation for additional surgery because he did not believe an additional procedure would improve Claimant's symptoms or function.

25. On September 2, 2015 the parties conducted the post-hearing evidentiary deposition of DIME Dr. Fillmore. In Dr. Fillmore's DIME report he determined that Claimant had reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. However, Dr. Fillmore did not address the reasonableness or necessity of the ulnar shortening osteotomy recommended by Dr. Yi. During the deposition Dr. Fillmore initially could not state whether Claimant was at MMI because he did not know whether the proposed surgery would improve Claimant's condition. Dr. Fillmore recommended a second opinion about whether the surgical procedure was reasonable and necessary.

26. Later during the deposition, Dr. Fillmore reviewed surveillance video of Claimant from November 21-22, 2014 December 20, 2014 and December 23, 2014. He reaffirmed that Claimant had reached MMI because he could not discern Claimant's limitations. He agreed with Drs. Roth and Thurston that additional surgery to Claimant's right wrist was not reasonable and necessary. Although he acknowledged that it was possible that Claimant was not performing any activities in the video that caused right wrist pain, he stated that it was not probable.

27. Near the conclusion of the deposition, Dr. Fillmore again suggested that a second opinion from a hand surgeon regarding the proposed ulnar shortening osteotomy was appropriate. However, he subsequently reaffirmed that Claimant remained at MMI based on his hand movements and lack of pain behaviors exhibited in the video surveillance.

28. Despite some equivocation during his deposition testimony, DIME physician Dr. Fillmore ultimately concluded that Claimant reached MMI on September 2, 2014. Based on his review of the medical records and considering the input of independent medical examination physicians Drs. Roth and Thurston, Dr. Fillmore determined that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. He explained that Claimant did not require additional medical care and assigned a 12% right upper extremity impairment rating. However, during his September 2, 2015 post-hearing evidentiary deposition, Dr. Fillmore initially could not

state whether Claimant was at MMI because he did not know whether the surgery proposed by Dr. Yi would improve Claimant's condition. Dr. Fillmore thus recommended a second opinion about whether the surgical procedure was reasonable and necessary.

29. Later during the deposition, Dr. Fillmore reviewed surveillance video of Claimant from November 21-22, 2014 December 20, 2014 and December 23, 2014. He reaffirmed that Claimant had reached MMI because he could not discern Claimant's limitations. He agreed with Drs. Roth and Thurston that additional surgery to Claimant's right wrist was not reasonable and necessary. Near the conclusion of the deposition, Dr. Fillmore again suggested that a second opinion from a hand surgeon regarding the proposed ulnar shortening osteotomy was appropriate. However, he subsequently reaffirmed that Claimant remained at MMI based on his hand movements and lack of pain behaviors exhibited in the video surveillance. The deposition dialogue suggests that Dr. Fillmore equivocated about whether Claimant had actually reached MMI or required additional treatment. However, in ascertaining Dr. Fillmore's ultimate opinion based on a review of his report and deposition testimony, he determined that Claimant reached MMI on September 2, 2014. The initial ambiguity in his MMI opinion early in the deposition was resolved after he viewed the surveillance video from November 21-22, 2014 December 20, 2014 and December 23, 2014. Accordingly, Claimant bears the burden of overcoming Dr. Fillmore's MMI determination by clear and convincing evidence.

30. Claimant has failed to produce clear and convincing evidence to overcome Dr. Fillmore's DIME determination that Claimant reached MMI on September 2, 2014. Dr. Fillmore reviewed Claimant's medical records, conducted a physical examination and considered surveillance video of Claimant. He also reviewed the opinions of independent medical examination physicians. Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Dr. Roth noted that Dr. Fillmore had based his opinion on the totality of the available information including medical records and surveillance videos. He summarized that Dr. Fillmore's opinion was consistent with the *AMA Guides*.

31. In contrast, Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury. However, although Drs. Yi and Ogin expressed differences of opinion with Dr. Fillmore about whether Claimant requires additional surgery and has reached MMI, their opinions do not constitute clear and convincing evidence to overcome Dr. Fillmore's MMI determination. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's September 2, 2014 MMI determination was incorrect.

32. Claimant has failed to establish that it is more probably true than not that he is entitled to receive TPD benefits for the period September 5, 2014 until terminated

by statute. Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Although Claimant asserts that he is entitled to receive TPD benefits subsequent to September 5, 2014 because he was unable to perform his regular job duties as a chef for Employer, he has failed to demonstrate that he has suffered any wage loss as a result of his altered job duties. It is thus speculative to conclude that Claimant suffered a wage loss that was caused by his August 5, 2011 industrial injuries. Moreover, Claimant has not demonstrated that a worsened condition caused additional restrictions resulting in a greater impairment of his temporary work capability than existed at the time of MMI. Finally, Dr. Zierk persuasively commented that Claimant exhibited a desire for secondary gain as part of his clinical assessment. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

33. Claimant has failed to demonstrate that it is more probably true than not that surgical intervention in the form of an ulnar shortening osteotomy is reasonable, necessary and causally related to his August 5, 2011 right wrist injury. Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Yi summarized that the anatomical changes caused by the first surgery created additional anatomical changes requiring the second surgery. Moreover, Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury.

34. In contrast, Dr. Roth explained that it was not reasonable to expect that Claimant would benefit from additional medical treatment. He detailed that the proposed surgery would not improve Claimant's work circumstances, "personal behavioral deficiencies" or drug tendencies. Furthermore, Dr. Thurston agreed with Dr. Fillmore that Claimant had reached MMI. He disagreed with Dr. Yi's recommendation for additional surgery because he did not believe an additional procedure would improve Claimant's symptoms or function. Moreover, Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 and did not require additional medical care. Dr. Fillmore assigned Claimant a 7% right upper extremity impairment rating for his wrist flexion deficits and an additional 5% upper extremity impairment rating for his wrist extension deficits. Finally, Dr. Zierk performed multiple screening tests and examined Claimant. He highlighted that Claimant exhibited symptom magnification, drug seeking behavior, a desire for secondary gain and maladaptive avoidance. Dr. Zierk concluded that Claimant's testing results reflected that he was inconsistent and failed to provide a valid effort. Claimant had abnormal recovery patterns and engaged in over-reporting of cognitive difficulties. Dr. Zierk's assessment reflects that Claimant is not a suitable candidate for Dr. Yi's proposed surgery. In conjunction with the persuasive medical opinions of Drs. Roth, Thurston and Fillmore, Claimant's request for an ulnar shortening osteotomy 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).

Overcoming the DIME

4. Pursuant to §8-40-201(11.5), C.R.S. MMI "means 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."

5. 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).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 7. 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).

8. As found, despite some equivocation during his deposition testimony, DIME physician Dr. Fillmore ultimately concluded that Claimant reached MMI on September 2, 2014. Based on his review of the medical records and considering the input of independent medical examination physicians Drs. Roth and Thurston, Dr. Fillmore determined that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. He explained that Claimant did not require additional medical care and assigned a 12% right upper extremity impairment rating. However, during his September 2, 2015 post-hearing evidentiary deposition, Dr. Fillmore initially could not state whether Claimant was at MMI because he did not know whether the surgery proposed by Dr. Yi would improve Claimant's condition. Dr. Fillmore thus recommended a second opinion about whether the surgical procedure was reasonable and necessary.

9. As found, later during the deposition, Dr. Fillmore reviewed surveillance video of Claimant from November 21-22, 2014 December 20, 2014 and December 23, 2014. He reaffirmed that Claimant had reached MMI because he could not discern Claimant's limitations. He agreed with Drs. Roth and Thurston that additional surgery to Claimant's right wrist was not reasonable and necessary. Near the conclusion of the deposition, Dr. Fillmore again suggested that a second opinion from a hand surgeon regarding the proposed ulnar shortening osteotomy was appropriate. However, he subsequently reaffirmed that Claimant remained at MMI based on his hand movements and lack of pain behaviors exhibited in the video surveillance. The deposition dialogue suggests that Dr. Fillmore equivocated about whether Claimant had actually reached MMI or required additional treatment. However, in ascertaining Dr. Fillmore's ultimate opinion based on a review of his report and deposition testimony, he determined that Claimant reached MMI on September 2, 2014. The initial ambiguity in his MMI opinion early in the deposition was resolved after he viewed the surveillance video from November 21-22, 2014 December 20, 2014 and December 23, 2014. Accordingly, Claimant bears the burden of overcoming Dr. Fillmore's MMI determination by clear and convincing evidence.

10. As found, Claimant has failed to produce clear and convincing evidence to overcome Dr. Fillmore's DIME determination that Claimant reached MMI on September

2, 2014. Dr. Fillmore reviewed Claimant's medical records, conducted a physical examination and considered surveillance video of Claimant. He also reviewed the opinions of independent medical examination physicians. Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Dr. Roth noted that Dr. Fillmore had based his opinion on the totality of the available information including medical records and surveillance videos. He summarized that Dr. Fillmore's opinion was consistent with the *AMA Guides*.

11. As found, in contrast, Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury. However, although Drs. Yi and Ogin expressed differences of opinion with Dr. Fillmore about whether Claimant requires additional surgery and has reached MMI, their opinions do not constitute clear and convincing evidence to overcome Dr. Fillmore's MMI determination. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's September 2, 2014 MMI determination was incorrect. *Compare In Re Lafont*, W.C. No. 4-914-378 (ICAP, June 25, 2015) (concluding that the claimant had overcome the DIME determination because the DIME physician had failed to perform an adequate examination and comply with *AMA Guides* based on an expert physician's opinion).

TPD Benefits

12. To establish entitlement to temporary disability benefits, the claimant must prove by a preponderance of the evidence that the industrial injury has caused a "disability," and that he has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. 2010; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. There is no statutory requirement that the claimant present evidence of a medical opinion of an attending physician to establish his physical disability. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the claimant's testimony alone could be sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic, supra.* The second element 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 inability to work, or physical restrictions which preclude the claimant from securing employment. *See Ortiz v. Charles J. Murphy and Co.*, 964 P.2d 595 (Colo. App. 1998); *Chavez v. Manpower*, W.C. No. 4-420-518 (May 11, 2000); *Davisson v. Rocky Mountain Safety, Inc.*, W.C. No. 4-283-201 (June 21, 1999). For a claimant to receive additional temporary disability benefits after reaching MMI he must show that the worsened condition caused additional restrictions resulting in a greater impairment of his temporary work capability than existed at the time of MMI. *In re Fontecchio,* W.C. No. 4-376-276 (ICAP, July 28, 2003).

13. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TPD benefits for the period September 5, 2014 until terminated by statute. Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Although Claimant asserts that he is entitled to receive TPD benefits subsequent to September 5, 2014 because he was unable to perform his regular job duties as a chef for Employer, he has failed to demonstrate that he has suffered any wage loss as a result of his altered job duties. It is thus speculative to conclude that Claimant suffered a wage loss that was caused by his August 5, 2011 industrial injuries. Moreover, Claimant has not demonstrated that a worsened condition caused additional restrictions resulting in a greater impairment of his temporary work capability than existed at the time of MMI. Finally, Dr. Zierk persuasively commented that Claimant exhibited a desire for secondary gain as part of his clinical assessment. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

Surgical Request

14. 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).

15. As found, Claimant has failed to demonstrate by a preponderance of the evidence that surgical intervention in the form of an ulnar shortening osteotomy is reasonable, necessary and causally related to his August 5, 2011 right wrist injury. Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Yi summarized that the anatomical changes caused by the first surgery created additional anatomical changes requiring the second surgery. Moreover, Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury.

16. As found, in contrast, Dr. Roth explained that it was not reasonable to expect that Claimant would benefit from additional medical treatment. He detailed that the proposed surgery would not improve Claimant's work circumstances, "personal behavioral deficiencies" or drug tendencies. Furthermore, Dr. Thurston agreed with Dr. Fillmore that Claimant had reached MMI. He disagreed with Dr. Yi's recommendation for additional surgery because he did not believe an additional procedure would improve Claimant's symptoms or function. Moreover, Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 and did not require additional medical care. Dr.

Fillmore assigned Claimant a 7% right upper extremity impairment rating for his wrist flexion deficits and an additional 5% upper extremity impairment rating for his wrist extension deficits. Finally, Dr. Zierk performed multiple screening tests and examined Claimant. He highlighted that Claimant exhibited symptom magnification, drug seeking behavior, a desire for secondary gain and maladaptive avoidance. Dr. Zierk concluded that Claimant's testing results reflected that he was inconsistent and failed to provide a valid effort. Claimant had abnormal recovery patterns and engaged in over-reporting of cognitive difficulties. Dr. Zierk's assessment reflects that Claimant is not a suitable candidate for Dr. Yi's proposed surgery. In conjunction with the persuasive medical opinions of Drs. Roth, Thurston and Fillmore, Claimant's request for an ulnar shortening osteotomy is denied and dismissed.

ORDER

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

1. Claimant reached MMI on September 2, 2014.

2. Claimant has failed to produce clear and convincing evidence to overcome Dr. Fillmore's DIME determination that Claimant reached MMI on September 2, 2014.

3. Claimant's request for TPD benefits is denied and dismissed.

4. Claimant's request for an ulnar shortening osteotomy is denied and dismissed.

5. Any issues not resolved by this Order are reserved for future determination.

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

DATED: January 27, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

BASIS FOR CORRECTED ORDER

The Respondents moved for a corrected order due to a discrepancy between the amount of the disfigurement award found in paragraph 175 and the amount found in the Order. Based on the Respondents' motion, the ALJ hereby enters the following corrected order. The correction will be identified in bold-faced type.

PROCEDURAL HISTORY

1. The Respondents filed a Final Admission of Liability (FAL) on March 8, 2013. The Claimant timely objected and applied for a Division Independent Medical Examination (DIME).

2. Prior to the filing of the FAL, the Respondents had filed an application for hearing (AFH) on January 11, 2013 on the issues eventually heard by ALJ Margot Jones on April 3, June 7, June 10 and August 26, 2013.

3. While the hearings before ALJ Jones were pending, the Respondents moved to hold the DIME proceedings in abeyance pending resolution of the issues before ALJ Jones. On June 26, 2013, ALJ Jones granted the Respondents' motion.

4. ALJ Jones entered her Findings of Fact, Conclusions of Law, and Order on November 5, 2013. ALJ Jones found that control of medical care did not revert to the Claimant when his authorized treating physician discharged him; that Claimant shall return to Dr. Orent for authorized care and for referrals to specialists; and that Claimant's entitlement to indemnity benefits after January 18, 2013 is barred and shall remain barred until Claimant returns to Dr. Orent or Dr. Kistler.

5. Both the ICAO and the Court of Appeals have affirmed ALJ Jones' November 5, 2013 order.

6. On February 20, 2014, Claimant filed another AFH, but a hearing never commenced. Claimant endorsed several issues which included change of physician, insurance coverage penalties alleging Respondents engaged in improper communication with treatment providers; the FAL was defective; attorney fees and costs; and bad faith.

7. Subsequent to the filing of the February 20, 2014 AFH, five pre-hearing conferences were held concerning discovery disputes and the myriad of issues Claimant endorsed. As pertinent to the issues before the undersigned ALJ, PALJ Patricia Clisham ordered that:

a. Respondents were not required to produce a copy of the insurance policy for this claim;

b. the issue of change of physician was limited to the time period subsequent to ALJ Jones' November 5, 2013 order;

c. TTD and TPD were stricken or voluntarily withdrawn;

d. Insurance coverage was stricken but Claimant may appeal the decision to a merits ALJ at the OAC. Respondents were permitted to add the issue of attorney fees to the response to the AFH to defend the appeal if the issue is found to be unripe by the OAC ALJ.

e. The issues of authorized provider, deauthorization and MMI were stricken.

f. The DIME is no longer held in abeyance.

g. The February 20, 2014 AFH was stricken and Claimant was ordered not to re-apply for hearing until he had complied with discovery orders.

h. Claimant was limited to presenting testimony from himself and Dr. Bennett when the hearing was reset upon the issues endorsed in the February 20, 2014 AFH.

i. Claimant was permitted to re-file his AFH limited to the following issues i) change of physician based on change of circumstances subsequent to ALJ Jones November 5, 2013 order; ii) penalty for improper communication with health care providers; and iii) penalty for improper communication with Claimant's authorized treating providers.

j. Respondents' request for attorney fees may be raised with the OAC ALJ.

8. On December 4, 2014, Respondents filed an AFH to overcome the DIME opinions concerning the date of MMI and the permanent impairment rating.

9. On January 6, 2015, Claimant filed an Amended Response to the AFH. Claimant listed the following issues, which have been summarized by the ALJ:

a. Medical benefits, which included authorized provider, change of physician, reasonably necessary, related to the injury, and treatment after maximum medical improvement;

b. Disfigurement;

c. Temporary total disability benefits;

d. Temporary partial disability benefits;

e. Insurance Coverage;

f. Permanent Partial Disability Benefits;

g. Permanent Total Disability Benefits;

h. Production of the Respondents' complete files related to the Claimant including a copy of the insurance policy and all other documents providing or describing coverage for workers' compensation, surveillance documents, Claimant's personnel file, and other employment records;

i. Various defenses (which the ALJ will not recite);

j. Penalties for failure to comply with WCRP Rule 11 regarding medical records submitted to the DIME physician;

k. MMI date if Claimant has reached MMI;

l. Current DIME determinations set aside due to alleged violation regarding DIME records;

m. Insurance coverage (increased liability and penalties for noncoverage); and

n. Interest

10. Three additional pre-hearing conferences occurred before PALJ Clisham concerning the Respondents' December 4, 2014 AFH and Claimant's Amended Response. PALJ Clisham entered the following orders pertinent to the issues presented to the undersigned ALJ:

    a. The PALJ has jurisdiction to determine which issues are legally ripe for adjudication and may determine whether issues previously stricken may be stricken again;

    b. The issue of insurance coverage was stricken;

    c. The issue of production of the Respondents' complete file was stricken;

    d. Change of authorized treating provider was limited again to circumstances subsequent to ALJ Jones' November 5, 2013 order;

    e. Respondents may add the issue of attorney fees and costs;

11. Nowhere in any of the pre-hearing orders that followed the December 4, 2014 AFH did Claimant move to endorse the issue of appealing the PALJ orders; nor did he specifically endorse it in his response to the AFH.

12. The first time Claimant raised the issue of appealing pre-hearing orders was in his case information sheet. Issues may not be added in a case information sheet, and may only be added by written agreement of the parties or order. OACRP Rule 12.

13. The ALJ ultimately declined to revisit PALJ Clisham's orders, not necessarily because the issue was not properly endorsed, but because the ALJ determined Claimant's arguments concerning the orders were without merit.

ISSUES

Based on the foregoing procedural history, the application for hearing filed December 4, 2014, the amended response filed January 6, 2015, and the statements made by the parties when the hearing commenced, the issues presented for determination are as follows:

1. Claimant alleges that the Division Independent Medical Examination (DIME) opinion is invalid because some of the medical records submitted to the DIME physician contained markings or underlined portions. Claimant alleges that such markings constitute improper communication with the DIME entitling him to a new DIME, and imposition of penalties against the Respondents.

2. Whether Respondents have overcome the DIME opinions concerning the extent of permanent impairment/the permanent partial disability (PPD) award and the date of maximum medical improvement (MMI).

3. Whether Claimant is permanently and totally disabled.

4. Whether Claimant is entitled to maintenance medical treatment.

5. Whether Claimant is entitled to a change of physician.

6. The Claimant also requested a de novo review of several orders issued by Pre-hearing ALJs. Specifically, Claimant alleges that PALJ Patricia Clisham erred in striking the issue of "insurance coverage" and "production of Respondents' complete file" from Claimant's Response to Application for Hearing. As stated above, the ALJ declined to engage in such a review, and after more carefully reviewing the pleadings, Claimant never endorsed the issue of reviewing the PALJ orders.

7. Disfigurement.

8. Whether attorney's fees should be assessed against Claimant for endorsing unripe issues for hearing, specifically issues that had previously been stricken by a PALJ.

FINDINGS OF FACT

Pre-MMI Medical Treatment and Claim History

1. Claimant is a 65-year old man who worked for the Employer as a Senior Buyer/Planner for approximately 14 ½ years.

2. On December 19, 2011, Claimant sustained injuries when he tripped on a piece of wood on the floor at work. Claimant testified that he fell forward towards his chest, and pushed up against his right hand, forearm and shoulder and then rolled onto his back. He also stated that he struck his right knee.

3. Claimant selected Dr. Sander Orent as his authorized treating physician (ATP) and began receiving treatment on January 19, 2012. Thereafter, Claimant underwent significant medical treatment within the workers' compensation system for his injuries. The medical treatment included the following:

- Physical therapy for his hand, shoulder and knee;
- MRI of his right shoulder;
- Surgery to repair his right rotator cuff and biceps tendon tears;
- MRI of his right knee;
- EMG/NCS on the right upper extremity;
- Injections for his right forearm and wrist problems;
- Viscosupplementation injections into the right knee;
- Surgery for the radial nerve symptoms; and
- Narcotic pain medications.

4. In August 2012, Dr. Orent (and his physician's assistant) had released Claimant to return to work, but limited to four hours per day with restrictions concerning use of his right arm.

5. Dr. Orent made many references in his reports that Claimant expressed he could not tolerate working more than four hours per day. In the September 6, 2012 record, Dr. Orent noted that Claimant was "adamant" he could not work more than four hours per day because he gets exhausted and he is afraid he will asleep on the way home. Dr. Orent stated, "Certainly we do not want to risk this." Claimant reiterated his intolerance to working more than four hours per day to Dr. Orent on October 4, 2012.

6. Claimant wrote a letter dated October 24, 2012 to Dr. Orent complaining of hypersensitivity in his right hand.

7. On November 19, 2012, Dr. Orent referred the Claimant to Dr. Lief Sorenson for pain management given Claimant's lack of improvement. Dr. Orent had expressed concerns over Claimant's ability to undergo pain management treatment given that Dr. Schneider had performed knee surgery on November 8, 2012, and had prescribed narcotic pain medications. Claimant did not report to Dr. Orent that he had already scheduled an appointment with Dr. Bennett (the ALJ infers that Claimant had already scheduled the appointment with Dr. Bennett because the intake paperwork for Dr. Bennett's office was dated November 14, 2012).

8. Claimant had an EMG of his right upper extremity performed by Dr. Hammerberg on December 12, 2012. Dr. Hammerberg concluded that the EMG findings were compatible with the clinical diagnosis of chronic right posterior interosseous neuropathy, a mild right ulnar neuropathy, and a mild entrapment of the right median nerve within the carpal tunnel.

9. On December 18, 2012, Dr. Sorenson evaluated the Claimant. Dr.

Sorenson noted mild decreased sensitivity to touch on the right forearm and hand (Claimant had reported hypersensitivity to Dr. Bennett just five days earlier – see paragraph 27 below). Dr. Sorenson recommended neuropathic cream to assist in the weaning off of pain medication. Upon examination, Dr. Sorenson found no evidence of Complex Regional Pain Syndrome (no swelling, no allodynia or color change found), and thus recommended against a sympathetic block. Thereafter, a discussion took place concerning the necessity for Claimant to sign a narcotic agreement with Dr. Sorenson. Claimant refused to sign the narcotic agreement with Dr. Sorenson, which prevented Dr. Sorenson from being able to treat Claimant.

10. Dr. Orent ultimately found that Claimant reached MMI on December 27, 2012 with no ratable impairment. Claimant was upset with Dr. Orent's determination concerning MMI and informed Dr. Orent that he would seek treatment with Dr. Bennett. Claimant had already had an initial consultation with Dr. Bennett on December 13, 2012.

11. Dr. Orent kept Claimant's work restrictions the same: four hours per day with no use of his right arm except to handle pieces of paper. Dr. Orent had previously recommended that Claimant use voice recognition software at work.

12. On January 24, 2013, Dr. Orent referred the Claimant to Dr. Lawrence Lesnak for an evaluation and impairment rating.

13. Dr. Lesnak evaluated the Claimant on February 20, 2013. Dr. Lesnak took a history from Claimant and reviewed Claimant's medical records. Claimant reported that he has constant right forearm, hand and thumb and finger pain; and intermittent right shoulder pain; constant right knee pain with mild weakness; and mild tingling in the superior buttocks region, bilaterally.

14. Claimant reported that he had regained full range of motion in his right shoulder but continued to have some pain involving his right shoulder and right upper arm.

15. Upon physical examination of Claimant's right upper extremity, Dr. Lesnak found no evidence of peripheral extremity edema and that "there was no evidence of any skin temperature or color changes involving his right distal upper extremity as compared to his left distal upper extremity." Percussion over Claimant's right radial tunnel produced some symptoms. Claimant had no tenderness over his knee or any knee effusion. Claimant had some limited range of motion in his right upper extremity as documented below.

16. Dr. Lesnak also noted that, "the patient exhibited severe pain behaviors during today's evaluation and appeared to be very 'dramatic' throughout my evaluation. He consistently would not shake my hand, but instead shook with his left hand."

17. Dr. Lesnak noted that Claimant was taking Oxycodone 10 mg four times

per day per Dr. Bennett's prescription.

18. Dr. Lesnak's impressions and recommendations include as it relates to the right upper extremity: probable right radial neuritis, no clinical evidence to suggest CRPS, including CRPS type I or II, right shoulder strain, with no clinical evidence of impingement syndrome or symptomatic specific right shoulder joint pathology. Dr. Lesnak stated, "Please note that at this point there is absolutely no medical evidence to suggest that any of the patient's low back/buttock symptoms, previously reported radiating left leg symptoms, his right knee symptoms for which he underwent treatment for his underlying osteoarthritis, as well as any evaluations performed by Dr. Bennett, would be in any way related o his previous occupational injury of 12/19/11."

19. Dr. Lesnak rated Claimant's right upper extremity only. He provided impairment ratings of 6% of the upper extremity for Claimant's right shoulder and 10% of the upper extremity for Claimant's residual right radial neuropathy, for a combined impairment rating of 15% of the right upper extremity. Dr. Lesnak opined that no maintenance medical care was indicated to cure these two work-related conditions.

20. Although Claimant had complained of back pain and left hip pain both of which he attributed to the work injury, neither Drs. Lesnak or Orent related these complaints to the original injury primarily because the symptoms surfaced several months after the work injury.

21. Dr. Orent also opined that the work injury did not cause Claimant's ongoing knee symptoms.

22. On March 8, 2013, Respondent's filed a Final Admission of Liability admitting to the 15% right upper extremity rating provided by Dr. Lesnak, with an MMI date of December 27, 2012, while denying liability for maintenance medical care.

23. Claimant objected to the Final Admission and filled a Notice and Proposal to Select Division Independent Medical Examiner.

24. Claimant eventually underwent the DIME on October 16, 2014, which Dr. Ronald Swarsen performed.

25. While undergoing medical treatment with Dr. Orent and the other providers to whom Dr. Orent had referred Claimant, the Claimant simultaneously pursued medical treatment on his own. Claimant self-referred to Dr. Judi Chen for a second EMG/NCS because he was dissatisfied with the results from the same test performed by Dr. Green. Claimant also initiated medical treatment with Dr. David Schneider for his knee symptoms. Finally, Claimant pursued treatment with Dr. Daniel Bennett for pain management.

26. Dr. Schneider had previously treated Claimant's right knee in 2001 so Claimant returned to him on September 19, 2012 complaining of right knee pain. Dr.

Schneider had already evaluated the Claimant for left hip and low back pain in July 2012. Dr. Schneider eventually recommended surgery on the right knee which he performed on November 18, 2012. Claimant continued to follow up with Dr. Schneider concerning his knee. Drs. Orent, Lesnak and Swarsen have all opined, and the ALJ agrees, that the need for surgery on Claimant's right knee was unrelated to the work injury.

27. According to a November 23, 2012 note from Claimant's primary care physician, Dr. Loree Koza, Claimant had stopped all of his pain medications.

28. Claimant's initial consultation with Dr. Bennett occurred on December 13, 2012. Claimant prepared intake forms prior to his appointment, which were dated November 14, 2012. Claimant stated that his symptoms included hypersensitivity in right hand, thumb and fingers. Claimant also attached a list of his medications. He noted that Dr. Orent was prescribing: OxyContin 10 mg., 1 tablet at night; Oxycodone, 5 mg. every 4 hrs, p.r.n.; and Dr. Schneider had prescribed Oxycodone HCL 5mg.

29. According to Dr. Bennett's report, Claimant reported the following symptoms regarding his right upper extremity: intolerance to light touch; myoclonic activity (sporadic and pre-dates burning pain); temperature sensitivity to both heat and cold; color changes (blue and marbled or red and wet); significant diminished hair growth; and brittle nails with early ridging. Claimant reported burning, stabbing, painful tingling with an underlying ache. Dr. Bennett commented the December 12, 2012 EMG findings were inconsistent with Claimant's reported pain levels.

30. Dr. Bennett diagnosed Claimant as suffering from: 1) Complex Regional Pain Syndrome (CRPS) 2) R/O sympathetic maintained pain (SMP), and 3) status post radial nerve entrapment with release. Dr. Bennett recommended among other things, that Claimant undergo a stellate ganglion block, which Claimant underwent on December 26, 2012. Dr. Bennett did not refer Claimant for any other diagnostic tests that would assist in accurately diagnosing CRPS. As part of his recommendations, Dr. Bennett agreed with, "continuing oxycodone 5-10 mg q4h prn severe pain in the interim."

Post-MMI Medical Treatment and Claim History

31. On January 3, 2013, Dr. Bennett issued work restrictions that reduced Claimant's work hours from four per day to two per day with breaks.

32. Claimant returned to work on Monday, January 7, 2013, after the Employer's holiday break. Claimant advised his supervisor, Geri Siebenaller, that he was addicted to pain medications. Due to concerns for Claimant's health and job safety, Siebenaller informed Marcia Norris, who handles workers compensation claims for the Employer, about Claimant's report. Norris scheduled a meeting with Siebenaller and Claimant which took place on Wednesday, January 9, 2013. During this meeting, Norris advised Claimant that she had spoken with Dr. Orent's office and that Dr. Orent was willing to see the Claimant the next day, January 10, 2013. She gave Claimant her

business card with the appointment date on the back. Claimant advised Norris that he did not want her scheduling appointments for him and that he would have to talk to his attorney about attending the appointment. Thereafter, Claimant advised Norris to cancel the appointment.

33. The Insurer's adjuster then scheduled Claimant for a demand appointment with Dr. Orent to take place on Monday, January 14, 2013, with the alternative option of seeing his partner, Dr. Kistler, on Friday, January 18, 2013.

34. On January 16, 2013, Judge Purdie then ordered the Claimant to attend an appointment with Dr. Kistler who is Dr. Orent's practice partner. The appointment was scheduled for January 18, 2013.

35. The Claimant attended the appointment at Dr. Kistler's office on January 18, 2013. However, Dr. Kistler recorded that, "The patient wanted to record the visit today and I allowed that even though I cannot say as I have ever been recorded by a patient in the past…" The patient wanted to speak to his attorney, so I had him go out of the room to do that…." The patient came back following his phone call with his attorney saying that he really cannot proceed without the form being in place…

36. After Dr. Lesnak's evaluation on February 20, 2013, Claimant underwent medical treatment primarily with unauthorized providers for his various pain complaints. Dr. Bennett essentially assumed management of Claimant's care with Dr. Schneider evaluating his orthopedic complaints including the right knee and right shoulder. Claimant saw other providers for conditions and symptoms unrelated to his work injury.

37. On April 4, 2013, Dr. Bennett documented Claimant's pain medications as: Oxycodone 10 mg BID for breakthrough pain; and OxyContin 10 mg A.M., and 30 mg P.M. for pain. Dr. Bennett increased Claimant's pain medications.

38. By May 13, 2013, Claimant had a spinal cord stimulator implanted to treat CRPS as diagnosed by Dr. Bennett. Thereafter, Claimant suffered from a myriad of ailments to include low back pain, leg pain, and carpal tunnel syndrome, most of which have been treated by Dr. Bennett.

39. The parties proceeded to hearing on April 3, June 7 and June 10, 2013 before AL Margot Jones on whether the right to control medical care reverted to the Claimant and whether Claimant's benefits should be suspended for violation of a pre-hearing order.

40. ALJ Margot Jones issued her order on November 6, 2013 finding in favor of the Respondents. The Claimant appealed to the ICAO which upheld ALJ Jones' order. The Claimant appealed to the Colorado Court of Appeals, which also upheld the decision of the ICAO and ALJ Jones. Claimant has apparently filed a petition for writ of certiorari to the Colorado Supreme Court, but has not received a response.

41. Despite the order of ALJ Jones, and the subsequent affirmances by the ICAO and Court of Appeals, the Claimant has never returned to Drs. Orent or Kistler. Rather, Claimant continued to treat with unauthorized providers, Drs. Bennett and Schneider.

42. On February 3, 2015, Dr. Orent wrote a letter and commented on video surveillance taken of the Claimant in October 2014. Dr. Orent noted that Claimant had no problems using his right arm or right shoulder in the video and thus should have no occupational or functional work restrictions.

43. The most recent medical record offered into evidence was dated March 5, 2015 from Dr. Bennett. As of that date, Claimant had been diagnosed with a number of conditions that include: right arm pain (secondary to CRPS); carpal tunnel syndrome, thoracic outlet syndrome, cervical dystonia, insomnia due to another medical condition, spondylosis with myelopathy in the lumbar region, long term opiate use, and partial rotator cuff tear. Dr. Bennett stated that Claimant is permanently and totally disabled due to his right rotator cuff tear, low back and CRPS in his right arm.

44. According to the March 5, 2015 report, Dr. Bennett was prescribing Claimant the following:

> OxyContin, 40 mg, 1 tablet every morning for pain;
> Oxycodone, 10 mg, 1 daily as needed for break through pain;
> Subsys Liquid, 100 MCG, sublingual up to 4x per day for pain; and
> Zolpidem for sleep

45. Dr. Bennett testified that Subsys is brand name for Fentanyl and that Claimant's dosage is the lowest dosage a patient can take. Dr. Bennett believed that Claimant takes less pain medications at the time of the hearing than in December 2012 when he first started treating Claimant. However, Dr. Bennett initially recommended "continuing oxycodone 5-10 mg q4h prn severe pain in the interim." Assuming Claimant took 4 10mg pills per day, he would have taken only 40 mg of Oxycodone per day. It appears Claimant's medications have indeed increased since December 2012 rather than decreased.

Video Surveillance

46. The video surveillance taken of the Claimant on October 17, 2012 depicted Claimant leaving the Employer's offices while talking on a cell phone. He held the cell phone in his right hand up to his left ear. The Claimant proceeded to walk to his vehicle while talking on the phone. He pulled his car keys out of his pocket with his right hand then used his right hand to open the car door. He used his right hand/arm to pull himself into the vehicle. The Claimant then drove away with his right hand on the steering wheel and his left hand holding the cell phone.

47. The Claimant is then depicted pushing a shopping cart and placing items into the back of his vehicle. He pushed the shopping cart with some force into the cart

corral. The Claimant proceeded to a different store and once again was shown pushing a shopping cart and loading his vehicle with his purchases.

48. Claimant testified that on October 17, 2012, he had just started a scheduled vacation after he left work.

49. The Claimant is later shown carrying a cup from a fast food restaurant in his right hand outside of Panorama Orthopedics where he had an appointment scheduled with Dr. Schneider concerning his right knee symptoms. The Claimant returned home at approximately 6:00 p.m.

50. The Claimant eventually got into a truck that had a trailer hitched to it and drove around to a different part of his property. He then loaded two red tanks then two propane tanks into the trailer then continued to load several other items onto the trailer using both hands or just his right or just his left hand. Claimant then manipulated a large tarp using both hands/arms to grasp the tarp and place it on the trailer. Manipulating the tarp lasts almost four minutes. Claimant removed additional propane tanks using his bilateral hands/arms from the back of the pickup truck and placed them onto the trailer. He used his right hand to twist and maneuver the tanks into place. Claimant added additional items to the trailer using both upper extremities. He carried away an unidentified object under his right arm. The video continues to show Claimant loading items into the trailer until approximately 6:42 p.m.

51. Claimant testified he was in pain while engaging in these activities as he is always in pain.

52. On October 18, 2012, surveillance video resumed with Claimant carrying some items in his right hand. He then opened the hood of his truck with both arms/hands then poured some type of engine fluid into the engine using his left hand. He closed the hood with his left hand. The Claimant continued to load items into his vehicle including a large case (appeared to be a gun case) which he carried with his right hand. He bent down onto his right knee to pick up some small items under the truck. He used his right hand. Claimant is next shown in a parking lot. He carried grocery bags with his left hand. He then unlocked then opened the truck cap door with his right hand, and placed the bags into the truck bed with his left arm. Claimant next climbed up onto the rear bumper. He appeared to use both arms while maneuvering items around the bed of the truck. Claimant then climbed down and used his right hand to shut the door.

53. Claimant is next shown at a gas station. While waiting for the fuel to pump, he walked around talking on his cell phone using his left hand with his right hand in his jeans pocket. He grabbed the gas receipt with his right hand then used his right hand to open the truck door. The Claimant climbed into the truck and drove off. The video concluded.

54. Surveillance was also taken from October 16-19, 2014. On October 16,

2014, the video showed Claimant walking with his items under his left arm while carrying keys in his right hand. Claimant opened his truck door with his right hand, got in and closed the rear truck door with right hand. The Claimant is next observed getting into his truck. He again used his right hand to enter key into locked truck door.

55. On October 18, 2014, the video showed Claimant carrying a large step stool under his right arm and holding it with his right hand. Next, he manipulated a large tarp with both arms and hands. He bent down on his hands and knees to spread the tarp across his RV. Another man assisted him. Claimant then climbed down the RV ladder with some hesitation but he used both hands/arms to hold on to the ladder as he descended. Once on the ground, he used his right arm which he extends above his head to hand a cover to the man helping him who is still on top of the RV.

56. Claimant is next observed standing around for a few minutes then walking around again. Claimant took a glove off his right hand to use a keypad to enter his garage.

57. The Claimant re-appeared carrying a rake with his right hand. He got down onto the ground next to a trash can. As he stood up, he used his right hand and arm to push himself up off of the ground. Claimant stood for a while looking around again then he started talking with a man. Claimant stepped out of view of the camera for a while, but appeared to continue his conversation with the man. He shook the man's right hand with his left, and they continued to talk as Claimant stepped out of view again. They parted ways and the video concluded.

58. On October 19, 2014 beginning at 12:52 p.m., the video showed Claimant outside using a leaf blower. He held the leaf blower in both his right hand and left hand. Claimant used both hands together, as well as his right hand only and his left hand only at times to hold the blower and manipulate it to reach the desired areas of the yard.

59. At around 1:10 p.m., Claimant switched from the blower to a leaf vacuum. Claimant held the leaf vacuum with right hand while holding the debris bag in the left hand. Claimant held the vacuum fairly still while he maneuvered his body to access the debris. At approximately 1:21 p.m., he stopped using the vacuum, and set it down.

60. The video showed Claimant handling the power cord using both hands. Then, Claimant had a trash bag in hands. He opened it up using both hands then emptied the vacuum bag into the trash bag. He used his right hand to shake the leaf vacuum bag then used both hands to shake the leaf vacuum bag to get the debris into the trash bag. Claimant proceeded to vacuum leaves/debris again by holding the vacuum in his right hand and the debris bag in his left hand.

61. Claimant continued to vacuum leaves until about 1:33 p.m. when he had to empty the debris bag again. After emptying the debris bag, he picked up the trash bag and slung it over his left shoulder and walked away.

62. Claimant returned to the yard and began to gather the power cord. He wrapped it up over his left arm using his right hand/arm to wind it around his left arm. Claimant then picked up the leaf vacuum and with his right hand and walked out of view. Claimant then wrapped up another power cord using the same method with his right hand winding it around his left arm. He continued these activities until approximately 1:40 p.m.

63. At approximately 1:53 p.m., Claimant then appeared with a lawn mower. Claimant mowed the lawn until approximately 2:19 p.m. At 2:33 p.m., Claimant returned to the yard riding a tractor/mower, which he rode around the year until about 2:39 p.m. He then reappeared on the tractor at 2:45 p.m. and the video ended at 2:49 p.m. The Claimant shifted the tractor/mower with his right hand.

64. Claimant did not appear to have any difficulty engaging in the tasks depicted in any of the video surveillance. He certainly does not appear to be in significant pain although he testified he was in constant pain.

Validity of the DIME

65. The Respondents submitted a packet of medical records (DIME packet) to Dr. Swarsen as required by WCRP 11, and the Claimant alleges some of the records contain markings that should be construed as inappropriate communication with Dr. Swarsen. At the hearing, Claimant also asserted that the DIME packet contained what he referred to as "advisory opinions" from Claimant's authorized treating physicians (ATPs), which he also alleged were improper.

66. Although Claimant did not specifically identify which records he alleges contain inappropriate markings, the Respondents identified records in their position based on Claimant's answers to interrogatories. Those records are as follows:

- Dr. Hak
- Drs. Orent & Kistler
- Dr. Lesnak
- Dr. Sorensen

67. Upon reviewing the DIME packet records of the aforementioned physicians, the ALJ finds that any markings (circling or underlining) found thereon are innocuous and not intended as a "communication" with the DIME physician as contemplated by WCRP Rule 11-6.

68. The "advisory opinions" referenced by Claimant constitute medical records as defined in WCRP Rule 11-3 (J) and (K), and do not constitute an improper communication with the DIME physician as contemplated by WCRP Rule 11-6.

69. The Claimant has made no showing that the innocuous markings or the "advisory opinions" in any way tainted the DIME process or opinions rendered by Dr.

Swarsen. The ALJ finds that the DIME was conducted pursuant to WCRP Rule 11, and that no penalties shall be imposed against the Respondents for any violations thereof. Further, the ALJ finds that the DIME opinion stands as valid.

DIME Opinions

70. Dr. Swarsen issued a 58-page DIME report. He reviewed the extensive medical records and summarized them, while also providing commentary and observations throughout his entire report, labeled as "interim review". In addition, Dr. Swarsen physically examined the Claimant and took a history from him.

71. Claimant provided the following chief complaints to Dr. Swarsen:

- Worst current symptom: carpal tunnel that was mild but is now severe which includes thoracic outlet syndrome. Claimant stated his hands are numb and he wakes up screaming in the middle of the night. The Claimant complained of bilateral pain in his hands and fingers, as well as tingling and swelling.

- Right forearm: Claimant stated it was much better with the stimulator but he can still feel some pre-stimulator symptoms. He does not have acute sensitivity to touch.

- Right shoulder: Claimant has good range of motion but continues to have pain with motion in the joint. He cannot carry things on the shoulder and cannot engage in major carpentry projects any more.

- Low back: Claimant reported nerve pain down his legs and swollen feet but improvement in his right leg symptoms. He stated he uses a recliner for his low back, neck and feet, noting "that's where I live."

- Right knee: Claimant has continued pain on the inside of his right knee and under the patella. He felt his knee has improved and he can walk his dog.

- Upper back/neck: Claimant reported pain along the neck and upper back which as improved with Botox.

- Left hip: He reported continued pain at the left hip region but he pointed more toward the region of his left buttock.

72. Claimant reported his pain level is usually 5 out of 10 where a level 1 is almost unnoticeable and 10 being so severe that suicide would be considered. Claimant reported that at worst, his pain reaches 10 out 10. Claimant reported that he rests or lays down 2-4 hours per day to relieve pain and that he sleeps less than 4 hours per day. He reported he is never pain free.

73. Claimant reported that his medications included: OxyContin 10 qam; OxyContin 40 qhs; Oxycodone 10 mg tid; and Subsys 100 mg qid.

74. Throughout the medical record review Dr. Swarsen commented on the causal relationship to Claimant's growing list of symptoms to the work injury. In that regard, Dr. Swarsen stated, "The case has become extremely convoluted, complex and enmeshed with ostensibly all issues supposedly related to the initial work injury according to [Claimant] however causality has not supported these claims."

75. Dr. Swarsen questioned Dr. Bennett's' diagnosis of CRPS without following the appropriate protocol set forth in the Medical Treatment Guidelines. Dr. Swarsen also questioned implantation of a spinal cord stimulator absent additional testing for CRPS.

76. Dr. Swarsen noted that one of the goals of spinal cord implantation per the Guidelines is to reduce the level of narcotic medication the patient is ingesting and that as of October 2013, this goal had not been met. Dr. Swarsen stated that:

> More invasive procedures continue to be introduced. This case now has a life of its own, many components of which are unrelated to the original mechanism of injury. Prognosis is poor just based on the review of the records. Expanding symptoms, increasing invasive procedures, increasing opioids and no noted improvement in function.

77. Dr. Swarsen commented, "What started as a contusion of a knee and shoulder has ever expanding symptoms now including the low back, neck upper back and thoracic outlet".

78. Dr. Swarsen found no causal relationship between Claimant's newly diagnosed carpal tunnel syndrome and the work injury.

79. Upon physical examination of Claimant's right forearm and hand, Dr. Swarsen did not observe any color changes or loss of hair comparing the right extremity to the left. He further noted similar capillary refill with right compared to left hand and no temperature changes. He did note that both of Claimant's hands appeared pale and both felt slightly cool.

80. Dr. Swarsen listed the conditions he believed to be occupationally related and those not-occupationally related. The diagnoses he found to be work related included the right shoulder, forearm and knee. He disagreed with Dr. Bennett and opined that the conditions involving: thoracic outlet syndrome; carpal tunnel syndrome, back pain, neck pain, hip pain are not related to the August 2011 work injury. Dr. Swarsen also stated that Claimant has a chronic pain syndrome of his right upper extremity, likely sympathetically mediated pain.

81. Regarding the relatedness of Claimant's second shoulder surgery to the work injury, the ALJ finds that on February 6, 2013, the Claimant began complaining to Dr. Schneider of moderate right shoulder pain that occurred constantly. Dr. Schneider noted that Claimant complained of the inability to actively work his arm even though Claimant's active and passive range of motion was essentially full. Dr. Schneider recommended a repeat MRI.

82. Claimant's February 26, 2013 MRI revealed instrasubstance tearing of the supraspinatus with a thin linear split heading towards the myotendinous junction. On June 18, 2013, Dr. Schneider performed surgery on the right shoulder to repair a re-tear and to determine if Claimant had acquired an infection. The operative report showed that only an arthroscopic examination with synovectomy and debridement occurred, and that no repair of a re-tear occurred.

83. On September 18, 2013, Dr. Schneider reported no infection in the right shoulder, but Claimant still reported symptoms including pain and weakness in his right shoulder.

84. Dr. Swarsen related Claimant's second shoulder surgery to the work injury and adjusted the MMI date to September 18, 2013, which was the date of Claimant's last follow-up with Dr. Schneider. Dr. Swarsen rated Claimant's right upper extremity at 33%. As noted previously, based upon his record review alone, work prognosis is poor, but Dr. Swarsen had expressed a desire to review the surveillance tapes described by Drs. Orent and Lesnak.

85. Dr. Swarsen noted that medical maintenance would be appropriate only for chronic pain in the right upper extremity. Dr. Swarsen stated that Claimant is dependent on opioids as well as the neurostimulator due to the clinical course followed by Dr. Bennett both of which have provided limited functional improvements. Dr. Swarsen recommended maintenance of the stimulator and medications as managed by Dr. Bennett.

86. Dr. Swarsen opined that accurately diagnosing Claimant's chronic pain at this point would be difficult if not impossible. Dr. Swarsen disagrees with Dr. Bennett's diagnosis of CRPS due to a lack of workup for CRPS in accordance with the DOWC's Medical Treatment Guidelines. Dr. Swarsen concluded that the more supported diagnosis is sympathetic mediated pain rather than CRPS. Dr. Swarsen concluded that: "Frankly, clinically, this case is quite complex and enmeshed with prior decision regarding treatments selected. Under these circumstances, defining the boundaries of medical maintenance is difficult and becomes a dynamic target." Dr. Swarsen also recommended a complete psychological evaluation, noting that it would not be related to the workers' compensation claim.

Overcoming the DIME Opinions

87. The Respondents seek to overcome Dr. Swarsen's opinions concerning the date of MMI and the permanent impairment rating assigned to Claimant's right shoulder.

88. In support of the opinions that Dr. Swarsen erred when changing the date of MMI from December 27, 2012 to September 18, 2013, Respondents presented the opinions and testimony of Drs. Orent and Lesnak.

89. As found above, Dr. Orent had imposed work restrictions that included sedentary work at four hours per day with minimal use of the right upper extremity and had prescribed voice activated computer software for Claimant to use.

90. In a letter dated May 20, 2013, Dr. Orent opined that he could not relate the Claimant's re-tear of the supraspinatus to any occupational exposure. Dr. Orent commented that Claimant had "marked restrictions" regarding the right shoulder and it would be substantially difficult to determine a mechanism of injury that would make the re-tear causally related to the initial injury.

91. On June 27, 2013, Dr. Orent wrote a letter after he reviewed the videotape surveillance of Claimant's activities on October 17 and 18, 2012. Dr. Orent stated, "the amount of activity he is performing with an absolute absence of pain behaviors strongly suggests, in my opinion, malingering." This is not physiologic…." My opinion now is that [Claimant] is consciously malingering and that he is attempting to put non-occupational problems into the occupational setting." Dr. Orent pointed out that at the time this videotape was secured Claimant had been telling him that we as disabled and incapable of even using a keyboard.

92. On July 30, 2013, Dr. Lesnak also opined that the partial re-tear in Claimant's right shoulder was completely unrelated to his original injury. Dr. Lesnak noted that Claimant was performing activities outside of his work restrictions as shown in the surveillance video taken in October 2012. Dr. Lesnak opined that Claimant need no further surgery on his right shoulder, and if Claimant underwent any additional surgery, it would be completely unrelated to the work injury.

93. Also in the July 30, 2013 report, Dr. Lesnak reiterated that his examination of Claimant in February 2013 did not suggest CRPS; and hence he felt that the implantation of a spinal cord stimulator was neither reasonable nor necessary medical care, nor causally related to the work injury. He further again stated that Claimant's low back symptoms were not work related and that based upon his review of the medical reports, lumbar surgery was not reasonable nor necessary. He further concurred with Dr. Orent's opinion that the re-tear of the supraspinatus detected upon MRI scanning was not causally related to the industrial injury, again based upon the fact that due to the restrictions Claimant was working under after the original surgery, the tear could not have been caused by any work activity. Dr. Lesnak commented on the

surveillance videotape taken on October 17 and 18, 2012. He opined that Claimant demonstrated no functional limitations whatsoever with the right upper extremity or at all.

94. Dr. Orent testified during the hearing held on April 6, 2015. He reiterated his opinion that the re-tear in Claimant's right shoulder was not related to work exposure especially because Claimant was not working at all around that time. Dr. Orent explained that he perceived no basis to change the date of MMI based on a shoulder surgery that did not arise from a work-related injury or condition. Dr. Orent opined that Claimant remained at MMI as of December 27, 2012.

95. Dr. Lesnak also opined that Dr. Swarsen's impairment rating for the right shoulder was also clearly in error, as evidenced by the range of motion Claimant displayed in the videotape footage secured on the exact date of Dr. Swarsen's examination, and the two days thereafter.

96. Both Drs. Orent and Lesnak testified that based upon their review of the videotape surveillance and observations of Claimant's level of function in both October 2012 and October 2014, Claimant's diagnosis must include malingering. Further, both doctors concluded that as a result, no work restrictions are indicated, or at the most per Dr. Lesnak, Claimant should avoid continuous overhead activities with the right upper extremity, as the only restriction. Furthermore, Dr. Orent, who treated Claimant on a bi-weekly basis for over one year, opined that the discrepancies between what Claimant was advising him as to his physical capabilities back in October 2012, were so very disparate from what was depicted on the surveillance videotape that this has caused him to re-think his diagnosis of malingering and also consider the diagnosis of Munchausen's disease or other severe psychiatric explanation for the discrepancy. Dr. Orent admitted that psychiatry or psychology were not his areas of expertise.

97. Dr. Orent further opined that the level of function demonstrated on both surveillance tapes, the 2012 tape secured prior to any SCS implantation, and the 2014 tape after the implantation, causes him to question even the diagnosis of neuropathy in the right extremity, for in his opinion, a patient with a neuropathy, could not tolerate the vibration of the leaf blower or other activities Claimant was participating in during the surveillance videotape. Dr. Lesnak testified consistently with this opinion and his observations of the videotape.

98. Both Drs. Orent and Lesnak disagree with Dr. Bennett's diagnosis of CRPS, and both agree with the DIME physician, in that Dr. Bennett did not follow the Medical Treatment Guidelines in attempting to confirm this diagnosis. Accordingly, both Drs. Orent & Lesnak disagree with Dr. Bennett's decision to refer this Claimant for the implantation of a spinal cord stimulator.

99. Dr. Orent testified that in the 40 years that he has been practicing, he has "only recommended that a patient undergo this procedure two to three times, and I treat some very significant chronic pain in some very significant CRPS patients….This is not one of those times that would have even considered remotely considered a spine

stimulator". Dr. Lesnak agreed and noted that in the 18 years that he has practiced in Colorado, he has only made this recommendation five to six times.

100. Both Drs. Orent & Lesnak opined that unfortunately, Claimant is now on 2-3 times the amount of narcotic medication than he was at the time he stopped seeing Dr. Orent in December 2012, and that this is inconsistent with the goals for the implantation of a spinal cord stimulator. Both doctors agreed that the goal of such implantation involves an increase in function and a decrease in narcotic medication usage.

101. Dr. Bennett testified at the hearing as expert in anesthesiology, pain medicine, interventional spine and pain surgery, and device implantation. Dr. Bennett has authored a peer reviewed article on CRPS and spinal cord stimulation which was published in the Pain Medicine Journal.

102. Dr. Bennett is not Level II accredited, he does not typically treat workers' compensation patients, and while he knows of the Medical Treatment Guidelines, he is not intimately familiar with them. He testified that the Guidelines are outdated and that he does not "treat to treatment guidelines." Rather, he treats the patient with the most reliable data.

103. Dr. Bennett testified that when he initially examined the Claimant, he determined Claimant had a regional pain syndrome in his entire right upper extremity. Dr. Bennett described his exam findings as indicated above in paragraph 29. He testified that he elected to proceed with the stellate ganglion blocks which Claimant did not respond to. Dr. Bennett concluded that Claimant's lack of response suggested he did not suffer from SMP but rather suffered from CRPS.

104. Dr. Bennett opined that the additional testing recommended by the Guidelines and Dr. Swarsen to diagnose CRPS was unnecessary in Claimant's case. He felt the clinical symptoms were sufficient to make the diagnosis.

105. Dr. Bennett agreed that no other physician has agreed Claimant has CRPS, including Drs. Orent, Lesnak and Sorenson, all of whom examined the Claimant in and around December 2012. Drs. Lesnak and Sorenson specifically examined Claimant's right hand looking for symptoms of CRPS and found none.

106. Dr. Bennett believes that Claimant suffers from pain in his right arm and in other parts of his body. Dr. Bennett testified that Claimant's right shoulder is main reason Claimant remains on opioids, in addition to Claimant's other conditions.

107. Dr. Bennett agreed with Dr. Swarsen's conclusions regarding SMP, but he believes Claimant suffers from SMP as well as CRPS. Dr. Bennett also opined that the improvement in Claimant's symptoms after implantation of the spinal cord stimulator suggests that CRPS is the correct diagnosis.

108. Dr. Bennett disagreed that the goal of spinal cord stimulator implantation was to increase function and decrease opioid dependency. Dr. Bennett further testified that according to his computations, Claimant is now being prescribed less or the same amount of narcotic medication as when he first began treating Claimant in December 2012.

109. Dr. Bennett did not believe that Claimant's activities in the surveillance videos contradicted the diagnoses of torn rotator cuff; thoracic outlet syndrome; traumatic neck; radial nerve entrapment; CRPS; carpal tunnel syndrome; or the extent of the pain Claimant has described. Dr. Bennett basically testified that the medical treatment Claimant has received would allow him to engage in the level of activity depicted in the videos. He also stated that he encouraged Claimant to be active.

110. Based on the credible and persuasive evidence, the ALJ finds the Respondents have not overcome the DIME opinions concerning the second shoulder surgery, adjusted MMI date, and impairment rating for the right upper extremity. The Claimant, although his credibility overall is questionable, has consistently complained of right shoulder pain even immediately after the first surgery. Even Dr. Hsin opined that it was reasonable for Claimant to discuss, and potentially undergo, additional surgery with Dr. Schneider. Although Claimant had restrictions regarding use of his right upper extremity, there is no persuasive evidence that the causal connection to Claimant's right shoulder problems was severed at some point between the first surgery and the second surgery. The ALJ is not persuaded by the testimony of Drs. Lesnak and Orent concerning assessment of Claimant's permanent impairment based on the surveillance videos.

Permanent Total Disability

111. At the time of the hearing, the Claimant was 64 years old with a date of birth of August 21, 1950. The Claimant has a college education and significant work experience.

112. Claimant testified that his position with the Employer was "fairly unique." He explained that his position was classified as a senior buyer/planner but that he was involved in a tremendous amount of corporate level teamwork, working with the Employer's software, software vendors and coders. He testified that he "ran teams under the direction of the executive vice president of North America . . . for the purposes of software enhancements."

113. Claimant's position also involved travel, both domestic and international. He made his position seem important and he seemed proud of the work he performed for the Employer.

114. The Claimant testified that he attended vocational rehabilitation in 2014 but quit because had surgeries scheduled in October and December and didn't feel he could give an honest effort given that surgery causes "additional pain" and "issues with

rehabilitation."

115. Claimant testified that he gets drugged sleep due to the Ambien, OxyContin, Oxycodone and Fentanyl he takes at night. He stated that sometimes if he is in too much pain that combination of drugs does not help him sleep much.

116. Claimant testified that he has nerve pain and muscular pain. He testified that the spinal cord stimulator mitigates the nerve pain in his right arm. He then testified that if he turns off the stimulator his pain returns immediately. Claimant testified that he has back pain, both muscular and nerve, and nerve pain in his neck.

117. Claimant testified that all his medical conditions prevent him from sitting for long periods of time and his fine motor skills, which include typing and mousing, are gone.

118. Claimant testified that has difficulty cleaning his house and he had recently begun seeking help from his neighbor's wife.

119. Claimant's testimony was articulate, he was a good historian and his thoughts were organized. He did not demonstrate any memory problems nor did he appear overly drowsy or drugged from medications.

120. Claimant admitted that around October 2012 he asked Dr. Orent to reduce his work hours from four to something less because his pain. Claimant was also concerned about driving after working four hours because he was tired due to lack of sleep from his pain symptoms.

121. As found above, Claimant repeatedly advised Dr. Orent that he could not tolerate working more than four hours per day.

122. Claimant testified that he can function better now but his pain has not improved. Claimant's testimony contradicted Dr. Swarsen's comments that Claimant reported reduced pain but no increase in functionality.

123. Claimant had a somewhat contentious relationship with the Employer. The Employer had wanted Claimant to increase his work hours and Claimant wished to reduce his hours. In addition, psychometric testing Claimant underwent revealed that Claimant had some level of dissatisfaction with the Employer.

124. Dr. Swarsen noted that he observed Claimant "move around the exam room and transition with much greater ease than I would have expected from his history and was able to fill out his forms writing with the right hand (though he appeared to shake it once in a while), he presented himself as disabled." Dr. Swarsen stated that he does not question Claimant's symptoms but does questions what "elements if any the psychological milieu adds to his self-perception."

125. Dr. Bennett testified that his diagnoses of injuries related to the industrial injury include: Torn rotator cuff, thoracic outlet syndrome, cervical dystonia, radial nerve entrapment, CRPS, and carpal tunnel syndrome.

126. Dr. Bennett further testified that despite all of the surgeries to cure and relieve Claimant from the effects of his back pain, he still has hardware in his back causing mechanical back pain, and that since Dr. Schneider did not repair the supraspinatus tear when he did the last surgery, Claimant continues to experience shoulder pain, and despite undergoing carpal tunnel releases, Claimant continues to experience pain as well as radial pain despite the fact that Dr. Conyers performed a radial release; and hence, Claimant must continue on opioids.

127. Dr. Bennett opined that Claimant is unable to earn any wages. Dr. Bennett testified that in his experience treating CRPS, it fluctuates despite the spinal cord stimulation. He testified that, "out of the blue you would five days, three weeks, two months of pain spikes on top of the baseline pain that are hard to control, even with stimulation." Dr. Bennett further testified that Claimant's pain spikes would prevent him from sitting or standing for any prolonged period of time to engage in a job.

128. Both Drs. Lesnak and Orent believe Claimant has no functional limitations based on the video surveillance, and thus should be able to work.

129. Claimant applied for Social Security Disability and was initially denied. After a hearing before a Social Security Administration ALJ, the ALJ entered an order on August 28, 2014, finding that the Claimant was disabled as defined by the Social Security Act. The undersigned ALJ is not bound by this determination.

130. Respondents retained Donna Ferris as an expert in vocational rehabilitation. On February 12, 2015, Ferris met with the Claimant. Bonnie Hacker who is also a vocational evaluator was present at the meeting. Hacker works with Bonnie Ruth who performed a vocational evaluation on behalf of the Claimant. Ferris issued a report on March 17, 2015.

131. When Claimant first met Ferris, he refused to shake Ferris' hand with his right hand, and instead shook her hand with his left hand.

132. When Ferris asked Claimant about his symptoms, he stated he was a "chronic pain patient" and explained he has had nine surgeries. Claimant reported that the spinal cord stimulator alleviates 90% of the pain in his forearm on a normal day and the stimulator also improved the hypersensitivity in his right hand. He reported that he can feel the stimulation throughout his entire body.

133. Claimant reported ongoing constant right shoulder pain even at rest. Claimant told Ferris that his first shoulder surgery he had left him in excruciating pain. Claimant reported ongoing back pain, and that before the surgery Dr. Bennett performed he could not walk. Claimant also reported surface nerve pain his neck and

calves that had been increasing over the four months prior to February 12, 2015.

134. Claimant also reported bilateral carpal tunnel problems and that he had undergone surgeries for those problems. He reported ongoing pain but not as severe as prior to the surgeries, and that he has now developed trigger fingers and increased pain in other fingers. Claimant finally reported thoracic outlet syndrome and described nerve pain in his pectoralis muscles. Claimant reported that these symptoms combined result in sleep deprivation.

135. At that time, Claimant's medications included Oxycodone 10 mg at three doses per day; Oxycontin 10 mg – one in the morning; Oxycontin 40 mg – one at night; Subsys 100 mcg in liquid form – four times per day; and Ambien (unknown dosage) – one at night for sleep. Claimant reported to Ferris that he takes the Oxycontin 40 mg, Oxycodone 10 mg, Subsys and Ambien at night before bed in an effort to sleep. Claimant reported difficulty falling and staying asleep despite these medications.

136. Claimant has a bachelor of science in business administration with an emphasis in international finance and computer information systems. Claimant reported advanced computer skills in both software applications and hardware. Claimant is knowledgeable in Microsoft Office applications.

137. Claimant worked for the Employer as a Senior Buyer/Planner from November 1998 through January 2013. His job duties included planning and purchasing of materials and capital equipment; significant use of the Employer's computer system; international travel to train and give presentations on the Employer's computer system.

138. Claimant explained to Ferris that he has looked at available positions on the Internet, and has spoken to headhunters but has had no interviews. Claimant stated that he is "bluntly honest" about his medical condition and has told potential employers he can work only three to five days per month secondary to his "medical needs." He stated he does not look disabled so he can get the job but he cannot keep the job.

139. Ferris concluded that based upon the lack of permanent restrictions assessed by Drs. Orent and Lesnak, the authorized treating physicians; it is her opinion, that Claimant remains capable of earning wages despite his work related injuries.

140. During the hearing, Ferris testified consistent with her report. She noted that Claimant reported continued symptoms in his right arm, shoulder, low back and nerve pain in his neck, both calves and feet. He advised her that due to these symptoms he had to make choices about what activities he participated in the day, but whatever the choice he made, he paid for it the next day. Claimant further reported that if he vacuums, he uses his left hand. He does some laundry, takes his dog for a walk and drives, but had difficulty driving long distances due to low back pain and also due to the vibration. He felt his ability to drive had improved since his carpal tunnel releases.

141. Ferris discussed her review and observations of Claimant's activities and level function in both surveillance videotapes and her understanding of Claimant's restrictions in 2012, when the first tape depicts his activities. She opined that his activities in the 2012 tape were highly inconsistent with the sedentary work restrictions he was under at the time. Ferris further stated that her review of both tapes to include the 2014 video surveillance, and the inconsistencies of level of function seen therein, raised questions in her mind about Claimant's true functional capabilities.

142. Ferris reiterated her opinion that Claimant is capable of earning wages, and that Claimant is capable of returning to any work for which he has prior training and experience.

143. On cross-examination, Ferris was asked, if she had to use the DIME physician's opinion only, would her opinion change. Ferris indicated that the DIME did not contain sufficient information for her to render a vocational evaluation if it was the only report she had to rely on.

144. Ferris further opined that the she did not comment on the other "human factors" that an ALJ considers when analyzing this Claimant's ability to earn wages, such as Claimant's age and where he lives, for in her opinion, because those factors do not preclude Claimant from being able to earn a wage.

145. Ferris also noted that the mere experience of chronic pain does not preclude someone, including the Claimant, from working. She stated, "people have chronic pain and they function in the workplace every day of their lives in spite of chronic pain. So the existence of chronic pain, in and of itself, does not necessarily limit a person's ability to function in the workplace."

146. Bonnie Ruth, Ph.D., also performed a vocational evaluation of the Claimant by telephone on March 11, 2015. She issued a report dated March 14, 2015. Claimant stated that he is a chronic pain patient and has had nine surgeries. He reported that he has a spinal cord stimulator that controls 90% of his pain on a normal day. Claimant reported he had difficulty using his right arm and hand to do his taxes and trouble pulling checks out of his checkbook. Claimant reported that he has thoracic outlet syndrome and pain from his pectoral muscles down his arms. He reported surface nerve pain in his calves, feet and neck. Claimant stated he had no back problems prior to his work injury and that he told Dr. Orent about it during his first few visits, but Dr. Orent did not put it into the reports.

147. Claimant reported the same medications to Dr. Ruth as he did to Ferris but added a thyroid medication and aspirin to the list. Claimant told Dr. Ruth that all of his doctors have advised him he needs to get off his pain medication but when he tries to reduce his medications, he wakes up screaming at night due to pain.

148. Claimant essentially provided the same reports concerning his activities of daily living to both Dr. Ruth and Ferris.

149. Claimant's work history has primarily involved manufacturing settings where he worked in inventory control or purchasing. He has always worked with computers and has good computer skills.

150. In February or March 2014, Claimant entered a program at the Division of Vocational Rehabilitation in Longmont. After participating in the program for approximately nine months, the Claimant asked himself if he really wanted or could do a job given all of the drugs he takes. He then quit the program. Claimant has searched for jobs on the Internet but he does not feel anyone would hire him given his medications and bad days that would lead to him missing work.

151. Dr. Ruth opined that Claimant is unable to work based on the opinions of Drs. Schneider and Bennett. She stated that the shoulder condition and CRPS are what primarily render him unable to work, and that both conditions were identified by Dr. Swarsen as work-related. She further stated that the non-work related conditions make Claimant even less likely to return to work but that the CRPS and shoulder alone regardless of the other conditions make Claimant unable to return to work.

152. Dr. Ruth testified at hearing consistent with the opinions in her report. She admitted that she had never met Claimant prior to the first hearing, and prior to the preparation of her report. However, she based her opinion that Claimant is permanently and totally disabled on the DIME's opinions and her perception of Claimant's overall pain level.

153. Dr. Ruth testified that Ferris made mistakes in formulating her opinions because she did not consider Dr. Swarsen's conclusions about the conditions that are related to the claim and his opinion that it is unlikely that Claimant could return to work in any capacity. Dr. Ruth also commented on Dr. Orent's notes regarding Claimant's likely inability to return to the job he held with the Employer.

154. Dr. Ruth testified that she reviewed literature related to individuals with CRPS with regard to return to work and that the prognosis for returning to work is poor in older people with CRPS. She stated, "I have articles that say they almost never return to work." She also felt he could not drive for 30 minutes given his medications. She testified that Dr. Bennett stated Claimant should not drive on a regular basis. There is nothing in the record to support Dr. Ruth's contention regarding formal limitations on driving from Dr. Bennett or any other physician.

155. Dr. Ruth opined that there is no work Claimant can perform in the Dacono area where he resides because the jobs available involve manual labor or driving.

156. Dr. Ruth admitted that Dr. Swarsen did not provide any specific physical restrictions, so she is "not relying on any specific restrictions**.** I am relying on the overall pain level. This is what is disabling with CRPS." Dr. Ruth admitted that as a vocational expert, she is not qualified to gauge the level of pain a person is experiencing; and that

it is especially difficult to do this over the telephone, as was the case herein. She further admitted that in her report, she noted that she observed Claimant's physical functioning in the surveillance videotapes and that it was her observation that Claimant did not exhibit any pain behaviors with any of the activities, and that she never observed him refraining from using his right upper extremity differently than his left.

157. Dr. Ruth also testified that independently as a vocational expert, she judged this Claimant incapable of driving thirty minutes to work on a regular basis. However, she admitted that she is not a doctor of medicine, and that no treating physician has restricted Claimant from driving. Dr. Ruth further opined that she based her opinion that this Claimant is permanently and totally disabled on not only the DIME opinions, but "my knowledge regarding CRPS and return to work." Yet, when asked if she agreed that Dr. Swarsen had found that Dr. Bennett had failed to properly confirm the diagnosis of CRPS through the appropriate testing required by the Treatment Guidelines, she responded, "According to the Workers Compensation Guidelines, yes, not necessary according to medical guidelines". Dr. Ruth was unable to explain which "medical guidelines" she was referring to.

158. Upon review of the October 2014 surveillance video, Dr. Orent issued a report dated February 3, 2015, wherein he noted that he reviewed 1 hour and 29 minutes of videotape. He opined that during all of the activity that he observed Claimant doing, he saw no evidence of any type of physical restriction in multiple activities, and that it was quite clear that Claimant had no problems with his right shoulder. Based upon his observations, Dr. Orent opined that he saw no reason for any physical restriction on Claimant's future work endeavors.

159. Claimant testified he was aware of much of the surveillance and was just getting on with his life. He declared that, "he is not a cripple, he is just disabled." Claimant testified that he was in constant pain while conducting all of the activities observed in the videos.

160. Given the very vast disparities between the Claimant's clinical presentations, the video surveillance, his presentation to the vocational experts, and his presentation at hearing, the ALJ cannot discern with any level of accuracy whether Claimant truly suffers from the pain and lack of function he claims. Moreover, Dr. Bennett's opinions concerning the myriad of medical conditions, including CRPS, he attributes to Claimant's injury are unpersuasive. Dr. Bennett failed to follow the Medical Treatment Guidelines to confirm the CRPS diagnosis, and Dr. Swarsen questioned such diagnosis as well. Dr. Bennett essentially testified that he need not follow the Guidelines because he is an expert in CRPS and that his clinical judgment should be sufficient. Dr. Ruth relied very heavily upon a CRPS diagnosis to determine that Claimant is unable to earn any wages. She further relied upon non-existent work restrictions and journal articles which state that older people with CRPS rarely return to work. Her opinions are unpersuasive as are Dr. Bennett's. While the ALJ understands Claimant is not necessarily pain free, he has failed to demonstrate that his work injury has rendered him unable to earn any wages.

Maintenance Medical Treatment

161. As found above, Dr. Swarsen recommended maintenance of the right upper extremity condition in the form of spinal cord stimulator maintenance and medications as managed by Dr. Bennett.

162. At hearing, both Drs. Orent and Lesnak opined that Claimant is not in need of any maintenance medical care to maintain the work related conditions at MMI. They both further opined that since it is their strong opinion that the spinal cord stimulator implantation was neither reasonable nor necessary, and that maintenance of the device should not be the liability of the Insurer.

163. Dr. Bennett testified that Claimant requires opioid chemotherapeutics to maintain a reasonable degree of function.

164. The ALJ finds that implantation of the spinal cord stimulator was unauthorized and not reasonable or necessary. As such, the Respondents are not liable for maintenance of the stimulator.

165. The Claimant has also failed to prove entitlement to maintenance medical care in the form of opioid prescription medication. Although Claimant may suffer from some residual pain in his right upper extremity as a result of his work injury, the Claimant has failed to prove that he requires opioids to cure and relieve him of such pain or to maintain his condition at MMI. The Claimant provided no credible or persuasive evidence that the opioids improve his pain or his function. He testified that his pain has not improved but his function has, but Dr. Swarsen's report stated that his pain had improved but his function had not. As noted above, the inconsistencies in Claimant's testimony, clinical presentation and video surveillance call into question whether Claimant truly suffers from the pain he claims.

Change of Physician

166. Although the ALJ has found that Claimant is not entitled to maintenance medical care, the ALJ will nevertheless address the issue of change of physician. Claimant alleges he should be entitled to a change of physician to Drs. Bennett and Schneider. The evidence presented to the undersigned ALJ was limited to circumstances that have occurred subsequent to the order ALJ Jones entered on November 5, 2013.

167. Claimant presented little evidence on this issue other than his testimony that the surgeries performed by Drs. Bennett and Schneider have helped him tremendously, and that the "spinal cord stimulator made a world of difference in regard to the nerve pain" he has in his hand. Dr. Swarsen concluded, and the ALJ finds, that many of the surgeries Drs. Bennett and Schneider performed on Claimant were unrelated to the work injury.

168. Dr. Bennett also testified that since Dr. Lesnak believes Claimant does not have CRPS, Dr. Lesnak would not be an effective treatment provider for the Claimant.

169. Claimant testified that his treatment goals with Dr. Bennett included reducing his opiate intake, increasing function and returning to work. Claimant testified that he has not been able to return to work, his function has improved but his pain has not. Claimant's subjective pain complaints have essentially remained unchanged based on pain diagrams he has completed over the years.

170. Claimant testified that workers' compensation was "basically taken away from me because I had - - I guess the audacity to try to get myself better my going to a doctor that was not within the workmen's comp structure."

171. In examining the abundance of evidence presented in this case, the ALJ can find no persuasive or credible evidence that since November 5, 2013, any circumstances have changed such that Claimant would be entitled to a change of physician. Claimant raised no new persuasive arguments pertaining to the change of physician issue, and no objective evidence demonstrates that the treatment Claimant has received with Drs. Bennett and Schneider since November 5, 2013 has improved his condition in any meaningful way. Claimant's subjective pain complaints are essentially the same; his function has not improved despite his testimony to the contrary (he testified that he now cannot perform basic housework); and he has not returned to work and alleges he is incapable of working. Claimant's authorized treating physicians remain Drs. Orent, Kistler, Sorenson, Hsin and Conyers.

172. The ALJ recognizes that Claimant's relationship with Dr. Orent has deteriorated; however, he has never made a bona fide attempt to treat with either Drs. Kistler or Sorenson, neither of whom have refused to treat the Claimant in the past.

Disfigurement

173. The Claimant did not actually show the ALJ any scars or other disfigurement. Instead, the Claimant asked the ALJ to consider the DIME physician's descriptions of his scars.

174. Dr. Swarsen described the scars as follows: a "well-healed 1" angular scar toward the medial aspect of the right upper arm consistent with the reported documented open tenodesis of the right biceps." A "well-healed 3 ½" vertical scar at the proximal volar aspect of the forearm consistent with the reported cubital tunnel surgery." A "well-healed 4 1/2" midline scar consistent with the reported placement of the permanent neurostimulator."

175. The ALJ awards **$1,800.00** for the scarring on the medial aspect of the right upper arm; and for the scarring on the forearm. The scar for the implantation of the spinal cord stimulator is not considered because the ALJ has found that its implantation was unauthorized, unreasonable and unnecessary.

Attorney Fees

176. As stated above in the procedural history, following the December 4, 2014 AFH, the Claimant filed an amended response on January 6, 2015, and endorsed two issues (production of Respondents' complete files and insurance coverage) that PALJ Clisham had previously stricken after pre-hearing conferences held pursuant to the February 20, 2014 AFH.

177. The Respondents scheduled pre-hearing conferences on February 4, 2015 to address the two previously stricken issues and to renew their request to strike the issues, and add the issue of attorney fees and costs pursuant to §8-43-211(3), C.R.S.

178. The issue of "production of Respondents' complete files" arises out of a discovery dispute. Claimant requested production of the complete file in a discovery request dated February 21, 2014. PALJ Clisham entered an order on June 13, 2014, granting Respondents' motion to be relieved from any obligation to produce its insurance policy for the claim, and other documents related to ADA, EEOC, ADEA and OSHA. PALJ Clisham did not address ripeness in her order.

179. Claimant did not appeal PALJ Clisham's June 13, 2014 order to an OAC ALJ. Instead, he listed the issue of "production of Respondents' complete files" in his January 6, 2015 amended response to AFH.

180. The ALJ finds that Claimant's endorsement of the issue of "production of Respondents' complete files" is not even a justiciable issue, and therefore, cannot be considered ripe or unripe. It's a discovery problem that PALJ Clisham handled, which was not properly appealed to the OAC. No attorney fees shall be assessed for Claimant's listing of "production of Respondents' complete files" on his amended response to the AFH.

181. Regarding the insurance coverage issue, Claimant's counsel argued at the hearing before the undersigned ALJ that PALJ Clisham did not strike the issue as unripe but instead struck it because she did not believe it had legal viability. However, the June 26, 2014 order entered by PALJ Clisham specifically stated that the issue of insurance coverage was stricken as either unripe or resolved by ALJ Jones' November 5, 2013 order. ALJ Jones' order did not deal in any way with the issue of insurance coverage, thus PALJ Clisham struck it as "unripe."

182. Rather than appeal PALJ Clisham's order to a merits ALJ, Claimant restated the issue in his amended response to the AFH. The ALJ cannot necessarily find the issue unripe as a matter of law despite PALJ Clisham's findings. The Claimant elected to endorse it again on a response to a new AFH, and the prior finding of PALJ Clisham has no preclusive effect on the current AFH or response.

CONCLUSIONS OF LAW

General

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

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

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

Penalties – Invalid DIME Opinions

4. As found above, the ALJ perceives no violation of any rule or statute as it pertains to the medical records submitted to the DIME physician. The extremely minimal markings, underlining or circling found on only a few pages of the voluminous DIME records are innocuous and do not constitute improper communication with the DIME physician. As such, no penalty shall be imposed against the Respondents and the Claimant is not entitled to a new DIME. The opinions of the DIME are upheld as valid and will be relied upon for the purposes of this ALJ's decision.

Overcoming the DIME Opinions

5. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

6. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

7. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

8. However, if the DIME physician offers ambiguous or conflicting opinions concerning MMI, it is for the Administrative Law Judge to resolve the ambiguity and determine the DIME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000). In doing so, the Administrative Law Judge should consider all of the DIME's written and oral testimony. *Lambert & Sons, Inc., v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1988).

9. As found above, the Respondents have failed to overcome the DIME opinions regarding the second shoulder surgery, adjusted MMI date, and impairment rating for the right upper extremity. The Claimant, although his credibility overall is questionable, has consistently complained of right shoulder pain even immediately after the first surgery. Even Dr. Hsin opined that it was reasonable for Claimant to discuss, and potentially undergo, additional surgery with Dr. Schneider. Although Claimant had restrictions regarding use of his right upper extremity, there is no persuasive evidence that the causal connection to Claimant's right shoulder problems was severed at some point between the first surgery and the second surgery. The ALJ is not persuaded by the testimony of Drs. Lesnak and Orent concerning assessment of Claimant's permanent impairment based on the surveillance videos. In addition, the ALJ is not persuaded by the opinions of Drs. Orent and Lesnak concerning the origin of the partial re-tear of the supraspinatus. Their opinions represent a mere difference of opinion concerning causation, and are insufficient to overcome Dr. Swarsen's conclusions. Consequently Claimant reached MMI on September 18, 2013 with a 33% impairment of the right upper extremity.

Permanent Total Disability

10. Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the inability to earn "any wages in the same or other employment." *Christie v. Coors Transportation Co.,* 933 P.2d 1330 (Colo. 1997). Under the statute, the Claimant carries the burden of proof to establish permanent total disability by a preponderance of the evidence. The question of whether the Claimant proved permanent total disability is a question of fact for resolution by the Administrative Law Judge. Under this statute, a Claimant is not permanently and totally disabled if she able to earn some wages in modified, sedentary, or part time employment. *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

11. In ascertaining whether a Claimant is able to earn any wages, the Judge may consider various "human factors," including a Claimant's physical condition, mental ability, age, employment history, education, and availability of work that the Claimant could perform. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998); *Holly Nursing v. ICAO,* 992 P.2d 701, 703 (Colo. App. 1999). The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the Claimant under his or her particular circumstances." *Bymer, supra*.

12. Given the very vast disparities between the Claimant's clinical presentations, the video surveillance, his presentation to the vocational experts, and his presentation at hearing, the ALJ cannot discern with any level of accuracy whether Claimant truly suffers from the pain and lack of function he claims. Moreover, Dr. Bennett's opinions concerning the myriad of medical conditions, including CRPS, he attributes to Claimant's injury are unpersuasive. Dr. Bennett failed to follow the Medical Treatment Guidelines to confirm the CRPS diagnosis, and Dr. Swarsen questioned such diagnosis as well. Dr. Bennett essentially testified that he need not follow the Guidelines because he is an expert in CRPS and that his clinical judgment should be sufficient. The ALJ disagrees with Dr. Bennett's conclusions based on the credible opinions of Drs. Swarsen, Orent and Lesnak. The diagnosis of CRPS is questionable at best and the ALJ declines to consider the diagnosis as a condition that would impact Claimant's ability to earn wages.

13. Dr. Ruth relied very heavily upon a CRPS diagnosis to determine that Claimant is unable to earn any wages. She further relied upon non-existent work restrictions and journal articles which state that older people with CRPS rarely return to work. Her opinions are unpersuasive as are Dr. Bennett's. While the ALJ understands Claimant is not necessarily pain free, he has failed to demonstrate that he suffers from a level of pain that would prevent him from working.

14. In addition, Claimant has acquired sufficient skills (through both education and experience) throughout his life in order to earn wages. Claimant testified about his breadth of experience working for the Employer, and the skills and expertise he developed both there and with prior employers. The Claimant did not appear drowsy or

drugged during his testimony. He was a good historian, articulate and his thoughts were organized. The Claimant testified he could get the job but not keep the job due to his chronic pain condition. The ALJ is not convinced that Claimant suffers from a chronic pain condition that would affect his ability to obtain and sustain employment. As such, the Claimant has failed to establish that preponderance of the evidence that he is unable to earn any wages in the same or other employment as a result of his work injury.

Maintenance Medical Treatment

15. To prove entitlement to medical maintenance benefits, a Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of the condition. *Grover v. Industrial Commission,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

16. Claimant has failed to prove that he is entitled to maintenance medical treatment. First, implantation of the spinal cord stimulator was unauthorized and not reasonable or necessary. The ALJ credits the opinions of Drs. Orent and Lesnak regarding implantation of the stimulator. Even Dr. Swarsen questioned it. The Claimant has also failed to prove entitlement to maintenance medical care in the form of opioid prescription medication. Although Claimant may suffer from some residual pain in his right upper extremity as a result of his work injury, the Claimant has failed to prove that he requires opioids to cure and relieve him of such pain or to maintain his condition at MMI. The Claimant provided no credible or persuasive evidence that the opioids improve his pain or his function. He testified that his pain has not improved but his function has, but Dr. Swarsen's report stated that his pain had improved but his function had not. As noted above, the inconsistencies in Claimant's testimony, clinical presentation and video surveillance call into question whether Claimant truly suffers from the pain he claims.

Change of Physician

17. Section 8-43-404(5)(a)(VI), C.R.S., allows a change of physician upon written request to the insurer. If the insurer neither grants nor denies the request within twenty days, the insurer shall be deemed to have waived any objection to the employee's request. While this issue may be moot given the conclusions regarding maintenance medical treatment, the ALJ has nevertheless addressed the issue.

18. In examining the abundance of evidence presented in this case, the ALJ can find no persuasive or credible evidence that since November 5, 2013, any circumstances have changed such that Claimant would be entitled to a change of physician. Claimant raised no new persuasive arguments pertaining to the change of physician issue, and no objective evidence demonstrates that the treatment Claimant has received with Drs. Bennett and Schneider since November 5, 2013 has improved his condition in any meaningful way. Claimant's subjective pain complaints are essentially the same; his function has not improved despite his testimony to the contrary (he testified that he now cannot perform basic housework); and he has not returned to work and alleges he is incapable of working. Claimant's authorized treating physicians remain Drs. Orent, Kistler, Sorenson, Hsin and Conyers.

Disfigurement

19. Pursuant to §8-42-108(1), C.R.S., Claimant is entitled to a discretionary award for his serious and permanent bodily disfigurement that is normally exposed to public view. As found, Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view. Accordingly, Claimant is entitled to disfigurement benefits in the amount of $1,800.00.

Attorney Fees

20. Section 8-43-211(3), C.R.S. permits an award of attorney fees for endorsing issues not ripe for adjudication. The Respondent has failed to prove entitlement to an award of attorney fees pursuant to §8-43-211(3). The ALJ cannot necessarily find the issues of production of Respondents' complete files and insurance coverage were not ripe for adjudication. The mere fact that PALJ Clisham had ordered both issues stricken leading up to a hearing set pursuant to a prior application for hearing does not automatically make the issues unripe as a matter of law.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME opinions concerning MMI and permanent impairment. Claimant reached MMI on September 18, 2013 with 33% permanent impairment of the right upper extremity.

2. Claimant has failed to prove that he is permanently and totally disabled as a result of his workers' compensation claim.

3. Claimant's request for maintenance medical treatment is denied and dismissed.

4. The Claimant has failed to prove entitlement to a change of physician. The authorized treating physicians remain Drs. Orent, Kistler, Sorenson, Hsin and Conyers.

5. The Respondents shall pay Claimant $1,800.00 for disfigurement.

6. No attorney fees shall be imposed against Claimant for endorsing unripe issues for hearing.

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

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

DATED: January 26, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Did Claimant satisfy the applicable burden of proof to establish that he is entitled to an award of temporary total disability benefits commencing March 29, 2012 and continuing?

- If Claimant is entitled to an award of temporary total disability benefits did Respondents establish any circumstances to terminate the benefits?

- Did Respondents prove by a preponderance of the evidence that Claimant's entitlement to temporary total disability benefits, if any, should be suspended or reduced based on Claimant's participation in alleged injurious practices?

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. At hearing Respondents' Exhibits A through G were admitted into evidence.

2. Claimant was born in China on April 13, 1962 and lived there until he was 39 years of age. He then immigrated to the United States. Claimant speaks Chinese and does not speak, read or write English. Claimant has worked as a chef for his entire life.

3. In November 2009 Employer hired Claimant to work as a chef in the Employer's Asian restaurant. Claimant opened the restaurant, turned on the lights, prepared soups, prepared and cut food ingredients, cleaned the kitchen, checked stock and cooked food.

4. Claimant testified as follows concerning the events of December 20, 2011. It was a busy day and the kitchen filled with smoke while he was cooking. He then experienced pressure in his chest and could not stop coughing. Thereafter, whenever the kitchen filled with smoke he experienced chest pain and pressure. He also experienced symptoms when climbing stairs. Claimant never had these symptoms prior to December 20, 2011.

5. Claimant explained that in December 2011 the ventilation system at the Employer's restaurant had not been cleaned for more than a year and did not operate properly. Although Claimant reported the ventilation problem to the Employer Claimant testified that the vent remained unrepaired for three months.

6. Claimant testified that on March 21, 2012 he first sought medical treatment for his symptoms from a "family doctor" near his home.

7. On March 21, 2012 PA-C Valerie Maes examined and treated Claimant at Rocky Mountain Family Medicine (RMFM). Claimant reported chest pain, shortness of breath and coughing. Claimant stated that he thought he was "breathing in smoke at work." PA Maes assessed bronchitis, "possibly secondary to smoke exposure." PA Maes prescribed an antibiotic and other medication and referred Claimant for an electrocardiogram (EKG) and spirometry examination.

8. Claimant returned to work at the Employer on March 29, 2012. However, Claimant testified that his chest began to hurt and he gave the Employer a release he received from his "doctor." Claimant testified that he advised the Employer he would rest until April 3, 2014.

9. Claimant's Exhibit 2, p.12, is a "Work/School Release" dated March 29, 2012. The release is illegibly signed by a "provider" at RMFM. The release states Claimant was seen on March 21, 2012 and was "okay to return to work on" April 3, 2012. The ALJ infers this is the release Claimant allegedly gave to the Employer on March 29, 2012.

10. Claimant returned to RMFM on April 4, 2012 where he was seen by PA Maes. Claimant reported he had additional shortness of breath and was weak and dizzy when he attempted to return to work. It was noted Claimant was taking albuterol for his cough and shortness of breath.

11. On April 4, 2012 PA Maes issued another work release to Claimant. This release states that Maes saw Claimant on April 4 and the return to work date was to be determined. PA Maes noted Claimant needed further treatment and evaluation.

12. Claimant testified that he has not worked, nor has he looked for any work since March 29, 2012. He stated that he gave the April 4, 2012 work release to the employer.

13. On April 11, 2012 Claimant returned to RMFM. On that date PA Maes issued a note stating that Claimant was "suffering from chronic bronchitis most likely directly attributed to smoke inhalation at his work establishment." Nathaniel Moore, M.D., referred Claimant for pulmonary medicine and "GI" consultations.

14. On May 10, 2012 Ahmad Rashid, M.D., and PA-C Kasia Hoover examined Claimant at National Jewish Hospital (NJH) on referral from Dr. Moore. Claimant gave a history of "increasing respiratory difficulty" over the past 6 months that he related to "increased smoke inhalational exposure at work." Claimant reported his symptoms of cough, chest pain and dyspnea would improve when he went home from work at night and then worsen when he returned to work. The Claimant advised Dr. Rashid and PA Hoover that he had been off of work since March but had "not noted much improvement in the symptoms." Dr. Rashid and PA Hoover noted that spirometry testing revealed slightly reduced air flow and that Claimant had normal oxygenation at room

temperature. These providers agreed that Claimant's cough may have been "smoke/irritant induced from his occupational exposures," but noted his symptoms had changed little despite being off of work for 2 months. Dr. Rashid and PA Hoover questioned whether there might be "an underlying asthmatic component." Dr. Rashid prescribed Prednisone, Advair, and Albuterol. Dr. Rashid and PA Hoover recommended Claimant stay off work until further evaluation considering "the hypersensitivity of his airways and aggravation by" his exposure to smoke at work.

15. Claimant returned to NJH and Dr. Rashid examined him on May 30, 2012. Dr. Rashid noted Claimant continued to experience coughing that was "triggered" by exposure to smoke, cold air, dust and cooking fumes. Dr. Rashid reviewed pulmonary function tests (PFTs) that showed "evidence of small airway hyperactivity." Dr. Rashid opined Claimant "does seem to have underlying small airway obstructive lung disease – cough variant asthma" and that the "symptoms of cough and wheezing do get worse by workplace exposure to fumes and smoke." Dr. Rashid suggested Claimant use a mask at work but Claimant was "very reluctant to do so." Dr. Rashid described Claimant as "clinically better" but stated Claimant thought he could "not go back to work at this point." Dr. Rashid prescribed Advair and referred Claimant to NJH occupational medicine division "to see if there is anything that we can change in his workplace that might help him keep his job."

16. On July 11, 2012 Annyce Mayer, M.D., examined Claimant at NJH for the purpose of performing an occupational/environmental consultation. Claimant gave a history that he had no respiratory problems until 6 months ago when there was "more smoke in the kitchen because the ventilation system was not working as well as it should." Claimant reported he initially experienced chest discomfort when he left work. By the end of February 2012 or the beginning of March 2012 he began to "cough along with the chest discomfort towards the end of the workday." Claimant reported his cough was better since leaving work at the end of March but the cough was still triggered by smoke, heat and cold. Dr. Mayer opined Claimant's symptoms were suggestive of "airway irritation." Dr. Mayer stated that the "exposure was not consistent with RADS, but bronchitis and irritant-induced asthma" were "in the differential." An element of vocal cord dysfunction (VCD) could not be ruled out. Dr. Mayer recommended a methacholine challenge with laryngoscopy after clarification of Claimant's cardiovascular status.

17. On August 17, 2012 Dr. Mayer referred Claimant for a methacholine challenge with laryngoscopy and an esophagram to rule out gastroesophageal reflux disease (GERD). In the August 17 note Dr. Mayer noted that "schedulers were provided Ms. Chen's contact information as Wei works during the day, to help facilitate the scheduling of his tests."

18. On September 13, 2012 Claimant underwent rhinolaryngoscopy with methacholine challenge. Karin Pacheco, M.D., diagnosed VCD and chronic rhinitis.

19. On September 26, 2012 Dr. Mayer noted Claimant's condition was unchanged except he had a "sense of something in his throat" and had developed

hoarseness that increased with exposure to wind and air conditioning. Claimant was not taking any medications. Dr. Mayer noted claimant had recently undergone a methacholine challenge test that was positive for "mild asthma" and an esophagram showed "mild spontaneous GERD noted only to the mid esophagus." Dr. Mayer assessed cough, chest tightness, throat tightness and shortness of breath that "by history developed in temporal association with failure of the exhaust ventilation system to remove smoke." Dr. Mayer opined Claimant's symptoms are "due to a combination of mild asthma and vocal cord dysfunction, both irritant-induced on a medically probable basis." Dr. Mayer opined the GERD was not work-related but was "probably contributing to the delay in [Claimant's] recovery." Dr. Mayer prescribed "QVAR" one puff twice daily and ProAir HFA 1-2 puffs as needed. Dr. Mayer also prescribed Omeprazole twice daily, Ranitidine and speech therapy "for breathing techniques including with exposure to irritants and exercise." Dr. Mayer noted that she expected Claimant would respond well to this course of treatment.

20. Dr. Mayer added an addendum to her September 26, 2012 note stating that Claimant's case had been discussed in an occupational and environmental medicine case conference with an "industrial hygienist and occupational pulmonologists." Dr. Mayer wrote that it was the "consensus opinion of the group that but for the described smoke exposure, it is medically probable that [Claimant] would not have developed these respiratory symptoms due to asthma and vocal cord dysfunction."

21. On October 10, 2012 Dr. Mayer noted Claimant had not been able to tolerate the OVAR and ProAir treatments. Claimant requested oral medication and Dr. Mayer prescribed "albuterol extended release 4 mg twice daily."

22. On October 19, 2012 Dr. Mayer noted Claimant reported "improvement with albuterol." Claimant also reported that he recently had been cooking at home and about twice a week "will stir fry something such as pepper, which will increase his symptoms." Dr. Mayer opined that if Claimant continued treatment he would continue to improve and be able to return to work as a cook in a kitchen with "appropriate ventilation."

23. On October 23, 2012 Lawrence Repsher, M.D., performed an independent medical examination (IME) of Claimant. Dr. Repsher issued a written report on October 29, 2012. Dr. Repsher took a history, reviewed records of Claimant's treatment at NJH and performed a physical examination (PE). Dr. Repsher noted Claimant had undergone "normal" chest x-rays and PFTs. Claimant's oxygen saturation was also reportedly normal. On PE Dr. Repsher noted that Claimant's breath sounds were initially normal but then Claimant began to have "volitional cough and wheezing." Dr. Repsher commented that the September 2012 methacholine challenge was reported to be strongly positive but Dr. Repsher opined, based on Claimant's "behavior during my physical examination" that Claimant was "clearly malingering." Dr. Repsher's impression was malingering versus Munchausen's syndrome. Dr. Repsher opined that Claimant has no medical condition and therefore there was no "causality." Likewise, Dr. Repsher opined Claimant does not need any additional medical care and does not need any restrictions.

24. On January 16, 2013 Dr. Mayer noted that Claimant's breathing continued to improve although he had some "triggering symptoms" around smoke, stir frying in the home and cold air. Claimant had reportedly stopped using albuterol and his GERD medications because he believed they caused him to experience severe elbow pain. Dr. Mayer noted Claimant had a history of epicondylitis and recommended he get treatment for this condition. Dr. Mayer stated that she would not recommend that Claimant resume taking albuterol because Claimant was convinced the drug triggered his elbow pain. Dr. Mayer stated she would be willing to prescribe albuterol again if Claimant wanted to try it, but opined it would not necessarily be required considering Claimant's "considerable improvement." Dr. Mayer's diagnoses remained unchanged. However, she opined Claimant's condition had stabilized and he had reached maximum medical improvement (MMI) since there was no additional treatment to be considered.

25. By using the methodology recommended by the Division of Workers' Compensation Level II accreditation course Dr. Mayer assessed 14% whole person impairment for occupational asthma. She noted no impairment rating was available for paroxysmal VCD. As permanent restrictions Dr. Mayer recommended Claimant "avoid exposure to irritant dust, smoke and fumes and physical exertion in cold air."

26. At the request of Claimant's former attorney, Dr. Rashid submitted a report dated February 25, 2013. Dr. Rashid wrote that "the clinical findings and spirometry as well as subsequent workup by Dr. Annyce Mayer from the division of environmental and occupational medication, indicate a diagnosis of mild reactive airway disease and bronchospasm, most probably caused by exposure to smoke in the workplace." Dr. Rashid also stated that he reviewed Dr. Mayer's "consult notes" and concurred with her opinion.

27. On March 21, 2013 Clarence Henke, M.D., conducted an IME of Claimant at the Respondents' request. Dr. Henke is board certified in preventative medicine and board certified by the conjoint boards of internal medicine, pathology, radiology and nuclear medicine. He is Level II accredited. Dr. Henke took a history from Claimant, reviewed medical records and performed a PE. Dr. Henke apparently did not review any medical records subsequent to Dr. Repsher's October 29, 2012 report.

28. In a report dated April 4, 2013 Dr. Henke stated Claimant gave a history that he was working as a cook and began having "breathing problems" in the "summer of 2011" because of a poorly functioning ventilation system. On PE of the neck Dr. Henke noted wheezing and stridor over the larynx when Claimant was speaking and breathing. On PE of the chest Dr. Henke noted that breath sounds were normal in quiet breathing but slight rhonchi and wheezing were caused by forced exhalation." Dr. Henke's impressions included "occupational asthma secondary to smoke inhalation" at work, laryngitis secondary to VCD of uncertain etiology and GERD. Dr. Henke opined that Claimant's occupational asthma was improved by medications provided by NJH physicians, but Claimant reported he could not "financially afford these medications." Dr. Henke opined Claimant would continue to improve if he could afford the medications prescribed at NJH. Dr. Henke opined claimant could return to work avoiding smoke,

gasses, fumes and extreme temperature changes. Dr. Henke opined Claimant "will be able to return to work as a cook in kitchens that provide appropriate ventilation."

29. On April 29, 2013 Insurer filed a General Admission of Liability. Respondents admitted Claimant sustained an injury on December 20, 2011. Insurer admitted liability for medical benefits but not temporary total disability (TTD) benefits.

30. Claimant returned to Dr. Mayer on July 31, 2013. Dr. Mayer noted that the claim for workers' compensation had been "accepted" and that Claimant had recently undergone an IME. Claimant reported symptoms of cough and throat tightness particularly when walking outside on windy and cool days. Dr. Mayer recommended that Claimant again try oral albuterol, and Claimant indicated his willingness to do so. Dr. Mayer also prescribed speech therapy to improve "breathing techniques." Dr. Mayer also recommended further evaluation of GERD.

31. On September 9, 2013, Dr. Mayer reported that Claimant felt "about 30% better" since resuming albuterol. Dr. Mayer noted Claimant had recently undergone a "pH probe" and there was no evidence of GERD, which had previously been considered a contributor to Claimant's symptoms. On PE Dr. Mayer noted prominent laryngeal sounds on forced exhalation. Dr. Mayer stated Claimant had not yet returned to speech therapy for review of breathing techniques, but she opined that Claimant's "examination today certainly suggests that a large component of his ongoing symptoms are related to vocal cord dysfunction." Dr. Mayer anticipated MMI in 6 to 8 weeks.

32. On November 12, 2013 Dr. Henke issued an additional report after reviewing Dr. Mayer's notes of January 16, 2013 and July 21, 2013. Dr. Henke wrote that he agreed with Dr. Mayer's January 16, 2013 statements that Claimant was at MMI and no additional treatment was needed. Dr. Henke also stated that based on Dr. Repsher's October 23, 2012 examination Claimant could have returned to work "in some capacity that did not feature environmental conditions that could irritate his respiratory system." Dr. Henke noted claimant had multiple non-industrial health issues. Dr. Henke did not think that claimant was totally incapable of working.

33. On December 5, 2013 Claimant returned to Dr. Mayer. Dr. Mayer noted Claimant had undergone 4 sessions of speech therapy to address his breathing technique. The speech therapist reported that Claimant responded well but the favorable response was "short-lived." Dr. Mayer opined Claimant was at MMI. Dr. Mayer assessed a combined 19% whole person impairment for asthma and VCD, which Dr. Mayer classified as an "air passage defect." Dr. Mayer reiterated that Claimant was restricted from exposure to irritant dust, smoke, fumes and work in cold air. Dr. Mayer opined these restrictions would limit Claimant's employment options including his "former career as a chef in a Chinese restaurant." Dr. Mayer recommended medical maintenance treatment to include two clinic visits per year as needed and ongoing use of oral albuterol.

34. In their position statements both parties indicate that Respondents requested a Division-sponsored independent medical examination (DIME) following Dr. Mayer's December 5, 2013 report.

35. On February 20, 2014 Michael Volz, M.D., performed a DIME. Dr. Volz took a history, performed a PE and reviewed medical records. It is not always clear which medical records Dr. Volz reviewed since he did not summarize them in his report. Claimant's reported symptoms included a cough, chest pain, shortness of breath and chest tightness. Claimant gave a history of onset of the symptoms since December 2012. These symptoms reportedly appeared "after inhaling smoke." Claimant reported he tried inhalers for asthma but they did not work. He was currently taking "asthma pills" twice daily. On PE Dr. Volz noted airflow was normal and there were no "unordinary breath sounds."

36. Dr. Volz "assessed" cough, dyspnea, chest pain and chronic pharyngitis. Dr. Volz opined the cause(s) of Claimant's symptoms remains "unknown" at this time. Dr. Volz further stated that the "accurate/diagnoses is/are not clearly established." Dr. Volz explained that the timing of the onset of Claimant's symptoms does not prove that a "workplace exposure" caused the issues. Instead, Dr. Volz stated that the possibility of RADS was highly unlikely in the absence of a "of a sudden and acute exposure." He did state that if there was an "airflow issue at work" there is no doubt "this factor could at least temporarily" have worsened Claimant's "status non-specifically."

37. Dr. Volz opined that a "positive" methacholine test does not mean that "someone has asthma," especially where the person failed to respond to "controller asthma medications." Dr. Volz noted that Claimant was taking albuterol but still experienced symptoms. However, Dr. Volz also noted that Claimant's reported "improvement on oral tabs of albuterol suggests subjectively asthma might be present." Dr. Volz also noted that Claimant's "objective tests do show some degree of airway reversibility" that "would suggest asthma might be present."

38. Dr. Volz also opined there is "absolutely no evidence" to support the diagnosis of VCD. He noted that a key feature of VCD is paradoxical vocal cord movement on inspiration. However, in this case closure of the vocal cords was only seen on expiration. He further opined that the record contains evidence that Claimant has GERD which could explain his symptoms. In any event, Dr. Volz opined that the medical literature indicates that if VCD is present there is a very high likelihood that it is not work-related.

39. Dr. Volz opined Claimant is not at MMI because he has not tried to relieve his symptoms through the use of alternative inhaled "combination medications." However, Dr. Volz opined that "the question of whether to discuss MMI" is a "moot point" because Claimant's symptoms cannot be causally connected to his work. Dr. Volz stated that if causation was established he would assign a 0% impairment rating because there are "no current objective abnormalities beyond the question of bronchiectasis, the cause and duration of which is unknown."

40. On March 20, 2014 Dr. Volz completed a Division IME Examiner's Summary Sheet on which he marked an "x" next to the statement: "No the claimant is not at MMI."

41. There is no credible and persuasive evidence that Respondents filed a Final Admission of Liability (FAL) following the issuance of Dr. Volz's DIME report. Rather, the Respondents state in their position statement that the case "remained on General Admission."

42. Claimant returned to Dr. Mayer on December 31, 2014. Claimant reported that overall he was doing "relatively well." Claimant reported there had been a "problem with his medication being covered last fall" but he was using the medications on December 31. Dr. Mayer recommended Claimant continue to use albuterol as needed for asthma and return in a year for follow up unless there was a earlier worsening of condition.

43. Dr. Henke testified by deposition on April 8, 2015. Dr. Henke stated that he agreed with Dr. Rashid that Claimant's symptoms (cough, chest tightness and dyspnea) were "smoke/irritant induced from his occupational exposure." Dr. Henke testified that on PE of the Claimant he noted "slight sounds of wheezing" during forced expiration. Dr. Henke stated that this finding gave him the impression that Claimant "had occupational asthma, which is work-related, secondary to smoke inhalation at the workplace." Dr. Henke testified that he agreed with Dr. Volz that the cause of Claimant's symptoms could not be traced to a "cause" associated with a specific date or event. However, Dr. Henke opined the Claimant's respiratory symptoms were "aggravated" by irritants in the workplace including smoke. Dr. Henke explained that asthma is a "general condition" with many causes, but when he used the term "occupational asthma" he was referring "very specifically to smoke inhalation."

44. Dr. Henke testified that he agreed with Dr. Volz's opinion that "there's absolutely no evidence to support a vocal cord dysfunction." Dr. Henke explained that there is "no anatomical reason for that to cause respiratory discomfort."

45. Dr. Henke testified that Dr. Rashid's suggestion that Claimant wear a mask to work was a "reasonable accommodation." Dr. Henke understood Claimant did not want to use a mask. Dr. Henke stated the type of mask he recommended for Claimant would include a "small oxygen supply" and contain a filter that would remove smoke particulates. Dr. Henke opined it would be difficult to wear a mask "on an eight-hour or more time of work as a chef."

46. Dr. Henke opined that Claimant could have returned to work at the end of October 2012. Dr. Henke explained that by that date Claimant's symptoms had improved and the diagnostic tests, primarily spirometry, did not show any evidence of lung abnormalities. Consequently Dr. Henke opined there was no reason for Claimant to remain off of work. However, Dr. Henke opined Claimant should avoid exposure to "smoke and dust." Dr. Henke opined Claimant could return to work as a chef as long as the smoke was properly controlled and the vent system is working on the hood.

47. Dr. Henke testified he agreed with Dr. Mayer's January 13, 2013 report that Claimant's condition, although not fully resolved, was stable and Claimant was at MMI because there was no additional treatment to be considered.

48. Dr. Mayer testified by deposition on June 18, 2015. Dr. Mayer disagreed with Dr. Henke that there is no evidence that Claimant sustained VCD. Dr. Mayer opined that exposure to "irritants" is a "known" cause of VCD. She explained that exposure to irritants can cause "endogenous or exogenous" VCD. She explained that an example of endogenous VCD would occur after a "severe respiratory illness" while exogenous VCD is a type of "learned response" that can develop as a "protective mechanism" that develops when a person is in an irritant environment.

49. Dr. Mayer testified that during her treatment of Claimant she never thought there was a cause of Claimant's symptoms other than exposure to smoke caused by the faulty ventilation system at Claimant's job.

50. Dr. Mayer testified that a positive methacholine challenge is a "test of nonspecific air wave's hyperresponsiveness, which in the proper clinical context does establish the diagnosis of asthma." Dr. Mayer explained that taken together with Claimant's pre-challenge history of cough, wheeze, chest tightness and shortness of breath the methacholine challenge results established "confirmed" asthma. Dr. Mayer stated that "one can't fake a positive methacholine challenge." Dr. Mayer testified that asthma can "trigger coughs."

51. Dr. Mayer opined that returning to work while using a "respirator" was not a "feasible option" for Claimant. Dr. Mayer opined that "wearing a mask" for eight hours per day would have "been extremely difficult" because the mask would have been "hot and uncomfortable," particularly in a cooking environment. Further, Dr. Mayer opined that use of the mask would have impeded "communication." Dr. Mayer disagreed with Dr. Henke that use of a mask with oxygen would be a "reasonable accommodation." Dr. Mayer stated that use of oxygen presents a fire hazard and is typically not recommended "within six feet of stoves."

52. Dr. Mayer was asked when Claimant could have returned to work. Dr. Mayer stated that she was concerned that working in any kind of a kitchen environment would have been "difficult" for Claimant unless the local exhaust system was "optimized" to prevent "too much in the way of irritant exposures." Dr. Mayer explained that merely because an exhaust system is working properly does not mean the conditions are "optimized." Dr. Mayer stated that she did not know anything about the "current status" of Claimant's workplace and therefore did not know if the ventilation conditions were ever "optimized such that he could return to work."

53. Dr. Mayer testified that she was never under the impression that Claimant returned to work during treatment. Dr. Mayer credibly explained that when she wrote that "Wei works during the day" in the August 17, 2012 note she was referring to Claimant's son Jay, not to Claimant himself. Dr. Mayer further explained that she

referred to Ms. Chen because Chen was to act as Claimant's interpreter for scheduling appointments.

54. Claimant proved it is highly probable and free from serious doubt that he developed symptomatic occupational asthma proximately caused by the admitted industrial accident of December 20, 2011.

55. Claimant credibly testified that on December 20, 2011 he was performing his duties as a chef when the kitchen became very smoky because of a malfunctioning exhaust system. Claimant credibly testified that this event caused him to experience pressure in his chest and coughing. Claimant continued to experience these symptoms whenever the kitchen filled with smoke, and his symptoms tended to decline when he went home from work. Claimant credibly testified that the ventilation system was not repaired before he left work on March 29, 2012. Claimant credibly testified he had not had any respiratory symptoms prior to the events of December 20, 2011.

56. Dr. Mayer credibly and persuasively opined that Claimant's exposure to smoke at work caused him to develop irritant-induced asthma. Dr. Mayer credibly explained that the methacholine challenge was positive for asthma when considered in the context of Claimant's history. Dr. Mayer credibly and persuasively opined that there is a significant "temporal relationship" between the malfunctioning of the ventilation system at Claimant's place of employment and the development of Claimant's respiratory symptoms.

57. Dr. Mayer's opinion that work-related exposure to smoke caused Claimant to develop asthma is corroborated by Dr. Henke. In his report of April 4, 2013 Dr. Henke opined that Claimant sustained "occupational asthma" secondary to exposure to smoke. He explained that the diagnosis was supported by sounds of "slight rhonchi and wheezing" on forced exhalation. Even though Dr. Henke changed his opinion concerning whether or not Claimant suffers from VCD, he never changed his opinion that Claimant developed "occupational asthma" caused by exposure to smoke. Dr. Mayer's opinion is further corroborated by Dr. Rashid who reviewed Dr. Mayer's notes and concurred with her opinion that Claimant suffered from "mild reactive airway disease and bronchospasm, most probably caused by exposure to smoke in the workplace."

58. Dr. Repsher's opinion that Claimant has "no medical condition" and that Claimant is "malingering" is not persuasive. Dr. Mayer persuasively testified that it is not possible to "fake" a response to a methacholine challenge. Although Claimant may have exaggerated his symptoms when Dr. Repsher performed his examination, the ALJ is not persuaded that all of Claimant's symptoms were fabricated. Even Dr. Volz, the DIME physician acknowledged the Claimant may have experienced a "temporary," albeit "unspecified," condition when he was exposed to smoke in the workplace.

59. To the extent Dr. Volz, the DIME physician, opined that Claimant does not suffer from asthma caused by his exposure to smoke in the workplace the ALJ finds his opinions are not persuasive. Dr. Volz's opinions are persuasively refuted by the

credible opinions of Dr. Mayer, Dr. Henke and Dr. Rashid. Doctors Mayer, Henke and Rashid agree that exposure to smoke either caused Claimant to develop asthma or aggravated a prior underlying condition that manifested itself as symptomatic asthma. Moreover, even Dr. Volz admitted that Claimant's "subjective" improvement while taking albuterol and "objective" tests demonstrating "some degree of airway reversibility" suggest asthma "might be present."

60. Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing March 29, 2012.

61. As found, Claimant has proven by clear and convincing evidence that exposure to smoke at work caused him to develop occupational asthma. Dr. Mayer opined that that Claimant's symptoms of cough, chest tightness and shortness of breath result from a "combination" of "mild asthma" and VCD. (See Finding of Fact 19). Dr. Mayer has repeatedly and persuasively opined that Claimant should not return to work in an environment where he is exposed to smoke and fumes. (Findings of Fact 25 and 33). When asked when Claimant could have returned to work Dr. Mayer credibly testified that she does not know when Claimant could have returned to his pre-injury employment, if ever, because she has no information that the ventilation system had been "optimized" sufficiently to allow him to return to work.

62. The ALJ infers from Dr. Mayer's testimony and restrictions that she believes occupational asthma is at least one of the causes of the need for a restriction that prevented Claimant from returning to his pre-injury job. Further Dr. Mayer was of the opinion that the restriction should remain in place until the ventilation system was "optimized" to prevent exposure to irritants.

63. Dr. Mayer's opinion that occupational asthma restricted Claimant from returning to his pre-injury employment is corroborated by the opinions of Dr. Henke. Dr. Henke testified that he believes Claimant suffers from "asthma" that was "aggravated" by exposure to smoke in the workplace. Dr. Henke opined Claimant should avoid dust and smoke. Dr. Henke opined Claimant could return to work as a chef as long as the smoke was properly controlled and the ventilation system was working. The ALJ infers from these statements that Dr. Henke agrees with Dr. Mayer that claimant should not be exposed to smoke in the workplace and should not be released to return to his regular employment until the ventilation system is "working."

64. Claimant credibly testified that he left work on March 29, 2012 as a result of the restrictions imposed at RMFM. Claimant credibly testified he has not returned to work since that time.

STIPULATIONS

65. The parties stipulated that the Claimant's TTD rate is $467 per week.

66. The parties stipulated that if Claimant is awarded TTD benefits Respondents are entitled to a Social Security Disability offset of $49.38 per week commencing March 29, 2012 and continuing.

67. The parties stipulated that if Claimant is awarded TTD benefits Respondents are entitled to an unemployment insurance offset of $185.54 per week for the period of November 18, 2012 through May 30, 2013.

68. The parties stipulated that if Claimant is awarded TTD benefits Respondents are entitled to an unemployment insurance offset of $151.38 per week for the period of May 31, 2013 through July 7, 2013.

CONCLUSIONS OF LAW

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

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

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

LEGAL STANDARD TO PROVE ENTITLEMENT TO TEMPORARY TOTAL DISABLITY BENEFITS

Claimant contends that a preponderance of the evidence demonstrates that he is entitled to an award of TTD benefits commencing March 29, 2012 and continuing to the present. Claimant argues that the admitted industrial injury caused both occupational asthma and VCD. He further asserts that both of these conditions have contributed to his inability to return to his regular employment.

Respondents contend that Claimant failed to prove that he is entitled to TTD benefits. In support of this position Respondents assert that Dr. Mayer restricted Claimant from work, at least in part, because she diagnosed VCD. However, Respondents note that the DIME physician (Dr. Volz) found Claimant does not have VCD and that even if he does it is not work-related. Respondents assert that Claimant

failed to "overcome" Dr. Volz's findings regarding VCD by clear and convincing evidence. Respondents contend that in these circumstances Claimant is not entitled to TTD benefits. Respondents' argument assumes that even if Claimant proved he has work-related asthma that he would not be entitled to TTD benefits unless he also proved that he has VCD.

The Respondents also argue that Claimant has "waived" the right to contest the DIME physician's opinions because Claimant failed to apply for a hearing to "overcome the DIME."

.Relying on Dr. Repsher's opinions, Respondents also argue that "malingering is present in this case." Respondents cite Dr. Repsher's opinion as the basis for their "position that TTD should be awarded from the date of injury to October 23, 2013, when Claimant was able to return to work.

The ALJ concludes Claimant proved by clear and convincing evidence that he sustained occupational asthma as a result of the admitted industrial injury of December 20, 2011. In these circumstances, the ALJ concludes Claimant proved he is entitled to TTD benefits without regard to whether he has work-related VCD.

Usually a claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks TTD benefits were proximately caused by an injury or occupational disease arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must also 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); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999); *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).

To prove an initial entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, the claimant left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to prove a causal connection between the work-related injury and

a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of "disability" presents a question of fact for the ALJ. To prove disability there is no requirement that a claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). When a claimant does present medical evidence of restrictions it is for the ALJ to assess the weight and credibility to be assigned such evidence. *King v. The Inn at Silver Creek,* WC 4-844-514 (ICAO February 6, 2012).

As an initial matter the ALJ concludes it is necessary to determine the burden of proof which the Claimant must bear in order to establish that the admitted industrial injury "caused" the alleged temporary disability. This issue arises because Claimant asserts that he must prove by a mere preponderance of the evidence that the occupational diseases of asthma and VCD caused his temporary disability. Conversely, Respondents argue the parties are bound by the Dr. Volz's finding that Claimant does not have work-related VCD.

The ALJ notes that Respondents do not cite any cases, statutes or other authority to support their argument that because Dr. Volz is the DIME physician his "diagnosis determinations" must be "accepted." Consequently, the ALJ is left to state his own understanding of the legal basis for Respondents' argument.

The ALJ infers that Respondents' legal argument is that the findings of the DIME physician (Dr. Volz) concerning Claimant's diagnoses and the causes of those diagnoses are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(II), C.R.S., and § 8-42-107(8)(c), C.R.S., require that the treating physician's determinations with respect to MMI and permanent medical impairment "cannot be disputed in the absence of" a DIME. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 190 (Colo. App. 2002). Section 8-42-107(8)(b)(III), C.R.S., provides that a DIME physician's finding concerning MMI "may be overcome only by clear and convincing evidence." Similarly, § 8-42-107(8)(c), C.R.S., provides that a DIME physician's finding concerning permanent medical impairment "may be overcome only by clear and convincing evidence."

Our courts have held that determinations of MMI and medical impairment require a 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). Therefore, a DIME physician's findings concerning the diagnoses of a claimant's medical conditions and the cause of those conditions are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office, supra*.

In contrast, when the issue to be determined concerns the "threshold" determination of whether the Claimant sustained *any injury* proximately caused by the performance of service arising out of and in the course of employment, the DIME physician's opinion is not given any presumptive weight and need not be overcome by clear and convincing evidence. Rather the threshold issue of "compensability" is determined under the preponderance of the evidence standard. *Eller v. Industrial Claim Appeals Office,* 224 P.3d 397 (Colo. App. 2009); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

In this case the "threshold" issue of whether the Claimant sustained an injury arising out of and in the course of employment is not in dispute because the Respondents filed a GAL admitting that Claimant sustained a compensable injury on December 20, 2011. *See Leprino Foods v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *Nielsen-Hernandez v. King Soopers*, WC 4-657-036 (ICAO February 2, 2011); *Gianzero v. Final Order Wal-Mart Stores, Inc.,* WC 4-669-749 (ICAO May 5, 2010). The Respondents have not sought to withdraw that admission.

Rather the precise issues presented for determination are whether the Claimant sustained work-related asthma and/or VCD as a result of his exposure to smoke at work, and whether one or both of these conditions caused Claimant to become temporarily disabled. The Claimant does not dispute that Respondents timely sought a DIME to review Dr. Mayer's December 5, 2013 finding that Claimant was at MMI and had a 19% whole person impairment rating attributable to the residual effects of asthma and VCD. The question of whether the admitted injury caused asthma and/or VCD fell within the DIME physician's authority to diagnose the Claimant's medical conditions, determine whether any of Claimant's medical conditions are work-related, determine whether Claimant's conditions are stable and determine whether these conditions caused any ratable permanent impairment. It follows that the question presented here is the "extent" of the Claimant's work-related injury and not the existence of a work-related injury. The "extent" of Claimant's injury was a question properly submitted to the DIME physician and the ALJ and the parties are bound by the DIME physician's findings unless overcome by clear and convincing evidence. *Leprino Foods v. Industrial Claim Appeals Office, supra*; *Nielsen-Hernandez v. King Soopers, supra*; *Gianzero v. Final Order Wal-Mart Stores, Inc., supra*.

It follows that becasue the DIME physician found the Claimant does not have work-related asthma and/or VCD the claimant must overcome those findings by clear and convincing evidence.

DIME PHYSICIAN'S TRUE OPINION REGARDING DIAGNOSES OF OCCUPATIONAL ASTHMA AND VCD

The ALJ notes that the DIME physician's findings concerning the correct diagnosis of Claimant's injury-related medical conditions and the cause of those conditions are somewhat ambiguous. On the one hand Dr. Volz "assessed" the Claimant with cough, dyspnea, chest pain and chronic pharyngitis and stated the cause of these conditions remains "unknown." This would suggest that Dr. Volz found the Claimant does not have diagnosable asthma, or if he does have asthma it is not work-related. (Dr. Volz emphatically found Claimant does not have VCD, and even if he did it would probably not be work-related.)

On the other hand, Dr. Volz indicated Claimant is not at MMI because he should try different medications for treatment of asthma. Dr. Volz also marked the Division IME Examiner's Summary Sheet to indicate Claimant is not at MMI. Section 8-40-201(11.5), C.R.S., defines MMI 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." (Emphasis added.) Because Dr. Volz has indicated Claimant is not at MMI his report could be interpreted as finding that Claimant has work-related asthma and needs additional treatment for that condition before reaching MMI.

In cases where a DIME physician offers ambiguous or conflicting inferences concerning MMI or impairment, the ALJ must 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); *Rainwater v. Sutphin*, WC 4-815-042-04 (ICAO September 9, 2014).

The ALJ determines as a matter of fact that Dr. Volz's true findings are that Claimant probably does not have asthma, but even if he does have asthma it is not causally related to his exposure to smoke in the workplace.

With regard to the "diagnosis" of Claimant's condition, the ALJ finds that Dr. Volz never actually diagnosed Claimant as suffering from "asthma." Rather, Dr. Volz "assessed" Claimant with symptoms of cough, dyspnea, and chest pain and stated that the cause of these conditions or symptoms is "unknown." Dr. Volz further stated that the "accurate/diagnoses is/are not clearly established." Moreover, Dr. Volz discussed why he believes that Claimant's symptoms are not consistent with asthma and why the positive methacholine challenge may not be diagnostic of asthma considering the persistency of Claimant's symptoms despite the use of albuterol.

With regard to the cause of Claimant's symptoms, the ALJ finds that Dr. Volz did not intend to suggest that Claimant is not at MMI because he needs additional medical treatment for work-related asthma. Dr. Volz stated that he considered his discussion of

MMI, and hence the need to try different asthma medications, to be "moot" because "there is no clear established causal work relationship." The ALJ finds that Dr. Volz's statement means that even if Claimant has asthma that condition is not related to Claimant's employment. Therefore, the ALJ determines that Dr. Volz found it would be meaningless to consider whether Claimant needs additional treatment for asthma because that condition would not causally related to his employment.

It follows from this discussion that Claimant is obliged to overcome Dr. Volz's findings regarding diagnosis and causation by clear and convincing evidence.

OVERCOMING DIME BY CLEAR AND CONCINCING EVIDENCE

The ALJ concludes Claimant proved by clear and convincing evidence that he has work-related occupational asthma proximately caused by the admitted industrial injury of December 20, 2011.

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 a DIME physician's findings concerning MMI and or impairment must produce evidence demonstrating that it is highly probable the DIME physician's findings are incorrect. The question of whether the party challenging the DIME physician's findings has overcome them 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 54 through 59, Claimant proved it is highly probable and free from serious doubt that he sustained occupational asthma proximately caused or aggravated by exposure to smoke in the workplace. As found, the ALJ is persuaded by the opinions of Dr. Mayer, Dr. Rashid and Dr. Henke that Claimant has occupational asthma that was either caused by or aggravated by the workplace exposure to smoke. The ALJ is persuaded by Claimant's testimony that the asthma was caused or aggravated by the exposure to smoke that resulted from the malfunctioning of the ventilation system in the employer's kitchen. The ALJ finds that the opinions of Dr. Volz are not persuasive for the reasons stated in Finding of Fact 59.

ALLEGED WAIVER OF RIGHT TO CHALLENGE DIME PHYSICIAN'S FINDINGS

Respondents contend that Claimant "waived" his right to challenge the DIME physician's findings because he did not timely apply for a hearing to overcome the DIME. The ALJ rejects this argument.

As Respondents acknowledge in their position statement, an "implied" waiver based on a party's conduct must be free from ambiguity and clearly manifest an intent not to assert the right or benefit. *Department of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984).

Section 8-43-203(2)(b)(II)(A), C.R.S., provides that a claimant has 30 days after the respondents file an FAL to contest the admission in writing and request a hearing on ripe issues. However, in the event a party requests a DIME, the claimant is not required to request a hearing "until the division's independent medical examination process is terminated for any reason." Section 8-43-203(2)(b)(II)(A) also provides as follows:

> The respondents have twenty days after the date of mailing of the notice from the division of the receipt of the IME's report to file an admission or to file an application for hearing. The claimant has thirty days after the date respondents file the admission or application for hearing to file an application for hearing, or a response to respondents' application for hearing, as applicable, on any disputed issues that are ripe for hearing.

There is no credible or persuasive evidence to establish Respondents filed an FAL after the DIME report was issued. Neither is there any credible and persuasive evidence that they filed an application for hearing to contest any finding of the DIME physician. It follows that the Claimant's obligation to challenge the DIME physician's findings by objecting to an FAL or by filing a response to the Respondents' application for hearing never actually arose under § 8-43-203(2)(b)(II)(A). In these circumstances the Claimant's failure to "file an application for hearing" to contest one or more of the DIME physician's findings does not constitute an implicit waiver of the right to do so. To the contrary, it appears that nothing can be inferred from Claimant's failure to request a hearing because his duty to contest the DIME physician's findings had not yet been triggered under the statutory scheme.

TEMPORARY TOTAL DISABLITY BENEFITS

Claimant argues he is entitled to an award of TTD benefits commencing March 29, 2012 and continuing because the combination of asthma and VCD rendered him to be unable to perform his regular employment. Claimant relies heavily on the restrictions imposed by Dr. Mayer as the basis for this argument. Respondents assert Claimant failed to prove that he was "disabled" from performing his regular employment and is not entitled to TTD benefits. Specifically Respondents contend that Dr. Mayer considered VCD when "precluding Claimant from working in smoke and with irritant spices." Respondents assert that Claimant has not overcome the DIME physician's finding that Claimant does not have VCD. Respondents also assert that if Claimant is awarded TTD benefits the award should not continue past October 23 when Dr. Repsher opined Claimant could return to work.

As determined in Findings of Fact 60 through 64 Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing March 29, 2012 and continuing until terminated by law or order. As found, the ALJ is persuaded by the testimony opinions of Dr. Mayer and Dr. Henke that as of March 29, 2012, when Claimant left work, occupational asthma contributed to Claimant's inability to perform his regular duties as a Chef. Specifically, Claimant could not return to work

at his regular employment because the Employer's ventilation system caused him to be exposed to irritant smoke at levels that would have caused him to experience symptoms of asthma. There is no credible and persuasive evidence that the ventilation system was ever sufficiently repaired to avoid exposure to smoke at levels that would allow Claimant to perform his regular duties.

The ALJ considers the arguments about whether or not Claimant could return to work with a "mask" to be a red herring. Claimant's regular job did not require use of a "mask." Provision of a mask, even if workable, would have constituted an offer of modified employment. There is no showing that any offer of modified employment was ever made.

The Respondents insist that because Dr. Mayer considered the diagnosis of VCD as one of the bases for imposing the restriction against returning to regular employment, Claimant has not proven entitlement to TTD benefits. The respondents argue that Claimant has not overcome the DIME physician's opinion that Claimant does not have VCD. Indeed, the ALJ has not found that Claimant overcame the DIME physician's opinion that Claimant does not have VCD.

However, as found, Dr. Mayer imposed the restriction against returning to regular employment in part because of the established diagnosis of work-related asthma. Dr. Henke imposed a restriction against returning to regular employment based *entirely* on the diagnosis of asthma. Indeed, Dr. Henke is of the opinion Claimant does not have VCD. It follows that Claimant has proven by a preponderance of the evidence that work-related injury is, at a minimum, a partial cause of his inability to resume his regular employment and Claimant is entitled to an award of TTD benefits. *See Horton v. Industrial Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996).

The respondents advance a meritless argument that any TTD benefits awarded should end on October 23, 2013, when Dr. Repsher opined that Claimant had no medical condition and did not need restrictions. As noted above, once Claimant establishes a right to TTD benefits the benefits continue until such time as the Respondents establish grounds to terminate them in accordance with one of the circumstances listed in § 8-42-105(3). Because Dr. Repsher is an IME physician and not a treating or attending physician, his opinion is insufficient to provide a basis for terminating Claimant's TTD benefits under any of the statutory conditions. The same is true of Dr. Henke insofar as Dr. Henke agreed with Dr. Repsher.

INJURIOUS PRACTICE

Respondents contend that Claimant engaged in injurious practices by failing to seek medical treatment from April 29, 2013 to July 31, 2013, and from December 2013 to December 2014. Respondents also assert that Claimant's failure to take albuterol constituted an "injurious practice." The Respondents argue Claimant's actions should result in a reduction or suspension of Claimant's compensation pursuant to § 8-43-404(3), C.R.S.

The pertinent passage of § 8-43-404(3) states the following:

> 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.

The burden of proof to establish the elements of this defense rests with the Respondents. *Cain v. Industrial Commission,* 136 Colo. 227, 315 P.2d 823 (Colo. 1957). Generally, the question of whether the circumstances would justify the ALJ in exercising discretion to reduce or suspend compensation presents issues of fact. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

The ALJ concludes that Respondents failed to prove it is more probably true than not that Claimant engaged in an injurious practice or failed to cooperate with medical treatment from April 29, 2013 (when the GAL was filed) to July 31, 2013 when he returned to Dr. Mayer. As determined in Finding of Fact 24, Claimant was seen by Dr. Mayer, an ATP, on January 16, 2013. At that time Dr. Mayer concluded that Claimant did not need any further treatment and placed Claimant at MMI. Therefore, Claimant's failure to seek medical treatment from April 29, 2013 until July 31, 2013 cannot be classified as persistence in an injurious practice or a "refusal" to submit to treatment needed to promote recovery. Instead, Claimant's behavior during this period of time is best categorized as cooperation with the then existing recommendations of the ATP.

The ALJ concludes that Respondents failed to prove it is more probably true than not that Claimant persisted in an "injurious practice" that imperiled or retarded recovery when he stopped taking albuterol. It is true that Claimant stopped taking albuterol because of his incorrect belief that it was causing elbow pain. However, it cannot be said that refusal to take albuterol was retarding or imperiling Claimant's recovery. When Dr. Mayer examined the Claimant on January 16, 2013 she noted that, although she was willing to prescribe albuterol, the drug was not necessarily required in view of Claimant's "considerable improvement." Thus, at that time the Claimant was not refusing to submit to medical treatment that was reasonably necessary to promote his recovery.

The respondents failed to prove it is more probably true than not that Claimant's failure to seek medical treatment between December 2013 and December 2014 constituted an injurious practice or a refusal to cooperate with medical treatment reasonably essential to promote recovery. Claimant was examined by Dr. Mayer on December 5, 2013. At that time Dr. Mayer placed Claimant at MMI for the second time and recommended "maintenance treatment" to include "two clinic visits per year as needed" and ongoing use of oral albuterol. Thus, in December 2013 it was Dr. Mayer's opinion that Claimant did not need any "clinic visits" unless Claimant, at his own discretion, thought he needed one. In these circumstances Claimant's failure to seek medical treatment from December 2013 to December 2014 was not a violation of his

physician's treatment recommendations and can hardly be viewed as persistence in an injurious practice or refusal to submit to treatment reasonably essential to recovery.

ORDER

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

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

2. Insurer shall pay Claimant temporary total disability benefits at the stipulated rate commencing March 29, 2012 and continuing until terminated by law or order.

3. Insurer may take an offset against liability for temporary total disability benefits based on the stipulations contained in Findings of Fact 66 through 68.

4. Respondents' request to suspend or reduce Claimant's temporary total disability benefits based on alleged injurious practices is denied.

5. 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: January 5, 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. 4-887-035-02

ORDER UPON REMAND

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On December 4, 2015, the Industrial Claim Appeals Office (ICAO) issued a Remand Order, setting aside the undersigned Administrative Law Judge's (ALJ's) order of June 16, 2015 for further findings concerning the Claimant's "release to return to work," and entitlement to temporary disability benefits from the date of the admitted injury, February 13, 2012, through the date of maximum medical improvement (MMI), May 5, 2014. ICAO transmitted the file upon remand to the undersigned ALJ on January 12, 2016, at which time the matter was deemed submitted for an Order Upon Remand.

After a thorough review of the evidence, Administrative Law Judge (ALJ) Edwin L. Felter, Jr. concludes that an additional evidentiary hearing concerning the issues of average weekly wage (AWW) and temporary disability benefits is required in order to comply with the law of the case, established by ICAO. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).

The hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 21, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 5/21/15, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM). The ALJ rendered Full Findings of Fact, Conclusions of Law and Order, dated June 16, 2015, after considering the Respondents' detailed objections to the proposed decision, filed prior to the entry of the decision (hereinafter referred to as "Objections").

Claimant's Exhibits1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through M were admitted into evidence, without objection.

ISSUES TO BE CONSIDERED AT EVIDENTIARY HEARING UPON REMAND

The issues to be determined after the evidentiary hearing upon remand, by this decision, concern average weekly wage (AWW), temporary partial disability (TPD) and temporary total disability (TTD) benefits from February 13, 2012, the date of the admitted injury, through May 5, 2014, the date of maximum medical improvement (MMI). Collateral issues involve the legal status of a nurse practitioner's (NP) release to return to work, allegedly approved, after-the-fact by physicians who did not actually see the Claimant until much later, but merely "rubber-stamped" the NP's release to return to work. This presents factual issues to be resolved on remand concerning whether a nurse practitioner fits under the definition of "**attending** (emphasis supplied) physician; whether a NP may give a claimant a written release to return to regular employment," [§ 8-42-105 (3), C.R.S.], without a co-signature by a physician; and, whether an **attending physician** can give a blanket delegation to a NP to release injured workers to return to work, without regard to a licensed physician exercising any medical judgment concerning the release to return to work. In any event, ICAO has established the law of the case that an "attending physician" can give a blanket delegation to a NP to release injured workers to return to work.

FINDINGS OF FACT ON REMAND

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

Preliminary Findings

1. The Respondents admitted liability for back injuries sustained by Claimant arising out of a slip and fall accident on February 13, 2012.

2. On July 24, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for zero temporary disability benefits; a maximum medical improvement

(MMI) date of May 5, 2014; 14% whole person permanent medical impairment (PPD) for a total of $5,852.56 (based on a lower AWW as a component of the formula), however, permanent disability was not designated as an issue nor was it an issue at the hearing, PPD benefits were payable at the rate of $150 per week; $40,438.08 in medical benefits to date were admitted; and, the Respondents admitted for causally related and reasonably necessary post-MMI medical maintenance benefits.

3. The Claimant was working as a school bus driver at the time of her injury. Claimant testified that she was able to continue to work as a bus driver but had difficulty performing some of the lifting and reaching duties required of her employment. There is a factual issue concerning whether the Claimant continued working contrary to the retrospective restrictions imposed by Dr. Reichhard and Dr. Ghazi, to whom the original delegating (to the NP) physicians deferred. The Claimant continued to work for the Employer until she was dismissed from employment on May 22, 2013. The reasons for the Claimant's dismissal are unclear. It is a plausible explanation that the Claimant may have had difficulty performing all of her job duties as a school bus driver, which would be consistent with her testimony.

Medical Status

4. After the admitted injury, the Employer sent the Claimant to Banner Health for treatment, where she was seen by Paulette Carpenter, FNP (Nurse Practitioner). According to the Claimant, Carpenter referred her for an orthopedic evaluation a few months after her injury. Claimant was seen by Robert Benz, M.D., an orthopedic surgeon. According to the Claimant, she was not seen by another physician until she was seen by Adam Mackintosh, M.D., a Sterling physician, in August 2013. The Claimant denied having been seen by Jeff Bacon, M.D., at Banner Health nor was there any persuasive evidence proffered that the Claimant was, in fact, seen by Dr. Bacon. In the Remand Order, ICAO indicates that the Claimant "was initially seen by Family Nurse Practitioner Carpenter," and "Carpenter's reports indicate that the claimant was able to return to regular work almost immediately after the injury." ICAO then found: "the **majority** (emphasis supplied) of Carpenter's reports were co-signed by Dr. Bacon and also Dr. MacKIntosh."

5. **"Attending Physician"** and "**Physician"** are not defined in the Workers' Compensation Act. *See* § 8-40-201, C.R.S. § 8-42-105 (3) (c) and (d) provide that temporary disability ceases when "**the attending physician"** gives an employee a written release to return to work." Webster's New World Dictionary defines "physician" as a "**doctor** of medicine." As the Respondents imply in their argument concerning the status of "nurse practitioners," herein below, nurse practitioners may generically be considered "doctors of medicine." In any event, there are factual issues surrounding the status and abilities of nurse practitioners, which should be resolved after an additional evidentiary hearing.

6. In their Objections to the proposed decision, the Respondents argued the validity of Nurse Practitioner Carpenter's "releases to return to work" at great length. Respondents argued:

> Claimant was working under a full duty work released by Dr. Bacon, Dr. Macintosh, Dr. Fenton and Dr. Nix (ATP's) and a Nurse Practitioner working under them, Paulette Carpenter. Claimant's attorney downplayed the role of nurse practitioners, but they play an essential role in modern American healthcare. Their role will expand under the Affordable Care Act, as it provides greater opportunities for primary health care to Americans formerly uninsured. *See* "Nurse Practitioners and Primary Care, Health Affairs, May 15, 2013, www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=92. As explained by Dr. Macintosh in his evidentiary deposition, Nurse Practitioner Carpenter is a "midlevel" who is able to prescribe medications and propose treatment plans. Deposition of Dr. Macintosh, pp. 31-32. Dr. Macintosh fully trusts Paulette Carpenter as a nurse practitioner; he trusts her judgment and he knows she is "outstanding at what she does." *Id.*

The Respondents generalize by attributing NP Carpenter's opinions to Dr. Bacon, Dr. MacKintosh and Dr. Fenton because NP Carpenter was working under their blanket supervision, as subsequently ratified by them in blanket form. Suffice it to say, a more refined factual issue on remand is presented concerning the exact actions and roles of Dr. Bacon, Dr. MacKintosh and Dr. Fenton in the Claimant's early releases to return to work, under the blanket authorization to NP Carpenter. Additional Findings to comply with ICAO's Remand Order can only be made after hearing additional evidence.

7. The Claimant was subsequently referred to Kenneth Pettine, M.D., Usama Ghazi, D.O., and Gregory Reichhardt, M.D. All of these physicians were within the chain of authorized referrals and, therefore, authorized.

8. The Claimant's medical records from Banner Health reveal that the Claimant was treated by Paulette Carpenter, FPN, throughout the course of her medical treatment. With the exception of the period from October 25, 2012 until November 17, 2012, FPN Carpenter indicated Claimant was able to return to full duty work. The Physician's Reports of Workers' Compensation Injury up until April 16, 2013 were signed by FPN Carpenter, without co-signatures by physicians. The majority of reports beginning on April 16, 2013 were signed or co-signed by Dr. Bacon (who had never

seen the Claimant) or Dr. MacKintosh, who saw the Claimant for the first time in September 2013. With the aforementioned exception, all medical reports after April 16, 2013 indicated that the Claimant was able to return to full duty work. There is presently no persuasive evidence that the Claimant was seen by Dr. Fenton, however, this presents a factual issue which should be resolved through the process of an additional evidentiary hearing with Dr. Fenton's testimony, among other things.

9. Dr. MacKintosh testified by deposition on April 10, 2015. He first saw the Claimant in September 2013. He stated that Paulette Carpenter, FNP, provided primary care to the Claimant prior to this date. Dr. MacKintosh began seeing the Claimant when nurse practitioners (NPs) required a physician to sign off on treatment. The ALJ infers and finds that NPs began having concerns about functioning under a blanket authorization wherein physicians did not specifically exercise medical judgment in specific cases. In September 2013, Dr. MacKintosh stated that he felt the Claimant could perform the regular duties of a bus driver as he understood them to be, and that he was hesitant to place work-restrictions on patients that could impact their employment. Dr. MacKintosh stated that there were physical limitations that the Claimant should have avoided after her injury such as heavier lifting. Dr. MacKintosh did not disagree with the permanent restrictions provided by Dr. Reichhardt because that was "Dr. Reichhardt's area of expertise**."** **Dr. MacKintosh stated that the Claimant had medical incapacity after her date of injury and it would not have been unreasonable for the Claimant to have the permanent restrictions provided by Dr. Reichhardt in place from her date of injury until MMI** (emphasis supplied)**.** Dr. MacKintosh deferred to Dr. Reichhardt on the issue of medical restrictions, and Dr. Reichhardt, as subsequently inferred and found herein, retrospectively restricted the Claimant to limitation of lifting, pushing, pulling and carrying up to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist to a rare basis four times per hours. Factual issues concerning the Claimant's abilities to perform as a school bus driver and to perform in her other four employments on a continuing basis are presented and these can only be resolved by further medical opinions, comparing the restrictions to the job duties. Also, there is a factual issue concerning the Claimant's disability status after the Employer herein terminated her employment on May 22, 2013 for unclear reasons.

10. The Claimant was seen once by Dr. Benz on or about May 4, 2012 for a perfunctory orthopedic surgical evaluation. Dr. Benz did not become a regular treating physician. He was merely a one-time surgical consultant. In addition to stating the opinion that the Claimant would not benefit from surgical intervention, Dr. Benz indicated that the Claimant could return to her full duties as a bus driver. There is no persuasive indication that Dr. Benz understood the Claimant's "full duties" as a bus driver. Additional evidence in this regard, which should include questions of Dr. Benz concerning the Claimant's job duties in all of her jobs, is required in order for the ALJ to make additional Findings consistent with ICAO's Remand Order.

11. The Claimant was seen by Kenneth A. Pettine, M.D., on or about March 1, 2013. Dr. Pettine was of the opinion that the Claimant was a candidate for a 2-level fusion procedure. Dr. Pettine also outlined a number of non-operative treatment options. Dr. Pettine stated the opinion that the Claimant should avoid heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. Dr. Pettine's opinions contraindicate the generalized releases to return to work by NP Carpenter.

12. Against a backdrop of early "full duty releases to return to work" by NP Carpenter, the Claimant underwent bilateral L4-5, bilateral L5-S1 facet joint intra-articular injections performed by Scott Hompland, D.O., on September 6, 2012 and December 6, 2012. Additional evidence concerning the causal relatedness of these procedures is required.

13. The Claimant was seen by Usama Ghazi, D.O., on or about November 11, 2013. Dr. Ghazi recommended a course of treatment to begin with sacroiliac injections. Dr. Ghazi subsequently performed bilateral sacroiliac injections and a sacrococcygeal joint injection with some improvement. Dr. Ghazi noted that the Claimant was frustrated that her tailbone pain was precluding her from returning to her occupation as a trucker. Dr. Ghazi did not specifically comment on work-restrictions. Therefore, additional evidence is required concerning Dr. Ghazi's opinions concerning work restrictions.

14. The Claimant was placed at MMI by Dr. Reichhardt on May 5, 2014. Dr. Reichhardt issued a 10% whole person permanent impairment rating for Claimant's cervical spine and 11% whole person permanent impairment rating for Claimant's lumbar spine (later apportioned to 4%). Dr. Reichhardt recommended 3 years of maintenance treatment and provided permanent work-related restrictions of limited lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist "to a rare basis four times per hours." Dr. Reichhardt deferred any opinion concerning the Claimant's temporary restrictions prior to MMI to the Claimant's authorized treating physicians, which would be NP Carpenter as endorsed by Dr. Bacon, Dr. MacKintosh and Dr. Fenton, who essentially deferred to Dr. Reichhardt, thus, creating a "merry-go-round" effect concerning temporary restrictions. Additional evidence concerning the deference to Dr. Reichhardt is required.

Multiple Employments as of Admitted Date of Injury

15. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amount to $10, 012.05 divided by 52 = $192.35 per week, as opposed to the admitted AWW of $156.76. This higher AWW would affect the formula for determining whole person permanent partial disability, however, permanency was **not** a designated issue. The Respondents argue that there is **no** medical evidence indicating that the admitted injury caused the Claimant to become temporarily disabled

after working at these jobs for a period of time. Additional medical evidence is required in order for the ALJ to make additional Findings, consistent with ICAO's Remand Order.

Average Weekly Wage (AWW)

16. If additional medical evidence supports temporary disability after the Claimant had worked at her multiple employments until she could no longer do so under the prevailing medical restrictions, then, as of the admitted date of injury, the Claimant had three concurrent, multiple employments. Her gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amounts to $10, 012.05 divided by 52 = $192.35 per week. Add $110.09 per week from Stops and $157.16 per week from Quizno's, and an overall AWW of $459.60 results, however, this amount is only tentative contingent on medical support for temporary disability from these jobs, or any combination of these jobs. A subsequent evidentiary hearing on these issues is required. If there is no medical support, then, the Claimant's AWW is $192.35.

Unemployment Insurance (UI) Benefit Offset

17. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

Multiple Employments

18. From the date of the admitted injury of February 13, 2012 until the Claimant was terminated from employment by the Employer herein on May 22, 2013, she continued to earn $192.35 per week from the Employer herein. From February 13, 2012 through December 31, 2012, she continued working for Stops, earning an additional $110.09 per week. From February 13, 2012 through April 15, 2012, she also continued working for Quizno's at $157.16 per week.

Ultimate Findings

19. In order to comply with the ICAO Remand, additional evidence, as herein above described, concerning whether the physicians at Banner (Dr. Bacon, Dr. Fenton and Dr. MacKintosh) specifically exercised independent medical judgment in the Claimant's releases to return to work, prior to September 2013.

20. At the additional hearing, specific medical evidence is required to determine whether the Claimant was temporarily disabled when and as her concurrent employments were no longer made available to her (and whether she had been working these jobs contrary to her medical restrictions).

CONCLUSIONS OF LAW

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

Law of the Case

a. It is the law of the case that Nurse Practitioner (NP) Carpenter's releases to return to work under the blanket supervision of Dr. Bacon, Dr. MacKintosh and Dr. Fenton (although they did not co-sign or see the Claimant after the admitted injury) are legally binding releases (Dr. Mackintosh first saw the Claimant in September 2013--over a year-and-a-half after the admitted injury). There is no persuasive evidence that Dr. Bacon or Dr. Fenton ever saw the Claimant. Dr. MacKintosh first saw the Claimant in September 2013, however, more evidence in this regard is required in order for the ALJ to comply with the Remand Order. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Whether NP Carpenter qualifies as an "attending physician," or, in the alternative, released the Claimant to return to work early in the claim under the generalized understanding that she could do so with the blanket approval of Dr. Bacon, Dr. MacKintosh and Dr. Fenton is, in part, a factual issue which must be determined after an additional evidentiary hearing in order for the ALJ to make additional Findings, consistent with ICAO's Remand Order.

Average Weekly Wage and Temporary Disability Benefits

b. In light of ICAO's Remand Order, an additional evidentiary hearing is required in order to determine the correct AWW and whether the Claimant is entitled to temporary disability benefits after the date of her admitted injury.

Unemployment Insurance Benefit Offset

c. Section 8-42-103 (1) (f), C.R.S., provides for a 100% offset for UI benefits. As found, the Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013, and the Respondents are entitled to an offset of $64.50 per week during this period of time.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant shall set the matter for an additional hearing upon remand to the undersigned Administrative Law Judge., on the issues of "release to return to work," average weekly wage, and temporary disability benefits, according to the rules for setting of hearings. No new Application for Hearing or Response shall be filed, however, Case Information Sheets (CISs) shall be filed, listing the additional medical witnesses necessary to comply with the herein Order Upon Remand..

B. the matter shall be set on a non-trailing docket for one full day.

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

DATED this_____day of January 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

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 January 2016, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord.rm

ISSUES

I. Whether Respondents have overcome the opinion of the DIME physician regarding MMI by clear and convincing evidence.

II. Whether respondents are liable for Botox injections, a 48 Hour EEG, additional occipital nerve blocks, a sleep study, Depakote, and payment of an ambulance bill for treatment of seizure and sleep disorders as reasonable, necessary medical treatment related to Claimant's June 22, 2012 industrial injury.

FINDINGS OF FACT

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

1. Claimant suffered an admitted industrial injury on June 22, 2012. At that time, Claimant was repeatedly head-butted by a juvenile inmate and suffered a nasal fracture, neck sprain and concussion as a result.

2. The Claimant was placed at MMI by her ATP, Dr. George E. Schwender, M.D. on May 21, 2013. Dr. Schwender assigned a 23% whole person impairment.

3. Respondents challenged the opinions of Dr. Schwender by requesting a Division Independent Medical Examination (DIME), which was subsequently scheduled with Dr. David Yamamoto, M.D.

4. Claimant saw Dr. Yamamoto on August 12, 2013, for purposes of completing the requested DIME. At that time, Dr. Yamamoto felt the Claimant was not yet at MMI, because she required additional treatment, especially for her post-concussion headaches. Dr. Yamamoto also rendered an advisory impairment rating of 26% whole person.

5. After receiving the DIME report from Dr. Yamamoto, the Respondents did not challenge his opinions.

6. Claimant was eventually seen again by Dr. Yamamoto for a follow-up DIME on November 19, 2014. Once again, Dr. Yamamoto felt the Claimant was not at MMI, because her post-concussion headaches had not been adequately addressed, along with the failure to follow through with his earlier treatment recommendations. Dr. Yamamoto also issued an advisory impairment rating, of 25% whole person.

7. Following the second DIME, the Respondents challenged the opinion of Dr.

Yamamoto that the Claimant was not at MMI. Respondents also believed that if the Claimant was found at MMI, then the correct impairment rating was the one originally given by Dr. Schwender, 23% whole person. Moreover, even if the Claimant was not at MMI, Respondents challenged whether certain medical treatment was related to the industrial injury.

8. This ALJ finds that Respondents have failed to overcome the opinion of Dr. Yamamoto that the Claimant is not at MMI, by clear and convincing evidence.

9. Both Dr. Yamamoto and Claimant's current primary ATP, Dr. Miguel Castrejon, M.D., share the opinion that Claimant should be given a trial of medication, including Elavil or Propranolol, and if that fails to get Claimant's post-concussion headaches under control, then Botox injections should be tried. The Claimant's hypotension may cause the Elavil and Propranolol to fail, in which case, the best course for Claimant's treatment would be Botox injections. Based upon the evidence presented, Respondents failed to establish that the recommended trial of patient monitored Elavil/Propranolol has been provided. Moreover, in the case of Botox injections, the recommendation has been denied. The ALJ has considered the opinions of Dr. Yamamoto and Dr. Castrejon and finds that that their opinions on the treatment of Claimant's post-concussion headaches is persuasive. In making this finding, the ALJ has considered the opinions of Dr. Carlos Cebrian regarding MMI and the reasonableness, necessity and relatedness of Claimant's need for Botox injections and rejects them as unpersuasive.

10. Concerning Claimant's psychological symptoms, Dr. Yamamoto recommended six counseling sessions. Dr. Castrejon considered Dr. Yamamoto's argument for counseling noting that he would "concede" the same. Thus, on May 18, 2016, Dr. Castrejon referred Claimant for a psychological evaluation and subsequent follow-ups. While a psychological examination and a follow-up session have been accomplished, additional appointments have not. In fact, Dr. Hopkins noted on November 4, 2015, that he did not schedule Claimant for another appointment. Respondents have suggested that the results of Claimant's psychological evaluation indicate that she does not require counseling as a consequence of her June 22, 2012, work injury. After careful review of Dr. Hopkins' initial psychological evaluation report and his follow-up treatment note from November 4, 2015, the ALJ concludes that Respondents have misinterpreted the content therein. Based upon the reports as presented, the ALJ concludes that Dr. Hopkins opined that because of Claimant's personality characteristics and her preexisting psychological conditions, treatment for her psychological sequelae alone would be ineffective. Thus, while Dr. Hopkins noted that Claimant's cognitive complaints are not related to "structural damage" of the brain, he did note that Claimant's cognitive complaints are likely related to depression/anger and chronic head pain associated with her June 22, 2012 work injury. Dr. Hopkins recommended biofeedback training to assist with disconnecting Claimant's "head pain from the thought process that perpetuates [her] anger." Consequently, the ALJ concludes that Dr. Hopkins actually supports Claimant's need for additional psychological treatment which Respondents failed to establish has been completed.

11. After finding that the Claimant is not at MMI, and that she is entitled to medical treatment for her post-concussion headaches, as well as related psychological issues, there is still a need to address the relatedness of Claimant's need for treatment for an alleged seizure disorder, including her transportation via ambulance to secure treatment and the subsequent recommendations for Depakote and a 48 hour EEG, in addition to treatment for an alleged sleep disorder and balance (dizziness), to her admitted industrial injury. Based upon the evidence presented, the ALJ finds these medical conditions unrelated to Claimant's admitted June 22, 2012 work injury to the head, face and neck. Here, the conclusions of Dr. Castrejon persuades the ALJ that the aforementioned conditions either pre-existed and were not aggravated by the admitted injury or are related to non-occupationally induced conditions (orthostatic hypotension).

12. Based upon the evidence presented the ALJ finds and concludes that Claimant has failed to establish a causal connection between her admitted June 22, 2012 work injury and her need for treatment for the aforementioned conditions. Consequently, the ALJ concludes that Respondents are not liable to provide payment for treatment for a seizure and a sleep disorder, including transportation via ambulance, a 48 hour EEG study, Depakote, and a sleep study.

CONCLUSIONS OF LAW

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

Overcoming the DIME

A. A DIME physician's findings of causation and MMI 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 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.*

B. 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 question whether the DIME properly applied the Guides or other rating protocols is an issue of fact for the ALJ. *See McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). Proof that a DIME deviated from the AMA Guides does not compel the ALJ to find that the rating has been overcome by clear and convincing evidence. Rather, proof of such a deviation constitutes some evidence which the ALJ may consider in determining whether the challenge to the rating should be sustained. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Almanza v. Majestic Industries,* W.C. No. 4-490-054 (Nov. 13, 2003); *Smith v. Public Service Company of Colorado,* W.C. No. 4-313-575 (May 20, 2002). Similarly, while the Medical Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act, "compliance" with them does not control whether an expert's opinions constitute substantial evidence supporting a fact finder's determinations. Section 8-42-101(3)(b), C.R.S.; *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003); *Jiron v. Douglas County School District RE-1*, W.C. No. 4-636-107 (May 12, 2009).

C. In this case, the issue of whether Claimant is at MMI involves a complex medico-legal question regarding the cause of Claimant's need for additional treatment for post concussive headaches, a questionable seizure disorder, a sleep disorder and psychological sequelae that Claimant asserts are related to her June 22, 2012 work injury. Respondents argue that the evidence presented establishes that Dr. Yamamoto's opinion concerning MMI has been overcome by clear and convincing evidence because the treatment that is "reasonable, necessary and related" to the June 22, 2012 injury recommended by Dr. Yamamoto has been provided. Based upon the evidence presented, the ALJ is not persuaded. While the ALJ agrees that Claimant's asserted dizziness, balance and seizure disorders are unrelated to her June 22, 2012 work injury and that treatment for these conditions should be pursued outside of the workers' compensation system, the record evidence does not support Respondents assertion that Claimant has received all reasonable treatment for conditions caused by her June 22, 2012 injury necessary to bring her to MMI. To the contrary, the ALJ finds that the record evidence supports a conclusion that Claimant requires additional treatment for her pre-existing migraine headaches and depression which were aggravated by her June 22, 2012 industrial injury. Dr. Castrejon agrees with "Dr. Yamamoto's recommendation against MMI on the basis that these headaches have not been appropriately treated." He, like Dr. Yamamoto, recommends a trial of Elavil or Propranolol as a preventative for Claimant's headaches. However, as these medications can exacerbate Claimant's known orthostatic hypotension, Dr. Castrejon recommends careful patient response monitoring regarding the use of Elavil/Propranolol. In the event that this course of treatment proves ineffective, Dr. Castrejon, like Dr. Yamamoto, recommends that Claimant proceed with Botox injections.

D. As found, Respondents failed to establish that the recommended trial of patient

monitored Elavil/Propranolol has been provided. Moreover, the recommendation for Botox injections has been denied. Finally, as noted, there is record evidence supporting a conclusion that Dr. Hopkins actually supports Claimant's need for additional psychological treatment which has not been completed. The opinions of Dr. Cebrian regarding the reasonableness, necessity and relatedness of these treatment modalities has been carefully considered and are rejected as unpersuasive.

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional psychological counseling as well as post concussive headache treatment, including potential Botox injections is directly related to her industrial injury. Because this treatment presents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by the aggravation of her pre-existing depression and migraine headaches, Claimant is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing PDM *Molding v. Stanberg*, 898 P.2d 542 (Colo. App. 1995) *and Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

F. After considering the totality of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that the DIME physician's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented at hearing establishes a mere difference of opinion between the DIME physician and the medical expert (Dr. Cebrian) hired by Respondents. A professional difference of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Yamamoto's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set Dr. Yamamoto's opinion regarding MMI aside.

Relatedness of Claimant's Need for Treatment for an Alleged Seizure Disorder, Depakote, a 48 Hour EEG, a Sleep Disorder, Including a Sleep Study, and Dizziness/Balance Disorder to her June 22, 2012 Work Injury

G. 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).

H. 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).

I. Based on the totality of the evidence presented, the ALJ credits the opinions of Dr. Castrejon and Dr. Bernton to conclude that Claimant's need for treatment for an alleged seizure disorder, including her transportation via ambulance to secure treatment and the subsequent recommendations for Depakote and a 48 hour EEG, in addition to treatment for an alleged sleep disorder and balance (dizziness) are not related to Claimant's admitted June 22, 2012 work injury to the head, face and neck. As found above, the conclusions of Dr. Castrejon persuades the ALJ that the aforementioned conditions either pre-existed and were not aggravated by the admitted injury or are related to non-occupationally induced conditions (orthostatic hypotension). Consequently, the ALJ concludes that Claimant has failed to establish a causal connection between her admitted June 22, 2012 work injury and her need for treatment for the aforementioned conditions. Thus, Respondents are not liable to provide payment for treatment for a seizure and a sleep disorder, including transportation via ambulance, a 48 hour EEG study, Depakote, and a sleep study.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the Division IME opinion of Dr. Yamamoto that Claimant has not reached MMI for the effects of her admitted industrial injury is denied and dismissed.

2. Claimant is entitled to treatment for post-concussion headaches, including the use of Botox injections if her headaches cannot be controlled through the use of medications, such as Elavil and Propranol.

3. Claimant is also entitled to treatment for psychological conditions of anger and depression related to the industrial injury.

4. Respondents' request to terminate medical care related to an alleged seizure disorder, including her transportation via ambulance to secure treatment and the subsequent recommendations for Depakote and a 48 hour EEG, in addition to treatment for an alleged sleep disorder and balance (dizziness) is granted as these conditions are not related to Claimant's industrial injury.

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: January 14, 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 established by a preponderance of the evidence that post maximum medical improvement medical treatment is reasonably necessary and related to maintain claimant at MMI?

FINDINGS OF FACT

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

1. On April 6, 2012, Claimant, a now retired teacher for Employer, sustained a work related injury. Although Claimant reported and her providers addressed other areas, treatment focused primarily on injuries to her bilateral shoulders.

2. Claimant first sought medical attention from Dr. D'Angelo. On April 12, 2012, Claimant reported that she was experiencing neck and back muscle pain. Dr. D'Angelo determined at that point that Claimant's neck muscle pain was related to her work injury.

3. On April 11, 2012, MRIs revealed bilateral rotator cuff tears. Based on the MRI findings, on April 26, 2012 orthopedist Thomas Mann, M.D., evaluated Claimant and recommended surgery. On June 19, 2012, Claimant underwent a second surgical opinion with Dr. Christopher Isaacs, D.O., who concurred with Dr. Mann. Dr. Isaacs performed a right rotator cuff repair, and later performed a left rotator cuff repair.

4. Dr. D'Angelo directed Claimant's postoperative care which included medications, physical therapy, massage therapy, and acupuncture. On December31, 2012, Dr. D'Angelo diagnosed Claimant's cervical pain as "compensatory trapezius muscle spasm" and prescribed massage therapy and Flexeril, a muscle relaxant.

5. In January 2013, Dr. D'Angelo referred Claimant to Dr. Samuel Chan for a physiatry evaluation and possible treatment of the cervical spine based on Claimant's complaints of neck pain. Dr. Chan recommended a MRI of the cervical spine which was conducted on January 31, 2013. The MRI revealed multilevel degenerative changes with disc osteophytes complexes, and central canal stenosis at C5-6. During an examination on February 6, 2013, Claimant's cervical spine range of motion was noted to be within functional limits. Dr. Chan also recommended an EMG of the bilateral upper extremities which was conducted on February 22, 2013. The EMG showed no evidence of cervical radiculopathy.

6. Dr. Chan questioned whether Claimant's complaints were related to facet pathology, but concluded that any cervical spine pain was more myofascial in nature

and that physical examination did not suggest facet dysfunction. His conclusion is supported by Claimant's initial reports of neck muscle pain, Dr. D'Angelo's diagnosis of a muscle spasm, and the degenerative cervical MRI findings. Dr. Chan's treatment included several sessions of acupuncture which Claimant reported were not helpful.

7. On September 26, 2013, Claimant reported her pain as 1-2/10 and Dr. Chan noted her cervical range of motion was within functional limits.

8. On October 17, 2013, Claimant reported continued neck pain to Dr. Hnida who took over Claimant's care from Dr. D'Angelo when she left the practice group. Dr. Hnida conferred with Claimant's physical therapist who indicated Claimant had plateaued from a therapy standpoint.

9. On November 14, 2013, Dr. Isaacs examined Claimant and noted Claimant had good range of motion. He noted that Claimant's "shoulder is still giving her a fair amount of pain," and opined that there was nothing further he could offer Claimant and discharged her from care.

10. On December 18, 2013, Dr. Chan placed Claimant at maximum medical improvement and evaluated her for permanent impairment. Dr. Chan assigned Claimant extremity impairment ratings for range of motion deficits to her bilateral shoulders. In his impairment rating, Dr. Chan specifically opined that Claimant's cervical spine findings were pre-existing and degenerative in nature, and could "very well be an ongoing pain generator." He noted, "it has been counseled with [Claimant] that the cervical spine findings are pre-existing and degenerative in nature and I do not feel that there is a specific impairment from the incident that occurred in April 2012." Therefore he did not assign an impairment rating for the cervical spine. With respect to maintenance medical care, Dr. Chan recommended that Claimant continue an active exercise program on her own and noted that Claimant had already undergone an extensive course of physical therapy.

11. On December 18, 2013, Dr. Hnida also evaluated Claimant and considered her complaints of neck pain.

> [Claimant] has been thoroughly evaluated and worked up for cervical spine complaints by Dr. D'Angelo and Dr. Chan. She has been released from further care for her cervical spine complaints. . . . At this point, it has been determined that [Claimant] has concluded all treatments for her cervical spine and does not warrant impairment.

In particular, Dr. Hnida noted: "Neck pain, with long term assessment by other physicians, felt now to be secondary to preexisting abnormalities." Dr. Hnida agreed with Dr. Chan's upper extremity impairment ratings and agreed with his recommendation that Claimant did not need any maintenance medical treatment. Dr. Hnida found maximum medical improvement on January 22, 2014. He provided permanent restrictions and recommended no maintenance medical treatment.

12. On April 4, 2014, Respondents filed a Final Admission of Liability admitting to Dr. Hinda's January 22, 2014 date of maximum medical improvement and his scheduled impairment rating of Claimant's bilateral upper extremities. Respondents did not admit for maintenance medical care.

13. Claimant objected to the Final Admission and requested a Division IME. On October 4, 2014, Dr. Lindenbaum performed the DIME. In his report, Dr. Lindenbaum assigned Claimant a whole person impairment rating for her cervical spine. In addition, Dr. Lindenbaum assigned Claimant higher scheduled impairments for her shoulders than had Dr. Hnida or Dr. Chan.

14. Dr. Lindenbaum opined that Claimant may require injections for her cervical spine, but noted that this could be done under maintenance medical care. Dr. Lindenbaum recommended that Claimant be referred to a physiatrist for consideration of facet blocks, but was not specific as to the level or side where the blocks should be provided. Dr. Lindenbaum does not appear to have recognized that such a work up had already been performed, and that such treatment had been ruled out by Drs. Chan and Hnida.

15. On May 21, 2015 the parties reached a stipulation resolving all permanency issues. Specifically, Respondents agreed to file a Final Admission of Liability consistent with the impairment rating of Dr. Lindenbaum and, in exchange, Claimant agreed to waive her right to pursue conversion or permanent total disability benefits. Respondents filed a Final Admission of Liability based on the stipulation on June 5, 2015.

16. Paragraph 10 of the stipulation between the parties specifically held open maintenance medical care. Respondents continue to deny maintenance medical care. Claimant asserts entitlement to maintenance medical care, which is the only issue endorsed for hearing.

17. On February 2, 2015, Dr. Carlos Cebrian evaluated Claimant at Respondents' request. On March 19, 2015, Dr. Cebrian issued a report detailing his findings. He also testified via post-hearing deposition on November 16, 2015. During the evaluation, Claimant reported that she was taking no medication as a result of her April 6, 2012 injury, and that she was now "busier" in retirement taking care of her grandchildren, quilting, and gardening, than she was while working full time. With respect to Claimant's reported increased activity, Dr. Cebrian noted this was inconsistent with her reports to Dr. Lindenbaum that her neck pain limited her function. Dr. Cebrian noted on physical exam there were "negative facet maneuvers."

18. Dr. Cebrian opined that:

- Claimant did not suffer a work related injury to her cervical spine.

- While Claimant may have had some myofascial pain, this is relatively common after shoulder surgeries, and that there was no objective diagnosis of injury to the cervical spine.

- Claimant did not require maintenance medical care. In support of this position he noted that Claimant was not taking any medications and that no ongoing treatment was indicated.

19. With respect to Dr. Lindenbaum's opinion that further cervical spine work up was required, Dr. Cebrian testified that the spine had been fully evaluated. Both an MRI and EMG had been performed, radicular symptoms were ruled out, and Claimant had received cervical spine physical therapy as part of her post operative recovery. Dr. Cebrian also testified that Dr. Chan, a physiatrist, had fully evaluated the cervical spine, concluding any pain was more myofascial in nature, and that physical examination findings showed nothing which would suggest facet dysfunction.

20. Claimant does not specify what particular treatment she seeks. Instead she seeks a general order that she is entitled to "medical maintenance care under Grover Medicals."

21. Based on the totality of the evidence and Claimant's position statement, the Judge reasonably infers that Claimant could be seeking (1) additional physical therapy, (2) additional acupuncture, and (3) facet injections. With respect to each, the Judge finds as follows:

- Based on the totality of the evidence, Claimant has not satisfied her burden of establishing that additional physical therapy is reasonable, necessary and related to relieve the effects of Claimant's industrial injury or prevent further deterioration of Claimant's condition.

- Based on the totality of the evidence, Claimant has not satisfied her burden of establishing that additional acupuncture is reasonable, necessary and related to relieve the effects of Claimant's industrial injury or prevent further deterioration of Claimant's condition.

- Based on the totality of the evidence, Claimant has not satisfied her burden of establishing that facet injections are reasonable, necessary and related to relieve the effects of Claimant's industrial injury or prevent further deterioration of the claimant's condition.

In addition, the Judge finds that Claimant has not satisfied her burden of establishing that any maintenance medical benefits are reasonable, necessary and related to relieve the effects of her industrial injury or prevent further deterioration of her condition.

22. Because Claimant has failed to meet her burden of proof, her claim for post maximum medical improvement medical treatment is denied and dismissed.

CONCLUSIONS OF LAW

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

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 Commission,* 759 P.2d 705 (Colo. 1988). However, the burden of proof to establish entitlement to these benefits is on the claimant by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). In order to receive such 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); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of 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).

In this case, Claimant has failed to present substantial evidence that future medical treatment is or will be reasonably necessary to relieve her from the effects of the injury or prevent deterioration of her condition. The opinions of the authorized treating physicians are that Claimant does not require further medical care to maintain her status at maximum medical improvement. Dr. Hnida, Dr. Isaacs, and Dr. Chan have all had multiple opportunities to evaluate Claimant and to determine whether any additional treatment would help bring improvement or stabilize her condition. Each physician provided a clear opinion on maximum medical improvement and, when providing these opinions, each specifically indicated that maintenance medical care is not necessary. This opinion was additionally supported by the independent review and evaluation performed by Dr. Cebrian. The only medical opinion presented by Claimant is Dr. Lindenbaum's suggestion she undergo further workup for facet dysfunction in the cervical spine.

In making his recommendation, Dr. Lindenbaum failed to consider that Claimant has already undergone a complete work-up for any cervical spine pathologies. A MRI found normal degenerative disc disease for someone of Claimant's age without any indication that surgical intervention would be beneficial. An EMG found non-work related carpal tunnel syndrome, but ruled out radiculopathy. And multiple physical evaluations by a physiatrist, as suggested by Dr. Lindenbaum, failed to find any objective condition which could be treated or any evidence of facet dysfunction. At best, Dr. Lindenbaum suggested evaluations which have been performed or treatments which have been ruled out. His suggestion for maintenance medical care does not constitute persuasive evidence of a need for maintenance care as it has already been shown his recommendations would neither improve or stabilize Claimant's condition.

Claimant has failed to establish by a preponderance of the evidence that future medical treatment is reasonably necessary and causally related to relieve her from the effects of the injury or prevent deterioration of her condition. Claimant has presented no medical evidence that she requires further treatment for either shoulder. The only persuasive medical evidence presented by Claimant is the report of the Division evaluator, following his one-time evaluation of Claimant, which suggests an evaluation that has already been performed and a possible treatment which has already been ruled out. Claimant has had a complete course of care for her work injuries, is currently taking no medications and receiving no treatment for her work injuries and does not require further medical treatment to maintain her status at maximum medical improvement.

ORDER

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

1. Claimant's claim for post maximum medical improvement medical treatment is denied and dismissed.

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: January 6, 2016

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 medical treatment he received to his cervical spine was reasonable, necessary and related to his admitted April 7, 2013 work injury?

FINDINGS OF FACT

1. Claimant testified at hearing that he was injured on April 7, 2013 when he was checking the transmission under the hood of a customer's car when the driver jerked the car forward, striking claimant in the knees, forcing claimant into the engine area of the car. Claimant testified his knees popped and his head and neck skimmed the hood as the hood fell down on top of claimant. Claimant testified he fell back to the ground, slammed the hood down and instructed the woman driving the car to stay put, but she drove off. Claimant testified co-workers from the shop came to check on him and he tried to walk off the pain. Claimant testified his primary injury following the accident involved his knees.

2. Respondents admitted liability for the claim and filed a general admission of liability ("GAL") on April 24, 2013.

3. Claimant was first examined by Dr. Hughes on April 8, 2013. The medical records from Dr. Hughes document claimant complaining of immediate pain in his knees after the accident. Claimant denied any back pain.

4. Claimant provided insurer with a recorded statement on April 10, 2013. Claimant mentions in the recorded statement injuries to his knees, calf and leg, but does not mention his neck.

5. Initial medical treatment focused on claimant's knee injuries and claimant underwent bilateral knee replacement surgery with Dr. Copeland on April 1, 2014. Following the knee replacement surgery, claimant continued to complain of his legs giving away. Dr. Copeland noted claimant had a prior history of a cervical fusion at C3-C6 and was concerned claimant had a myelopathy. Dr. Copeland referred claimant to Dr. Janssen for evaluation of possible myelopathy and recommended claimant undergo a cervical magnetic resonance image ("MRI")

6. Dr. Janssen first evaluated claimant on October 7, 2014 and noted claimant was complaining of bilateral tremors in his bilateral upper and lower extremities. Dr. Janssen eventually reviewed claimant's MRI studies and noted claimant had a broad based disc vertical collapse, dissection, loss of structural integrity of the discs, C7 nerve root compression and vertical instability. Dr. Janssen diagnosed

claimant with a C7 radiculopathy/radiculitis. Dr. Janssen opined that this diagnosis appeared to be temporally related to claimant's workers' compensation injury when his head was jammed into the car. Dr. Janssen recommended an anterior cervical discectomy, fusion and reconstruction at C6-7.

7. Claimant returned to Dr. Copeland on November 14, 2014 and reported claimant was stating he was hit on the back and lower neck during his work injury. Dr. Copeland indicated that he agreed with Dr. Janssen that claimant's cervical condition and resultant lower extremity weakness was related to his work injury. Dr. Copeland further indicated that he did not believe claimant's lower extremity symptoms would improve until his cervical spine condition was addressed.

8. Claimant underwent an electromyelogram ("EMG") study with Dr. Dean on November 20, 2014. Dr. Dean noted claimant reported neck and shoulder pain in 2005 that resulted in a surgical fusion. Dr. Dean noted claimant was struck on the back of the head or neck in the April 2013 incident and that soon after he began noticing tingling in the right arm and both hands. Dr. Dean reviewed the EMG study and diagnosed cervical radiculopathy and cervical spine stenosis with early myelopathy. Claimant was also diagnosed with carpal tunnel syndrome. Dr. Dean noted that the carpal tunnel syndrome was not related to claimant's work injury of April 2013.

9. Claimant returned to Dr. Copeland on December 16, 2014 and reported two incidents of his legs giving out and claimant falling since his last evaluation. Dr. Copeland noted he had encouraged claimant to seek treatment for his cervical spine with Dr. Janssen and opined it was not safe for claimant to work.

10. Dr. Copeland issued a "To whom it may concern" letter on March 6, 2015 that indicated claimant had told him that the hood of the car he had been working on struck his head when the car hit him. Dr. Copeland responded to an inquiry from insurer on March 17, 2015 and noted that while claimant was at maximum medical improvement ("MMI") for his bilateral knee condition, he still needed to have his cervical spine condition addressed.

11. Claimant underwent cervical surgery under the auspices of Dr. Janssen on April 22, 2015. Claimant testified that the issues involving his lower extremities resolved with the surgery.

12. On October 5, 2015, in response to an inquiry from respondents' counsel, Dr. Copeland issued a statement indicating that claimant's statements in the recorded statements obtained by respondents called into question whether claimant was struck on the head in the April 7, 2013 injury. Dr. Copeland noted that his statement that claimant's condition was related to his work injury was based on claimant's history to Dr. Copeland that he was struck on the head by the car hood during the incident. Dr. Copeland noted that this issue involving whether claimant's cervical condition was related to the work injury was all based on whether the hood hit claimant in the head/neck.

13. Respondents obtained an independent medical exam ("IME") report from Dr. Reiss on September 9, 2015. Dr. Reiss issued a report that opined that claimant's cervical condition was not related to his work injury. Dr. Reiss noted that although claimant reported to Dr. Reiss at the time of his IME that he was struck on the back of his head in the accident, this is different that the initial medical history and audio recordings. Dr. Reiss opined that claimant perhaps developed a C7 radiculopathy many months after the work incident that was likely related to his pre-existing foraminal stenosis at the C6-7 level. Dr. Reiss opined that this was not related to claimant's work injury of April 7, 2013.

14. Dr. Janssen testified by deposition in this matter. Dr. Janssen noted that the recordings of claimant's history to Dr. Lindberg in January 2014 did not indicate claimant was struck on the back of his head during the accident. Dr. Janssen testified his report of October 2014 that indicated claimant's condition was temporally related to his work injury was based on claimant's history as provided to Dr. Janssen. Dr. Janssen effectively maintained the opinion that if the history provided to him by claimant was correct, his October 2014 opinion regarding the relatedness of claimant's cervical condition would remain unchanged. The ALJ finds the testimony of Dr. Janssen to be credible and persuasive.

15. Multiple recordings of claimant's accident history were entered into evidence at hearing, including the recorded statement claimant provided to insurer shortly after the injury, the recording of claimant's IME with Dr. Lindberg, and his statement to Mr. Bernhardt on February 7, 2014. Claimant does not report hitting the back of his head as a result of the accident in these recorded statements.

16. Respondents presented the testimony of Dr. Reiss at hearing. Dr. Reiss testified it was his opinion that claimant did not sustain an injury to his cervical spine on April 7, 2013. Dr. Reiss testified claimant did not have an injury that would involve his cervical spine being compressed and opined that claimant's reported leg weakness was likely related to claimant's knee surgeries. Dr. Reiss ultimately opined that claimant's cervical condition was not related to his work injury because there was no injury to claimant's head or neck.

17. Based on the testimony of Dr. Janssen, the ALJ determines that the issue in this case comes down to whether or not claimant's testimony regarding the circumstances surrounding his work injury on April 7, 2013 is credible. As noted by Dr. Copeland, claimant did not initially report an injury of striking his head during the work injury.

18. The ALJ finds claimant's testimony credible that he struck the back of his head on April 7, 2013 when he was struck by the car. While claimant did not report to the treating physicians that he struck his head, the ALJ notes that claimant's treatment at that time was focused on his bilateral knees. Under these circumstances, claimant's failure to report hitting his head during the incident in question is found to be understandable, and does not serve to overcome claimant's otherwise credible

testimony at hearing. Claimant's explanation of the injury as described in court is found to be reasonable and persuasive.

19. Because the ALJ determines that claimant's testimony regarding how he hit the back of his head on the hood of the car is credible, the ALJ credits the opinions of Dr. Copeland and Dr. Janssen and finds that claimant has established that his cervical condition is related to the April 7, 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. As found, claimant has proven by a preponderance of the evidence that the medical treatment to his cervical spine is reasonable, necessary and related to his April 7, 2013 work injury. As found, claimant's testimony at hearing as to the

circumstances of the injury on April 7, 2013 is found to be credible. As found, the deposition testimony of Dr. Janssen that indicated that if claimant's accident history of striking his head on the hood of the car was correct, then the treatment to claimant's cervical spine was related to the April 7, 2013 work injury is found to be credible and persuasive.

ORDER

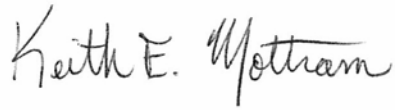
It is therefore ordered that:

1. Claimant has established that his cervical condition is related to the April 7, 2013 work injury. Respondents shall pay for the reasonable and necessary medical treatment related to claimant's cervical condition including the cervical surgery performed by Dr. Janssen 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: January 6, 2016



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

ISSUES

- Did Claimant prove by a preponderance of the evidence that the knee surgery proposed by Dr. Cunningham is reasonable and necessary, as well as related to his admitted industrial injury?

FINDINGS OF FACT

1. Claimant worked as a lead technician for Respondent-Employer for fourteen (14) years.

2. Claimant suffered an admitted industrial injury on May 20, 2013. At the time, he was working on a waterfall feature located at the top of a swimming pool. Claimant slipped and fell from the top of the waterfall to the bottom of the pool, which was empty. He testified that it was between a 12 and 14 foot fall and he lost consciousness.

3. As a direct result of his fall, Claimant injured his right ankle (comminuted talus fracture), right knee and hip, pelvis and low back. He was initially taken to Vail Valley Medical Center and then transported to Denver Health for further evaluation of his pelvis fractures.

4. Prior to the 5/20/13 industrial injury, Claimant had no history of knee problems. He did not have any prior pain complaints, injuries, treatment (including physical therapy or massage), or diagnostic tests (including x-rays or MRI-s)[1].

5. On May 29, 2013, Claimant was evaluated by Guy Kovacevich, M.D. Dr. Kovacevich's assessment was fracture (closed) foot metatarsal; pelvic fracture (closed), disruption. Claimant was to follow-up with a specialist. The ALJ notes that Claimant saw Dr. Kovacevich at regular intervals from May 2013 through August 2015 while he was receiving treatment for his injuries.

6. Claimant was examined by John Paul Elton, M.D. (orthopedic surgeon) on May 29, 2013 to whom he was referred for management of the talus fracture and pelvis fractures. Moderate edema was noted through the ankle and hindfoot. Pain with active compression was noted in his pelvis, but no instability. Dr. Elton recommended surgery to correct Claimant's lateral process fracture, including ORIF and subtalar arthroscopy. Dr. Elton stated Claimant would remain non-weight bearing for 8-10 weeks.

[1] The ALJ notes Claimant's medical records from St. Vincent's Hospital (Leadville) confirmed this, as there was no reference to prior right knee injury/treatment.

7. Dr. Elton performed the surgery on June 7, 2013 to repair the right talus fracture (ORIF). Dr. Kovacevich then examined Claimant on June 14, 2013 after he had undergone surgery and noted Claimant was restricted from putting weight on his right leg. Dr. Kovacevich also found Claimant was unable to work in his evaluation on July 10, 2013. Dr Elton saw Claimant for a follow-up evaluation on July 27, 2013. At that time, he had mild right ankle and hindfoot edema with minimal tenderness. Dr. Elton's assessment was closed fracture of other specified part of pelvis; fracture of astragalus (closed), satisfactory post-operative course post-ORIF, with subtalar arthroscopy. Dr. Elton recommended Claimant begin a more aggressive range of motion and issued a prescription for physical therapy. Dr. Elton said Claimant could progress to partial weight bearing in 2-3 weeks.

8. Dr. Kovacevich evaluated Claimant on August 5 and September 3, 2013. Claimant was recovering ankle/foot surgery and had stated weight-bearing as of the latter appointment.

9. When Claimant returned to Dr. Kovacevich on October 10, 2013, it was noted that after starting ambulation, Claimant's right knee was painful, with swelling. An MRI was ordered. Claimant testified he felt pain in his right knee once he began using it following the ankle surgery. The ALJ infers that Dr. Kovacevich ordered the MRI because he discerned swelling in Claimant's right knee at the time of this evaluation.

10. Claimant received physical therapy ("PT") at Parker Physical Therapy and Rehab from August 5, 2013 through October 28, 2013. His PT included various modalities, such as hotpacks, massage, ultrasound, stretching and therapeutic exercise.

11. An MRI was done on Claimant's right knee on October 17, 2013 and read by Kelly Lindauer, M.D. Dr. Lindauer's impression was moderate bone edema along the medial femoral condyle (stress-related); medial tibial plateau indicative of a stress-related bone edema, along with a subchondral trabecular fracture likely stress related along the medial tibial plateau; intact menisci and knee ligaments; moderate chondromalacia involving the medial patellar facet and central trochlea.

12. Claimant was evaluated by Dr. Elton on October 23, 2013, at which time he noted that the right knee pain had started over the past several weeks as he became more active. The pain was described as "daily intermittent mild aching discomfort"; discomfort worse with activity and weight–bearing. Dr. Elton reviewed the MRI, noting it showed a stress reaction along the far medial border of the medial tibial plateau with associated stress reaction of the medial femoral condyle. There was no cortical fracture or completed fracture with mild trabecular fracture.

13. Dr. Elton's assessment on 10/23/13 was pain in joint involving the lower leg; closed fracture of other specified part of pelvis; fracture of astragalus-satisfactory post-operative treatment (ORIF); and closed treatment multiple pelvic fractures. He recommended Claimant limit weight-bearing activities and use crutches until he had no pain in the knee. Claimant was given a prescription for PT.

14. Claimant was seen by Dr. Kovacevich on November 11, 2013. Claimant was requesting to return to work. Dr. Kovacevich's assessment was pelvis fracture-closed/pelv. disrup; fracture clsd. foot metatarsal; strain/sprain knee. Claimant's work restrictions were maximum 15 lbs. lifting, carrying, pushing/pulling; no crawling kneeling, squatting or climbing. Claimant was to continue PT.

15. Claimant returned to Dr. Elton on November 21, 2013, which was 5 ½ post ankle surgery. Claimant said he had returned to work and felt like he was getting stronger. His knee pain continued to improve, but had some mild swelling after a long day of standing. On examination, Dr. Elton noted a slight antalgic gait and Claimant had 130 degrees of stable motion at the knee. X-rays were taken which showed no evidence of fracture or periosteal reaction. Dr. Elton's assessment was the same as the 10/23/15 exam and Claimant was to continue with a home exercise program and wean off narcotic pain medications. Dr. Elton also noted he should follow-up in 8 weeks at which time the knee radiographs would be repeated if he still had pain.

16. Dr. Kovacevich examined Claimant on November 26, 2013[2] at which time he noted more discomfort in his knees and hips, as well as being tired at the end of the day. Dr. Kovacevich's assessment was the same as on 11/13 and Claimant's lifting restrictions were continued.

17. In the follow-up appointment with Dr. Kovacevich on December 26, 2013, Claimant was still having pain in his right knee. He was to continue PT and his lifting/carrying restrictions were 25 lbs. No restrictions were given for crawling, kneeling, squatting or climbing. Similarly, in the appointment on January 20, 2014, Claimant had discomfort in his right knee and Dr. Kovacevich's diagnosis was right knee sprain/strain. Claimant was to see Dr. Elton for a follow-up eval.

18. Dr. Elton saw Claimant on January 16, 2014, which was 7.5 months post ORIF right comminuted talus fracture with multiple pelvic fractures and stress fracture to the medical tibial plateau. Claimant reported his right knee was bothering him, especially after a full day with a lot of activity. Dr. Elton found his gait to be nonantalgic, however, there was a small right knee effusion. Claimant had mild tenderness at the medial line without tenderness at the tibial plateau. The x-rays showed no fractures or progression of stress reaction or periosteal reaction. Dr. Elton thought because the knee continued to give him discomfort, an intra-articular injection may need to be considered. He noted Claimant was able to work full duty.

19. Claimant was evaluated by Mary Bryan, PA-C at Dr. Elton's office on January 23, 2014 following the CT scan of his pelvis. He was concurrently complaining of right knee pain and wanted to discuss an injection, which was completed at that time.

20. Claimant returned to Dr. Kovacevich on March 4, 2014 and reported that he continued to have pain at the end of the day. Dr. Kovacevich assessment included knee sprain/strain and stated it was imperative for Claimant to start PT to work on total

[2] Dr. Kovacevich noted Claimant was involved in a MVA on 11/21/13 and sustained a concussion. This was also referenced in the St. Vincent hospital records. No knee complaints were documented.

body conditioning. Claimant's work restrictions included maximum 50 lbs. lifting, carrying, pushing/pulling.

21. Dr. Kovacevich examined Claimant on April 3, 2014, at which time he said his knee and ankle pain were better. His main symptoms related to the hip and an MRI was ordered. Claimant's work restrictions remained the same as 3/4/14. On April 13, 2014, Dr. Kovacevich noted Claimant's right knee strain was resolved.

22. Claimant returned to Dr Elton on April 21, 2014, which was 10 months post-surgery. Claimant reported that he had 6-8 hours of pain relief after the injection, but has the same mild discomfort. Dr. Elton's assessment with regard to the right knee was improving right knee stress reaction to medial tibial plateau. No specific treatment was recommended for the right knee. When Dr. Kovacevich saw him again on April 23, 2014, his right knee was noted to be improved after injection.

23. Claimant was evaluated by Scott Raub, D.O. on May 13, 2014, at which time he noted Claimant had right knee pain on the medial side, along with intermittent crepitus and popping. Dr. Raub's assessment was chronic right knee and hip pain; lumbar MRI-unremarkable; possible hip joint problem; prior right sacral fracture; status post right talus ORIF; no lumbosacral radiulopathy-either from hip or related to separate knee issue. Dr. Raub's treatment recommendations were confined to the hip and he performed a fluoroscopic right hip injection on May 28, 2014.

24. Dr. Raub saw Claimant in follow-up on June 10, 2014. Claimant reported his hip pain had improved with injection, but there was no improvement in his knee pain. Dr. Raub stated that the hip injection did not improve Claimant's knee pain, so he did not think it was referred form the hip. Dr. Raub recommended a repeat hip injection, but no other treatment was specifically provided to the right knee. The repeat injection was performed on June 18, 2014.

25. Claimant was examined by Dr. Raub on June 30, 2104, who noted the second injection did not provide relief for his hip pain. Dr. Raub did not see a clear pain source and recommended a second opinion with regard to the hip.

26. Dr. Kovacevich evaluated Claimant on September 17, 2014. Dr. Kovacevich recorded Claimant had a recent surgery with Dr. White to repair the torn labrum (hip) and found Claimant was unable to work from 9/17 through 10/9/14.

27. Claimant was examined by Shawn Karns, MPA, PA-C of Western Orthopaedics on November 18, 2014. Claimant was 2 ½ months post right hip arthroplasty with labral reconstruction and also for the past year his right knee has been bothering him. He received a cortisone injection, which provided relief for a month, but continued to have pain on the anterior part of the knee. On physical exam, PA-C Karns noted Claimant walked with a slightly guarded gait, but did not have knee swelling. Claimant had tenderness to palpation over the medial border of the patella as well as a positive grind test. PA-C Karns' assessment was patellofemoral issues in the right knee and Claimant received an injection into the anterolateral aspect of the right knee.

28. Claimant returned to Dr. Kovacevich on November 19, 2014, he was kept off work through 12/110/14. Dr. Kovacevich noted Claimant had undergone two injections for the right knee and continued to have symptoms.

29. Claimant was examined by Rick Cunningham, M.D. on December 23, 2014, at which time Claimant had right knee pain while with kneeling squatting and stairs. Dr. Cunningham reviewed the results of the 2nd MRI of the right knee. That MRI revealed "significant thinning of the trochlea cartilage". Dr. Cunningham believed that finding was more advanced than the results of the 1st MRI of October 17, 2013, which revealed only "moderate chondral thinning of the central trochlea" in the patellofemoral compartment of Claimant's right knee. On examination, Dr. Cunningham noted mild to moderate patellofemoral crepitus. There was no posterolateral or posteromedial rotary instability.

30. Dr. Cunningham's assessment was right medial knee pain, mild to moderate patellofemoral osteoarthritis. Dr. Cunningham opined: "MRI imaging demonstrates significant chondral thinning of the true clear groove and evidence of mild to moderate patellofemoral osteoarthritis. While it is possible that this was present prior to his work-related injury, the patient was asymptomatic before his fall. It is likely that his work-related injury aggravated this condition." Based upon the MRI results, Dr Cunningham recommended a Synvisc injection for the right knee.

31. Claimants aw Dr. Cunningham on January 15, 2015 for the Synvisc injection. Dr. Cunningham's assessment was mild to moderate patellofemoral compartment osteoarthritis-right knee. Claimant received the Synvisc injection and had no complications.

32. Dr. Cunningham examined Claimant on March 12, 2015. Claimant reported the Synvisc injection provided little or no relief. He had sharp and burning pain, localized to the anterior knee. On examination, Dr. Cunningham noted Claimant walked with a slightly antalgic gait and had mild knee effusion. There was severe patellafemoral crepitus and pain with patellar compression. Dr. Cunningham discussed treatment options, including conservative and surgical intervention. A right knee arthroscopy with chondroplasty of the patellafemoral compartment was described as the best option to address the condition of Claimant's right knee. The ALJ credits Dr. Cunningham's opinion that this proposed surgery represents the best treatment option.

33. Claimant was seen by Dr. Kovacevich on March 13, 2015. Dr. Kovacevich's diagnoses were right talus fracture- s/p ORIF; right hip s/p repair; low back pain; right knee strain. Claimant was awaiting clearance for right knee scope and he was to continue PT for his low back and hip. Claimant's work restrictions included maximum 10 lbs. lifting, carrying, pushing/pulling; 2 hours walking/standing; no crawling kneeling, squatting or climbing. The ALJ infers the crawling kneeling, squatting or climbing restrictions were related to his right knee symptomatology.

34. Jon M. Erickson M.D. (orthopedic surgeon) issued a letter, dated March 24, 2015 after reviewing some of the medical records in the case[3]. Dr. Erickson reviewed the record[4] of the MRI and noted that the majority of the pathology involved the patellofemoral compartment. Mild to moderate fissuring was noted on the medial patellar facet with concomitant damage in the trochlear groove. Dr. Erickson believed that many these abnormalities were pre-existing. Dr. Erickson noted that Claimant had a BMI of 32.67, which classified him as obese. Dr. Erickson recommended denial of the requested authorization of right knee scope with chondroplasty and synovectomy/plica excision. Dr. Erickson noted the results of the patellar chondroplasty procedure had not been very impressive.

35. Dr. Erickson issued a subsequent report, dated April 3, 2015. He noted additional records had been provided, but these did not change his opinion and recommended the proposed surgery be denied. Dr. Erickson compared the reports of both MRI-s and stated the fall caused a compression fracture to the medial compartment of the right knee. Dr. Erickson described this issue as resolved as of the second MRI and said Claimant did not complain of patellofemoral pain until recently. Dr. Ericson did not analyze whether the fall and its aftermath could have caused Claimant's patellofemoral arthritis to become symptomatic. The ALJ finds Dr. Erickson's opinion to be less persuasive than those of Dr. Cunningham and Dr. Kovacevich, as he did not examine Claimant, nor did he analyze the impact the 5/20/13 fall and subsequent gait alteration had on the patellofemoral osteoarthritis.

36. Dr. Kovacevich evaluated Claimant in April 7, 2015 and noted the request for surgery by Dr. Cunningham was denied. Claimant advised Dr. Kovacevich that he was doing more than his outlined restrictions. Claimant was to continue PT and await the appeal of the denial of surgery. Claimant's restrictions remained the same as the 3/13/15 appointment and Dr. Kovacevich advised Claimant to abide by his restrictions. In the examination of April 28, 2015, Dr. Kovacevich noted Claimant continued to have discomfort in his right knee, which he felt was causing him to alter his gait. Claimant reported soreness in the right knee after therapy. Claimant was to continue PT and stayed on modified duty.

37. A letter dated May 12, 2015 from Kurt Parker, PT was admitted into evidence. Mr. Parker stated Claimant's right knee had been problematic since the original injury. Mr. Parker noted he had been working with Claimant for the past twenty-one (21) months and said Claimant had consistently reported knee pain. Claimant had also expressed frustration that this problem had been put on the back burner.

---

[3] In his record review Dr. Erickson noted that he did not have Dr. Cunningham's earlier records and did not know whether Claimant had received PT or steroid injections. It does not appear that Dr. Erickson had records from Drs. Kovacevich, Elton or Raub, nor did he apparently have the PT records from Parker Physical Therapy.

[4] It does not appear that Dr. Erickson had the actual MRI films, nor did he refer to the x-rays taken in Dr. Cunningham's office.

38. Dr. Kovacevich's report from the May 20, 2015 examination noted Claimant felt about the same, specifically, activity caused his knee to be painful. On June 19, 2015, Dr. Kovacevich re-evaluated Claimant, who reported his foot and ankle felt fine, but any activity caused discomfort and pain in his knee. Claimant stated that he had an IME in Denver, but the physician did not examine his knee, but told him the MRI showed nothing was wrong. Dr. Kovacevich's assessment was knee sprain/strain, which was described as Claimant's primary issue. Dr. Kovacevich opined that Claimant's arthritis predated the injury but the fracture to the ankle and the injury to the hip "exacerbated and made the arthritic changes symptomatic". Claimant's restrictions were decreased (although he was still to do no kneeling) and Dr. Kovacevich was looking to taper his medications. The ALJ credits Dr. Kovacevich's opinion regarding the cause of Claimant's right knee condition.

39. At the request of Respondents, James Lindberg, M.D. performed an IME on June 16, 2015. Dr. Lindberg reviewed Claimant's course of treatment following the 5/20/13 injury. Dr. Lindberg stated Claimant more than likely suffered a contusion to his right knee, with concomitant stress reaction on the tibial plateau on the medial side and medial femoral condyle. Dr. Lindberg opined that the injury to his patella predated the accident, as this was not the type of injury one sees in an acute patellofemoral injury. Dr. Lindberg stated Claimant did not land on the anterior aspect of his right knee, but landed on the right side on the right hip.[5] Dr. Lindberg did not believe Claimant had a patellofemoral problem which required surgery. He also stated most of Claimant's pain complaints were medial joint line and there was no surgically treatable injury in the medial joint.

40. Dr. Kovacevich examined Claimant on July 31, 2015 and he had continued right knee pain, as well as swelling with activity. Dr. Kovacevich's diagnoses were s/p right talus fracture-ORIF; right knee pain; low back pain; s/p pelvic fr; right hip labral tear.

41. Dr. Lindberg testified as an expert in orthopedic surgery on August 19, 2015. He was board certified in that specialty, as well as Level II accredited pursuant to the W.C.R.P. He stated Claimant had patella femoral arthritis in the right knee and a small defect in the lateral femoral condyle (filled in with bone). Dr. Lindberg testified there was edema in the medial femoral condyle. This was confirmed by the 10/13 MRI. He opined the medial condyle condition was related to the fall at work. Dr. Lindberg testified the patellar femoral problem was identified early, but was asymptomatic and he thought the first mention of pain in this area was November 2104. Dr. Lindberg said there was no indication for surgical intervention in this area.

42. Dr. Lindberg reviewed the 12/14 MRI, which he said showed chondromalacia. There was a small 3X5 mm defect in the lateral tibia plateau (new) with subchondral osteophytes filling the defect. Dr. Lindberg did not address the issue

[5] Claimant correctly points out in his Position Statement that it was unclear how Dr. Lindberg concluded this, since Claimant lost consciousness and there was no other evidence that conclusively showed how Claimant fell or whether there was a direct impact on the knee.

of whether Claimant's altered gait could have accelerated the process of osteophyte formation. Dr. Lindberg testified that he believed a "majority" of Claimant's knee pathology was the patella femoral pathology, which the surgery was to address. Dr. Lindberg believed this condition was pre-existing and not aggravated/accelerated by the work injury. He also opined there was a less than 50/50 result with this surgery. Dr. Lindberg testified that while it was possible that Claimant's altered gait exacerbated the patella femoral osteoarthritis, it was not probable.

43. The ALJ found Dr. Lindberg's testimony generally persuasive, particularly in his review of the MRI-s and his description of Claimant's symptoms as these related the anatomic structures in Claimant's knee. However, Dr. Lindberg did not address the question of whether Claimant continued to pain complaints related to the stress injury to the femoral condyle (in addition to the patellofemoral pain) and whether the proposed surgery (including the chrondroplasty) could address those issues. Dr. Lindberg also did not testify on the issue of whether the chondroplasty could address the chondral thinning of the central trochlea and reduce Claimant's symptoms.

44. Claimant returned to Dr. Raub on August 20, 2015, which was the first time Dr. Raub had seen him since he underwent a right hip labral repair (9/2/14) done by Brian White, M.D. Prior to this surgery, he had very little low back pain, but was experiencing low back pain, as well as bilateral leg pain. It was noted that surgery was recommended for moderate patellofemoral arthritis (right knee). On examination, Dr. Raub noted Claimant had an antalgic gait on the right and he had to stand with his knee flexed.

45. In Dr. Raub's assessment concerning the right knee, he considered whether right knee problems were causing Claimant's current low back symptoms. Dr. Raub stated if he solely had low back pain that would be more possible. Given the leg symptoms "that seem to be neuritic, we need to make sure there is no structural change in the lumbar spine that would more likely correlate with symptoms". If there wasn't significant pathology, Dr. Raub was more inclined to say Claimant was putting mechanical stress on the lumbosacral area leading to some referred leg symptoms. A new MRI was ordered.

46. Dr. Raub evaluated Claimant on September 29, 2015 and he was complaining of low back pain at the lumbosacral area with right knee pain and intermittent bilateral lower extremity symptoms. In Dr. Raub's assessment of the right knee (right knee patellofemoral arthrosis), he noted that surgery had been recommended and he saw nothing on the lumbar MRI which would refer right knee pain in his opinion.

47. The ALJ finds that Claimant requires medical treatment for his right knee to cure and relieve the effects of his industrial injury. Claimant suffered a compression fracture to the medial compartment of the right knee, as well as an aggravation of the osteoarthritis in the patellofemoral compartment as a direct result of the 5/20/13 fall.

48. Claimant has proven the right knee arthroscopy with chondroplasty of the patellafemoral compartment recommended by Dr. Cunningham is reasonable and necessary. Claimant testified he is desirous of the surgery. The ALJ concludes that the surgery recommended by Dr. Cunningham will cure and relieve the effects of Claimant's industrial injury.

49. None of Claimant's authorized treating physicians found that he was at MMI with regard to his right knee.

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

CONCLUSIONS OF LAW

General

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. 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).

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).

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).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo.

1994). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Cunningham is reasonable and necessary, as well as related to his industrial injury. Claimant asserted he suffered a medial femoral condyle injury on 5/20/13. Also, while he may have had osteoarthritis in his right knee prior to his industrial injury, Claimant argued this condition was asymptomatic and never required treatment. It was only after the 5/20/13 injury and that he developed pain in the knee. Claimant also argued that the knee pain was a direct result of his limp while he was transitioning to weight bearing on the right leg. In summary, Claimant argued it was a combination of these factors which led to his need for surgery. The ALJ agrees. As found, Claimant met his burden of proving his entitlement to medical benefits.

In arriving at this decision, the ALJ fully considered Respondents' contentions. More particularly, Respondents argued that Claimant did not report right knee symptoms until well after the accident and his initial treatment. They asserted that Claimant suffered from pre-existing osteoarthritis, which was what caused his symptoms. Respondents also averred that criteria under the Medical Treatment Guidelines were not met and did not support the proposed surgery. Respondents also contended that the proposed surgery will not be efficacious for Claimant's symptoms and relied upon the expert opinions of Dr. Lindberg.

The ALJ considered the broader question of whether the Medical Treatment Guidelines-Lower Extremity Treatment Guidelines, Rule 17, Exhibit 6 ("Guidelines") applied to the requested knee surgery. The Guidelines are contained in W.C. Rule of Procedure 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. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award of deny benefits in certain situations. Thus, the ALJ has

discretion to approve medical treatment even if it deviates from the Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

W.C.R.P. 17-5(C) provides in relevant part:

> "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. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9."

In the case at bench, the Guidelines provided parameters for the ALJ to consider when evaluating the proposed right knee surgery. The ALJ notes that the Guidelines do not directly address the factual scenario presented by this case; namely where Claimant suffered an injury to the medial femoral condyle (variously described as "moderate bone edema", "stress reaction to medial tibial plateau" and "compression fracture to the medial compartment"), as well as trauma to the patellofemoral compartment where osteoarthritis was present.

W.C.R.P. 17-Exhibit 6, 2, a (i) [page 47] addresses osteoarthritis in the knee, but is concerned with "swelling and/or pain in a joint due to an **aggravating activity** in a patient with pre-existing change in a joint". [Emphasis added.]

The Guidelines further provide:

> "…There is good evidence from a randomized controlled trial that arthroscopic debridement alone provides no benefit over recommended therapy for patients with uncomplicated Grade 2 or higher arthritis…"
>
> "Therefore arthroscopic debridement and/or lavage are not recommended for patients with arthritic findings and continual pain and functional deficits unless there is meniscal or cruciate pathology …" [W.C.R.P. 17-Exhibit 6, 2, a (vi) [page 50].

The ALJ noted that both Drs. Erickson and Lindberg opined that the proposed procedure was not recommended pursuant to the Guidelines. However, this case not only arthritic changes in the patellfemoral compartment, but trauma to the medial tibial plateau. Neither of Respondents' experts were more persuasive than Claimant's treating physicians.

The ALJ also considered the Guidelines provisions with regard to Patellofemoral Pain Syndrome. (W.C.R.P. 17-Exhibit 6, 2, I (vi) [page 66]), but finds these do not apply in this instance. Claimant was never diagnosed with this condition, nor did the various orthopedists who examined him (including Dr. Lindberg) find weakening, instability or misalignment of the patellafemoral mechanism.

Because of the unique factual circumstances of this case (medial injury and aggravation of patellofemoral osteoarthritis), the Guidelines did not definitively assist the ALJ in determining whether a right knee arthroscopy with chondroplasty is reasonable and necessary in this case.

The ALJ considered the nature of the fall, Claimant's resulting treatment and the various medical expert opinions in the case. The ALJ was persuaded that not only did Claimant suffer an injury to the medial femoral condyle as a result of the industrial injury, but his pre-existing patellofemoral osteoarthritis was aggravated by the 5/13/13 injury and its aftermath.

As a starting point, the evidence before the Court established an injury and resulting symptoms in Claimant's right knee. Claimant's work-related injury involved a significant fall from a height of between 12-14 feet, which was not disputed. Claimant suffered multiple fractures, including the ankle and pelvis. (Findings of Fact 2 and 5). There was also direct evidence that Claimant suffered a medial femoral condyle injury. (Finding of Fact 11). This was confirmed by Respondents' expert, Dr. Lindberg. (Finding of Fact 41). Accordingly, an injury of this magnitude was the cause of Claimant's right knee symptoms and his need for surgery.

Second, Claimant's right knee symptoms were most probably the result of the acute injury to the medical femoral condyle and the aggravation of the osteoarthritis in the patellofemoral compartment. The symptoms came to the forefront after he became weight-bearing. Claimant subjectively reported pain and swelling in the knee. These symptoms were consistently reported after September, 2013. These symptoms were worse after activity. Claimant did not have these symptoms before his injury.

Objective evidence in the form of findings made by physicians and other providers supported the conclusion that Claimant had symptoms both on the medial side and the patellofemoral compartment. Some examples included:

- 10/10/13: Dr. Kovacevich noted swelling after Claimant became weight-bearing.
- 10/17/13: Dr. Lindauer reviewed MRI films and noted edema to medial tibial plateau.
- 11/21/13: Dr. Elton noted antalgic gait, limited ROM.
- 1/16/14: Dr. Elton observed small knee effusion.
- 5/13/14: Dr. Raub found crepitus and popping.
- 11/18/14: PA Karns found guarded gait and positive grind test.
- 12/23/14: Dr. Cunningham found mild to moderate patellofemoral crepitus.
- 3/12/15: Dr. Cunningham noted antalgic gait and small knee effusion.

- 5/12/15: Physical Therapist Parker noted consistent symptoms of knee pain.

Third, Dr. Kovacevich and Dr. Cunningham supported the recommended surgical procedure. As found, the proposed surgery is reasonable as it can not only address Claimant's symptoms on the medial side, but also in the patellofemoral compartment. In addition, both Dr. Kovacevich and Dr. Cunningham opined that previously asymptomatic arthritic condition to become symptomatic and recommended surgery.

The ALJ was persuaded that Claimant's treating physicians were in the best position to assess whether the proposed surgery was reasonable and offered the possibility of symptom relief. (Findings of Fact 32 and 38). As such, he is entitled to medical benefits, as recommend by these physicians.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the right knee arthroscopy with chondroplasty as recommended by Dr. Cunningham.

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: January 22, 2016

Digital signature

Timothy L. Nemechek
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 had a reasonable excuse for filing his Application for Hearing and Notice to Set more than two years but less than three years after the date of his left knee injury pursuant to §8-43-103(2), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he suffered a left knee injury during the course and scope of his employment with Employer on May 31, 2013.

FINDINGS OF FACT

1. Employer is a furniture moving company. On May 1, 2001 Claimant began working for Employer as a Mover. Claimant's job duties involved driving to a designated location, removing furniture from the property, packing the furniture into a truck and delivering it to another location.

2. Claimant testified that on May 31, 2013 he was moving furniture in South Dakota with coworker Jeremy Wager. They were specifically removing a large, front-loading washing machine from a home. Claimant remarked that, as they were moving the machine up a staircase, his hand slipped and the washer struck him in the left knee. He immediately experienced left knee pain.

3. Claimant remarked that, because his left knee was not terribly painful as a result of the accident, he decided to drive with Mr. Wager to their next moving assignment in Wyoming. Mr. Wager commented that on the drive to Cheyenne, Wyoming he contacted Employer's General Manager of Colorado Operations Tim Porter. Mr. Wager requested additional materials for the next move and a replacement Mover because Claimant had injured his left knee in South Dakota.

4. Claimant and Mr. Wager met replacement mover Troy Howdin at a Holiday Inn Hotel in Cheyenne on Saturday June 1, 2013. Claimant explained that the parties watched television, drank beer and went to bed. He testified that at about 11:30 p.m. he got out of bed to use the restroom in the hotel room but his left knee buckled and he fell to the floor. Because of Claimant's left knee pain he called 9-1-1 and was transported by ambulance to the Cheyenne Regional Medical Center Emergency Room.

5. The ambulance report specifies that paramedics found Claimant "sitting in an office chair in his room awake and alert with beer sitting on the desk beside him." Claimant stated that "he was wrestling with his buddy" approximately two hours earlier when his left knee went backwards and he felt a "pop." Claimant noted that his left knee

pain had increased but he denied any other knee injuries. He also stated that he had consumed approximately seven beers and had not taken any pain medication.

6. The report from the Cheyenne Regional Medical Center reflects that Claimant's attending physician was Michelle Lynn Anderson, M.D. Claimant reported left knee pain but refused an ice pack stating "it doesn't really help with the pain" and refused pain medications. Instead, he exclaimed "can I just get the hell out of here." Claimant reported that he had been wrestling with a buddy approximately one to two hours earlier when he felt his knee "pop" and experienced immediate pain. X-rays of Claimant's left knee were normal. He was diagnosed with left knee pain after "wrestling with friends," placed in a knee immobilizer and told to follow-up with orthopedics. The report did not mention any left knee injury while Claimant was moving a washing machine in South Dakota.

7. Claimant testified that he received a ride back to Colorado from friends. Mr. Wager and Mr. Howdin left Cheyenne to complete the next moving job in Wyoming. Mr. Porter testified that he learned of Claimant's left knee injury on Sunday June 2, 2013 when he received a telephone call from Mr. Wager. Mr. Porter also acknowledged that he had spoken to Mr. Wager on May 31, 2013. Mr. Wager explained that he and Claimant had been on the road for four weeks and Claimant had banged his knee. Mr. Porter noted that there was no suggestion during the telephone call that Claimant had injured his left knee on May 31, 2013. However, he sent Mr. Howdin to Cheyenne as a replacement mover because Claimant and Mr. Wager had been on the road for an extended period of time.

8. The June 2, 2013 First Report of Injury detailed the circumstances surrounding Claimant's left knee injury. The Report specifically provided that Claimant mentioned to Mr. Wager that he was "sore and fatigued from previous job." Claimant got up to use the restroom at about 1:00 a.m. and his knee buckled. Employer directed Claimant to Exempla Occupational Medicine for treatment. The June 4, 2013 Employee Incident Report also specified that Claimant's knee buckled when he got up to use the restroom but did not mention any specific work-related accident on May 31, 2013.

9. On June 4, 2013 Claimant visited Andrew Plotkin, M.D. at Exempla for an examination. Claimant reported that he was on a moving assignment and stopped at a hotel in Cheyenne for the night. When he stood up to use the restroom at approximately 1:00 a.m. his left knee buckled, he fell to the ground and experienced severe pain. Claimant did not mention any incident while moving a washing machine on May 31, 2013. Dr. Plotkin diagnosed Claimant with a left knee sprain and possible medial meniscal tear. He concluded that the "mechanism of injury did not arise from the course and scope of [Claimant's] work nor was there any demonstrated hazard that resulted in the injury. It is my opinion that this is a non-occupational injury." He recommended work restrictions but left the details to Claimant's private physician because the injury was not work-related.

10. Claimant testified that he did not agree with Dr. Plotkin's assessment and sought a change of physician. On June 7, 2013 Bruce D. McFarland, D.O. drafted a

note stating that Claimant was medically unable to work from June 1-14, 2013 or until "cleared by an orthopedic specialist."

11. On June 17, 2013 Claimant visited James Johnson, M.D. for an evaluation. Dr. Johnson recorded that Claimant "was doing a job in Cheyenne, Wyoming at which time his knee was in a tremendous amount of pain. Later on that night he was in more pain and his knee buckled." Claimant did not mention that he injured his left knee while moving a washing machine in South Dakota. An x-ray of Claimant's left knee did not reveal any fractures or tumors. Based on Claimant's pain sensitivity and the mechanism of injury Dr. Johnson recommended a left knee MRI.

12. On June 19, 2013 Claimant visited Tomm Vanderhorst, M.D. at Exempla for an examination. The report did not address any mechanism of injury. Dr. Vanderhorst diagnosed Claimant with a left MCL sprain, a left minor medial meniscus tear and a left shin abrasion. He released Claimant to modified duty employment.

13. On June 24, 2013 Claimant returned to Dr. Vanderhorst for an evaluation. The left knee MRI revealed a small meniscus tear. Dr. Vanderhorst noted that he was concerned about possible surgery because Claimant was "in far more pain than would be expected with such a small injury."

14. On June 27, 2013 Respondents filed a Notice of Contest challenging Claimant's claim because his left knee injury was not work-related.

15. On August 19, 2013 Dr. McFarland drafted a note permitting Claimant to return to regular employment. The note specifically provided that "[a]fter examining [Claimant] he is medically stable to return to full work duties."

16. On August 25, 2014 Claimant filed an Application for Hearing and Notice to Set. Claimant specified that the following issues would be considered at hearing: (1) compensability; (2) medical benefits; (3) Average Weekly Wage (AWW); (4) disfigurement; (5) Temporary Total Disability (TTD) benefits; (6) Temporary Partial Disability (TPD) benefits; and (7) Permanent Total Disability (PTD) benefits. On September 5, 2014 Respondents filed a Response to Claimant's Application for Hearing and Notice to Set.

17. On December 10, 2014 Respondents filed a Motion to Strike Claimant's Application with Prejudice. The Motion to Strike was predicated upon Claimant's failure to respond to Respondents' discovery requests.

18. On December 26, 2014 the Division of Workers' Compensation issued an Order striking Claimant's Application for Hearing without prejudice. The Order also prohibited Claimant from filing a new Application until he answered Respondents' pending discovery requests.

19. On July 24, 2015 Claimant answered Respondents' discovery requests and provided releases for personal health care information. On August 9, 2015 Claimant filed his second Application for Hearing and Notice to Set.

20. Claimant has demonstrated that it is more probably true than not that he had a reasonable excuse for filing his Application for Hearing and Notice to Set more than two years but less than three years after the date of his left knee injury. Initially, Claimant recognized the compensable character of his left shoulder injury when he reported the injury to Mr. Porter on June 2, 2013. On August 25, 2014 Claimant filed an Application for Hearing and Notice to Set. The Application was filed within two years of Claimant's injury date. The Application thoroughly apprised Respondents of the issues to be considered at hearing. Although the Application was stricken without prejudice because of a failure to produce discovery responses, it nevertheless informed Respondents that Claimant had suffered a compensable industrial injury and was seeking benefits. The second Application filed on August 9, 2015 was outside the two year statute of limitations but within the three year limitation period. A reasonable excuse exists for the late filing of the second application because Respondents had been informed that Claimant was seeking benefits under the original Application and thus were not prejudiced. Respondents had been advised by the August 25, 2014 Application that Claimant was seeking benefits as a result of the May 31, 2013 incident. Respondents were thus permitted to evaluate Claimant's claim to prepare a defense. Accordingly, Claimant's Application is not barred by the statute of limitations period in §8-43-103(2), C.R.S.

21. Claimant has failed to establish that it is more probably true than not that he suffered a left knee injury during the course and scope of his employment with Employer on May 31, 2013. Claimant and Mr. Wagar explained that on May 31, 2013 they were removing a large, front-loading washing machine from a home in South Dakota. Claimant remarked that, as they were moving the machine up a staircase, his hand slipped and the washer struck him in the left knee. He immediately experienced left knee pain. However, despite the testimony of Claimant and Mr. Wagar, the medical records suggest that Claimant injured his left knee in his hotel room in Cheyenne, Wyoming on June 1, 2013 and not while he was performing his job duties on May 31, 2013.

22. The ambulance report specifies that paramedics found Claimant "sitting in an office chair in his room awake and alert with beer sitting on the desk beside him." Claimant stated that "he was wrestling with his buddy" approximately two hours earlier when his left knee went backwards and he felt a "pop." The report from the Cheyenne Regional Medical Center also specifies that Claimant had been wrestling with a buddy approximately one to two hours earlier when he felt his knee "pop" and experienced immediate pain. The reports did not mention any left knee injury while Claimant was moving a washing machine in South Dakota. The June 2, 2013 First Report of Injury specifically provided that Claimant mentioned to Mr. Wager that he was "sore and fatigued from previous job." Claimant got up to use the restroom at about 1:00 a.m. and his knee buckled. On a June 4, 2013 visit to Dr. Plotkin Claimant reported that he was on a moving assignment and stopped at a hotel in Cheyenne for the night. When he stood up to use the restroom at approximately 1:00 a.m. his left knee buckled, he fell to the ground and experienced severe pain. Claimant again did not mention any incident while moving a washing machine on May 31, 2013. Dr. Plotkin persuasively concluded that the "mechanism of injury did not arise from the course and scope of [Claimant's]

work nor was there any demonstrated hazard that resulted in the injury." Even by June 17, 2013 Claimant reported to Dr. Johnson that he "was doing a job in Cheyenne, Wyoming at which time his knee was in a tremendous amount of pain. Later on that night he was in more pain and his knee buckled." Claimant still did not mention that he injured his left knee while moving a washing machine in South Dakota.

23. Claimant's testimony is simply inconsistent with the bulk of the medical records. Absent any mention of the washing machine incident in South Dakota, the medical records reflect that Claimant's left knee injury did not occur while performing his job duties for Employer, but instead occurred while walking or wrestling in a hotel room in Cheyenne, Wyoming. The activity did not constitute an employment duty but was removed from the employment relationship. Accordingly, Claimant's left knee injury did not arise out of the course and scope of his employment duties for Employer on May 31, 2013.

CONCLUSIONS OF LAW

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

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

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

Statute of Limitations

4. Section 8-43-103(2), C.R.S. provides that the right to Workers' Compensation benefits is barred unless a formal claim is filed within two years after the injury. However, the statute of limitations does not begin to run until the claimant, as a

reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). The requirement that the claimant recognize the "seriousness" of the injury contemplates the claimant will recognize the gravity of the medical condition. Finally, a "compensable" injury is one which is disabling and entitles the claimant to compensation in the form of disability benefits. *Romero v. Industrial Commission,* 632 P.2d 1052 (Colo. App. 1981). Therefore, to recognize the "probable compensable character" of an injury, the injury must be of sufficient magnitude that it causes a disability that would lead a reasonable person to recognize that he may be entitled to compensation benefits. *Id.*

5. A claim may be filed within three years after an injury if it is determined that a reasonable excuse exists for the failure to file the claim within two years and the employer's rights have not been prejudiced. §8-43-103(2), C.R.S. The claimant bears the burden of proving that a reasonable excuse exists. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 129 Colo. 257, 269 P.2d 696 (1954). A "reasonable excuse" is one which is "legally justifiable." *Armour & Co. v. Industrial Commission*, 149 Colo. 251, 368 P.2d 798 (Colo. 1962); *Morford v. Fresh Express*, W.C. No. 4-209-032 (ICAP, Sept. 29, 1995).

6. A "reasonable excuse" for neglecting to timely file a claim may exist when an employer misleads a claimant regarding compensability. *City and County of Denver v.* Phillips, 443 P.2d 379 (1968). However, a claimant's lack of knowledge of the law or of his legal rights cannot constitute a reasonable excuse. *Ramos v. Sears Roebuck Company*, W.C. No. 4-156-827 (ICAP, Feb. 10, 1994). The applicable standard is whether the claimant, as a reasonable person, believed that it was unnecessary to file a claim for compensation. *Id.* The existence of a reasonable excuse for purposes of neglecting to file a claim within two years is a matter within the discretion of the ALJ. *Emrich v. Jackson Hewitt Tax Service*, W.C. No. 4-241-443 (ICAP, Oct. 27, 1998). Moreover, an ALJ has "wide discretion" in determining whether reasonable excuse exists. *Butler v. Memorial Gardens Cemetery*, W.C. No. 4-589-950 (ICAP, Nov. 9, 2005).

7. As found, Claimant has demonstrated by a preponderance of the evidence that he had a reasonable excuse for filing his Application for Hearing and Notice to Set more than two years but less than three years after the date of his left knee injury. Initially, Claimant recognized the compensable character of his left shoulder injury when he reported the injury to Mr. Porter on June 2, 2013. On August 25, 2014 Claimant filed an Application for Hearing and Notice to Set. The Application was filed within two years of Claimant's injury date. The Application thoroughly apprised Respondents of the issues to be considered at hearing. Although the Application was stricken without prejudice because of a failure to produce discovery responses, it nevertheless informed Respondents that Claimant had suffered a compensable industrial injury and was seeking benefits. The second Application filed on August 9, 2015 was outside the two year statute of limitations but within the three year limitation period. A reasonable excuse exists for the late filing of the second application because Respondents had been informed that Claimant was seeking benefits under the original Application and

thus were not prejudiced. Respondents had been advised by the August 25, 2014 Application that Claimant was seeking benefits as a result of the May 31, 2013 incident. Respondents were thus permitted to evaluate Claimant's claim to prepare a defense. Accordingly, Claimant's Application is not barred by the statute of limitations period in §8-43-103(2), C.R.S.

Compensability

8. 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).

9. 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).

10. 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. 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.*

11. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a left knee injury during the course and scope of his employment with Employer on May 31, 2013. Claimant and Mr. Wagar explained that on May 31, 2013 they were removing a large, front-loading washing machine from a home in South Dakota. Claimant remarked that, as they were moving the machine up a staircase, his hand slipped and the washer struck him in the left knee. He immediately experienced left knee pain. However, despite the testimony of Claimant and Mr. Wagar, the medical records suggest that Claimant injured his left knee in his hotel room in Cheyenne, Wyoming on June 1, 2013 and not while he was performing his job duties on May 31, 2013.

12. As found, the ambulance report specifies that paramedics found Claimant "sitting in an office chair in his room awake and alert with beer sitting on the desk beside him." Claimant stated that "he was wrestling with his buddy" approximately two hours earlier when his left knee went backwards and he felt a "pop." The report from the Cheyenne Regional Medical Center also specifies that Claimant had been wrestling with a buddy approximately one to two hours earlier when he felt his knee "pop" and experienced immediate pain. The reports did not mention any left knee injury while Claimant was moving a washing machine in South Dakota. The June 2, 2013 First Report of Injury specifically provided that Claimant mentioned to Mr. Wager that he was "sore and fatigued from previous job." Claimant got up to use the restroom at about 1:00 a.m. and his knee buckled. On a June 4, 2013 visit to Dr. Plotkin Claimant reported that he was on a moving assignment and stopped at a hotel in Cheyenne for the night. When he stood up to use the restroom at approximately 1:00 a.m. his left knee buckled, he fell to the ground and experienced severe pain. Claimant again did not mention any incident while moving a washing machine on May 31, 2013. Dr. Plotkin persuasively concluded that the "mechanism of injury did not arise from the course and scope of [Claimant's] work nor was there any demonstrated hazard that resulted in the injury." Even by June 17, 2013 Claimant reported to Dr. Johnson that he "was doing a job in Cheyenne, Wyoming at which time his knee was in a tremendous amount of pain. Later on that night he was in more pain and his knee buckled." Claimant still did not mention that he injured his left knee while moving a washing machine in South Dakota.

13. As found, Claimant's testimony is simply inconsistent with the bulk of the medical records. Absent any mention of the washing machine incident in South Dakota, the medical records reflect that Claimant's left knee injury did not occur while performing his job duties for Employer, but instead occurred while walking or wrestling in a hotel room in Cheyenne, Wyoming. The activity did not constitute an employment duty but was removed from the employment relationship. Accordingly, Claimant's left knee injury did not arise out of the course and scope of his employment duties for Employer on May 31, 2013.

ORDER

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

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

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

DATED: January 5, 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 the total knee replacement surgery performed by Dr. Adams was reasonable and necessary medical treatment related to her September 10, 2013 workers' compensation injury?

FINDINGS OF FACT

1. Claimant sustained an injury to her right knee on September 10, 2013 when she walked into a room, noticed a resident who was in a wheel chair start to stand up and as she went to help the resident, the resident fell as claimant reached for the resident causing claimant to hyperextend her right knee.

2. Claimant was referred for medical treatment to Dr. Knaus who initially examined claimant on September 11, 2013. Dr. Knaus noted claimant did fairly well after the incident initially, but developed increasing pain and stiffness with instability in her right knee. Dr. Knaus referred claimant to Dr. Pevny for orthopedic consultation.

3. Claimant underwent a magnetic resonance image ("MRI") of her right knee on October 10, 2013. The MRI noted evidence of a prior right anterior crucial ligament ("ACL") reconstruction. The MRI also showed an old posterior horn lateral meniscal tear with later posterior horn meniscal osicle and osteoarthritis most severe in the patellofemoral and lateral compartments.

4. Claimant subsequently underwent surgery consisting of a right knee ACL reconstruction with partial medial and lateral meniscectomies and removal of multiple loose bodies under the auspices of Dr. Pevny on December 31, 2013.

5. Following claimant's surgery, claimant reported to be doing well initially, but subsequently developed persistent swelling and discomfort. Based on claimant's continued complaints, Dr. Pevny recommended a repeat MRI scan on September 2, 2014.

6. The MRI was performed on September 16, 2014 and showed tricompartmental osteoarthritis with increased cartilage fissuring and loss of intra-articular bodies. The MRI also showed fraying along the medial meniscal free edge and a small joint effusion.

7. Claimant underwent a second surgery under the auspices of Dr. Pevny on September 23, 2014. The second knee surgery involved a right knee arthroscopy, partial lateral mensiectomy, removal of loose bodies and debridement of the anterior compartment.

8. Following claimant's second surgery, claimant returned to Dr. Pevny on December 30, 2014. Dr. Pevny noted claimant was doing reasonably well with some residual symptoms that he opined was related to underlying degenerative disease in her knee in all three compartments. Despite claimant's degenerative disease in her knee, she reported she was doing better than she was prior to her surgery, but noted continuing problems including some stiffness, difficulty with terminal extension and occasional popping.

9. By June 30, 2015, Dr. Pevny noted claimant was continuing to complain of significant pain throughout her entire right knee. Dr. Pevny noted claimant had undergone multiple arthroscopic surgeries and clean outs with ACL reconstruction. Dr. Pevny noted that from her surgery he had observed arthritic disease in her knee in multiple compartments. Dr. Pevny noted claimant's young age, and referred her for a second opinion regarding possible total knee arthroplasty.

10. Claimant was eventually evaluated by Dr. Adams on July 17, 2015. Dr. Adams reviewed claimant's radiographic findings, performed a physical examination, obtained a medical history and concluded claimant was a candidate for a total knee arthroplasty. Dr. Adams performed the total knee arthroplasty on September 3, 2015.

11. Claimant testified at hearing that she had some initial improvements following both surgeries, but subsequently developed problems in her right knee. Claimant testified she initially tore her right ACL in 2002 and had surgery with Dr. Pevny to repair the torn ACL.

12. Respondents obtained a records review independent medical examination ("IME") of claimant with Dr. Failinger on November 25, 2015. Dr. Failing reviewed claimant's medical records and noted claimant had high grade arthritis prior to her surgeries related to her work injury. Dr. Failinger noted claimant's significant degenerative findings and opined that these findings were not related to her work injury.

13. Notably, the medical records from Dr. Adams and Dr. Pevny do not indicate that claimant's need for a total knee replacement is causally related to her September 10, 2013 work injury. Additionally, Dr. Pevny's notes indicate that claimant's tricompartmental arthritis was appreciated by him when he performed the surgeries. This indicates that the need for the total knee replacement is related to claimant's pre-existing condition and not related to her compensable work injury of September 10, 2013.

14. The ALJ credits the opinions expressed by Dr. Failing and finds that claimant has failed to establish that it is more probable than not that her right knee total knee arthroplasty is related to the September 10, 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 failed to establish by a preponderance of the evidence that the total knee replacement surgery performed by Dr. Adams is reasonable and necessary medical treatment related to her September 10, 2013 work injury.

6. As found, respondents are not liable for the cost of the total knee arthroplasty surgery pursuant to the Colorado Workers' Compensation Act.

ORDER

It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the total knee arthroplasty surgery performed by Dr. Adams 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: January 28, 2016

Keith E. Mottram

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for right shoulder surgery by Theodore F. Schlegel, M.D. and Cary R. Motz, M.D. is reasonable, necessary and causally related to her August 16, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant works as a Teacher for Employer. On August 16, 2013 she suffered an admitted industrial injury to her right shoulder while participating in a team building exercise. After Claimant jumped she was forcefully pulled backwards and landed on her right shoulder. Her arm was fully flexed over her head and she heard a cracking sound in her right shoulder when she landed. Claimant initially received medical treatment at the Centennial Medical Center Emergency Room.

2. On August 19, 2013 Claimant visited Authorized Treating Physician (ATP) Sharon Walker, M.D. at Arbor Occupational Medicine for an examination. Dr. Walker assigned Claimant work restrictions and prescribed physical therapy. She also recommended a right shoulder MRI. After reviewing the MRI, Dr. Walker diagnosed Claimant with a right shoulder strain and an acromioclavicular joint strain.

3. Claimant continued to receive treatment from Dr. Walker throughout the fall of 2013. She underwent conservative right shoulder treatment including physical therapy, injections and pool therapy.

4. On January 23, 2014 Claimant visited ATP John Raschbacher, M.D. at Arbor Occupational Medicine for an evaluation. Claimant reported continuing right shoulder pain. Dr. Raschbacher noted that Claimant exhibited a painful arc with forward flexion and a positive impingement sign in her right shoulder. He administered a right shoulder subacromial space injection.

5. On February 28, 2014 Claimant returned to Dr. Raschbacher for an examination. She reported improvement following the right shoulder injection but continued to experience anterior right shoulder pain. Dr. Raschbacher referred Claimant to Robert Schlegel, M.D. at the Steadman-Hawkins Clinic.

6. On April 30, 2014 Claimant visited Dr. Schlegel for an examination. Claimant reported progressive right shoulder pain, stiffness and range of motion limitations. Dr. Schlegel recommended conservative care including physical therapy. Claimant subsequently underwent 31 physical therapy sessions through the Steadman-Hawkins Clinic during the period June 9, 2014 until March 31, 2015.

7. On August 13, 2014 Claimant underwent a repeat right shoulder MRI. The MRI revealed mild rotator cuff tendinosis, slight subacromial bursal thickening, possible fraying of the superior labrum, mild long biceps tendinosis along the biceps anchor and an increased bone signal adjacent to the humeral head along the medial aspect of the bicipital groove.

8. On August 18, 2014 Claimant returned to Dr. Schlegel for an evaluation. Dr. Schlegel noted that the MRI revealed capsulitis and biceps tendinosis. He commented that the MRI also reflected some signal change in the bicipital groove and proximal humerus. Dr. Schlegel recommended surgery that included an arthroscopic lysis of adhesions, a capsular release and a biceps release.

9. On September 15, 2014 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged medical benefits and temporary disability benefits beginning October 16, 2014.

10. On October 16, 2014 Claimant underwent right shoulder surgery with Dr. Schlegel. In his operative report Dr. Schlegel noted degenerative fraying of the superior labrum, partial detachment of the biceps labral anchor, synovitis around the biceps tendon, chondromalacia involving the posterior glenoid and mild-to-moderate bursal hypertrophy. Dr. Schlegel remarked that there was no evidence of capsulitis.

11. On December 1, 2014 Claimant returned to Dr. Schlegel for an examination. She reported continued right shoulder pain that was localized to the mid-upper arm near the biceps. Claimant remarked that the pain was largely unchanged from before her surgery. Dr. Schlegel commented that the ongoing shoulder pain could be related to adhesive capsulitis. He recommended continued physical therapy, but if Claimant's condition did not improve, then injections might be warranted.

12. On December 17, 2014 Claimant visited James Genuario, M.D. based on a referral from Dr. Schlegel. Dr. Genuario stated that Claimant developed postoperative adhesive capsulitis. He reported that Claimant had 110 degrees of active and passive right shoulder flexion and 20 degrees of external rotation. Dr. Genuario administered a right shoulder intraarticular corticosteroid injection.

13. After obtaining approximately two weeks of excellent relief from the intraarticular corticosteroid injection, Claimant returned to Dr. Genuario on February 4, 2015. Dr. Genaurio again diagnosed Claimant with adhesive capsulitis, administered another right shoulder intraarticular steroid injection and recommended additional physical therapy.

14. On February 26, 2015 Claimant visited Alisa Koval, M.D. at Arbor Occupational Medicine for an examination. Claimant reported some right shoulder relief and increased range of motion following her recent cortisone injection. Dr. Koval noted Claimant's decreased range of motion and recommended a follow-up visit with Dr. Schlegel.

15. On March 13, 2015 Claimant underwent a repeat right shoulder MRI. The MRI revealed a possible irregular tendon remnant at the biceps anchor, an irregular and possibly scarred or degenerated tendon along the bicipital groove, possible adhesions and scarring. The MRI also reflected rotator cuff tendinosis, possible subacromial/subdeltoid bursitis and capsular synovial thickening.

16. On March 27, 2015 Claimant visited Scott Mullen, M.D. in Dr. Schlegel's office for an evaluation. After reviewing Claimant's right shoulder MRI he noted scarring within the interval, rotator cuff tendinosis, bursitis and capsular thickening that was more severe than the August 13, 2014 MRI and consistent with adhesive capsulitis. Dr. Mullen diagnosed Claimant with postoperative adhesive capsulitis.

17. On April 9, 2015 Claimant visited Dr. Koval and noted that Dr. Schlegel wanted to perform a second surgery to address an unattached biceps tendon, adhesive capsulitis and clean up scar tissue. Claimant reported painful range of motion and constant pain in her biceps. Dr. Koval referred Claimant for a second surgical opinion and recommended massage therapy.

18. On April 23, 2015 Claimant underwent an examination with Orthopedic Surgeon Cary Motz, M.D. Claimant reported continuing right shoulder pain with activities of daily living. After reviewing the March 2015 MRI, Dr. Motz diagnosed Claimant with right shoulder impingement, bicipital tenosynovitis, and moderate adhesive capsulitis. Dr. Motz recommended repeat right shoulder surgery.

19. On May 7, 2015 Claimant returned to Dr. Motz for treatment. Dr. Motz administered an ultrasound-guided right shoulder injection. He noted that the ultrasound did not reveal a biceps or rotator cuff tear. Nevertheless, he was surprised to see the biceps in the groove and remarked that the biceps "may have stuck in the groove and could be causing the symptoms."

20. On May 21, 2015 Claimant returned to Dr. Motz and reported a few days of relief from the last injection but progressively worsening pain. Dr. Motz noted positive objective testing, including decreased passive range of motion, and maintained his prior diagnoses. He recommended right shoulder surgery including arthroscopy with biceps tenotomy/tenodesis and debridement.

21. On May 30, 2015 John D. Douthit performed a records review of Claimant's case. Dr. Douthit noted that Claimant "has had neck and shoulder pain for two years since her injury and, if anything, medical care has made her worse." He determined the recommended right shoulder surgery was not reasonable, necessary, or related to Claimant's industrial injury. Dr. Douthit commented that Claimant's condition was identical to her preoperative condition before her first surgery. He summarized that a repeat surgery would not accomplish anything other than aggravate Claimant's pain and produce more scarring. Dr. Douthit strongly advised against repeat invasive surgery because it was "counterintuitive to inhibit adhesions and reduce pain with motorized cutting instruments." He recommended a right shoulder examination under

anesthesia with Dr. Schlegel. Respondents subsequently denied Claimant's right shoulder surgical request.

22. On July 28, 2015 Claimant returned to Dr. Koval and noted that Dr. Schlegel continued to recommended right shoulder surgery. Dr. Koval remarked that

> [i]t would be entirely inappropriate to end this case at this point in time. [Claimant] is an athletic woman, fairly young, age 42, and to be this limited in her range of motion and activity level for the rest of her life is entirely inappropriate and would represent a massive failure on the part of the Workers' Compensation system.

She noted positive objective testing and recommended continued massage therapy and medications.

23. On August 27 2015 Claimant underwent an independent medical examination with Eric O. Ridings, M.D. Dr. Ridings diagnosed Claimant with biceps tendonitis with a partial tear of the biceps anchor and a right shoulder strain. He stated that "there has been significant psychological overlay to the severity of the patient's complaints of pain and decreased function." Dr. Ridings noted that Claimant's complaints were quite similar to those she had experienced prior to her first surgery He acknowledged that the absence of adhesive capsulitis at the first surgery did not preclude the possibility that she subsequently developed the condition. Dr. Ridings noted that Claimant has had progressively worsening right shoulder range of motion deficits since the first surgery. The range of motion limitations could be due to progressive adhesive capsulitis or psychological overlay. Dr. Ridings explained that "[i]f [Claimant] truly has adhesive capsulitis, then the proposed surgery would be reasonable, necessary, and work-related." Similar to Dr. Douthit, Dr. Ridings recommended an evaluation of Claimant's right shoulder under anesthesia. If Claimant's examination under anesthesia reveals right shoulder limited range of motion, he recommended proceeding with the surgery proposed by Dr. Schlegel and Dr. Motz. He mentioned that "I am not suggesting [Claimant] is consciously exaggerating her symptoms, but rather that if there is not found to be an anatomic basis that this would be due to a preexisting psychiatric condition, not malingering."

24. Dr. Koval disagreed with Dr. Ridings' determination and maintained that right shoulder surgical intervention was warranted. She explained that Claimant cannot forward flex or laterally abduct to 90 degrees. Claimant has also exhibited negligible internal and external rotation and positive diagnostic testing. She recommended continued physical and massage therapy and medications. Dr. Koval concluded that Claimant had not reached Maximum Medical Improvement (MMI).

25. Dr. Koval also disagreed with Dr. Ridings' recommendation that Claimant undergo passive right shoulder range of motion testing under anesthesia. Dr. Koval specifically challenged Dr. Ridings' comment that if full, passive range of motion could be achieved under anesthesia, then Claimant does not require surgery. Dr. Koval stated that "simply because someone has full range of motion passively under

anesthesia" does not mean that "they should be able to demonstrate full range of motion actively out of anesthesia." She mentioned that she "can think of several clinical examples where this is not the case, mostly due to soft tissue dysfunction surrounding the shoulder joint." Dr. Koval summarized that Dr. Ridings' recommendation is not a definitive answer to whether Claimant should have surgery.

26. Claimant testified at the hearing in this matter. She stated that prior to her injury she was very active in sports including running, tennis, biking, soccer and basketball. She also coached high school girls' sports. Claimant explained that since her August 2013 injury she has been unable to compete in the sports that she enjoys and has had to stop coaching. She maintained that she has not had any prior right shoulder injuries, conditions, restrictions or limitations. Claimant explained that, following her first right shoulder surgery, she continued to experience right shoulder pain and range of motion limitations. Finally, postoperative treatment including massage, physical therapy and injections has not relieved her right shoulder symptoms.

27. Claimant has demonstrated that it is more probably true than not that the request for right shoulder surgery by Drs. Schlegel and Motz is reasonable, necessary and causally related to her August 16, 2013 admitted industrial injury. In October 2014 Claimant underwent a first right shoulder surgery with Dr. Schlegel. In his operative report, Dr. Schlegel noted that he examined Claimant's shoulder under anesthesia and did not find any evidence of adhesive capsulitis and proceeded with an arthroscopy. Following the first surgery Claimant did not improve and continued to report pain and other right shoulder symptoms. She underwent three right shoulder injections and received only temporary relief. On March 13, 2015 Claimant underwent a repeat right shoulder MRI that revealed increased capsular synovitis that is indicative of adhesive capsulitis. Five different treating surgeons diagnosed Claimant with postoperative adhesive capsulitis. Claimant's surgeons and Dr. Koval noted that Claimant has significantly decreased range of motion and recommend repeat surgery. Dr. Motz reviewed Dr. Schlegel's October 2014 operative report, Claimant's prior medical records and March 2015 MRI. He diagnosed Claimant with right shoulder impingement, bicipital tenosynovitis and moderate adhesive capsulitis. Dr. Motz administered an ultrasound-guided right shoulder injection. Although the ultrasound did not reveal a biceps or rotator cuff tear, Dr. Motz was surprised to see the biceps in the groove and remarked that the biceps "may have stuck in the groove and could be causing the symptoms." Dr. Motz recommended repeat right shoulder surgery to relieve Claimant's worsening symptoms. Finally, Dr. Koval explained that Claimant cannot forward flex or laterally abduct her right shoulder to 90 degrees. Claimant has also exhibited negligible internal and external rotation and positive diagnostic testing. Dr. Koval maintained that right shoulder surgery was warranted because of Claimant's range of motion deficits and limited activity levels.

28. In contrast, Drs. Douthit and Ridings challenge the surgical request and instead recommend right shoulder manipulation under anesthesia to determine whether Claimant actually has adhesive capsulitis. Dr. Ridings acknowledged that, if Claimant has adhesive capsulitis, then the surgery recommended by Drs. Schlegel and Motz is

reasonable, necessary, and related to Claimant's August 16, 2013 admitted industrial injury. Moreover, Dr. Ridings also acknowledged that, although Claimant did not have adhesive capsulitis at the time of the first surgery, she very well may have developed adhesive capsulitis. More importantly, Dr. Koval disagreed with Dr. Ridings' recommendation that Claimant undergo passive right shoulder range of motion testing under anesthesia. She specifically challenged Dr. Ridings' comment that if full, passive range of motion could be achieved under anesthesia, then Claimant does not require surgery. Dr. Koval stated that "simply because someone has full range of motion passively under anesthesia" does not mean that "they should be able to demonstrate full range of motion actively out of anesthesia." Finally, Dr. Ridings' concerns about Claimant's psychological condition are contrary to the large bulk of the medical records and the opinions of Claimant's treating physicians. Accordingly, based on the medical records and persuasive opinions of Drs. Schlegel, Motz, Koval and other treating physicians, Claimant has demonstrated that right shoulder surgery is reasonable, necessary and causally related to her August 16, 2013 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by 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. 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).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the request for right shoulder surgery by Drs. Schlegel and Motz is reasonable, necessary and causally related to her August 16, 2013 admitted industrial injury. In October 2014 Claimant underwent a first right shoulder surgery with Dr. Schlegel. In his operative report, Dr. Schlegel noted that he examined Claimant's shoulder under anesthesia and did not find any evidence of adhesive capsulitis and proceeded with an arthroscopy. Following the first surgery Claimant did not improve and continued to report pain and other right shoulder symptoms. She underwent three right shoulder injections and received only temporary relief. On March 13, 2015 Claimant underwent a repeat right shoulder MRI that revealed increased capsular synovitis that is indicative of adhesive capsulitis. Five different treating surgeons diagnosed Claimant with postoperative adhesive capsulitis. Claimant's surgeons and Dr. Koval noted that Claimant has significantly decreased range of motion and recommend repeat surgery. Dr. Motz reviewed Dr. Schlegel's October 2014 operative report, Claimant's prior medical records and March 2015 MRI. He diagnosed Claimant with right shoulder impingement, bicipital tenosynovitis and moderate adhesive capsulitis. Dr. Motz administered an ultrasound-guided right shoulder injection. Although the ultrasound did not reveal a biceps or rotator cuff tear, Dr. Motz was surprised to see the biceps in the groove and remarked that the biceps "may have stuck in the groove and could be causing the symptoms." Dr. Motz recommended repeat right shoulder surgery to relieve Claimant's worsening symptoms. Finally, Dr. Koval explained that Claimant cannot forward flex or laterally abduct her right shoulder to 90 degrees. Claimant has also exhibited negligible internal and external rotation and positive diagnostic testing. Dr. Koval maintained that right shoulder surgery was warranted because of Claimant's range of motion deficits and limited activity levels.

6. As found, in contrast, Drs. Douthit and Ridings challenge the surgical request and instead recommend right shoulder manipulation under anesthesia to determine whether Claimant actually has adhesive capsulitis. Dr. Ridings acknowledged that, if Claimant has adhesive capsulitis, then the surgery recommended by Drs. Schlegel and Motz is reasonable, necessary, and related to Claimant's August 16, 2013 admitted industrial injury. Moreover, Dr. Ridings also acknowledged that, although Claimant did not have adhesive capsulitis at the time of the first surgery, she very well may have developed adhesive capsulitis. More importantly, Dr. Koval disagreed with Dr. Ridings' recommendation that Claimant undergo passive right shoulder range of motion testing under anesthesia. She specifically challenged Dr. Ridings' comment that if full, passive range of motion could be achieved under anesthesia, then Claimant does not require surgery. Dr. Koval stated that "simply because someone has full range of motion passively under anesthesia" does not mean that "they should be able to demonstrate full range of motion actively out of anesthesia."

Finally, Dr. Ridings' concerns about Claimant's psychological condition are contrary to the large bulk of the medical records and the opinions of Claimant's treating physicians. Accordingly, based on the medical records and persuasive opinions of Drs. Schlegel, Motz, Koval and other treating physicians, Claimant has demonstrated that right shoulder surgery is reasonable, necessary and causally related to her August 16, 2013 industrial injury.

ORDER

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

Claimant's request for right shoulder surgery as recommended by Drs. Schlegel and Motz is granted.

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: January 14, 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 her claim should be reopened pursuant to Section 8-43-303, C.R.S.?

- Whether claimant has proven that she is entitled to medical treatment that is reasonable and necessary to cure and relieve claimant from the effects of her industrial injury?

FINDINGS OF FACT

1. Claimant was employed with employer on December 31, 2013 when she was injured within the course and scope of her employment with employer. Claimant testified she injured her right hand in the injury and her finger is now crooked. Claimant was injured when her right hand was caught in a shower door. Claimant was treated at the Aspen Valley Hospital Emergency Room ("ER")following her injury.

2. Claimant was referred for a surgical consultation with Dr. Golden on January 10, 2014. Dr. Golden noted claimant's right fifth finger was held in a swan neck position with an obvious injury to the tip of her finger. Dr. Golden noted claimant's contralateral hand (the left hand) had a mild swan-necking of the fifth finger as well. Dr. Golden noted that through questioning of claimant with a translator, claimant admitted to having a swan-neck deformity to her finger prior to the injury, but it may be accentuated by the injury. Dr. Golden noted claimant could have her sutures taken out and, after claimant heals, she would consider re-examination with correction of the swan-neck deformity.

3. Despite the records from Dr. Golden, claimant denied at hearing having a swan-neck deformity in her pinky prior to her work injury. The ALJ credits the reports from Dr. Golden which document claimant reporting the swan-neck deformity was present before her injury along with documentation of a swan-neck deformity in her contralateral hand as being more credible than claimant's contrary testimony at hearing.

4. Claimant was referred to Dr. Goyette for medical treatment following her injury. Dr. Goyette evaluated claimant on January 10, 2014 and noted claimant had a right pinky laceration and noted the stitches she had received at the ER. Dr. Goyette noted claimant had a fracture and recommended she continue using the splint and letting the bone heal.

5. Claimant returned to Dr. Golden on February 7, 2014. Dr. Golden noted claimant had undergone x-rays that showed a tuft fracture and what appeared to be more of a chronic swan necking of the PIP joint. Dr. Golden noted that it was possible that claimant had a tendon injury or a volar plate injury and, if acute, a magnetic resonance image ("MRI") would show the acute nature of the injury. Therefore, Dr. Golden ordered an MRI and opined that if the MRI did not show evidence of an acute injury, then she would question whether surgical intervention would be better for her than a silver ring spint.

6. The MRI was performed on February 25, 2014 and showed residual deformity of the fifth finger with hypertension of the MCP and flexion of the PIP joint; mild deformity of the tip of the distal phalanx due to the original fracture, and fifth finger flexor tenosynovitis without tendon rupture with mild bowstringing near the PIP joint with possible tear of the A2 pulley.

7. Claimant returned to Dr. Golden on March 4, 2014. Dr. Golden noted that claimant's x-rays show evidence of possible bony changes that would indicate and old PIP joint injury and opined that the MRI showed no acute injuries. Dr. Golden noted that possible bowstringing with possible injury to the A2 pulley, but found that this did not correspond to her area of tenderness and opined that this was merely an incidental finding. Dr. Golden noted that claimant is left with a swan-neck deformity which could be corrected surgically.

8. Dr. Golden issued an addendum regarding the proposed surgery on March 11, 2014. Dr. Golden noted claimant's medical history and her swan-neck deformity with a mallet. Dr. Golden acknowledged that whether the swan-neck deformity was caused by the mallet finder is difficult to say. Dr. Golden did not indicate in her addendum that the swan-neck deformity was related to her work injury.

9. Respondents obtained a records review independent medical examination by Dr. Mordick on March 16, 2014. Dr. Mordick reviewed claimant's medical records and opined that claimant's treatment to date had been appropriate. Dr. Mordick opined that it was his opinion that claimant's need for treatment of the swan neck deformity was not related to her work injury.

10. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Goyette on March 27, 2014. Claimant was provided with a 0% impairment rating.

11. A final admission of liability ("FAL") was filed by respondents on March 27, 2014 admitting for a period of temporary disability benefits and the 0% impairment rating. Claimant failed to object to the FAL and her case was closed as a matter of law.

12. Claimant testified at hearing that she returned to Dr. Golden one month after she received the FAL for additional treatment. Claimant testified she did not recall

the date she returned to Dr. Golden. According to the medical records entered into evidence at hearing, claimant did not return to Dr. Golden after March 4, 2014.

13. Claimant testified at hearing that her condition has gotten much worse since being placed at MMI. Claimant's testimony in this regard is rejected by the ALJ as not credible.

14. The ALJ credits the reports from Dr. Mordick and Dr. Goyette and finds that claimant has failed to establish that her claim should be reopened. The ALJ also credits the records from Dr. Golden that document claimant's condition being related to an old injury rather than an acute event and finds that claimant has failed to establish that additional medical treatment related to her work injury is appropriate in this case.

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 failed to demonstrate that additional medical treatment related to her work injury is reasonable and necessary.

6. 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. 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).

7. As found, claimant has failed to demonstrate that she has sustained a worsening of her condition that would entitle claimant to reopen her claim pursuant to Section 8-43-303.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim is denied and dismissed.

2. Claimant's request for additional medical treatment related to her December 31, 2013 work injury is denied and dismissed.

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

DATED: January 28, 2016

Keith E. Mottram

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

#KP821TPN0D1BXOv 2

ISSUES

- Did Respondents overcome the opinion of the DIME physician (Stanley Ginsburg, M.D.) concerning the Claimant's permanent medical impairment by clear and convincing evidence?

- If Respondents overcame the DIME physician's opinion, what is Claimant's medical impairment rating?

STIPULATED FACTS

The Parties agreed to the following facts:

1. Claimant's date of birth was January 20, 1994.

2. Claimant suffered an admitted industrial injury on July 22, 2013.

FINDINGS OF FACT

1. On 7/22/13, Claimant was working as a hostess for Respondent-Employer. The injury occurred when she cleaning the pie case at the restaurant. Claimant had lifted the glass cover up was bent over and was reaching inside the case. The glass cover came down and struck her in her lower back, just above her hips.

2. Claimant was nineteen (19) years old on the date of injury.

3. Claimant's medical history was significant before her industrial injury in that she had two (2) prior motor vehicle accidents and treated with a chiropractor, Daniel Flemming, D.C. In the patient information sheet she completed on March 2, 2012, Claimant stated that she was having neck and mid-back pain after being rear-ended in a car accident that day and the pain diagrams she completed showed neck and shoulder pain. No narrative report was included within these records, although what appear to be Dr. Flemming's handwritten treatment notes were included.

4. Claimant was involved in a second motor vehicle accident at the end of April, 2012[1]. She was complaining of neck and low back pain. At the time she stopped chiropractic treatments, Claimant continued to have neck inflammation, although some improvement was noted. Claimant treated with Dr. Flemming on the following dates, with the subjective symptoms noted below:

a. July 13, 2012: Claimant reported NP (neck pain), LBP (low back pain)

[1] In the patient information sheet on 4/30/12, Claimant stated the car accident was "last Friday".

and mid back problems along with some ongoing finger numbness.

b. September 11, 2012: Claimant reported NP (neck pain) and LBP (low back pain) over the last two days.

c. September 26, 2012: Claimant reported NP (neck pain), LBP (low back pain) and left wrist problems. Claimant again reported neck and low back pain on October 31, 2012.

d. February 5, 2013: Claimant reported LBP and hand numbness along with pain in her ankles and feet. She also noted neck pain which was getting worse over the last month.

e. February 11, 2013: Claimant again reported neck pain, mid back pain, knee problems and pain to her elbows. It was noted that she has not been sleeping due to her pain.

f. February 15, 2013: Claimant reported that her "entire back hurts" and noted that her legs hurt as well. She specifically reported neck and low back pain as well.

g. February 25, 2013, Claimant complained of pain in her cervical, thoracic, and lumbosacral spine.

5. In summary, Claimant received treatment at Dr. Flemming's office from 3/2/12- 2/25/13. Claimant received treatment at this office and the records reflected subjective reports of pain in the cervical, thoracic and lumbosacral spine throughout, although some slight improvement with treatment was noted in the records. No discharge summary was included. The ALJ notes that Claimant registered similar complaints after the 7/22/13 injury.

6. At the hearing Claimant testified that she was not having symptoms that she related to the MVA-s. Claimant also testified that she had not treated with Dr. Flemming (whom she identified as Dan) since she was fifteen (15) years old.[2] The chiropractic records admitted as Exhibit L highlighted the inaccuracy of this testimony and this hurt Claimant's credibility.

7. After her industrial injury at Village Inn, Claimant testified that she developed pain in her neck, mid and low back, as well as both of her extremities.

8. Claimant was sent to CCOM (Employer's ATP) and was evaluated by Mary Dickson, M.D. on July 22, 2013. Dr. Dickson noted that the glass cover hit her in the lower back and Claimant was complaining of cervical, thoracic and lower back symptoms, along with radicular symptoms down the right arm and leg. Dr. Dickson's

[2] The ALJ notes that in Claimant's Responses to Interrogatories, which were admitted as Exhibit 17, Claimant denied prior injuries to her back before the industrial injury. [Response to Interrogatory 11]. Claimant also did not say she had treated with Dr. Flemming. [Response to Interrogatory 10].

assessment was multiple contusions and strains to include cervical strain with radicular symptoms down right arm; thoracolumbar strain with radicular symptoms down the right leg. Medications (Ibuprofen, Skelaxin and Flexeril) were dispensed and Claimant was taken off work.

9. Claimant returned to Dr. Dickson on July 24, 2013, at which time improvement was noted in her right arm symptoms, although she had continued discomfort in cervical, thoracic spine and low back. Dr. Dickson adjusted Claimant's medication and started her on a physical therapy program. Work restrictions were also given.

10. Claimant was next seen by Dr. Dickson on August 2, 2013. At that time, improvement in her radicular symptoms (both right arm and leg) was noted. Claimant was to continue physical therapy and begin massage therapy over the next 2-3 weeks.

11. Claimant was examined by Dr. Dickson on August 20, 2013 and was complaining of pain between her shoulder blades, neck, mid and lower back. Dr. Dickson recommended that Claimant continue with physical therapy and recommended a TENS unit.

12. Dr. Dickson evaluated Claimant on September 19, 2013, noting there had been improvement in the right arm symptoms, which were present again, as well as left arm symptoms. Dr. Dickson recommended x-rays for the cervical, thoracic and lumbar spine. Claimant was to continue therapy and was returned to regular duty.

13. The spinal x-rays were taken at Penrad Imaging on October 1, 2013. Jon Snider, M.D. noted no acute abnormality in Claimant's lumbosacral spine. Timothy Cloonan, M.D. found her cervical and thoracic spine to be within normal limits.

14. Claimant returned to Dr. Dickson on October 3, 2013 and reported continued symptoms. Dr. Dickson reviewed the therapist notes and noted that Claimant was making all the sessions, but not demonstrating functional change with the treatment. Dr. Dickson's assessment was multiple contusions and strains to include cervical with symptoms into the upper shoulders; thoracolumbar strain with improved radicular symptoms right leg. Dr. Dickson discontinued PT and referred Claimant to Dr. Jenks.

15. Claimant was evaluated by Chad Abercrombie, D.C. (referred by Dr. Dickson) on October 13, 2013 for her ongoing neck and back complaints. She described lower neck and upper, mid and low back pain as constant. Tightness and some restrictions in range of motion were found in the cervical and thoracic spine. Dr. Abercrombie's assessment was lower cervical, thoracic and lumbar myofacial pain/tightness with associated articular component most likely reactionary to blunt trauma to dorsal spine. Dr. Abercrombie began treatment including manual joint mobilization-manipulation, myofacial release techniques and electrical modalities.

16. Claimant was examined by Jeffrey Jenks, M.D. on October 17, 2013, at which time it was noted that Claimant had bilateral cervical, thoracic and lumbosacral pain, as well as pain and parasthesias radiating into all four extremities. Upon examination, Dr. Jenks noted diffuse, nonspecific tenderness in the cervical, thoracic and lumbosacral paraspinals. Claimant's sensation was intact to pinprick in all of her extremities. Dr. Jenks' impression was myofacial cervical, thoracic and lumbosacral pain. Dr. Jenks injected 4 trigger points in the cervical periscapular and trapezial ridge region.

17. Dr. Dickson examined Claimant on October 25, 2013. Claimant related she underwent trigger point injections which were administered by Dr. Jenks that she described as painful. Dr. Dickson noted rounded shoulder posture, but no soft tissue bruising. Dr. Dickson noted Claimant had pain relief with Dr. Abercrombie's treatment and would also follow-up with Dr. Jenks.

18. Claimant returned to Dr. Jenks' office on November 7, 2013 and was seen by Jamie Case, M.S., PA-C. She stated that the injections did not help, but her treatments with Dr. Abercrombie were helpful. Modest increased tone was noted in the interscapular muscles. Full range of motion was seen in the cervical spine and upper extremities. PA-C Case's impression was myofacial pain in the cervical, thoracic and lumbar regions with noted improvement[3]. Claimant was given a prescription for Voltaren gel and was to continue chiropractic treatments with Dr. Abercrombie

19. Dr. Abercrombie issued a report dated November 7, 2013 in which he noted Claimant had completed seven (7) treatments. Tightness was noted in the qudarotus lumborum, rhomboids and longissimus thoracic region. Range of motion was full in all cervical thoracic and lumbar planes. Dr. Abercrombie's assessment was overall improved status with mild objective residual. The ALJ notes that Dr. Abercrombie's findings on range of motion were based upon clinical observations.

20. Dr. Dickson saw Claimant on November 15, 2013 and improvement was noted following Dr. Abercrombie's sessions. Claimant said she experienced soreness after dance classes, but some improvement.

21. The ALJ notes that over the course of her treatment of Claimant, Dr. Dickson consistently recorded in her records that the objective findings on examination were consistent with the mechanism of injury. The ALJ infers that Dr. Dickson found Claimant's pain complaints to be credible.

22. Claimant was taking a dance class in the fall semester at UCCS. Claimant testified that she did not take a dance class the second semester.

23. PA-C Case evaluated Claimant on December 3, 2013. PA-C Case's impression was noted improvement in cervical, thoracic and lumbar myofacial pain with

[3] PA-C case noted he staffed the case with Drs. Jenks and Abercrombie.

some increased tone in the right suprascapular region. Claimant was to complete her treatment with Dr. Abercrombie and then follow-up with Dr. Dickson.

24. Claimant did not lose time from work as a result of her injury. She testified that she continued to work for Employer through mid-January.

25. George Schwender, M.D. (of CCOM) evaluated Claimant on January 17, 2014, which was the first time Dr. Schwender examined Claimant. Claimant noted there was no change or improvement since the last visit and Dr. Schwender observed that she was in no distress and no particular tenderness was found upon examination. Dr. Schwender determined Claimant was at MMI with no impairment and had no work restrictions. For maintenance treatment Dr. Schwender opined that Claimant was to continue using a TENS unit for six months.

26. Although he stated there was full range of motion in Claimant's back, there were no worksheets admitted at hearing to show that Dr. Schwender performed range of motion testing at the time of this examination, including any reference to dual inclinometer measurements. The ALJ concludes that Dr. Schwender did not comply with the AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.) ["AMA Guides"] when he evaluated Claimant's permanent medical impairment because there was no evidence that he used dual inclinometers.

27. A Final Admission of Liability was filed by Insurer on January 24, 2014, admitting for 0% whole person impairment based upon Dr. Schwender's 1-17-14 report. Respondents denied liability for any maintenance medical treatment.

28. Respondent submitted a DVD documenting Claimant's activities on April 7 and April 18, 2014. (Exhibit J). Claimant was observed doing a number of activities, including entering/exiting a vehicle and walking. More particularly, the DVD documented the following:

<u>April 7, 2014</u>

1:22 p.m.: Claimant exited a car wearing approximately 2" high heels with no observable pain behaviors.

2:26 p.m.: Claimant walked out of building, got in vehicle and was able to turn her head without apparent difficulty.

2:36 p.m.: Claimant got out of car, appeared to have low back pain, walked a short distance and returned to her car.

2:47 p.m.: Claimant walked quickly up a sidewalk talking on cell phone, keys in right hand, cell phone in left hand held to ear. She walked back down sidewalk and got in car.

April 18, 2014

12:25 p.m.: Claimant walked quickly/runs up sidewalk, up a flight of stairs and runs back down.

29. Stanley Ginsburg, M.D. performed and DIME on May 9, 2014. Dr. Ginsburg evaluated Claimant for chronic pain, cervical, thoracic, thoracic outlet syndrome, low back SI joint range of motion, neurological radiating pain. At that time, Claimant told Dr. Ginsburg that she continued to have discomfort in her spine for her cervical to lumbar area. Claimant had diffuse pain, but no marked tenderness in the cervical, thoracic and lumbar areas. Claimant's neurological evaluation was normal. Dr Ginsburg noted the x-rays were normal, but scans had not been accomplished. He described he radicular complaints as atypical for this type of injury. After reviewing the mechanism of injury, Dr. Ginsburg wondered how this patient developed cervical symptoms. Also, there was variability in her response to therapy with initial improvement, then rather constant worsening.

30. Dr. Ginsburg noted that nine (9) months had elapsed since the date of injury. Dr. Ginsburg stated that he considered the entire picture carefully and concluded that Claimant had a 12% whole person permanent medical impairment to her lumbar spine, only. He assigned 5%for a specific disorder pursuant to the AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.) [4] and assigned 7% for Claimant's loss of range of motion. Dr. Ginsburg did not recommend maintenance treatment, but opined that a lumbar MRI would be appropriate.

31. The ALJ infers that Dr. Ginsburg fully considered whether Claimant sustained a permanent impairment, given the somewhat minimal findings on examination and concluded that she sustained a ratable impairment to the lumbar spine only. The ALJ credits Dr. Ginsburg's opinion that Claimant sustained a permanent medical impairment. However, Dr. Ginsburg did not have information concerning the two prior MVA-s in which Claimant was involved when considering Claimant's medical impairment. Also, Dr. Ginsburg did not include a separate section entitled "diagnosis", but included a section with his "observations".

32. Lawrence Lesnak, D.O. performed an IME on behalf of Respondents on July 29, 2014. He noted that Claimant had some tenderness throughout her paraspinal musculature bilaterally. She displayed no significant pain behaviors or nonphysiologic findings when he examined her. Dr. Lesnak found that Claimant had full cervical and thoracic spine range of motion. In his report, Dr. Lesnak noted that, on examination, there were "no abnormalities whatsoever," and, specifically, "no abnormalities with specific active range of motion measurements of her lumbar spine".

[4] Dr. Ginsburg's rating was based upon Chapter 3.3 of the AMA Guides, which incorporates Table 53 (page 80). Table 53 provides that Claimant is entitled to a 5% specific disorder rating.

33. As part of taking lumbar spine range of motion measurements, Dr. Lesnak performed straight leg raising tests on both the right and left sides, both of which yielded invalid results. Dr. Lesnak testified that his range of motion testing findings were valid. Dr. Lesnak opined that "there is absolutely no medical evidence to suggest that [claimant] has sustained any type of permanent functional impairment" as a result of the July 22, 2013 work incident.

34. Dr. Lesnak testified at hearing as an expert in occupational medicine and physiatry on behalf of Respondents. He was board certified in the specialty of physical medicine and rehabilitation and was Level II accredited pursuant to the W.C.R.P. Dr. Lesnak testified that the presentation of Claimant's symptoms was not consistent with any sort of objective radicular findings. Dr. Lesnak testified that based upon his range of motion testing, Claimant would have been entitled to a 0% impairment for that portion of the impairment rating. Dr. Lesnak did not dispute that Claimant would be entitled to a 5% impairment rating if the criteria for Table 53 were met and correlated to the clinical findings.

35. Dr. Lesnak testified that most of Claimant's symptomatic presentation after July 22, 2013 did not make sense medically. He stated, "It would be very unusual to start immediately having pain that goes from the upper or low back area…, shooting up to the head, shooting down lower, encompassing the arms and legs." Additionally, it was concerning that Claimant's symptoms were diffuse, or all over her body, rather than being localized. While testifying, Dr. Lesnak reiterated his opinion that a medical impairment rating was not warranted in these circumstances. Dr. Lesnak testified that DR. Ginsburg's rating did not follow the AMA Guides. The ALJ found Dr. Lesnak's testimony persuasive on this point.

36. An MRI of Claimant's lumbar spine was done on September 22, 2014, which was read by Eric Handley, M.D. Dr. Handley's impression was minimal L4-5 disc bulge and mild facet arthropathy. No thecal sac or foraminal narrowing was seen.

37. Claimant returned to CCOM on September 25, 2014 and was examined by George Johnson, M.D. At that time, Claimant was complaining of a dull ache in her low back, intermittent numbness in her extremities and occasional neck pain. Upon examination, Claimant had normal range of motion[5] in her lumbar spine and no pain to palpation. This was also true for her cervical spine. Dr. Johnson's diagnosis was sprain, lumbar spine and he confirmed the MMI date of 1/17/14. Dr. Johnson opined that the MRI did not show a condition which would require surgery, but facet joint injections may be beneficial.

38. Ronald Swarsen, M.D testified as an occupational medicine expert on behalf of Claimant. He has been Level II accredited pursuant to the W.C.R.P. since 1996. He did not examine Claimant, but reviewed her treatment records. He did not prepare a written report. Dr. Swarsen testified that Dr. Ginsburg's impairment rating

[5] No worksheets were included with Dr. Johnson's report.

was valid. This included the Table 53 specific disorder impairment and the range of testing which was performed. The ALJ credits Dr. Swarsen's testimony that Claimant would be entitled to a specific disorder impairment.

39. Dr. Swarsen specifically addressed the issue concerning whether the lack of a "diagnosis" section rendered Dr. Ginsburg's rating invalid. Dr. Swarsen noted that Dr. Ginsburg did not have a diagnosis section in this report, but there were consistent diagnoses throughout Claimant's treatment records and he opined this was support for Dr. Ginsburg's findings, including the rating. The ALJ credits Dr. Swarsen's testimony that there were clinical findings and diagnoses concerning Claimant's lumbar spine made by the treating physicians over the course of Claimant's treatment.

40. The ALJ finds that while Dr. Ginsburg's DIME report included a section entitled "comments", it did not include a "diagnosis" section, which is required by the AMA Guides Ch 2.3.[6] That section provides:

> "A clear, accurate, and complete report is essential to support a rating of permanent impairment. The following kinds of information are expected.
>
> **Medical evaluation includes:**
>
> **…**
>
> 4. Diagnoses and clinical impressions."

41. The ALJ finds that the comments section did not provide sufficient detail and did not correlate to the clinical findings made by other physicians. Therefore, Respondents showed it highly probable Dr. Ginsburg erred by not including a section that set forth diagnoses and clinical impressions.

42. The ALJ takes administrative notice of the AMA Guides, which governs Claimant's medical impairment. The ALJ also notes that Chapter 1.2 is an explanatory section which directly relates to chapter 2.3, at issue here. This section provides in pertinent part:

> "…Evaluation of impairment using the *Guides* requires integration of previously gathered medical information with the results of a current clinical evaluation. To characterize the impairment fully, the evaluation should be carried out in accordance with the directions in the Guides. Accomplishing this is based on using three fundamental components.
>
> First, Chapter 2 of the *Guides* lists the kinds of information needed to document the nature of an impairment and its consequences; specifies procedures for acquiring the information; and defines a structured format

[6] Exhibit K.

> for analyzing, recording, and reporting the information. A summary of this material appears at the beginning of each clinical chapter..."[7]

43. Based upon the evidence presented to the ALJ, Claimant met the criteria for a Table 53, II B lumbar spine impairment, as supported by the findings made by Dr. Ginsburg. Respondents failed to overcome this aspect of Claimant's rating. Claimant's entitlement to a specific disorder impairment rating was also supported by the records of Dr. Johnson. Therefore, Claimant is entitled to a 5% whole person impairment.

44. The ALJ finds that the only two physicians who conducted range of motion studies, as required by the AMA Guides were Dr. Ginsburg and Dr. Lesnak. The other findings with regard to range of motion were based upon clinical observations and not actual measurements. Dr. Ginsburg's found range of motion deficits in Claimant's lumbar spine and his measurements met the validity criteria under the AMA Guides. Dr. Lesnak did not obtain valid range of motion measurements for Claimant's lumbar spine.

45. In the Introduction section for chapter 2 of the AMA Guides, it specifies:

> "If two physicians using the *Guides* have obtained similar results and reached similar conclusions, a framework exists within which to resolve the discrepancies. Analysis of records and reports will disclose the differences. In such an instance, the differences will be in the clinical findings, which are matters of fact, not opinion; the latter can be verified by further observation of the claimant in accordance with the procedures and methods of the *Guides*…"[8]

46. The ALJ is unable to resolve the conflict between Dr. Ginsburg and Lesnak based concerning Claimant's range of motion deficits in the lumbar spine (or lack thereof) based upon the evidence adduced at hearing. As such, the ALJ finds Claimant is not entitled to additional impairment based upon loss of range of movement in her lumbar spine.

47. 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

---

[7] The second and third components refer to medical evaluation protocols and reference tables specifically keyed to the evaluation protocols.
[8] *Id.*

be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

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

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

OVERCOMING THE DIME ON THE ISSUE OF IMPAIRMENT

The Respondents contend that they proved by clear and convincing evidence that Dr. Ginsburg, the DIME physician, erred in assessing an impairment rating of 12% whole person for physical impairment. Relying principally on the opinions of Dr. Lesnak, they aver that Dr. Ginsburg did not properly apply the AMA Guides in arriving at his rating. Respondents' argument is twofold; first Respondents assert that Dr. Ginsburg's opinion was erroneous in that he did not identify a spinal disorder and did not provide a diagnosis. As part of this argument, Respondents contend that Dr. Ginsburg failed to base his rating on the AMA Guides and what is taught during the Level II accreditation course when evaluating Claimant's permanent medical impairment.

Second, Respondents argued that Claimant's symptoms do not correlate to either the mechanism of injury or the anatomical structure of her spine. Respondents also argued that Claimant failed to disclose her prior motor vehicle accidents to her doctors, as well as her prior chiropractic care.

Claimant contended that the DIME physician's opinion concerning impairment was correct and Respondents failed to meet their burden to overcome Dr. Ginsburg's opinion. Claimant asserted that Dr. Ginsburg validly found a specific disorder of the lumbar spine and his range of motion testing was valid.

Claimant argued that Dr. Swarsen's testimony that Dr. Ginsburg's rating was valid was persuasive on this point. Claimant further averred that the evidence of other medical professionals is a difference of opinion which does not constitute clear and convincing evidence.

A DIME's physician's rating is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. 2006; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002). Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'**;** it is evidence that his highly

probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert,* 914 P.2d 411, 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980).

Respondents meet this burden only by demonstrating that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002)(citing *DiLeo v. Koltnow, supra*). Respondents meet this burden only by demonstrating that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) (citing *DiLeo v. Koltnow, supra).*

The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002). Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*.

The factual scenario in the case at bench is similar to cases in which a part of the DIME physician's rating was overcome by clear and convincing evidence. See *Deleon v. Whole Foods Market, Inc.,* W.C. No. 4-600-477 (ICAO, November 16, 2006); *Ortiz v. Service Experts,* W.C. No. 4-657-974 (ICAO, January 22, 2009). *Deleon* addressed the proper evidentiary standard for determining a Claimant's impairment rating after an ALJ found that a portion of the DIME physician's impairment rating was overcome by clear and convincing evidence.

In the *Deleon* case the ALJ determined the Respondents overcame by clear and convincing evidence a DIME physician's finding that the Claimant sustained 5 percent impairment for lost range of motion in the lumbar spine. However, the ALJ also found that the Respondents failed to overcome by clear and convincing evidence the DIME physician's finding that the Claimant sustained 5 percent impairment for a specific disorder of the lumbar spine. Consequently the ALJ upheld the specific disorder portion of the rating. The ICAO ruled that once an ALJ determines "the DIME's rating has been overcome in any respect" the ALJ is "free to calculate the Claimant's impairment rating

based upon the preponderance of the evidence" standard. See also *Laclay v. Academy Insulation,* W.C. No. 4-693-581 (ICAO June 4, 2009).

As found, Respondents proved that Dr. Ginsburg erred in not including a section that specified a diagnosis and clinical impressions. The ALJ credited Dr. Lesnak's testimony on this issue. While Dr. Ginsburg included a section with comments and observations, the ALJ found more detail was required to connect the clinical findings and his final rating. Here, the Judge found Respondents showed it was highly probable that the "comments " section of Dr. Ginsburg's report did not comply with the AMA Guides. Respondents thus overcame Dr. Ginsburg's permanent medical impairment rating by clear and convincing evidence.

Claimant's Impairment Rating

Having decided that Dr. Ginsburg's opinion was overcome by clear and convincing evidence, the inquiry turns to what, if any, permanent medical impairment Claimant sustained as a result of her industrial injury. *Deleon v. Whole Foods Market, Inc, supra.* Under this scenario, the ALJ makes a determination of fact as to Claimant's correct medical impairment based upon the preponderance of the evidence standard. *Ortiz v. Service Experts,supra.* In the case at bar, the evidence submitted by Claimant showed that she sustained a permanent medical impairment.

First, Claimant showed it more probably true than not that her injury proximately caused a specific disorder of the lumbar region under Table 53 of the AMA Guides. There were objective findings made by her treating physicians, including Drs. Dickson, and Jenks, which support this. As found, these physicians correlated their clinical findings with Claimant's symptoms over the course of her treatment. Since the treatment was based upon finding made upon multiple evaluations, the ALJ concludes that Claimant sustained an injury to her lumbar spine that was ratable.

Second, there was objective evidence of a lumbar injury and therefore a potential impairment in Dr. Johnson's report and the MRI. As found, Dr. Johnson diagnosed lumbar strain in September 2014, more than a year after the injury. Although Dr. Johnson clinically observed full range of motion in the lumbar spine, he did not perform range of motion testing pursuant to the AMA Guides. Dr. Johnson further opined that maintenance treatment in the form of injections was reasonable. This was direct evidence that his clinical findings supported a diagnosis of lumbar strain and Claimant had symptoms for a period of longer than six (6) months. Based upon the evidence before the Court, Claimant had greater than six (6) months of pain and rigidity in her lumbar spine, which entitled her to a 5% specific disorder impairment.

Therefore, Claimant has proven by a preponderance of the evidence that she sustained a permanent medical impairment as a result of her injury. Based upon the clinical findings made by Drs. Dickson, Jenks, Johnson and Ginsburg, along with the testimony of Dr. Swarsen, the ALJ has concluded that Claimant sustained a 5% impairment to her lumbar spine as a result of the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a 5% whole person impairment as a result of the 7/22/13 industrial injury.

2. Respondents shall pay Claimant PPD benefits based upon a 5% whole person rating.

3. Since Claimant was a minor on the date of injury, PPD benefits shall be paid pursuant to Sections 8-42-102(4) and 8-42-107(8)(d),C.R.S.

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

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

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

DATED: December 31, 2015

Digital signature

Timothy L. Nemechek
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 right shoulder and right wrist with an onset date of December 5, 2013.

2. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on February 7, 2014.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment benefits for his right shoulder, right wrist, and left shoulder.

4. Whether Claimant has established by a preponderance of the evidence that Dr. Reichhardt is an authorized treating physician.

5. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Prior to November, 2013 Claimant worked for Employer in the position "trim loin tail." Claimant worked an overnight shift, labeled the "B" shift.

2. In approximately August, 2013 Claimant bid on a daytime "A" shift job position of "seam inside round." Claimant won the bid and began working the "A" shift in the position "seam inside round" in the beginning of November, 2013.

3. The new position of seam inside round was more physically demanding than Claimant's prior position of trim loin tail. The pull force for trim loin tail is listed on Employer's job description as 5-8 pounds while the pull force for seam inside round is listed as 35 pounds. A video of the different positions also shows the new position of seam inside round to be more physically demanding.

4. The seam inside round position required Claimant to hold a hook in his left hand, hook the meat, pull it closer to him, cut it with his right hand for 20-25 seconds, and rest for 8-10 seconds between cuttings. Claimant alleges that the repetitive motion from moving his hand and shoulder in the seam inside round position caused injury to his right wrist and shoulder.

5. Approximately one month after starting the seam inside round position, Claimant alleges that he began experiencing pain in his right wrist and right shoulder due to repetitive movements.

6. At this time, Claimant had been having trouble making count in his new position and was failing to meet his job requirements.

7. On December 5, 2015 Claimant was evaluated by Employer's health services unit. Claimant reported pain in his right wrist, that he had just started pulling count, and that this job was quite a bit harder than his previous job. It was noted that Claimant had tenderness and slightly limited range of motion in his right wrist. Claimant was provided a cold pack, NSAID's for pain, and an elastic wrist support. Claimant was restricted from using his right wrist for the rest of the shift. Claimant did not report any right shoulder pain. *See* Exhibit 2.

8. Claimant filled out a pain chart and circled his right hand/wrist as the injured area and rated the severity of pain as a 6/10. *See* Exhibit 2.

9. Claimant was provided a designated provider list. Claimant was told he could chose which provider he wished to select and Claimant initialed that he wished to select Banner Occupational Health Services. Claimant signed and dated this document. *See* Exhibit 2.

10. On December 6, 2013, Claimant was evaluated at Employer's health services. Claimant reported continued pain in his right wrist. It was noted that Claimant had better range of motion but noticeable weakness and tenderness. Claimant was provided a cold pack, NSAID's for pain, and a coban wrap for added support. Claimant was restricted to ¼ of a count. *See* Exhibit 2.

11. On December 9, 2013 Claimant was evaluated at Employer's health services. Claimant reported pain in the right wrist was a little better. It was noted Claimant had better range of motion and that Claimant had a small nodule like bump/growth on the radial head of the right wrist that was firm and moved when Claimant moved his wrist. Claimant was provided heat to his right wrist, ibuprofen, an elastic wrist support, and an ergo hook for his left hand. Claimant's ¼ of a count restriction was continued. *See* Exhibit 2.

12. On December 10, 2013 Claimant was evaluated at Employer's health services. Claimant reported his wrist was about the same. It was noted that tenderness was slightly improved but that Claimant still had a floating type of nodule about the radial head of the wrist. Claimant was provided heat, NSAID's for pain, and an elastic wrist support. Claimant continued to be restricted to ¼ of a count. *See* Exhibit 2.

13. On December 11, 2013 Claimant was evaluated at Employer's health services. Claimant reported continued pain in his right wrist and stated he was now also having pain in his right shoulder. Claimant reported that his supervisor was not

following the ¼ count restriction and that his supervisor had him on ½ of a count. Claimant was provided heat and NSAID's for pain. The ¼ of a count restriction was continued. *See* Exhibit 2.

14. On December 11, 2013 Claimant sought treatment at his personal provider's office and was evaluated by John Volk, M.D. Claimant reported right shoulder and hand pain for the last two weeks with numbness to his right fingers and difficulty making a fist. Claimant reported his belief that he injured his arm at work with repetitive motion cutting meat and that he was moved several weeks ago from the night to the day shift with a new job involving more repetitive motion of his right shoulder. Dr. Volk assessed right arm pain as a new repetitive use injury and advised Claimant to seek further evaluation through proper work channels. *See* Exhibit 3.

15. On December 12, 2013 Claimant was evaluated at Employer's health services. Claimant reported he was about the same. Claimant was again provided with heat, NSAID's for pain, and was continued on a ¼ of a count restriction. *See* Exhibit 2.

16. On December 13, 2013 Claimant was evaluated at Employer's health services. Claimant reported having more pain especially in the right shoulder. Claimant reported that his supervisor was not abiding by his ¼ of a count restriction. It was noted that Claimant continued to show good range of motion. Claimant was provided heat, NSAID's for pain, and his ¼ of a count restriction was continued. *See* Exhibit 2.

17. On December 16, 2013 Claimant was evaluated at Employer's health services. Claimant reported that his right shoulder was a little better after having the weekend off, but that he was still having pain. Claimant reported that his job of seam inside rounds was too hard for him and that he would like to be back on his old job of trim loin tails. Claimant reported that he wanted to stay on A shift. Claimant reported numbness in his 4th and 5th fingers, continued to have a floating nodule along the radial head of his right wrist, and showed full range of motion in his right wrist. Claimant was continued on ¼ of a count restriction. Claimant was referred to "Fab Supt" to discuss possibilities of a job change to betters suit his physical abilities. *See* Exhibit 2.

18. On December 17, 2013 Claimant was evaluated at Employer's health services. Claimant reported his right shoulder was hurting more and that he had little if any change to his right wrist. Claimant's ¼ of a count restriction was continued. *See* Exhibit 2.

19. In late December, 2013 Claimant's restriction was increased to ½ of a count.

20. On January 2, 2014 Claimant was evaluated at Employer's health services. Claimant reported pain/numbness in his right hand/thumb/index finger and pain in his right shoulder. It was noted that Claimant's initial pain was in the hand then several days later while on reduced count restriction Claimant began to report right shoulder pain. It was noted that Claimant had reported the job he was doing was too

hard and that if he could go back to trim loin tail that his complaints would be resolved. It was noted that Claimant was moved back to B shift not to his liking and that Claimant was back to the complaints of hand and now shoulder pain even though on his old job and on a reduced count. It was noted that the basis of Claimant's complaints showed to be unfounded with no mechanism to justify the complaints. Claimant's restrictions noted he would gradually resume back to full and regular duties in trim loin tail over the next two weeks. *See* Exhibit 2.

21. On January 3, 2014 Claimant was evaluated at Employer's health services. Claimant reported right hand and shoulder bothering him. It was noted there was no real mechanism apparent other than Claimant's displeasure with being back on B shift. It was noted that Claimant continued to show full range of motion with no acute distress or objective findings to note. Claimant was to continue with slowly progressing back to his regular duties. *See* Exhibit 2.

22. On January 7, 8, and 9, 2014 Claimant was evaluated at Employer's health services with no complaints specifically noted and continued expectation of working toward regular duties. *See* Exhibit 2.

23. On January 10, 2014 Claimant was evaluated at Employer's health services with no specific complaints noted and progression toward regular duties again continued. It was noted Claimant was playing on his cell phone. *See* Exhibit 2.

24. On January 14, 2014 Claimant was evaluated at Employer's health services. Claimant reported right hand numbness and pain. It was noted that Claimant had full range of motion and no indication or objective findings. It was noted that Claimant was able to play with his cell phone without difficulty during care. Claimant was released from health services with no restrictions. *See* Exhibit 2.

25. Claimant continued to work in trim loin tail on the B shift.

26. Employer generally treats its employees in its own health services unit. An employee is sent to a doctor when emergent treatment is needed, an employee asks to see a doctor, or if an employee is being treated in house and fails to show progression. When an employee asks to see a doctor, they are set up with an appointment as soon as possible. If they do not ask to see a doctor, the decision to send an employee to a doctor is made on a case by case basis.

27. In mid to late January, Claimant saw John Michaud, EMT at Employer's health services. Claimant asked to see a doctor. Mr. Michaud passed the information on in person to both the nurse who was primarily treating Claimant at Employer's health services as well as to the nurse manager of Employer's health services.

28. Around the same time in mid to late January, Employer was contacted by Insurer. Employer found out that Claimant had an attorney and wanted to see a doctor. Prior to mid to late January, Employer was not aware that Claimant wanted to see a

doctor. When an employee requests to see a doctor, the form the employee filled out when the initial injury was reported is pulled to see which doctor the employee chose and Employer sets employee up with an appointment.

29. Here, after finding out that Claimant had requested to see a doctor, Employer pulled the paperwork, saw that Claimant had selected Banner Occupational Health, and Employer set an appointment for Claimant at Banner Occupational Health with Cathy Smith, M.D. for February 27, 2014.

30. Jay Grant, LPN was the nurse that primarily treated Claimant at Employer's health services. Mr. Grant explained to Claimant at the initial visit that if a doctor was needed one would be made available and that Claimant needed to decide which doctor to pick on the form in the case one was needed. Claimant did not need an interpreter while being treated by Mr. Grant. Claimant communicated with Mr. Grant in English and expressed his complaints and needs without problems or hesitation in English. Claimant did not ask Mr. Grant for an interpreter at all during his treatment until after Claimant hired an attorney. Mr. Grant noted that if he believed an interpreter was needed or if Claimant had requested an interpreter, he had a language line available and would have used it. Claimant did not ask Mr. Grant if Claimant could see a doctor at any time during treatment and if Claimant had, Mr. Grant would have honored his request. Mr. Grant opined that if someone wanted to see a doctor he was fine with it and it made his job somewhat easier since he would no longer be primarily treating the person.

31. At hearing, Claimant answered questions asked to him in English several times prior to translation of the question to Spanish being completed.

32. On January 27, 2014 Insurer mailed a letter to Claimant advising him that an appointment had been scheduled for him with Dr. Cathy Smith at Banner Occupational Health for Thursday February 27, 2014. *See* Exhibit B.

33. Claimant alleges he never received the letter despite it being mailed to his correct address.

34. On February 7, 2014 while working in trim loin tail on the B shift Claimant alleges he suffered a new injury to his left shoulder. Claimant alleges he was moving a large bucket full of meat when it got stuck and he pulled with his left arm and felt strong pain in his left shoulder.

35. On March 12, 2014 Insurer mailed a second letter to Claimant noting he failed to attend the medical appointment set with Dr. Smith on February 27, 2014 and that they had rescheduled the appointment to Wednesday, April 9, 2014. Claimant also alleges that he never received this second letter despite it being mailed to his correct address. *See* Exhibit B.

36. Claimant received a phone call from Banner Occupational Health the day of one of his appointments as a reminder call. Claimant alleges he had insufficient time to make it to the appointment. Claimant is unsure if he received the call in February or in April.

37. There are no treatment records or reference to the February 7, 2014 alleged injury until March 6, 2014 and Claimant did not file a workers' compensation claim until May 8, 2014.

38. After his release from treatment at Employer's health services in January, 2014 and through April, 2014 Claimant was provided with in house treatment protocol slips. Most of the slips are illegible and it is unclear as to whether or not Claimant received any treatment on the dates he received treatment protocol slips. If claimant just received ice, Tylenol, or if the slips just repeated a restriction imposed by a doctor Claimant was seeing outside of Employer's health services, then a treatment record or detailed note would not be expected to exist. A treatment record or detailed note is only entered if an employee is taken back to a room for examination or if treatment is provided.

39. On March 6, 2014 Claimant was evaluated by Gregory Reichhardt, M.D. Claimant went to see Dr. Reichhardt at the direction of his attorney. Claimant reported bilateral shoulder and upper extremity pain. Claimant reported working as a meat trimmer where carcasses were suspended from a chain and he would cut the round of the carcass off and it would fall to the belt. Claimant reported starting cutting at shoulder level and moving down below shoulder level with significant force used in his right arm. Claimant reported that on one particular piece he had the onset of right shoulder and arm pain, reported the injury, and was seen at Employer's health services. Claimant reported he changed to night shift which was less physically demanding and that while on the night shift he was moving a tub of meat and again was seen at health services. Claimant reported then being switched to working in the laundry. *See* Exhibit 1.

40. Claimant reported pain over both shoulders, radiating down the arm and into the second and third digits of the right hand and the fourth digit of the left hand with some pain along the upper trapezius towards the neck. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain. Dr. Reichhardt recommended physical therapy for instruction in a periscapular stretching program, a scapular stabilization program, and cervical stretches. Dr. Reichhardt performed trigger point injections over the upper trapezius and levator scapula bilaterally. Dr. Reichhardt noted that if Claimant continued to have radiating upper extremity symptoms, he would recommend a cervical MRI. *See* Exhibit 1.

41. On April 4, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported continued pain over the neck, periscapular area, and both shoulders with pain extending down the arms and numbness extending down into the fourth digits bilaterally. Claimant reported no relief with the trigger point injections. Claimant was

referred for a cervical MRI and was referred for physical therapy. Claimant was provided work restrictions. *See* Exhibit 1.

42. On April 9, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported neck pain and bilateral upper extremity pain. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain and noted positive impingement signs in the shoulders. Dr. Reichhardt recommended an MRI to address cervical radiculopathy. *See* Exhibit 1.

43. On April 14, 2014 Claimant underwent an MRI of his cervical spine that was interpreted by Richard Ruderman, M.D. Dr. Ruderman provided the impression of minimal/mild degenerative disc disease and osteoarthritis with no evidence of focal disc protrusion or spinal stenosis. *See* Exhibit 1.

44. On April 15, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported he continued to have pain focused over the shoulders that radiates up towards the neck and pain and numbness extending down his arms. Dr. Reichhardt reviewed the cervical MRI images that demonstrated C3-4 osteophyte with moderate foraminal narrowing and disc bulges at C4 to C7 as well as mild left neuroforaminal C5-6 and C6-7. Dr. Reichhardt noted on examination positive shoulder impingement signs bilaterally and decreased bilateral shoulder range of motion. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain. Dr. Reichhardt opined that the examination was consistent with subacromial impingement and myofascial pain but that the cause of Claimant's more diffuse upper extremity pain was unclear. Dr. Reichhardt noted that he discussed doing a shoulder MRI but that Claimant noted it would be difficult for him to afford. Dr. Reichhardt also discussed pursuing an EMG/NCV test and that Claimant preferred to wait and do the shoulder MRI first. *See* Exhibit 1.

45. On April 24, 2014 Claimant underwent an Independent Medical Evaluation performed by Kathleen D'Angelo, M.D. Dr. D'Angelo performed a record review and physical examination of Claimant. She opined that Claimant had bilateral shoulder pain and impingement signs and possibly arthritis or another system disease, which were not work related. Dr. D'Angelo noted Claimant's ever changing and migratory pain complaints could not be traced to any specific physiologically or neurologically known pathway. Dr. D'Angelo noted Claimant's diffuse pain complaints in his entire left arm and right arm from his shoulders down to his fingers. Dr. D'Angelo disagreed with Dr. Reichhardt's opinion that Claimant's pain complaints were work related. *See* Exhibit A.

46. Dr. D'Angelo noted the inconsistencies in Claimant's report that his symptoms developed immediately to the right hand and shoulder when the medical records indicate first right wrist complaints and approximately one week later right shoulder complaints. Dr. D'Angelo noted the inconsistent reports of Claimant that the right shoulder/wrist was due to repetitive motion but also his report of one specific meat cut causing acute injury/pain. Dr. D'Angelo noted inconsistencies between reports to different medical providers on when and how Claimant's symptoms developed. Dr. D'Angelo opined that Claimant's pain to all of his fingers and his diffuse right and left

arm pain did not follow any known neurological pathway and was not consistent with symptoms of impingement. Dr. D'Angelo noted that although Claimant might have diagnoses of impingement syndrome and myofascial pain, the injuries that Claimant alleges did not cause either of those conditions. Dr. D'Angelo opined that the described mechanisms of injury would not cause prolonged pain complaints and normal physical examination findings. She noted that while observing Claimant at the IME he displayed normal range of motion with no apparent distress or pain. Dr. D'Angelo opined that with Claimant's right arm complaints, he had only been at the position for one month and only pulling count for one week and that the timeframe was not sufficient enough to develop a cumulative occupational disease. *See* Exhibit A.

47. On May 1, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported bilateral shoulder pain and pain over the dorsal radial aspect of the wrist. Claimant reported pain in his hands, primarily over the MP joints. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain, with an exam consistent with subacromial impingement and myofascial pain. Dr. Reichhardt again opined that the cause of the more diffuse upper extremity pain was unclear. Dr. Reichhardt also assessed right dorsal radial wrist pain, first dorsal compartment tenosynovitis and cyst overlying the abductor tendon, and right hand pain. *See* Exhibit 1.

48. On May 8, 2014 Claimant completed a Worker's Claim for Compensation for the alleged February 7, 2014 injury.

49. On May 12, 2014 Claimant underwent an MRI of his right shoulder. The impression was tendinosis and bursal sided attenuation and fraying of the supraspinatus tendon, but no evidence of a significant partial-thickness or full-thickness rotator cuff tear; small to moderate amount of fluid and edema in the region of the subacromial/subdeltoid bursa; and infraspinatus tendinosis without evidence of a significant infraspinatus tendon tear. *See* Exhibit 6.

50. On June 10, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported doing better and that he had better shoulder range of motion with his work in therapy but continued to have pain over the neck and in both shoulders. Claimant reported pain extending down his arms in digits three and four in both hands. Dr. Reichhardt continued his assessment, and again noted that Claimant's examination was consistent with subacromial impingement and myofascial pain but that the cause of Claimant's more diffuse upper extremity pain was unclear. *See* Exhibit 1.

51. On June 16, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported that he was doing better. Dr. Reichhardt noted on physical examination that Claimant had tenderness over both shoulder with mild range of motion limitations and positive impingement signs on both sides as well as decreased sensation in upper extremity digit four in both hands. Dr. Reichhardt continued to assess bilateral shoulder and upper extremity pain, right dorsal radial wrist pain, and right hand pain. Dr. Reichhardt noted that Claimant was taken off of work because of his restrictions but that Claimant wanted to try going back to full duty work. Dr. Reichhardt agreed it was

reasonable to give full duty work a try. Dr. Reichhardt also suggested an upper extremity EMG to evaluate the arm numbness. Dr. Reichhardt continued to opine that the cause of Claimant's more diffuse upper extremity pain was unclear but that it was medically probable that the subacromial shoulder impingement was related to Claimant's work activities. *See* Exhibit 1.

52. On July 24, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported he was doing better, continued to have bilateral shoulder pain, but was doing reasonably well working full duty. Claimant reported morning stiffness that lasts 20-30 minutes and that he had swelling in his hands as well as continued numbness and tingling in the upper extremities. Dr. Reichhardt recommended that Claimant get an arthritis profile and that Claimant proceed with a left shoulder MRI. *See* Exhibit 1.

53. On February 27, 2015 Claimant underwent an MRI of his left shoulder that was interpreted by Benjamin Aronovitz, M.D. The impression was high grade partial thickness bursal sided tear through the supraspinatus tendon; and partial thickness undersurface tear through the distal fibers of the subscapularis tendon, through which there is mild medial subluxation of the long head of the biceps tendon. *See* Exhibit 6.

54. Dr. Reichhardt testified at hearing. Dr. Reichhardt noted he did not focus much on Claimant's right hand or wrist complaints because the shoulders were a bigger complaint. Dr. Reichhardt noted his concern with structural problems associated with the shoulders and potential neurologic issues occurring in the neck which is why he first did a cervical MRI which only showed minor degenerative changes. He noted he then focused more on the shoulders. Dr. Reichhardt opined that it appeared unlikely that Claimant have an arthritic or rheumatoid arthritis component to his current pain complaints because Claimant did not have the classic manifestations of upper rheumatoid arthritis. He opined that it was unlikely that Claimant's hand and/or shoulder complaints represented an inflammatory arthritis. Dr. Reichhardt opined that Claimant's shoulder problems were more likely musculoskeletal problems including a partial thickness rotator cuff tear on the left and tendonosis and subacromial impingement.

55. Dr. Reichhardt acknowledged that in July of 2014 he was concerned with Claimant having a rheumatoid type problem due to his bilateral hand pain and swelling with morning stiffness. Dr. Reichhardt noted that the MRI of the left shoulder showed that Claimant had a downsloping acromion and opined that a downsloping acromion can contribute to or cause tendonosis in the rotator cuff and could cause rotator cuff tears. Dr. Reichhardt also opined that a partial thickness under surface tear of the subscapularis often tends to be degenerative and that he would most times think that it was a degenerative and not acute injury. Dr. Reichhardt, however, opined that although mostly degenerative and not acute, the partial thickness undersurface tear of the subscapularis tendon could have been aggravated by the work injury.

56. Dr. D'Angelo testified at hearing consistent with her report. Dr. D'Angelo opined that it was not medically probable that Claimant, a previously healthy 33 year old, would develop right wrist complaints, right shoulder complaints, then diffuse right

arm complaints, left shoulder complaints, then diffuse left arm complaints, neck complaints, and identical bilateral ring finger numbness in a short period of time due to separate discrete and unrelated injuries.

57. Dr. D'Angelo opined that it was not medically probable that Claimant's present complaints were causally related to his work with Employer either from an acute, chronic, or cumulative injury. Dr. D'Angelo opined that she could not with any medical probability offer one or more diagnoses that would explain Claimant's current complaints.

58. Dr. D'Angelo opined that impingement syndrome is a genetic predisposition to abnormalities in the bone structure at the AC joint. Dr. D'Angelo noted that Claimant was adamant at the IME that his pain began in his right shoulder, then descended down his arm finally culminating into total arm pain including the hand and wrist which was not consistent with Claimant's treatment records which show upon his initial report and pain diagram he noted only right wrist pain. Dr. D'Angelo noted the records were consistent with a ganglionic type cyst on claimant's right wrist which is most times associated with degenerative changes in the wrist.

59. Dr. D'Angelo noted Claimant's symmetric bilateral hand complaints of morning stiffness and swelling makes her concerned about a rheumatological disease given Claimant's young age and symmetrical symptoms. Dr. D'Angelo noted that with either an acute injury or a cumulative injury, the expectation and what is medically anticipated is that people heal, tissue heals. She noted that symptoms are anticipated to resolve particularly when away from the inciting activity but that with Claimant, he had been through five job changes and instead of improving, he had spreading symptoms. Dr. D'Angelo opined that was inconsistent with having suffered an acute injury or a cumulative injury but that with a systemic disease you would see that.

60. Dr. D'Angelo opined that a cumulative trauma type exposure has a general range of six months to fourteen years and that it would be unusual for an cumulative trauma to develop within only three to four weeks and would be very unusual for it to have persisted four months after the initial onset Claimant reported despite him having left the position three months prior. She opined that to have persistent pain that worsened and then spread after such a short period of exposure and a long period out of the job was very unusual and not medically consistent. Dr. D'Angelo opined that she had no medical diagnosis of a type of trauma to the shoulder that would account for swelling into Claimant's bilateral hands seven months after an initial presentation. Dr. D'Angelo opined that shoulder impingement is something Claimant has had since birth and will have and that he will continue to have flare and remissions and that his shoulder impingement is not related to either work incident he described. Dr. D'Angelo also opined that shoulder impingement is very localized and does not cause swelling or numbness and that shoulder impingement in this case only explained a portion of Claimant's complaints.

61. Dr. D'Angelo is found credible and persuasive. Her overall opinion notes Claimant's inconsistent reports of what body parts were initially injured, and how the symptoms first occurred and spread. Her overall opinion also notes Claimant's inconsistent report of when the injury occurred and whether it occurred acutely or whether it occurred from cumulative repetition. Her opinion that Claimant's various complaints and symptoms are unexplained and that she cannot offer a diagnosis fitting the various complaints and symptoms is consistent with Dr. Reichhardt's opinions that Claimants diffuse symptoms (besides bilateral shoulder impingement) could not be explained. Overall, Dr. D'Angelo is found credible and persuasive that Claimant did not suffer a work related injury either to the right shoulder, right wrist, or to the left shoulder.

62. The opinion of Dr. Reichhardt only opines that that the bilateral shoulder impingement symptoms are work related. Dr. Reichhardt does not relate the right wrist or the bilateral right and left arm diffuse symptoms to either work related injury date. Dr. Reichhardt, similar to Dr. D'Angelo, was unable to explain the more diffuse right and left arm symptoms and acknowledged that he did not focus on the right wrist. Overall, his opinion on the work relatedness of the bilateral shoulder impingement is not found as credible or persuasive as the opinion of Dr. D'Angelo.

63. Claimant's testimony is not found credible or persuasive. Claimant provided inconsistent reports of the right shoulder and right wrist injuries. Claimant also exaggerated his lack of English speaking skills as demonstrated by his answering several questions prior to translation and as shown by testimony of Mr. Grant who credibly explained that Claimant was able to receive treatment with no problems conversing in English. Claimant also did not file a claim regarding his alleged acute left shoulder injury for several months after the alleged injury date, which is not logically credible for someone who had suffered an acute 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

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to show that he suffered a compensable work injury to his right shoulder, right wrist, or left shoulder. Overall, Claimant is not found credible or persuasive in his testimony. For the alleged repetitive use injury to his right shoulder and right wrist, Claimant initially reported only right wrist pain. He later reported the right shoulder pain. Claimant at a later time then reported that the pain

started in his right shoulder and traveled down his entire arm into his right hand. Despite clear reports to Employer's health services that the initial pain was only to the right wrist, Claimant later provided inconsistent reports of where the initial pain was and how the pain started and traveled throughout his right upper extremity. Additionally, Claimant has in this claim reported two separate alleged mechanisms of injury to his right wrist and right shoulder. Claimant alleges both a repetitive use/cumulative trauma type mechanism but also reported a sharp acute injury to his right shoulder while cutting a piece of meat. For the left shoulder injury, Claimant alleges an acute injury but failed to report the injury immediately or seek immediate medical care. The first mention by medical providers of Claimant's left shoulder injury was not made until several months after the alleged acute injury occurred and Claimant did not file a claim for workers' compensation until several months after the alleged injury. These actions are inconsistent and are not logical for someone who had suffered an acute injury.

Further, the opinion of Dr. D'Angelo is found credible and persuasive that it is not medically probable that Claimant has such severe, widespread, and identical symptoms in both his right and left upper extremities despite very different reported mechanisms of injury. Dr. D'Angelo is credible and persuasive that the Claimant's conditions are not work-related. Claimant has had swelling in his bilateral hands which is consistent with an underlying rheumatological disorder and both Dr. D'Angelo and Dr. Reichhardt have recommended Claimant undergo testing. Claimant has swelling in pain in both hands throughout the claim despite being moved to different less demanding jobs and he continues to have swelling present in the morning upon waking. Dr. D'Angelo is credible that these symptoms are consistent with a systemic inflammatory disease. Further, it is noted that regardless of the work activities, the symptoms remained the same bilaterally and Claimant's arthritic symptoms continued up to the hearing date. Additionally, Dr. D'Angelo is credible that Claimant's downsloping acromion on his left shoulder can cause impingement and a rotator cuff tear and is a genetic predisposition not causally related to employment. Dr. D'Angelo is credible that a cumulative injury would not develop over a short period of time, a couple weeks, as Claimant alleges and also is credible that the symptoms would not persist for several months after the repetitive activity in question was no longer being performed. The evidence suggests that Claimant may have an underlying rheumatological process/disease. Both Dr. D'Angelo and Dr. Reichhardt have this shared concern and have recommended Claimant undergo an arthritis panel.

Dr. Reichhardt could not explain Claimant's diffuse bilateral arm symptoms and did not focus on Claimant's right wrist complaints during treatment, but Dr. Reichhardt opined that Claimant's bilateral shoulder impingement is work related. However, the opinion of Dr. D'Angelo that the bilateral shoulder impingement is not work relates is found more credible and persuasive. Dr. Reichhardt's opinion is based, in part, on Claimant's subjective report on how the injuries occurred. Claimant is not entirely credible and his reports cannot be relied upon to any degree of certainty. Overall, Dr. D'Angelo noted the inconsistent reports of initial pain locations, inconsistent reports of mechanisms of injury, and her overall opinion is credible and persuasive. Claimant has failed to show, more likely than not, that his bilateral shoulder impingement or his right wrist pain complaints are causally related to his employment.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

As Claimant has failed to establish an industrial injury, the medical treatment that Claimant has received to date has not been shown to be reasonable or necessary to cure and relieve any industrial injury. The conditions Claimant currently suffers from for which he seeks medical treatment are not causally related to an on the job injury and he therefore has failed to meet his burden of proof to show an entitlement to medical benefits.

Authorized Provider – Dr. Reichhardt

Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician(ATP). Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

In this case, Employer did not fail to exercise its right to select a treating physician. After being first notified of the injury at Employer's health services, Employer exercised its right to select a treating physician by providing Claimant with a designated provider form and Claimant was able to initial and choose which of the two providers he wished to designate. Employer thus exercised their right to select a physician. Employer did not advise Claimant that medical treatment would not be provided nor did

they refuse Claimant medical treatment. Rather, they treated Claimant in-house until the point where Claimant asked to see a doctor and Employer set up an appointment for Claimant with the provider Claimant had chosen from Employer's designated provider list.

The Claimant has failed to establish that the treatment he sought on his own with Dr. Reichhardt was authorized treatment. Employer had not denied Claimant treatment and had scheduled Claimant for an appointment with Dr. Smith at the time Claimant sought treatment elsewhere. Employer had been treating Claimant and had provided Claimant a designated provider list when Claimant reported the injury. As such, Claimant was aware that designated providers existed and was aware of which provider he was expected to see if he needed treatment from a doctor. Instead of seeking medical care from that provider, Claimant on his own sought out a separate provider and Claimant has not established that the right of selection had passed to him at the time he saw Dr. Reichhardt and has not met his burden to show that Dr. Reichhardt is an authorized provider in this matter.

Average Weekly Wage

As the claim is not compensable, the issue of average weekly wage is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury to his right shoulder and right wrist with an onset date of December 5, 2013.

2. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on February 7, 2014.

3. Claimant has failed to establish by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment benefits for his right shoulder, right wrist, and left shoulder.

4. Claimant has failed to establish by a preponderance of the evidence that Dr. Reichhardt is an authorized treating physician.

5. Any issues not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

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

DATED: January 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

1. Whether the respondents have overcome the Division independent medical examination (DIME) determination that the claimant is not at maximum medical improvement (MMI) by clear and convincing evidence.

2. If so, whether the claimant's impairment rating is the 0% provided by Dr. Hattem, the authorized provider (ATP), and Dr. Beatty.

FINDINGS OF FACT

1. The claimant was injured on January 23, 2014 when she fell in the parking lot outside of the respondent-employer's place of business. As the claimant was exiting her car, she slipped on snow and ice and fell with her left leg out in front of her and her right leg behind her. As she was falling, she twisted her body to the right, landing mostly on her right side.

2. She had immediate onset of pain in her low back which radiated down her left leg. She then got up and made her way to the door of her employer where she immediately went downstairs and notified her staff supervisor, Daphne, of the fall.

3. After the claimant made her way inside the store, she noticed that her clothes were wet from the snow upon which she fell. The claimant attempted to work but after one of the mall's security officers noticed that she "did not look good" and suggested that she go to the hospital, an ambulance was called and she was transported to Memorial Hospital. The claimant was treated and released.

4. She then followed up with Concentra Medical Clinic, her employer's authorized treating physician. When her condition failed to improve after undergoing physical therapy, dry needling and chiropractic therapy, the claimant underwent an MRI on her lumbar spine. She was then referred to Dr. John Bissell, for pain management. Dr. Bissell treated the claimant with medications and epidural steroid injections, from which the claimant had no long-lasting improvement.

5. Dr. Bissell referred the claimant to Dr. David Hopkins for a psychological evaluation which the claimant declined because, at the time, she did not feel her

problems were “mental” but, rather, “physical” in nature.

6. The claimant was also seen by Dr. Rauzzino, a neurosurgeon, who determined she was not a surgical candidate. The claimant was then sent back to Concentra where she was released from care by Dr. Hattem with no impairment. Dr. Hattem’s note of January 15, 2015 reflects “today, as requested, I will release [the claimant] to full time, full duty work.” When asked at hearing about whether she “agreed” with Dr. Hattem that she should be released from care at full duty, the claimant explained that it was her understanding that she would lose her job if she was released from care with any permanent physical restrictions.

7. The MRI of claimant’s lumbar spine showed mild degenerative changes as well as a subtle bilateral annular disc bulge with noncompressive left neural foraminal narrowing at L2-3; an annular disc bulge at L3-4 with small left foraminal disc protrusion potentially impinging the exiting L3 nerve root; a posterior bilateral annular disc bulge at L4-5 greatest on the left, potentially impinging the exiting L4 nerve roots; and a circumferential annular disc bulge at L5-S1.

8. The claimant observed that she still has significant pain in her lower back which radiates down her leg. She continues to work for the respondent-employer full time, although now works as a cashier. She has a constant limp because of the radiating pain in her left leg. The claimant has good days and bad days with regards to her low back and leg pain. On the bad days, the pain can be extreme especially if she has to stand too long. On those days, she cannot bend over too far and sometimes she gets nauseated from the pain. She feels that she needs more treatment on her lumbar spine because of her ongoing pain levels and the fact that she “does not walk normal” like she used to.

9. The claimant underwent a Division independent medical examination by Dr. Miguel Castrejon on May 6, 2015. Dr. Castrejon opined that the claimant was not at MMI and felt that she needed additional treatment on her lumbar spine to include a left L4-5 and L5-S1 facet joint injection and perhaps a repeat of the left L5-and S1 transforaminal epidural steroid injection. He opined that if there was objective evidence of benefit following the facet injection(s), consideration should be given to medial branch blocks and rhizotomies. He also felt that if Lyrica has not been attempted, it should be considered in low dose with slow progression to avoid side effects. He also recommended the use of nonnarcotic medications and an additional 6 physical therapy sessions following the facet injections to instruct the claimant with regards to an independent exercise program. At the end of this additional treatment, Dr. Castrejon recommended that a functional capacity examination should be completed. He also

gave the claimant a 17% whole person impairment to her lumbar spine.

10. Dr. Castrejon opined that the claimant's physical complaints of low back pain and radiculitis were consistent with her described mechanism of injury. He opined that the claimant had multi-level preexisting degeneration in her lumbar spine which was aggravated as a result of her slip and fall. He diagnosed the claimant with chronic lumbar musculo-ligamentous strain/sprain with left lower limb radiculitis. He opined that the claimant sustained a permanent aggravation of her preexisting degenerative lumbar spine condition when she fell in the parking lot. The basis for this opinion is the fact that the claimant has not had any medical treatment for her lower back since 2009, had not lost any time from work prior to this industrial injury due to her lower back pain nor had any functional residual impairment to her lower back prior to this industrial injury.

11. Dr. Castrejon explained that the reason he did not feel the claimant was at MMI was because she continued to have a medical condition that had been previously undiagnosed, namely, facet mediated pain (rather than discogenic or SI joint pain) and for which he opined that she would derive additional benefit from more treatment.

12. Dr. Castrejon opined that, in his experience, an SI condition will not typically refer pain distal to the knee. Referral of pain to the distal portion of the knee is not consistent with a regular strain/sprain type injury. Rather, Dr. Castrejon opined that the claimant likely is suffering from facet mediated pain based upon the MRI and the fact that he felt no one had looked at why the claimant was having lower limb symptoms as far down as the foot. He noted that a "facet mediated problem implies that at the level of the spine, there's some impingement. The MRI revealed that there was facet arthropathy at L4-5. There was also fusion at the level of the facet joint which implies a swelling.....So there are three sites of possible impingement of the nerve root–the disc bulge, the facet arthropathy with the fusion and a foraminal stenosis that was significantly more pronounced on the left at L4-5. The importance of the L4-5 level is that at that level, you will get pain referred into the limb distal to the knee to the level of the foot".

13. Dr. Castrejon also noted that the claimant received approximately 40% benefit following the nerve root blocks at L5 and S1 she underwent by Dr. John Bissell. If the claimant's pain is, in fact, originating out of the L4-5 facet joint, Dr. Castrejon explained that an individual could get some partial relief from an SI joint injection (as the claimant did) simply because the areas are anatomically so close to each other.

14. Dr. Michael Rauzzino and Dr. Brian Beatty both focused on Waddell signs in their medical reports to bolster their opinion that the claimant is malingering and has

symptom magnification. Dr. Castrejon rejected their reasoning by pointing out that Waddell signs were not developed to determine if an individual has symptom magnification or is malingering. Rather, Dr. Waddell developed those tests to specifically determine whether an individual requires psychological care to assist with chronic pain management. He noted that Dr. Hattem's report never mentioned Waddell signs nor indicated there was any element of malingering present. Additionally, Dr. Castrejon noted numerous instances in the medical records where the claimant complained of worsening pain, especially when the claimant attempted to increase her work hours from four to six per day. For that reason, as well as the fact that the claimant has continued to complain of consistent pain in her lumbar spine, Dr. Castrejon has recommended that a functional capacity evaluation be completed before the claimant reaches MMI to determine at what exertional level the claimant is truly capable of working.

15. Dr. Castrejon further testified that the facet injections he has recommended are not being recommended as maintenance medical care. His reasoning is based upon the fact that facet mediated pain syndrome is a new diagnosis and not one for which any of the claimant's previous physicians treated her. It involves its own specific form of care and treatment (facet blocks and perhaps a rhizotomy if the facet blocks are successful). Under the Colorado Worker's Compensation Treatment Guidelines, a rhizotomy is considered a surgical procedure that is curative in nature. Therefore Dr. Castrejon opined that it doesn't seem reasonable to continue the claimant on MMI status at the present time.

16. Dr. Castrejon further explained that it is difficult to determine if an individual is self-limiting if a physician only sees that individual one time. If a physician sees an individual numerous times and follows a patient over a longer period of time, it is easier to make that assessment. Dr. Castrejon commented numerous times on the fact that the claimant had a solid work history with the respondent-employer and has continued to work throughout this worker's compensation claim.

17. The claimant underwent an IME with Dr. Brian Beatty at the respondents' request on August 5, 2015. Dr. Beatty opined that he disagreed with Dr. Castrejon's assessment and felt the claimant remained at MMI, as previously determined by Dr. Hattem, on March 3, 2015. In his opinion, the slip and fall incident which is the subject matter of this claim resulted merely in a lumbar sprain. He also opined that the claimant's preexisting degenerative condition in her lumbar spine has been the source of her pain since she reached MMI. He further opined that the claimant would not have any physical restrictions as a result of this work related injury and that he would not recommend any further treatment with the exception of a possible additional epidural

steroid injection. He does not feel the claimant should undergo another injection until the claimant participates in a psychiatric assessment to determine if the claimant has an underlying somatoform disorder or other issues contributing to her current symptoms. Any further epidural injections or facet blocks should be categorized as maintenance care.

18. Dr. Beatty agreed that he simply has a difference of opinion with regards to Dr. Castrejon regarding the issues of MMI, where the claimant's pain is truly coming from (discogenic versus facet mediated pain); whether the claimant has any permanent impairment related to this injury and the claimant's need (or lack thereof) for future medical treatment.

19. The ALJ finds Dr. Castrejon's analyses and opinions to be more credible than medical analyses and opinions to the contrary.

20. The ALJ finds that the respondents have failed to establish that Dr. Castrejon's analyses and opinions concerning MMI are clearly erroneous.

CONCLUSIONS OF LAW

1. A DIME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." C.R.S. § 8-42-107(8)(b)(III); *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). "Clear and convincing evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probably or the converse, and is free from serious or substantial doubt. *Metro Moving,* supra; *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence established that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

2. To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097

(ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

3. A DIME's "deviation from the *AMA Guides* constitutes some evidence that the DIME physician's rating is incorrect." *Jaramillo v. Pillow Kingdom and Gen. Ins. Co. of Amer. d/b/a Safeco Ins.*, W.C. No. 4-457-028 (ICAO, Sep. 10, 2002). Whether or not the DIME correctly applied the *AMA Guides* and whether a party overcomes the DIME is a question of fact for determination by the ALJ. C.R.S. § 8-43-301(8); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO, Aug. 18, 2004).

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

5. An ALJ is required to make specific findings only as to the evidence which is deemed persuasive and determinative. An ALJ is not obligated to address every issue raised or evidence which is unpersuasive. *See Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992) (citing *Roe v. Indus. Commission*, 734 P.2d 138 (Colo. App. 1986); *Crandall v. Watson-Wilson Transportation System, Inc.*, 467 P.2d 48 (Colo. 1970)). Furthermore, an ALJ may resolve conflicts in the evidence based upon his credibility determinations. *See*, *Brodbeck v. Too Busy Painting and Pinnacol Assurance*, W.C. No. 4-163-762 (ICAO, Apr. 16, 2002) (citing *Riddle*, 839 P.2d at 489).

6. Here, there is insufficient evidence to support the contention that it is highly probable that Dr. Castrejon's opinion concerning MMI is incorrect. Dr. Castrejon credibly and persuasively opined that the claimant is in need of additional care to cure or relieve the claimant from the effects of her industrial injury.

7. The ALJ concludes, as found above, that the respondents have failed to establish by clear and convincing evidence that the DIME physician, Dr. Castrejon, was incorrect in opining that the claimant is not at MMI.

ORDER

It is therefore ordered that:

1. The claimant is not at maximum medical improvement as determined by Dr. Castrejon.

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: January 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

The issues for determination at the hearing were:

1. Whether the Respondents have overcome by clear and convincing evidence the DIME opinion of Dr. Jeffrey Jenks regarding the Claimant's status related to maximum medical improvement ("MMI").

2. Whether the Claimant proved, by a preponderance of the evidence, that she is entitled to medical treatment recommended by the DIME examiner that is reasonably necessary to cure and relieve the effects of the Claimant's February 28, 2014 work injury.

FINDINGS OF FACT

1. The Claimant testified at the hearing that she worked for Employer in February of 2014. Her job duties at that time included driving a feed truck and working on the roll floor. The feed truck she drove was slightly larger than the size of a dump truck. The Claimant would sit about 8 feet off the ground when she was behind the wheel of the truck.

2. Currently, the Claimant is employed as a pharmacy technician for a different employer. Her current job duties include receiving prescriptions, typing into the computer, and grabbing bottles of medication from the pharmacist and bagging them.

3. On February 28, 2014, the Claimant testified that she had just picked up a full load which is 37,000 pounds of feed. On right side of the truck cab is a whole set of levers to operate the conveyor belt for the feed and the scale, among other things. She testified that as she was going down the alley, she passed another driver and there was a slight incline and she started to brake and noticed there were no brakes. She ended up driving into the pond. She testified that she had been in a hurry to get back to the feed lot and she driving about 35 miles per hour last time she looked at speedometer. The Claimant testified that she was wearing a seatbelt at the time of the accident. The truck rolled onto passenger side and the Claimant got out of the vehicle on driver side. She rolled down the window and climbed out and over to the back of truck to the loader basket and they got her to the shore.

4. The Claimant testified that she left work early that day but did not go to hospital that day. She was leaving to see doctor at 3pm that day for previously scheduled appt for another unrelated medical issue. The Claimant didn't go to hospital on March 1st or 2nd either. The Claimant testified credibly that she had filled out paperwork prior to that for her work injury, but office manager didn't fill out paperwork until March 3rd, so her supervisors didn't approve for the Claimant to go to the doctor until March 3rd.

5. After the motor vehicle accident with the feed truck, the Claimant testified that her symptoms included neck and lower back pain, numbness in her fingers, and constant pain close to tail bone that radiates into her buttocks and down into her thigh.

6. On March 3, 2014, the Claimant saw Dr. John D. Glick for medical treatment. Dr. Glick notes, "patient is presenting for pain in her low back, sacrum, across her buttocks as well as in her upper back and shoulder, these all started after an incident where she rolled a feed truck onto its side, this is a low speed MVA, this occurred 3 days ago…" Dr. Glick noted the Claimant reported that at the time of the incident she felt fine but developed worsening pain over the next couple of days. The worst pain was in her low back and left posterior ribs. After physical examination, Dr. Glick assessed a "multitude of soft tissue injures as well as a possible cracked rib. Dr. Glick noted that he offered pain medications to the Claimant but the Claimant's supervisor was present and pushed her not to get any prescription medication and the Claimant declined them (Claimant's Exhibit 3).

7. On March 3, 2014, Andrea Prise, the office manager for the Employer wrote an e-mail addressed to other employees along with the Claimant stating,

> [The Claimant] said she was just fine with taking Tylenol and Ibuprofen. Dr. Glick did prescribe her Flexeril, a muscle relaxer, but she said she didn't want it and gave him the prescription back. Marked full duty for work status, but limited to driving/no shoveling for the week. Her back checks out clear, but she does have a crack in her 6th rib. We will still need to get her to fill out an ESI. I dropped her off at her car before I remembered to do that…"

8. Employer's First Report of Injury was prepared by the Employer's office manager Andrea Prise on March 10, 2014. She noted the Claimant was injured on February 28, 2014 while driving a feed truck. The report notes that the Claimant

> drove the feed truck into the settling pod. The truck laid over on its side in the pod. The EE's unk hand slipped when crawling out of the truck and hit on the side of the truck. The EE suffered a cracked 6th rib. The EE did seek medical treatment…

9. The Claimant saw Dr. Glick again on March 19, 2014 for follow up of the MVA at her work. Dr. Glick notes that the Claimant had declined muscle relaxants and pain medications for rib and low back pain at the last visit because the Claimant reported that she was concerned they would fire her because of the accident. Dr. Glick also noted that "the representative who was present at the last visit also told me that they would rather that I did not prescribe any medication and that it would be 'better for them.'" The Claimant was also advised that the accident was not covered by workers' compensation because it was her fault and so chiropractic care would not be covered. Dr. Glick noted that he placed a call to the insurer's claim's management department to report threatening and inappropriate management of this incident by the Employer. At

this visit, the Claimant reported a sensation of numbness running down her arm into her left hand along with tightness in her neck and shoulder. Pain in the ribs and low back was improving but was exacerbated by working in the mill where the Claimant had to work overhead and push large carts up to several 100 pounds. On examination, Dr. Glick noted, "very tight trapezius and strap muscles in her left neck, radiating down across the top of her shoulder, also tender to palpation in lumbar stress spinal muscles, left somewhat more than right, with spasm here as well, also tender to palpation over her area of possible rib fracture…" Dr. Glick prescribed Flexeril and Vicodin and referred the Claimant for physical therapy. He provided work restrictions limiting repetitive lifting to 25 pounds and all lifting to 50 pounds, pushing to 100 pounds and no shoveling work. Dr. Glick also recommended an MRI of the cervical spine (Claimants' Exhibit 3).

10. As of April 16, 2014, Dr. Glick continued to report "significant tension and spasm in [the Claimant's] trapezius muscles and leading up into her paraspinal muscles on the left side of her cervical spine" and bilateral tenderness to palpation in the lower lumbar paraspinal muscles. Dr. Glick notes slow, if any, progress and continued the Claimant with physical therapy. He also noted that if there was no substantial improvement over the next 2-3 weeks, consideration would be given to a referral to orthopedics (Claimant's Exhibit 3).

11. On April 29, 2014, the Claimant saw Dr. Glick again and reported continued moderate to severe pain. Dr. Glick noted the Claimant reported pain in her shoulder, trapezius, her right low back and numbness in her left hand. Dr. Glick noted that the MRI of the Claimant's neck did not seem to show pathology to cause the symptoms she was experiencing and so he suspected compression of the nerves in the muscles of the Claimant's shoulder. Dr. Glick noted that a next step would be an EMG and potential follow up with a cervical spine evaluation and injections (Claimant's Exhibit 3).

12. The Claimant saw Dr. Rick Zimmerman on May 16, 2014 on referral from Dr. Glick for a neck and low back consultation. After taking a history of present illness from the Claimant, reviewing her 4/8/14 MRI of the cervical spine and conducting a physical examination, Dr. Zimmerman assessed the Claimant with,

1. Cervical strain with whiplash mechanism of injury
2. Myofascial pain in the left upper quadrant with tender points noted in the upper trapezius muscle
3. lumbar strain with extension-based pain
4. possible sacroiliac joint strain
5. cervical disc degeneration in the C3-4, C4-5 and C5-6 levels that do not correlate with the patient's symptoms (likely incidental finding)

Based on his assessment, Dr. Zimmerman performed 4 trigger point injections in the left upper trapezius and cervical paraspinals and in the lumbar paraspinals. After five minutes, the Claimant reported 85% relief in the neck and greater than 50% relief in the back, and therefore a diagnostic response for both areas. Dr. Zimmerman

recommended a formal physical therapy regimen to include myofascial release, cervical range of motion, posture training, core activation and hip flexor stretches. Dr. Zimmerman noted that at the one-month follow up reevaluation, cervical or lumbar facet injections would be considered as well as right SI joint injections if the SI joint dysfunction continued (Claimant's Exhibit 5; Respondents' Exhibit C, pp. 11-13).

13. On May 20, 2014, the Claimant returned to Dr. Glick for follow up. He noted that the Claimant had seen PM&R for her injury which included "whiplash to her upper back and neck, particularly her left shoulder, as well as low back strain." Dr. Glick noted the Claimant underwent some injections into her neck and shoulder which helped. On examination, Dr. Glick continued to note tenderness to palpation and spasm in the paraspinal muscles on the left side of the Claimant's neck and her left trapezius and bilateral spasm in the paraspinal muscles of her lumbar region. He did note improvement (Claimant's Exhibit 3).

14. On June 17, 2014, Dr. Glick noted the Claimant still had tenderness to palpation and moderate spasm in her trapezius and rhomboids on the left sides and tenderness to palpation in her lumbar region, but no spasm at that location.

15. The Claimant saw Dr. Zimmerman on September 26, 2014 for an impairment rating. He noted that she had been seen on September 12, 2014 for a right SI joint steroid injection that was diagnostic according to Dr. Zimmerman as he reported that it relieved all of her perisacral pain and therapeutic as it relieved 75-80% of her right-sided lumbosacral pain. Dr. Zimmerman quoted the Claimant as stating, "It really helped a lot." Dr. Zimmerman noted the Claimant's formal physical therapy was complete and the Claimant was continuing with home exercises. He noted the Claimant continued to use her TENS unit for myofascial pain primarily in the left lower quadrant. Dr. Zimmerman noted that, "today [the Claimant] states she is functional and uses pain medications on a p.r.n. basis and reports total relief in her neck and shoulder pain and 80% relief in her right-sided perisacral pain." Based on the positive response to injections and physical therapy, Dr. Zimmerman noted that the Claimant's cervical strain, myofascial pain and right SI joint dysfunction had resolved and he found the Claimant to be at MMI as of September 26, 2014. He opined that the Claimant "has been symptom free for several weeks," sacroiliitis does not qualify for an impairment, and the Claimant had full range of motion of her lumbar spine. Therefore, Dr. Zimmerman noted that the Claimant received no impairment for her injuries. He opined there were no permanent work restrictions. For maintenance, Dr. Zimmerman noted the Claimant was to taper off use of Tramadol over the next several weeks and she may need trigger point injections or an SI joint injection for any flare ups over the next 6 months. Dr. Zimmerman also recommended a 6 – 12 month gym membership to follow up with the independent exercise program the Claimant learned in physical therapy. He anticipated case closure with Dr. Glick the following week (Claimant's Exhibit 5; Respondents' Exhibit C, pp. 8-10).

16. On November 20, 2014, the Respondents filed a Final Admission of Liability admitting for medical benefits, but no permanent partial disability, per the

impairment rating medical report of Dr. Zimmerman from September 26, 2014 (Respondents' Exhibit A, p. 1).

17. On March 24, 2015, the Claimant saw Dr. Jeffrey P. Jenks for a Division IME. He noted that the Claimant's symptoms at the time of the DIME were cervical pain and low back pain and that the symptoms began following a work-related motor vehicle accident on February 28, 2014. The Claimant reported to Dr. Jenks that after the truck she was driving lost its brake, she rolled the truck into a ditch and had to crawl out of the vehicle. She reported that over the following one to two days, she developed pain in her cervical and lumbosacral region. Dr. Jenks noted that the Claimant was treated by Dr. Glick and Dr. Zimmerman and underwent physical therapy and trigger point injections for her cervical and lumbosacral regions which helped. The Claimant also reported that a right SI joint injection on September 12, 2014 gave her a 75-80% improvement in her symptoms. Dr. Jenks notes that in spite of being placed at MMI on September 26, 2014, the Claimant "complains of persistent cervical pain, which radiates into her trapezial ridge and into the left periscapular region," intermittent paresthesias in the fingers of her left hand" and "bilateral lumbosacral pain, worse on the right." Dr. Jenks noted that the Claimant denied any prior cervical or lumbosacral pain. On physical examination, Dr. Jenks noted that the Claimant exhibited tenderness in the left cervical paraspinal region and along mid-cervical facets. He noted that cervical range of motion was decreased secondary to pain. Dr. Jenks also noted tenderness over L4-5 and L5-S1 facets bilaterally and tenderness over both SI joints. There was increased pain with lumbar extension. It was Dr. Jenks' impression that the Claimant had ongoing cervical pain that was likely soft tissue, but could be related to cervical facet dysfunction and she had ongoing lumbosacral pain. He opined that the Claimant was not at MMI and recommended a lumbosacral MRI to evaluate for a discogenic source for her ongoing symptoms. For the cervical pain, Dr. Jenks opined that the Claimant should undergo diagnostic cervical medial branch blocks with a possible rhizotomy, depending on the result of the medial branch blocks. Dr. Jenks also opined that further trigger point injections could be an option. Although he felt she was not at MMI, Dr. Jenks also provided an impairment rating for the Claimant's loss of range of motion. He noted a 14% impairment due to cervical range of motion deficits and a 4% Table 53 impairment for a total 17% whole person impairment for the cervical range of motions deficits. For the lumbar spine, Dr. Jenks provided a 5% Table 53 impairment and a 2% range of motion impairment since he did not include the lumbar flexion and extension measurements. Combining all of the impairment ratings, resulted in a 23% whole person impairment rating (Claimant's Exhibit 1).

18. On June 25, 2015, the Claimant saw Dr. Allison Fall for an Independent Medical Examination. The Claimant reported her mechanism of injury to Dr. Fall relatively consistent with what she had reported to previous physicians, although she also mentioned that she believes she may have blacked out. The Claimant reported that the physical therapy and trigger point injections helped her condition and that a right sacroiliac joint injection decreased her pain 40-50% (which is significantly lower that the number Dr. Zimmerman reported on September 26, 2014). The Claimant stated to Dr. Fall that about one week after that SI injection she was placed at MMI, saw Dr. Glick one last time, and then has not had any treatment since. The Claimant described

shooting pains in her low back that go up to her mid back. She described swelling in her shoulder where she has numbness and tingling every once in a while in her shoulder blade area. The Claimant also reported neck pain to Dr. Fall. The Claimant reported that her pain can range from 3/10 to 9/10 in the evenings. She reported her pain was aggravated by prolonged standing. The pain is alleviated by using the TENS unit for 30 minutes to one hour. The Claimant denied that she had prior symptoms before her motor vehicle accident. On physical examination, Dr. Fall found no visible or palpable spasming in the cervical spine region. She also found the Claimant's shoulder examination to be unremarkable with no signs of internal derangement or loss of range of motion. Dr. Fall found that the Claimant's lumbosacral area was generally normal and her range of motion was only restricted due to obesity. Dr. Fall ultimately opined that the Claimant most likely suffered only soft tissue injuries and she is at MMI and has no medical impairment as a result of the work injury. Dr. Fall stated that she was, "in agreement with the impairment assessment noted by Dr. Zimmerman." She found that the Claimant required no additional treatment or permanent work restrictions (Respondents' Exhibit B).

19. The Claimant testified credibly that she never told Dr. Zimmerman that she had "zero pain" or that her neck and back pain had completely resolved. The Claimant testified that the injections she received helped with her neck pain but that it did not go away. She also had physical therapy, but this did not make the pain go away permanently. The numbness in her fingers has never gone away completely either. With specific reference to office visit notes of Dr. Zimmerman on May 16th and September 26th, the Claimant stated that she is not, and was not, able to touch her hands to the ground, regardless of what these medical notes state. While at Dr. Zimmerman's office to determine the Claimant's range of motion, she testified that she stood in front of him and put her arms out and arms pushed and then she bent over as far as she could. She testified that she also looked from side to side. The Claimant testified that Dr. Zimmerman did not measure any motion with any sort of device when she was examined by him.

20. The Claimant further testified that prior to February 28, 2014, she did not ever have pain in her shoulder, back or neck. Prior to February 28, 2014, the Claimant used to engage in activities such as fishing, hiking and golfing. She testified credibly that after February 28, 2014 she has not been able do these things because she has too much low back pain.

21. The Claimant testified that she did believe she had a rib fracture because her side hurt and because she was told she had a rib fracture. This is consistent with an e-mail written by the Employer's office manager who attended appointments with the Claimant that the Claimant had cracked ribs. She was not able to see Dr. Glick after September of 2014 because she did not have insurance. She did try to go back to see him to get an impairment rating but he wasn't allowed to do this as he lacked the certification.

22. The Claimant was sent to see Dr. Jenks for an MMI determination and impairment rating. The Claimant testified that he used medical instruments for her range

of motion measurements. The Claimant testified credibly that he used a round scale and he pushed buttons and it would measure how far I could move. The Claimant told Dr. Jenks she had pain in lower back, neck and shoulder and that the pain had been ongoing since September.

23. The Claimant testified that she did not think her employer was treating her professionally prior to her termination from employment. The Employer's office manager accompanied the Claimant to doctor office visits and directed the Claimant not to take any medications or therapies recommended by Dr. Glick. This is documented in the March 19, 2014 medical note of Dr. Glick and he found the behavior of the Employer's representative to be "very threatening and inappropriate" (see Claimant's Exhibit 3).

24. The Claimant testified that she suffers from depression and she was diagnosed by Dr. Reed who prescribes Prozac for this condition. The Claimant does not recall if Dr. Jenks asked her if she was diagnosed with depression.

25. Dr. Allison Fall testified at the hearing as an expert in the areas of physical medicine and rehabilitation and regarding Level II certification matters. She testified that a patient is at MMI when that patient's condition is stable and there is an expectation that the patient requires no more active treatment. Dr. Fall testified that she is familiar with the Claimant and met with her for an IME and reviewed her medical records before the IME. Then, Dr. Fall reviewed the medical records again after the interview and physical examination of the Claimant. Dr. Fall testified that, per the medical records, the Claimant's injuries were lumbar strain and cervical strain with myofascial pain, which had resolved.

26. Dr. Fall testified that in reviewing Dr. Jenks' DIME report, it was significant to her that the report was 6 months after the last doctor appointment for the injury because the Claimant's condition seemed somewhat benign and then at DIME, it had worsened. Dr. Fall testified that Dr. Jenks recommended a lumbosacral MRI to evaluate for discogenic source of pain, but she opined that an MRI would not show discogenic origin. Rather, a discogram could be used for this. Dr. Fall also testified that it was her opinion that as of March 2015, it was her understanding that the Claimant had resolved myofascial pain, so she didn't understand why Dr. Jenks would attribute the symptoms the Claimant was reporting at the DIME back to the Claimant's work injury. She opined that Dr. Zimmerman's report and impairment rating were fairly complete and denoted that the Claimant's symptoms were essentially resolved.

27. Dr. Fall testified that the Claimant did not tell her anything about the speed of the vehicle. However, from the medical records of Dr. Glick and Dr. Zimmerman, Dr. Fall believed the Claimant's MVA was a lower speed accident. Dr. Fall opined that in a lower speed accident, there is less body movement and you wouldn't expect much in the way of injury.

28. In reviewing Dr. Jenks' DIME, Dr. Fall notes that regarding the Claimant's cervical pain, he recommends diagnostic cervical medial branch blocks with a possible rhizotomy and depending on the results, that she might need trigger point injections. Dr.

Fall does not believe this is indicated because she opines there is still not causal link between cervical symptoms and the Claimant's documented mechanism of injury. Dr. Fall further opined that Dr. Jenks did not perform a causal analysis regarding the Claimant's lumbar or cervical conditions and he didn't comment on Dr. Zimmerman's findings and account for the difference in his opinion and Dr. Zimmerman's. However, Dr. Fall failed to note that Dr. Zimmerman, with whom she agrees, found the Claimant had cervical strain with whiplash mechanism of injury, which would be important in a causal analysis.

29. Ultimately, Dr. Fall opined that Dr. Jenks erred in his opinion that the Claimant was not at MMI due to the causation issue, the Claimant's symptoms and the fact that, per Dr. Fall's opinion, there is no reasonable expectation that additional treatment would lead to positive change. Dr. Fall opined that you have to look at some other underlying reasons for continued reports of pain, for example, treatment at work and depression.

30. On the issue of range of motion measurements, Dr. Fall testified that per her review of Dr. Zimmerman's 9/26/14 medical note, Dr. Zimmerman addressed cervical range of motion, and she pointed to Exhibit C, p. 9, at the 3rd paragraph. Dr. Fall finds the notation regarding cervical ROM from Dr. Zimmerman inconsistent with cervical discogenic pain as she finds that Dr. Zimmerman specifically evaluated for this and noted the Claimant was within functional limits. As for the Claimant's lumbar range of motion, Dr. Fall pointed to Exhibit C, p. 9, at the 2nd paragraph and opined that this notation was inconsistent with ongoing symptomatology of the lumbar spine. Thus, Dr. Fall testified that she agrees with Dr. Zimmerman that there is no ratable impairment for the injuries the Claimant sustained in the MVA. Dr. Fall finds no evidence to support the ratable impairment Dr. Jenks assigned for Claimants cervical condition and testified that there is nothing in the treatment records to show related ongoing cervical condition tied to the injury. Also, Dr. Fall opined that if there is no Table 53 rating, you don't proceed to ROM deficits for cervical. The only exception to this is if there is a severe shoulder condition with related cervical, otherwise you don't get to cervical ROM without a cervical Table 53 rating. As for the lumbar spine rating from Dr. Jenks, Dr. Fall testified that Dr. Zimmerman's report of 9/26 showed full lumbar ROM. Also, Dr. Jenks refers to lumbar "pain" and Dr. Fall opines that it is not appropriate to rate for lumbar pain.

31. Based on her IME and review of the medical records and her examination of the Claimant, Dr. Fall finds the Claimant reached MMI on September 26, 3014 and that she did not sustain any permanent impairment based on her industrial injury. Dr. Fall testified that the Claimant requires no further medical treatment for any condition related to her industrial injury.

32. On cross examination, Dr. Fall testified that she has no basis to doubt that the Claimant is in pain. However, Dr. Fall relates this to psychological factors. Dr. Fall did acknowledge that the Claimant had no prior conditions for her back or neck and there was no documented injury or trauma prior to this injury that could have caused the Claimant's symptoms. On the other hand, she also testified that neither she nor Dr. Zimmerman found objective symptoms when examining the Claimant.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Burden of Proof for Challenging an Opinion on MMI Rendered by a DIME Physician

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

Here, the Respondents have failed to meet their burden of proof to show that it is highly probable that the opinion of Dr. Jenks on the determination of the Claimant's MMI status was clearly incorrect. Dr. Fall disagrees with Dr. Jenks's opinion that the Claimant is not at MMI. Dr. Fall opines instead that Dr. Zimmerman's opinion that the Claimant was at MMI as of September 26, 2014 is correct. Dr. Jenks found that the Claimant is not at MMI because he opined that there were additional medical treatment options to diagnose and potentially improve the Claimant's low back and cervical conditions, which would not be consistent with a finding of MMI. He opined that the Claimant's pain could be related to cervical fact dysfunction and he found she continued to suffer from lumbosacral pain not present prior to her injury. He specifically recommended the Claimant undergo a lumbosacral MRI to evaluate for a discogenic source for her ongoing symptoms. For the cervical pain, Dr. Jenks opined that the Claimant should undergo diagnostic cervical medial branch blocks with a possible rhizotomy, depending on the result of the medial branch blocks. Dr. Jenks also opined

that further trigger point injections could be an option. Dr. Fall does not believe these recommendations are indicated because she opines there is still not causal link between cervical symptoms and the Claimant's documented mechanism of injury. Dr. Fall found no visible or palpable spasming in the cervical spine region. She also found the Claimant's shoulder examination to be unremarkable with no signs of internal derangement or loss of range of motion. Dr. Fall found that the Claimant's lumbosacral area was generally normal and her range of motion was only restricted due to obesity. Yet this does not square with Dr. Jenks' findings which are credible and persuasive.

A finding that additional diagnostic procedures which offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment could be warranted would be consistent with a finding that the Claimant was not at MMI as Dr. Jenks determined. The conclusion of Dr. Fall that the Claimant is not at MMI for her low back and cervical conditions amounts to a difference of opinion with Dr. Jenks, based mainly on her views regarding a causation issue for the cervical condition, which is not sufficient to overcome the DIME physician's opinion. Thus, Dr. Jenk's determination that the Claimant is not at MMI has not been overcome by clear and convincing evidence. Therefore, Respondents' application to overcome the DIME opinion is denied and dismissed.

Medical Benefits–Authorized, Reasonably Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

In this case, the Claimant continues to suffer from cervical and lumbosacral pain due to her work related motor vehicle accident. The DIME physician Dr. Jenks recommended the Claimant undergo a lumbosacral MRI to evaluate for a discogenic source for her ongoing symptoms. For the cervical pain, Dr. Jenks opined that the Claimant should undergo diagnostic cervical medial branch blocks with a possible rhizotomy, depending on the result of the medial branch blocks. Dr. Jenks also opined that further trigger point injections could be an option.

The Claimant's ATP, Dr. Glick, had evaluated the Claimant on May 20, 2014 after her first round of injections into her neck and shoulder performed by Dr. Zimmerman. While he indicated she experienced some relief from the injections, he still noted tenderness to palpation and spasm in the paraspinal muscles on the left side of the Claimant's neck and her left trapezius and bilateral spasm in the paraspinal muscles of her lumbar region. After this, Dr. Glick referred the Claimant to Dr. Zimmerman again for further evaluation and possible injections. After SI injections performed on September 12, 2014, Dr. Zimmerman noted a diagnostic response as he reported that it relieved all of her perisacral pain and a therapeutic response as it relieved 75-80% of her right-sided lumbosacral pain. Dr. Zimmerman noted that the Claimant reported total relief in her neck and shoulder pain and 80% relief in her right-sided perisacral pain. Based on the positive response to injections and physical therapy, Dr. Zimmerman opined that the Claimant's cervical strain, myofascial pain and right SI joint dysfunction had resolved and he found the Claimant to be at MMI as of September 26, 2014. Yet, the Claimant credibly testified that she never told Dr. Zimmerman that she had "zero pain" or that her neck and back pain had completely resolved. The Claimant testified that the injections she received helped with her neck pain but that it did not go away. She also had physical therapy, but this did not make the pain go away permanently. The numbness in her fingers has never gone away completely either. With specific reference to office visit notes of Dr. Zimmerman on May 16th and September 26th, the Claimant stated that she is not, and was not, able to touch her hands to the ground, regardless of what these medical notes state. While at Dr. Zimmerman's office to

determine the Claimant's range of motion, she testified that she stood in front of him and put her arms out and arms pushed and then she bent over as far as she could. She testified that she also looked from side to side. The Claimant testified that Dr. Zimmerman did not measure any motion with any sort of device when she was examined by him. This is in contrast with the Claimant's credible testimony that during the DIME, Dr. Jenks made use of formal instruments to measure her range of motion. Based on what he saw during his examination, coupled with his review of the medical records, Dr. Jenks recommended additional diagnostic and therapeutic treatment. The treatment recommended by Dr. Jenks is reasonably necessary to cure and relieve the Claimant of the effects of her February 28, 2014 work injury. In this case, the ALJ finds the recommendations and opinions expressed by Dr. Jenks to be more persuasive than those of Dr. Fall and Dr. Zimmerman. Dr. Fall opined that she was in agreement with Dr. Zimmerman and felt that Dr. Jenks failed to establish a causal relationship prior to making diagnostic and treatment recommendations for the Claimant. The ALJ does not find these arguments as persuasive as the opinion of Dr. Jenks.

The Claimant has established the right to the diagnostic and treatment recommendations expressed by Dr. Jenks in his DIME report.

ORDER

It is therefore ordered that:

1. The Respondents have failed to meet the burden of proving, by clear and convincing evidence that the DIME physician is in error as to his determination that the Claimant is not at MMI.

2. The Respondents' application to overcome the DIME opinion is denied and dismissed.

3. The Respondents shall provide medical treatment to the Claimant consisting of the treatment recommendations by Dr. Jenks, including a lumbosacral MRI, diagnostic cervical medial branch blocks with a possible rhizotomy, and further trigger point injections, to the extent they are indicated and recommended by the Claimant's ATP based on the results of the diagnostics.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 4, 2016

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a worsening of condition thereby supporting reopening of her claim; and if so,

II. Whether Dr. Robert Sung's recommendation for a L4-L5 fusion surgery is reasonable, necessary, and related to Claimant's industrial injury.

FINDINGS OF FACT

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

1. Claimant works for Employer as a city bus driver. She has been employed in this capacity since 2011.

2. On April 13, 2014, Claimant experienced mechanical problems with the bus she was driving during her shift. Consequently, she returned to the maintenance facility to report the trouble to the company mechanic. While walking across the parking lot, Claimant slipped on water near the bus wash bay. Claimant fell onto her knees and back. A workers compensation claim was filed and liability for injuries to Claimant's knees and back was admitted.

3. Claimant came under the care of Dr. George Johnson at Concentra Medical Centers. She was initially diagnosed with bilateral knee strain and contusion, lumbar pain, and post-laminectomy syndrome. Claimant was treated conservatively, with physical therapy and medication; Tramadol, Motrin, and Percocet. She was given restrictions of 20 lbs. carrying, no kneeling, crawling, squatting or climbing. Her employer could not accommodate the restrictions, so she was off work on temporary total disability from April 28, 2014 until July 30, 2014. She returned to work on July 31, 2014.

4. Claimant developed persistent low back pain following her slip and fall. Dr. Johnson's office notes from June 4, 2014 indicate that her low back pain was constant and 5/10 in severity, compared with 2/10 prior to the April injury. He commented, "She states that her current back pain is significantly worse than her prior back pain."

5. Claimant has a history of pre-existing residual low back pain secondary to injuries sustained in car accidents occurring in 2004 and 2008. Claimant came under the care of Dr. Katherine Leppard following her 2004 car accident. She has received extensive treatment from Dr. Leppard, including treatment for back pain.

6. Following her 2008 car accident, Claimant developed worsening low back and left leg pain. Consequently she was referred for an MRI of the lumbar spine. On July 20, 2009, Claimant underwent a lumbar MRI which revealed an interval progression of severe L5-S1 degenerative disc disease and associated marrow reactive changes and edema, persistent moderate left L5-S1 neural foraminal stenosis with minimal left L5 nerve root compression, a 3mm left intraforaminal disc protrusion with mild contact on the left L4 foraminal nerve root and mild L2-3 and L4-5 disc degeneration.

7. Claimant's low back and left leg pain continued so she was referred to Dr. Roger Sung who evaluated Claimant and recommended surgery. On September 1, 2009, Dr. Sung performed a L5-S1 decompression and instrumented fusion procedure. Claimant testified that following this procedure she did well. She was able to reduce the amount of pain medication she was taking and had no functional limitations. As noted Claimant began working for Employer as a bus driver in 2011. Medical reports from Dr. Leppard dated April 29, 2010, November 1, 2010, and August 26, 2011, supports Claimant's testimony. These records document minimal use of narcotic medication and overall compliance with the continued use of such medication. Moreover, the records establish that Claimant had "excellent results" from her lumbar fusion surgery and that her primary concerns were persistent shoulder pain despite rotator cuff surgery in addition to neck pain for which Claimant ultimately underwent cervical fusion.

8. Nonetheless, medical records submitted at hearing support a conclusion that Claimant has never been pain free regarding her low back since 2009. For example in 2013 Claimant undertook injection therapy for lower back pain. On January 14, 2013 and December 5, 2013, Dr. Stephen Ford provided epidural steroid injections for low back pain. Dr. Ford's reports from these encounters documents Claimant's need for ESI's as necessary for lumbar disc disease noting specifically that Claimant has "chronic bilateral lower back pain (LBP), buttock, leg pain/numbness/tingling to feet has returned." Regardless, a medical report from Dr. Leppard, dated March 17, 2014, approximately 30 days prior to her work related slip and fall indicates that Claimant was managing her chronic back pain with the use of Ultram and the rare Percocet; indicating further that Claimant had "dramatically reduced" the use of pain medication over the preceding years.

9. Based upon the medical records submitted, the ALJ is persuaded that Claimant was not actively engaged in low back treatment in the weeks prior to her April 13, 2014 work related slip and fall. Rather, the ALJ finds that while Claimant had chronic low back pain, she was managing that pain with the appropriate use of medication only.

10. Following Claimant's April 13, 2014 slip and fall and in light of her leg pain Claimant underwent an EMG with Dr. Leppard to determine the cause of pain and numbness in her lower extremities on June 12, 2014. Dr. Leppard opined that there is no electrodiagnostic evidence of a lumbar radiculopathy and concluded that Claimant was experiencing peripheral neuropathy.

11. Dr. Johnson also ordered a repeat lumbar MRI, which was performed on August

4, 2014. It showed degenerative changes at T11-12; T12-L1; L2-3, and L4-5, slightly worse at L4-5. Claimant returned to Dr. Ford for a series of epidural steroid injections, which were done on August 24, 2014; October 6, 2014 and October 20, 2014.

12. Dr. Johnson placed the Claimant at maximum medical improvement on October 22, 2014 without permanent impairment. Dr. Johnson indicated that he believed that Claimant had "returned to her normal status of health prior to her fall." Claimant did not object to the Final Admission and her case closed.

13. Claimant testified that she disagreed with the decision to place her at MMI. Dr. Johnson's report of MMI supports Claimant's testimony. According to Claimant, she was slightly better when she was placed at MMI. Per her testimony, her pain was substantial necessitating copious amounts of pain medications which have persisted since her fall.

14. Claimant's back pain worsened subsequent to her release by Dr. Johnson, culminating in insurance approval for her to return to his facility on July 17, 2015. His report from that date states, "She complains of lower back pain which has been progressing gradually since December of last year. . .She saw Dr. Sung on July 9, 2015. She (sic) recommended surgery. . . Currently the patient complains of moderately severe nearly constant lower back and left leg pain. The left leg pain is described as burning and stabbing."

15. Dr. Johnson also discussed Claimant's prior history of a low back injury and surgery, stating, "She states that her baseline pain prior to the injury [of April 13, 2014] was 1-2/10 in severity." In his treatment plan, Dr. Johnson stated, "I believe the current low back pain is mostly due to her work related injury in 2004 with worsening of the condition from her injury on 4/13/2014. I recommend reopening the case and doing an MRI to evaluate the lumbar spine and see if surgery is needed." Dr. Johnson completed Form WC164 for that visit, stating, "MMI date unknown at this time because need additional evaluation."

16. The MRI was done on July 23, 2015, revealing evidence of postop changes status post posterior decompression and fusion at L5-S1 with posterior left foraminal osteophyte formation causing moderate left-sided neural foraminal narrowing; and degenerative changes of T10-L3 disc spaces; and mild to moderate degenerative changes of the L4-5 disc space. The August 4, 2014 and July 23, 2015 MRI's were compared by Dr. Kahn. Based upon the evidence presented, including the MRI reports and , the ALJ finds that there was been insignificant interval changes at the L4-L5 and L5-S1 levels.

17. Dr. Johnson saw the Claimant in follow-up on August 7, 2015. At that time, he again recommended reopening the case, stating that Claimant may need additional surgery, and the case was positive for anticipation of permanent medical impairment. He notes that Claimant had increased her pain medication though there is no change in her MRI. He referred Claimant back to Dr. Sung for additional evaluation. Insurer

denied the referral and any further treatment as well as Claimant's request to reopen the claim.

18. Claimant did return to Dr. Sung on July 9, 2015, at her own expense. At that time, Dr. Sung stated that he thought an adjacent segment fusion (at L4-5) would help with her back and leg pain. For comparison, when claimant saw Dr. Sung's physician's assistant, Phil Falender, on August 6, 2014, he recommended that she return to Dr. Ford for an additional injection. The recommendation for surgery was not made until the July 9, 2015 visit to Dr. Sung. Although Dr. Sung noted that imaging, including x-rays and MRIs were reviewed, he did not comment on the findings of those imaging studies.

19. On October 8, 2015, Dr. Kathie McCranie performed an Independent Medical Examination (IME) of Claimant at the request for Respondents. Following review of medical records and examination of Claimant, Dr. McCranie authored a report indicating that given Claimant's subjective report of a change in her low back symptoms following her April 13, 2014 slip and fall, she would need to review Claimant's medical records pre-dating the April 13, 2014 injury. Additional records were provided after which Dr. McCranie authored a second report wherein she opined that Claimant's reports of increased symtomotolgy were without objective changes in examination or diagnostic imaging. Consequently, Dr. McCranie opined that there was no "objective basis for the lumbar surgery to be related to the 04/14/14 (sic) Workers Compensation injury." According to Dr. McCranie, Dr. Sung's proposed surgery would not likely alleviate Claimant's "complaints and symptoms."

20. Regarding the request to reopen the claim, Dr. McCranie opined that Claimant did not meet the criteria for spinal fusion under the Colorado Medical Treatment Guidelines (MTGs) because there was no MRI evidence of spinal stenosis, nerve root compression or instability. Rather, Dr. McCranie noted that the MRIs revealed a widely patent L4-L5 neural canal. Moreover, Dr. McCranie noted that Dr. Sung simply described Claimant's response to ESI as "good" and Claimant actually described a 60% short-term benefit to ESI which according to Dr. McCranie constitutes a "non-diagnostic" response as it relates to the efficacy of ESIs. Consequently, Dr. McCranie opined that the request for surgery is based "purely" on Claimant's subjective complaints of increased pain.

21. Dr. Sung responded to Dr. McCranie's report on November 16, 2015. In an "addendum" to a November 5, 2015 letter he authored to Claimant's counsel. In his addendum Dr. Sung notes: Regarding Dr. Kathy McCranie's IME, I disagree with her report. Patients do not have to have neurologic deficits to have a benefit from surgery. Moreover, Dr. Sung noted that there does not have to be substantial changes on imaging study to support a complaint of increased symptoms and that a positive EMG is not a prerequisite for surgery. Finally, Dr. Sung noted that Claimant's response to ESI supported that her pain was coming from the L4-L5 spinal level. Consequently, Dr. Sung continued to recommend surgery for this segmental level which had been aggravated by her April 13, 2014 slip and fall.

22. Dr. Kathy McCranie testified by deposition on December 1, 2015. Dr. McCranie testified regarding Dr. Sung's recommendation for surgery, the Colorado Workers' Compensation Treatment Guidelines, and Claimant's current complaints and symptoms. As provided in her reports, Dr. McCranie testified that a fusion surgery is a serious surgery where each subsequent surgery is less likely to be successful. Dr. McCranie testified that Claimant's MRIs did not change post MMI and did not show instability or stenosis. She testified that Claimant's injections were not diagnostically significant and Claimant's pain generator was not properly isolated. Finally, Dr. McCranie credibly testified as to the importance of the Treatment Guidelines and how Claimant's symptoms did not correspond to the required findings for a spinal fusion without radiculopathy.

23. Claimant testified to worsening functional decline in the face of her ongoing low back and left leg symptoms. She must limit her shopping to short trips where she is able to buy a few items. She can no longer vacuum her house, participate in chosen recreational pursuits, such as hunting, fishing and 4 wheeling or interact with her grandchildren as she used to. According to Claimant she would like to return to her "normal" life and decrease the use of medications again.

24. Based upon the record evidence as a whole, the ALJ is persuaded that Claimant's low back condition has worsened since being placed at MMI on October 22, 2014.

25. Based on a totality of the evidence presented, the ALJ finds that Claimant had proven that the surgery recommended by Dr. Sung is reasonable, necessary and related to Claimant's April 13, 2014 slip and fall injury involving Claimant's low back.

26. Dr. McCranie's opinions as expressed in her IME reports and subsequent deposition testimony are not persuasive.

CONCLUSIONS OF LAW

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

Generally

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 claimant shoulders the burden of proving her condition has changed and her 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 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). In this case, the evidence presented persuades the ALJ that Claimant has proven that her low back condition has worsened since being placed at MMI on October 22, 2014. At the time of her discharge on October 22, 2014, Claimant was experiencing the maximum, but temporary, effects of three epidural steroid injections done closely together. When the effects of these injections wore off, Claimant's pain returned and worsened, as documented by the authorized treating physician, Dr. George Johnson.

Dr. Johnson specifically recommended reopening her case in July of 2015, for consideration of additional surgery. Dr. Roger Sung has recommended that additional surgery, a fusion at L4-5. At the time of her discharge in October of 2014, surgery was not being recommended. Claimant's pain levels were temporarily manageable likely due to the effects of her ESIs. When she returned to Dr. Johnson in July of 2015, she reported low back pain progressing gradually since December of last year. She complained of moderately severe nearly constant lower back and left leg pain described as burning and stabbing. She was taking Tramadol three times per day and Percocet two to three times per day. Dr. Johnson stated that her back pain was mostly due to her work related injury in 2004 with worsening of condition from her injury on 4/13/14. He recommended reopening her case to see if surgery was needed. Accordingly, Claimant's request to reopen her claim is hereby granted.

Medical Benefits
The Proposed L4-L5 Spinal Surgery Recommended by Dr. Sung

F. 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).

G. 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 L4-L5 fusion surgery recommended by Dr. Sung is reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Sung to recommend surgical intervention.

H. 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 low back pain. While the MTGs provide for that several pre-operative surgical indications should be considered before surgery is undertaken, including assessment/definition and treatment of all likely pain generators along with x-ray, MRI or CT myelography findings consistent with spinal stenosis with instability or disc pathology, 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.

Although Dr. Sung's treatment notes are devoid of substantial detail and although Dr. McCranie testified that Claimant's potential pain generators have not been adequately defined and treated and Claimant's MRI did not demonstrate spinal stenosis with instability, the ALJ concludes that Dr. Sung adequately identified Claimant's pain generator as an L4-L5 disc herniation causing stenosis and pain. 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 and restore her function. Based upon the evidence presented and in keeping with the MTGs, the ALJ concludes that Claimant's surgery has been contemplated within the context of expected functional outcome and not merely for the purposes of pain relief.

ORDER

It is therefore ordered that:

1. Claimant's request for re-opening of her claim is GRANTED.

2. Respondent shall pay for all authorized reasonable and necessary treatment medical treatment, resulting from the Claimants April 13, 2014 slip and fall, including but not limited to the L4-L5 spinal surgery recommended by Dr. Sung

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: January 20, 2016

/s/ Richard M. Lamphere

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

ISSUES

- In the case before the ALJ, are the Respondents required to overcome the DIME finding that the claimant is not at MMI by clear and convincing evidence and if so, have the Respondents sustained their burden?

FINDINGS OF FACT

Based upon the evidence presented at Hearing, the ALJ finds as follows:

1. The Claimant works for the Employer as a lead support person and while working in the course and scope of her employment was physically assaulted by one of the clients of the Employer on May 30, 2013. The Claimant is a supervisor of other support staff, working on a computer and performing intake work for the employer's patients. Claimant described her work as primarily sedentary in nature. (Transcript, July 10 hearing, page 38, lines 16-22).

2. The Employer works with mandated clients coming out of prison or probation and a client of the employer's came into an area of the employer's premises that was posted not to enter. As the lead support person, the Claimant tried to get the individual to turn around and go back to the lobby. Claimant was unsuccessful in doing so, but was finally able to get in front of the client and indicated to the client that she needed to turn around and go back out to the lobby.

3. At that point and at that time, the client "body butted" the Claimant, poured the contents of an Arizona tea can over the Claimant's head, started pulling the Claimant's hair and hitting her. The Claimant, with the help of two of her co-workers, was able to subdue the assailant and got the assailant up against a wall. The Claimant testified that the assailant was fighting the Claimant and the co-workers the whole time, clenching her fists and trying to get away. During the approximate fifteen minute period of time that the Claimant and her co-workers were trying to control the assailant and the struggle ensued, the Claimant testified that she sustained injuries to her hand and finger from which she recovered, but that her left knee was caught between the assailant's knee and the male therapist's knee and that their knees were grinding against her left knee until the police arrived and took the assailant into custody. (Transcript, July 10 Hearing, page 16, lines 17-25; page 17, lines 1-5).

4. The Claimant testified that her left knee and hand started to swell immediately and the police took pictures of her swelling. Claimant filed an incident report with her Employer and was sent to Champs for evaluation and treatment. On the

incident report initially filled out by the Claimant she did not note the left knee problem but mentioned her right hand, right arm and shoulder. (Transcript, July 10, 2015, p. 20, line 15).

5. The Claimant testified that prior to the incident of May 30, 2013, she had never had any care and treatment for any injuries to her left knee, had never been evaluated for any type of pain or problems associated with her left knee, had never had any diagnostic tests or restrictions placed upon her activities due to any type of medical condition associated with her left knee, and had never had any swelling or pain in her left knee. (Transcript, July 10 hearing, p. 33, lines 10-25; p.38, lines 1-6).

6. Claimant was first examined at the Champs Clinic by PA Micheal Dietz on June 6, 2013 and advised PA Dietz of the problems that she was having with her left knee since the events that took place on May 30, 2013. PA Dietz examined the claimant's left knee on June 6, 2013 but did not take any X-Rays. Claimant was of the opinion that her knee condition was worsening since the day of the incident and that the pain in her knee had continued since the day of the assault.

7. Claimant was seen again by PA Dietz again on June 20, 2013 and Mr. Dietz's report is before the ALJ. Claimant testified that as of June 20, 2013 she was still limping due to her left knee complaints. Her knee was hurting and she was of the opinion that at that time her pain level was at a 5-6 based upon a 1-10 scale with 10 being the worst pain imaginable. PA Dietz in his report of June 20, 2013 indicated that the Claimant continued to have a "minimal amount of discomfort." Claimant, at the hearing of July 10, 2013 testified that she disagreed with that notation by PA Dietz that she had a minimal amount of discomfort as of June 20, 2013. (Transcript, July 10, 2015, page 24, line 3). Claimant testified that she thought her pain level was still at about a 5-6 on the above pain scale.

8. Claimant was reexamined again by PA Dietz on July 11, 2013. PA Dietz's July 11, 2013 report is before the ALJ. PA Dietz placed the claimant at MMI on that date with a provision if the Claimant continued to have problems that the Claimant could return for evaluation and treatment. PA Dietz put in his report of that date that the Claimant has a history of arthritis in her left knee. The Claimant testified that she did not recall any conversations with PA Dietz about her having arthritis of her left knee and that she had never had any problems of any type prior to the injury of May 30, 2013 with her left knee, nor was she aware that she had arthritis in her knee at that time. PA Dietz did not perform any diagnostic tests whatsoever on her left knee. PA Dietz's report states: "however at four to six weeks now, if she continues to have pain, it would certainly be reasonable to reopen the claim for recheck, but this is not anticipated." Claimant was not seen by a doctor prior to being placed at MMI by PA Dietz and there is no indication that any diagnostic tests were undertaken prior to the Claimant being placed at MMI by PA Dietz.

9. Claimant, between the date of the injury and the time of the hearing of July 10, 2015, had not been taken off work nor had she missed any time from work other than for doctor's visits. The Claimant has continued to work full duty for the Employer.

10. After the Claimant was released by PA Dietz as having reached MMI on July 11, 2013, the Claimant continued to perform her job duties and according to the Claimant's testimony, the pain never went away. Finally Claimant testified she could no longer stand the pain and requested permission from Pinnacol to go back to see the doctor. The Claimant credibly testified that she is not the type of person to complain and run to the doctor and was hopeful that with the passage of time the pain would lessen or diminish completely. (Transcript July 10 Hearing, p.39, lines17-20).

11. The Claimant credibly testified that she did not have any additional injuries to her left knee between the time that she was released at MMI by PA Dietz and the time that she returned to see Dr. Charbonneau on February 20, 2014.

12. Dr. Charbonneau's report of February 20, 2014 of his examination of the Claimant of even date therewith is before the ALJ and has been reviewed. Dr. Charbonneau's report indicates the history of the May 30 event but sets forth that it was the right knee of the Claimant that was caught between the assailant and the coworker which the claimant denies. Dr. Charbonneau advised the Claimant that the issue with her left knee could be multifactorial including the possibility of arthritis, the injury, and her weight. Dr. Charbonneau was of the opinion that the Claimant could continue to do her job but that it would be helpful to have an MRI performed to diagnose the Claimant's condition and to determine the best course of treatment, if any. (Respondents' Ex. E, pp 071-076).

13. An MRI was performed on June 20, 2014. The results of that MRI demonstrated that the Claimant had: degenerative arthritis of the left knee and meniscus tears of the left medial meniscus. (Respondents' Ex. C).

14. On July 7, 2014, the Claimant went back to Dr. Charbonneau to review the results of the MRI with him. Dr. Charbonneau's report of July 7, 2014 has been reviewed. That report states that Dr. Charbonneau was of the belief that the Claimant needed an orthopedic consultation and Dr. Charbonneau referred the Claimant to Dr. Kindsfater with Orthopedic Center of the Rockies for that consultation. (Respondents' Ex. E, pp.078-081).

15. The Claimant was seen by Dr. Kindsfater, an orthopedic surgeon on July 23, 2014 and his report has been reviewed. Dr. Kindsfater is of the opinion that the Claimant is in need of a total knee arthroplasty. Dr. Kindsfater opined concerning causation that the on the job injury of May 30, 2013 exacerbated the Claimant's underlying arthritic condition and caused the necessity for the total knee arthroplasty. (Respondents' Ex. F, p. 093).

16. The insurer thereafter had Dr. Jon Erickson perform a staffing review of the matter and Dr. Erickson's physician advisor report of July 28, 2014 has been reviewed by the ALJ. Dr. Erickson's report states: "Obviously we have a significant situation here because in my opinion it is difficult to believe that advanced arthritis of the patellofemoral and medical compartments were caused by what was felt to be a knee sprain… I therefore believe that Dr. Kindsfater is probably in error in his conclusion, but I think that to afford both Dr. Kindsfater and the patient their day in court, so to speak, an IME should be performed which will hopefully address the issue of causality here. The orthopedic surgeon performing this examination can review the actual studies and x-rays and make a determination as to whether or not this was an aggravation of her pre-existing condition or whether it is not related to the work injury."

17. Dr. Erickson testified at the Hearing. Dr. Erickson is an orthopedic surgeon. Dr. Erickson stated that the Claimant had pre-existing degenerative arthritis of her left knee. He testified that there was lack of clarity in the medical records of the mechanism of injury and how severe it was. Dr. Erickson acknowledged that the Claimant did have an injury to her left knee but the records according to Dr. Erickson "seem to indicate" that she continued to improve over the three visits with PA Dietz. Dr. Erickson thought that since PA Dietz did not request diagnostic tests that PA Dietz did not think of the injury as being severe. Dr. Erickson on direct examination concluded that since the Claimant did not return to seek treatment until January of 2014 that the injury had resolved and that the Claimant sought additional treatment in January of 2014 because of an additional problem that was as a result of the underlying degenerative condition. Dr. Erickson was unable to testify based upon the MRI examination in June of 2014 as to whether the meniscal tears were as a result of the compensable injury of May 30, 2013 or not. Dr. Erickson agreed that the treatment of choice for the Claimant presently is a total knee arthroplasty and further testified that it really made no difference whether the Claimant had pain in the knee before the injury of May 30, 2013, but was of the opinion that in order to have an aggravation there had to be a significant injury. Dr. Erickson opined that he assumed that if PA Dietz thought the injury was significant that he would have done the appropriate studies. (Transcript, July 10 hearing, pages 43-59).

18. Upon cross-examination, Dr. Erickson acknowledged that Dr. Shea, the DIME physician, followed the AMA Guides in performing his evaluation and Dr. Erickson testified that he was not critical of Dr. Shea's opinion as to whether he appropriately followed the AMA Guides in his determination but had a difference of opinion with Dr. Kindsfater and Dr. Shea regarding the causation of Claimant's condition. (Transcript, July 10 Hearing, page 61, lines 11-22; page 67, lines 10-22). Dr. Erickson further indicated that the location of the Claimant's pain was on the medial side of the knee both immediately after the injury and when the Claimant saw Dr. Charbonneau in February of 2014. Dr. Erickson further acknowledged that when an individual is bone on bone with degenerative arthritis it does not mean that a total knee arthroplasty needs to be performed, but it is a question of whether the individual has pain that limits the individual's functionality. (Transcript, July 10 Hearing, p.65, lines 9-12). Dr. Erickson was unsure of which condition was making the Claimant symptomatic, the arthritis or

the meniscal tears or a combination of both. Dr. Erickson was asked at page 77 of the transcript of Hearing of July 10, the following:

> Q. "If the IME doctor who looked at the x-rays and looked at the MRI had come back and issued a report saying, gee, in my opinion, this injury aggravated, accelerated the preexisting, underlying, asymptomatic degenerative arthritic condition and she needs a total knee replacement, would you have agreed with that?
>
> A. "I would have assumed that whoever the individual that did the IME was a credible physician, and I would go along with that opinion."

19. The Claimant had an IME examination with Dr. James Lindberg at the request of the Insurer and his report of August 19, 2014, and his Deposition of June 10, 2015 have been reviewed by the ALJ. Dr. Lindberg took a history and reviewed the medical records in the file. Dr. Lindberg's conclusions in his report were that the Claimant had severe pre-existing osteoarthritis and that the meniscal tear was degenerative in nature and neither were caused by incident at work. Dr. Lindberg opined that "given her obesity and severe osteoarthritis, I find it not credible that she was asymptomatic prior to this alleged injury sustained at work. There was no fall. There was no twist. There was no blow." (Respondents' Exhibit A, 002). Dr. Lindberg's Deposition has been reviewed. Dr. Lindberg testified that he did not believe the Claimant was asymptomatic before the injury. (Deposition, page 10, lines 10-20). He is further of the opinion that Dr. Shea, the DIME doctor, is in error in his causation determination and that the Claimant was lying about her being asymptomatic prior to the injury of May 30, 2013. (Deposition, page 22, line 22).

20. The Claimant had a DIME examination performed by Dr. Brian Shea and Dr. Shea's DIME report of February 23, 2015 has been reviewed. Dr. Shea noted that he reviewed all of the medical reports regarding the care and treatment given to the Claimant and the reports of Dr. Erickson and Dr. Lindberg. Dr. Shea concluded: "Records indicate there are no previous left knee problems in the patient and the proximate cause of the injury is directly tied to the assault from a patient that she had on 5/30/13. If it is determined that she wants to have left knee surgery to repair the meniscal tear or have a full knee replacement by Dr. Kindsfater, then this should be approved under the Worker's Compensation system. Yes, she is overweight. Yes, there were degenerative conditions going on in her left knee prior to the day of the injury but she was symptom-free in the left knee with no complaints. This injury on the day of the assault unfortunately started a cascade of problems and pathology in her left knee which is directly attributed to the injury and to say otherwise is to ignore the facts." (Respondents' Ex. H, p. 098).

21. The Claimant testified that her examination with Dr. Lindberg took approximately 5-10 minutes and that the examination with Dr. Shea, the DIME, was

very thorough regarding the examination of the Claimant's knee and Dr. Shea questioned the Claimant about how the injury occurred. (Transcript, July 10 Hearing, pages 41, lines 24-25 and page 42, lines 1-16).

22. The ALJ finds the Claimant credible in her testimony that she did not have any pre-existing problems with her left knee prior to May 30, 2013. There are no medical records indicating any previous examinations or limitations on the Claimant's activities. Further when the Claimant was put at MMI by PA Dietz the Claimant still had ongoing pain. While the opinions are conflicting between the doctors as to the causation of the need for the total knee arthroplasty, there is consensus that the Claimant needs the surgery.

23. The ALJ finds that the issue of causation of the claimant's condition must be overcome by the Respondents by clear and convincing evidence and the ALJ finds further that the Respondents have not overcome the opinion of the DIME doctor by clear and convincing evidence.

CONCLUSIONS OF LAW

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

1. Section 8-42-107(8)(b)(III), C.R.S., provides that the DIME determination of MMI shall only be overcome by clear and convincing evidence. The DIME's determinations of causation are binding unless overcome by clear and convincing evidence. See ***Qual-Med, Inc. v. Industrial Claim Appeals Office,*** 961 P.2d 590 (Colo. App. 1998); ***Cudo v. Blue Mountain Energy Inc.,*** W.C. N0. 4-375-278 (ICAO, October 29, 1999). Thus a DIME physician's findings that a causal relationship does or does not exist between an injury and the requirement for medical treatment must be overcome by clear and convincing evidence. ***Cordova v. Industrial Claim Appeals Office,*** 55 P.d 186 (Colo. App. 2002).

Respondents argue that under ***Roberts v. Frontier Airlines,*** (ICAO, 2/02/2015, W.C. 4-819-127) it is Claimant's burden "to prove that the knee degeneration is work related because this is a scheduled rating," and that since this injury is a scheduled injury that the DIME doctor's opinion regarding causation is not entitled to greater weight under the statute. The ALJ has reviewed the ***Roberts'*** decision and finds it to be inapposite to the instant claim. In ***Roberts,*** the issues for determination were decidedly different than in the instant situation as the DIME's determination of MMI and impairment rating had become final and the Claimant was additionally alleging permanent total disability. The ICAO determined that when the issue is conversion of the schedule to a whole person that the DIME opinion regarding that conversion is not entitled to the heightened degree of weight as set forth in the statute for the DIME's opinions relating to MMI and PPD. Further the Claimant here is not claiming that the degeneration was caused by the admittedly compensable on the job injury. Claimant contends that the compensable on the job injury caused the pre-existing arthritic

condition to become painful and that the pain related to that aggravation necessitates the proposed medical treatment. This therefore entails a causation analysis of the condition for which the Claimant is requesting treatment for which the DIME physician's opinion is entitled to greater weight under the provisions of Section 8-42-107(8)(b)(III), C.R.S.

2. "Clear and convincing evidence" is evidence which proves that it is "highly probable" the DIME physician's opinion is incorrect. ***Id.*** The question of whether the DIME physician's determination of MMI has been overcome by "clear and convincing evidence" is a matter of fact for determination by the ALJ. ***Id.*** Mere differences of opinion between the determination of the DIME doctor regarding MMI and those of other evaluating doctors with contrary views are insufficient to sustain Respondents' burden of overcoming the DIME opinion by clear and convincing evidence. Thus, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the DIME physician's MMI finding is incorrect. ***Qual-Med, Inc.,*** supra. Moreover, the Respondents are responsible for the direct and natural consequences which flow from a compensable injury. The Colorado Court of Appeals previously has held that the DIME physician's opinion on the cause of a Claimant's disability is an inherent part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. ***Egan v. Industrial Claim Appeals Office,*** 971 P.2d 664 (Colo. App. 1998). The party disputing the DIME physician's opinions on the issue of causation bears the burden to overcome the DIME physician's opinions by clear and convincing evidence. ***Hodges v. ATR Collision, Inc.,*** W.C. No. 4-751-557 (January 19, 2011).

3. The Respondents do not dispute that the recommended surgery is reasonable and necessary. The Respondents only dispute that it is not causally related to the admitted industrial injury. The Respondents contend based upon the opinions of Dr. Lindberg and Dr. Erickson that the DIME's determination of Dr. Shea which is supported by the opinion of Dr. Kindsfater is incorrect and that the need for the surgery suggested is not causally related to the admittedly compensable on the job injury.

4. The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(I)(a), C.R..S. ***Snyder v. Industrial Claim Appeals Office,*** 942 P.2d 1337 (Colo. App. 1997); ***Country Squire Kennels v. Tarshis,*** 899 P.2d 362 (Colo. App. 1995). Further , the Respondents are liable for medical treatment if the employment-related activities, aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment Section 8-41-301(i)(c), C.R.S.; ***Snyder v. Industrial Claim Appeals Office,*** supra. Pain is a typical symptom from the aggravation of a pre-existing condition. The Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. See, ***Merriman v. Industrial Commission,*** 120 Colo. 400, 210 P.2d 448 (1949); ***Abeyta v. Wal-mart Stores,*** W.C. No. 4-669-654 (January 28, 2008).

5. Weighing the medical evidence is the sole prerogative of the ALJ. It is well held that the expert opinion of an expert may not be solely based upon the opinion of another expert. Dr. Erickson, one of the Respondents' experts, testified that he did not have any basis upon which to dispute that the DIME had used the *AMA Guides* appropriately but that he disagreed with the DIME's opinion regarding the causation of the need for the total knee arthroplasty. An expert's opinion must not be predicated, in whole or in part, on opinions of others, expert or lay. See ***People v. Beasley,*** 43 Colo. App. 488, 608 P.2d 835 (1979); ***People v. District Court,*** 647 P.2d 1206 (Colo. 1982). Dr. Erickson conceded that his opinion amounted to a difference of opinion only between he and Dr. Shea, the DIME and that of Dr. Kindsfatter. Dr. Erickson further testified that if the additional IME selected by the Respondent Pinnacol had rendered an opinion that the compensable on the job injury had necessitated the need for the total knee arthroplasty he would have then agreed that the need for the surgical intervention was in fact job related. Under the standard set forth in ***Beasley,*** supra, if such is the case then Dr. Erickson's opinion regarding causation would be based entirely on the opinion of the additional opining doctor. As such Dr. Erickson's opinion regarding causation is given little weight by the ALJ.

6. The ALJ is experienced in the assessment of medical evidence and testimony, and is presumed to have special expertise in evaluating this type of evidence. ***Wierman v. Tunnell,*** 108 Colo. 544, 120 P.2d 638 (1941); ***Seagrave v. Sanders,*** W.C. No. 3-107-326 (June 5. 1995.) The ALJ is fully capable of weighing the doctor's testimony and reports and, in doing so, of considering the bases for their opinions. Insofar as 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).

7. Dr. Lindberg has opined that there is no support for a causal relationship between the claimant's need for surgery and the industrial injury because there was no indication of trauma to the knee joint itself when the claimant sustained her injury on May 30, 2013. Dr. Lindberg indicated in his Deposition that the claimant is being untruthful when she has stated that she had no pre-existing problems with her left knee. The Respondents have presented no evidence of any pre-existing history of care or treatment of the claimant's left knee nor is there any evidence presented that the claimant had any complaints of pain or injury to her left knee that predates the admittedly compensable on the job injury. The claimant testified credibly that she sustained an injury and described the grinding of her knee between that of her co-worker and the assailant while waiting for the police to arrive. Dr. Kindsfatter and the DIME, Dr. Shea, both concluded that this event aggravated the Claimant's underlying arthritic condition and that it was the injury that created the pain and that the recommended surgery was causally related to the compensable industrial injury.

8. When determining credibility of witnesses, 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. ***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 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)

9. "Maximum medical improvement" is defined in Section 8-40-201(11.5) R.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."

Reasonable and necessary treatment and diagnostic procedures are a prerequisite to MMI. MMI is largely a medical determination heavily dependent on the opinions of medical experts. ***Villela v. Excel Corporation,*** W.C. Nos. 4-400-281, 4-410-547

10. The ALJ concludes in the matter before her that it is the Respondents' burden to overcome by clear and convincing evidence the opinions relating to causation and MMI rendered by Dr. Brian Shea, the DIME physician. In order to meet their burden the Respondents must show that it is highly probable that the DIME opinion of Dr. Brian Shea regarding the Claimant not having reached MMI as a result of the admittedly compensable injury of May 30, 2013 is in error. The ALJ concludes for the reasons set forth above that the Respondents have failed to sustain that burden.

ORDER

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

1. The Respondents have failed to overcome the finding of the DIME doctor that the Claimant is not at MMI by clear and convincing evidence. The ALJ finds that the need for the total knee arthroplasty of the Claimant's left knee is as a result of the aggravation of the Claimant's pre-existing condition by the admittedly compensable on the job injury of May 30, 2013.

2. 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: _____

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

WC 4-956-542

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that a repeat right leg EMG/NCV test, consultation with neurologist Dr. Burnbaum, and pool therapy are reasonable and necessary maintenance medical benefits to relieve Claimant of the effects of her April, 2014 work injury or to prevent further deterioration of her condition.

FINDINGS OF FACT

1. On April 26, 2014 Claimant suffered an admitted work injury to her lower back when she was on a ladder stocking shelves, turned to talk to a co-worker, and slipped off the ladder stumbling down a few ladder steps. Claimant reported that she twisted her lower back and left knee as she stumbled and that she had constant moderate pain to the back near the hip and mild pain to the knee after the incident. *See* Exhibit A.

2. On April 27, 2014 Claimant was evaluated at Delta County Memorial Hospital by Charles Bibby, M.D. Claimant reported falling approximately three feet off a ladder onto her feet, that she jerked her back and had pain in her low and mid back and anterior chest. A chest x-ray was performed and was found normal with noted minimal degenerative change present in the spine and postsurgical changes of a cholecystectomy. Claimant also underwent a CT scan of her lumbar spine and cervical spine with no definite evidence of fracture, early degenerative disc disease noted in the mid lumbar spine, and disc herniation suspected, most pronounced at the L4-L5 level. *See* Exhibit G.

3. On April 30, 2014 Claimant was evaluated by Kevin Pulsipher, D.O. Claimant reported she could not walk and had sharp spasm type pain rated at 8/10. Claimant's weight was noted to be 177 pounds, and her height was 5'4". Dr. Pulsipher assessed lumbar strain and opined that there seemed to be a huge anxiety/secondary gain element. Dr. Pulsipher opined that Claimant's behavior was utterly out of proportion to exam findings, CT scans, and reports and mechanisms of the injury. He referred Claimant to physical therapy and explained that the symptoms and exam were most consistent with a benign musculoskeletal back injury. *See* Exhibit 6.

4. On May 7, 2014 Claimant was evaluated by Dr. Pulsipher. Claimant reported she was walking much better. Claimant had a hostile and confrontational attitude and noted she wanted to transfer her care to GJ orthopedics. Claimant reported incorrectly that she had an MRI at the hospital. Dr. Pulsipher noted evidence of exaggerated pain behavior. Claimant insisted she wanted to know what was wrong

with her back but refused to hear Dr. Pulsipher's opinion of back strain. Dr. Pulsipher noted that Claimant's function was inconsistent with a catastrophic disc injury and much more consistent with a back strain. Dr. Pulsipher transferred Claimant's care due to her hostile attitude. Dr. Pulsipher released Claimant to light duty work and continued to opine that there was major secondary gain in this case. *See* Exhibit 6.

5. On May 22, 2014 Claimant was evaluated by Todd Ousley, PA and Kirk Clifford, M.D. Claimant reported low back pain for approximately one month after she fell off a ladder, landed on her feet, and had the onset of fairly severe low back pain. Claimant reported debilitating pain. Claimant reported that she initially had numbness and tingling radiating down the posterior aspects of both legs to the knees but that those symptoms subsided a couple of weeks ago. Claimant was assessed with lumbar strain in the setting of mild L4-L5 spondylosis. Claimant was referred to physical therapy for core strengthening, general conditioning, and a home program. Claimant was advised after therapy for one week she could try return to work with a 15 pound work restriction. Dr. Clifford noted that if Claimant was not significantly improved at the next visit in 4-6 weeks, then consideration would be given for a lumbar MRI. Dr. Clifford noted that x-rays of the lumbar spine were obtained in the office and that there was a very slight amount of L4-L5 degenerative disk disease. *See* Exhibit J.

6. On July 3, 2014 Claimant was evaluated by Dr. Clifford. Claimant reported going to physical therapy and felt that a lot of her pain was subsiding but then went back to work for a 9 hour shift and her pain returned back into her legs down to her calves. Claimant reported feeling unable to do a 9 hour shift and some of the work. Dr. Clifford continued to assess lumbar strain, L4-5 lumbar spondylosis and questioned stenosis or disk herniation. Dr. Clifford noted without significant improvement he planned to get an MRI of Claimant's back and he placed her on restrictions of 4 hours of work a week and 50 pounds lifting. *See* Exhibit J.

7. On July 31, 2014 Claimant was evaluated by Dr. Clifford. Dr. Clifford noted that the MRI showed a mild L4-L5 disk bulge with facet widening at the L4-L5 level. Dr. Clifford noted that Claimant went back to work at 4 hours but that her pain was so severe that she was unable to continue working. Claimant reported both back and leg pain. Dr. Clifford noted that Claimant had a little bit of disk degeneration and herniation at the L4-L5 level with facet widening and opined that Claimant was likely developing some micro-instability. He noted it was important for Claimant to work on core strengthening exercises and noted that an epidural steroid injection would be tried. Dr. Clifford opined that he was not expecting any surgical management for her back. *See* Exhibit J.

8. On August 25, 2014 a transforaminal epidural steroid injection was performed by Dr. Clifford. Post injection Claimant reported not a lot of difference. *See* Exhibit J.

9. On September 17, 2014 Claimant was evaluated by Jason Bell, P.A. Claimant reported continued severe back pain and bilateral lower extremity numbness

and tingling down to both feet, right greater than left. PA Bell assessed lumbar stenosis with a mild L4-L5 disk bulge. PA Bell opined that he did not see anything from a surgical standpoint for treatment of her back pain and leg radiculopathy. PA Bell stressed Claimant's daily home exercise program. PA Bell opined there was not much more that he recommended from an interventional standpoint. *See* Exhibit J.

10. On October 16, 2014 Claimant was evaluated by Dr. Clifford. Claimant reported no great benefit from the transforaminal injections and that she had continued back pain and leg pain. Dr. Clifford provided an impression of bilateral leg symptoms and questioned neuropathic pain. Dr. Clifford noted his plan to have Claimant undergo EMG nerve conduction studies to make sure she was not having any nerve dysfunction. Dr. Clifford noted he reviewed the MRI and x-rays which did not show evidence of nerve compression. *See* Exhibit J.

11. On November 5, 2014 Claimant underwent EMG nerve conduction studies performed by Mitchell Burnbaum, M.D. Dr. Burnbaum evaluated Claimant and noted a lot of pain behavior during the procedure. Dr. Burnbaum noted that Claimant was significantly overweight. Dr. Burnbaum noted no evidence of root compression and that her nerve conduction studies and EMG were normal. *See* Exhibit K.

12. On November 20, 2014 Claimant was evaluated by Dr. Clifford. Claimant reported continued back pain and leg pain. Dr. Clifford noted that he reviewed the EMG studies which were normal with no evidence of any root compression or peripheral neuropathy. Dr. Clifford opined that no additional injections, surgeries, or other more aggressive treatment was recommended. Dr. Clifford recommended Claimant continue with physical therapy, icing, anti-inflammatory medication, and Lyrica. Dr. Clifford discussed with Claimant that it may take years for her to fully recover but that she needed slow, gradual work. *See* Exhibit 2.

13. On December 5, 2014 Dr. Clifford referred Claimant to Jeffrey Krebs, D.O. for evaluation for pain management. *See* Exhibit 2.

14. On March 16, 2015 Claimant was evaluated by Dr. Krebs. Dr. Krebs noted that Claimant underwent a right sided L4-5 and L5-S1 transforaminal epidural steroid injection as well as EMG studies. Dr. Krebs noted the EMG was normal, that it was noted that Claimant had a lot of pain behavior during the EMG and that the previous MRI of the lumbar spine had showed mild spondylosis across the L4-5 level, mild central disk bulge, some slight widening of facets, but no evidence of nerve compression which reiterated the unremarkable EMG study. Dr. Krebs assessed lumbar stenosis with mild L4-5 disk bulge, work related. Dr. Krebs noted Claimant had invalid straight leg raising testing. After repeated testing, Dr. Krebs provided a 9 % whole person impairment rating. Dr. Krebs opined that Claimant was at maximum medical improvement (MMI) and that her condition would not improve with surgical intervention or active medical treatment. Dr. Krebs opined that medical maintenance care was warranted. Dr. Krebs explained to Claimant that it was essential to work on weight loss and walking. Claimant reported she had such leg and foot pain that she

could not walk and as an alternative, Dr. Krebs suggested that aquatic therapy might be helpful. Dr. Krebs opined that aquatic therapy and/or weight loss should be included in medical maintenance and should be continued for 48 months. Dr. Krebs noted that in order to maintain MMI, a visit with a geriatric surgeon to consider laparoscopic stomach banding ought to be contemplated if Claimant could not lose weight from a conventional standpoint. Dr. Krebs opined that Claimant could not lift/push/pull any weight and that she should be limited in standing and walking to less than about half an hour a day of both and opined that Claimant might benefit from a cane or 4 point walker. *See* Exhibit L.

15. On July 31, 2015 Claimant was evaluated by Dr. Krebs. He noted that in order to maintain MMI, he discussed weight loss and exercise with Claimant. *See* Exhibit L.

16. On August 4, 2015 Dr. Krebs submitted a request for pre-authorization for repeat right leg EMG/NCV testing and consultation with neurologist Dr. Burnbaum. *See* Exhibit L.

17. On August 11, 2015 Claimant underwent a Division Independent Medical Examination (DIME) performed by Craig Stagg, M.D. Claimant reported stumbling off a ladder, bouncing down, and hitting the ground on her feet without hitting or falling. Claimant reported that immediately her low back and right knee began bothering her. Dr. Stagg noted that since that time, Claimant had received a significant amount of treatment.

18. Dr. Stagg reviewed medical records and noted that he did not see any prior back injuries or treatment of the back although the records were extensive and he may have missed something. He assessed a small disk herniation at L4-L5. He opined that Claimant reached MMI on March 16, 2015. He noted that for range of motion, six measurements were taken and were invalid. He noted Claimant has had measurements on two different occasions that were invalid both times. He provided Claimant with a 10% whole person impairment rating. He opined that there was no impairment or further treatment needed for her legs, feet, or right knee issues and that her injury caused the low back problem and no other injuries. He opined that maintenance care outlined by Dr. Krebs was appropriate. *See* Exhibit M.

19. On August 12, 2015 Respondents filed an Application for Hearing contesting Dr. Krebs' request for repeat EMG/NCV testing and consultation with Dr. Burnbaum. On September 2, 2015 Respondents filed an Application for Hearing contesting Dr. Krebs' request for pool therapy.

20. On October 12, 2015 Respondents filed a Final Admission of Liability (FAL). The FAL admitted to a 10% whole person impairment rating as well as reasonable, necessary, and related post MMI medical benefits. In the FAL Respondents noted that they denied any recommendations of weight loss treatment or surgery. *See* Exhibit F.

21. Anjmun Sharma, M.D. performed an Independent Medical Examination Record Review in this case. Dr. Sharma reviewed approximately 1,500 pages of medical records, dating back to 1995. Dr. Sharma noted that on May 21, 2008 Claimant was evaluated by Lee Bules, D.O. for back pain since bending forward. Dr. Bules noted that Claimant had a history of mild back pain and headaches on and off and that Claimant generally saw a chiropractor. Claimant reported to Dr. Bules that earlier that week she began having a lot more back spasm and then pain into her right hip and down into her right leg. Dr. Bules noted Claimant was uncomfortable just sitting and standing because of the spasm in her back and that there was tenderness in her mid-lower back and a little bit into the right upper buttock. Dr. Bules prescribed Tylenol with Codeine and referred Claimant to follow up with her chiropractors. Dr. Sharma also noted Claimant's extensive history of kidney stones with several visits to medical providers for treatment. *See* Exhibit N.

22. Dr. Sharma also reviewed all the medical records surrounding the April 26, 2014 work injury. Dr. Sharma opined that Claimant reached MMI on March 16, 2015 with a 10% whole person impairment. Dr. Sharma opined that there was no reasonable necessity in this claim for any continued medical treatment and that Claimant could return to work full duty with no permanent work restrictions. Dr. Sharma opined that Claimant had a strain in her back and nothing more and that Claimant's current ongoing pain symptoms were out of proportion to her medical records. Dr. Sharma noted that spondylolisthesis can be caused by chronic degenerative changes over time and that obesity and smoking both contribute to spondylolisthesis. Dr. Sharma noted that Claimant is obese and is a chronic heavy smoker. Dr. Sharma opined that the MRI study indicates that Claimant has had low back pain for quite some time and that there was nothing acute on any of the diagnostic tests that indicated an acute structural change. Dr. Sharma was concerned that Claimant was discharged from Dr. Bules' care just prior to her reported work injury for violation of her pain contract and was concerned that Claimant might have a narcotic-seeking habit. Dr. Sharma suspected some secondary gains in this claim. *See* Exhibit N.

23. Dr. Sharma opined that Dr. Krebs' request for authorization for additional medical treatment including pool therapy, repeat leg and lower extremity EMG and nerve conduction studies, and consultation with neurologist Dr. Burnbaum should all be denied and opined that the requests were not reasonable or medically necessary. Dr. Sharma opined that the requests are not considered to be part of the ongoing pain complaints for an acute injury that occurred in April. *See* Exhibit N.

24. Claimant's testimony, overall, is not found credible or persuasive. Claimant failed to disclose a prior back injection, prior back spasms, and prior back pain that radiated into her lower extremities. Claimant testified that she did not have any of those symptoms when medical records from May 21, 2008 show the contrary. *See* Exhibit H.

25. Multiple physicians opined credibly that Claimant had symptoms out of proportion, and that she displayed pain behaviors. Multiple physicians were concerned about secondary gain issues.

26. Although Dr. Krebs has requested repeat EMG/NCV testing and consultation with Dr. Burnbaum, Dr. Krebs and Dr. Clifford both opined that there was no evidence of nerve compression and that the results of the prior EMG testing was consistent with the MRI performed in this case. Dr. Krebs did not provide a new analysis or reason for requesting the repeat testing when the prior EMG/NCV testing showed no abnormalities and was consistent with prior MRI testing.

27. Claimant was obese prior to the work injury. Claimant remains obese at this time. Dr. Krebs noted Claimant's limitations of standing or walking were limited to less than half an hour per day and that Claimant needed to perform exercise in order to maintain MMI. Dr. Krebs' opinion is found credible and persuasive.

28. Dr. Krebs opined that aquatic therapy should be included in maintenance treatment. Dr. Clifford also opined that it was important to work on core strengthening exercises. As part of this claim, Claimant performed pool therapy which allowed her to perform exercises in the pool reducing the load on her joints and helped improve her function.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals*

Office, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Medical Benefits after MMI

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." *See* § 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

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).

Claimant has established by a preponderance of the evidence that pool therapy recommended by Dr. Krebs is reasonably necessary to relieve the effects of the injury and to prevent further deterioration of her condition. As noted by Dr. Krebs, due to her work injury, Claimant has limitations in walking and standing and should limit her standing and walking to less than half an hour per day. Dr. Krebs credibly opined that Claimant not only needed to lose weight but needed to exercise in order to maintain MMI. Due to her injury and limitations, she cannot effectively exercise. However, pool therapy allows her to be somewhat weightless with less of a load placed on her joints and allows her to exercise in order to strengthen the muscles in her core, surrounding her back, and allows her to maintain her current condition. Claimant has shown by a preponderance of the evidence that she will not be able to maintain MMI or improve

function without weight loss and muscle strengthening. Because she is unable to exercise on land due to significant limitations caused by her work injury, Claimant has met her burden to show that the requested pool therapy is reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition.

However, Claimant has failed to establish by a preponderance of the evidence that repeat EMG/NCV testing or consultation with neurologist Dr. Burnbaum is reasonably necessary to relieve the effects of her injury or prevent further deterioration of her condition. Although Dr. Krebs requested authorization for repeat testing and consultation, Dr. Krebs failed to explain why he was doing so and failed to provide information as to why the repeat testing or repeat consultation would be reasonable or necessary. As found above, Claimant has already undergone this testing with Dr. Burnbaum and has already undergone a consultation. Dr. Burnbaum noted the results were all normal and did not show any abnormal nerve issues. It was also previously noted by Dr. Clifford and Dr. Krebs that the results from the EMG were consistent with the MRI study of Claimant's lumbar spine which also showed no evidence of nerve impingement. Claimant has failed to establish why a repeat test or repeat consultation is reasonable and necessary when the identical test previously performed showed no abnormalities and was consistent with MRI testing. Claimant does not have new or different symptoms that would warrant repeat testing nor has she shown any reason that the repeat testing or consultation is reasonable or necessary.

ORDER

It is therefore ordered that:

1. The request for pool therapy is granted.

2. The request for repeat EMG/NCV testing and consultation with neurologist Dr. Burnbaum is denied.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 14, 2016

/s/ Michelle E. Jones

_____

Michelle E. Jones
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 she is entitled to an award of temporary total disability ("TTD") benefits for the period of June 19, 2014 through February 18, 2015?

- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary partial disability ("TPD") benefits for the period of April 15, 2014 through June 18, 2014?

- Whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to her termination of employment?

- The parties stipulated prior to the hearing to an average weekly wage ("AWW") of $311.20.

- Claimant reserved the issue of TTD benefits after February 19, 2015.

FINDINGS OF FACT

1. Claimant was employed with employer performing industrial/commercial laundry. Claimant testified her job duties required her to arrange shirts and pants on hangers. Claimant sustained an admitted injury on April 15, 2014 when she was pulling very heavy clothes and injured her right arm up to her neck. Claimant testified she was in immediate pain, but did not report her injury right away to employer. Claimant did report her injury the next morning, however.

2. Claimant was referred by employer for medical treatment with Dr. Gustafson on April 17, 2014. Dr. Gustafson noted claimant's accident history, performed a physical examination and diagnosed claimant with a strain of her cervical and thoracic spine. Dr. Gustafson provided claimant with work restrictions of no lifting greater than 10 pounds, provided claimant with lidocaine patches, and referred claimant for massage therapy.

3. Claimant returned to work for employer and was provided with modified duty. Claimant testified at hearing that she may have had to lift more than ten pounds, but was not sure.

4. Claimant continued to treat with Dr. Gustafson and noted a pain level of 9/10 on May 7, 2014. Dr. Gustafson noted normal range of motion and strength of 5/5 in all major muscle groups in the right shoulder. Claimant returned to Dr. Gustafson on May 23, 2014 and reported that work seemed to really aggravate her. Dr. Gustason provided claimant with a prescription for Tramadol.

5. Claimant returned to Dr. Gustafson on May 30, 2014 with continued complaints of pain that were made worse by her work. Claimant also reported, however, that she was working light duty and it seemed to be going "alright". Dr. Gustafson continued claimant on light duty work with no lifting over 10 pounds and referred claimant for chiropractic adjustments.

6. Claimant again returned to Dr. Gustafson on June 13, 2014 and reported she did not notice any improvement following her therapy. Dr. Gustafson continued claimant's work restrictions.

7. Claimant testified at hearing that her job duties would require her to lift overhead and away from her body. Claimant testified her body became more debilitated with work. Claimant testified that her work made her arm worse and would request to leave early or call because she could not come in to work. Claimant testified she asked to perform a different light duty job because the job they had her do was making her arm and neck worse. Claimant testified employer gave her a different job but she was told to perform the job faster.

8. Claimant signed an agreement with employer on June 2, 2014 in which she agree to work within the restrictions set forth by Dr. Gustafson that included no lifting more than 10 pounds and no reaching overhead or away from her body. Claimant was again evaluated on June 13, 2014 and was referred to Dr. Langston for pain management.

9. Claimant testified she stopped showing up for work after June 18, 2014 because she felt she couldn't work for employer anymore. Claimant testified that she asked to be moved to another job around this time and was told "no" by employer. Claimant testified her neck got stiff and hurt a lot at work.

10. Claimant eventually returned to Dr. Gustafson's office and was evaluated by Ms. Herrera, the physicians' assistant, on June 26, 2014. Ms. Herrera noted that claimant's pain level was 8/10 which was consistent with her pain level on the June 13, 2014 evaluation. Ms. Herrera noted that if claimant didn't improve, she may need to be referred for an electromyelogram ("EMG") nerve conduction study. Ms. Herrera increased claimant's work restrictions to 5 pounds lifting on this date.

11. Claimant continued to treat with Ms. Herrera and Dr. Langston. Dr. Langston noted claimant was dealing with a myofascial pain syndrome and provided claimant with trigger point injections. Claimant reported to Ms. Herrera on July 8, 2014 that she had not responded favorably to the trigger point injections. Ms. Herrera referred claimant to Dr. Burnbaum for evaluation.

12. Claimant underwent the EMG studies with Dr. Burnbaum on August 7, 2014. The EMG studies were normal.

13. Claimant returned to Dr. Gustafson on August 13, 2014 with continued complaints of pain. Dr. Gustafson noted claimant's ongoing medical care and the

recent EMG study. Dr. Gustafson continued claimant's work restrictions of no lifting greater than 5 pounds with no repetitive motion of the right upper extremity.

14. Claimant returned to Ms. Herrera on September 10, 2014 and reported pain levels of 7 out of 10. Claimant reported that the numbness and tingling in her right arm has now resolved and is now just pain. Ms. Herrera noted that claimant was not currently working and "lifted her restrictions" indicating that she didn't believe that medically she needed restrictions in place. Pursuant to the WC164 form, claimant was released to return to work with no restrictions.

15. Claimant returned to Ms. Herrera on September 16, 2014 and again noted her pain level was a 7 out of 10. Ms. Herrera trigged some trigger point work in her right cervical and thoracic regions and noted claimant continued to report no relief in her pain with the medications or therapy. Ms. Herrera again released claimant to return to regular duty.

16. Claimant again returned to Ms. Herrera on October 9, 2014 and reported she felt her pain was getting worse, with a pain level of 9 out of 10. Ms. Herrera recommended claimant increase her medications and provided claimant with new work restrictions that includes no use of the right upper extremity and no lifting.

17. Claimant continued her care with Dr. Gustafson on October 29, 2014, again reporting that she felt she was getting worse. Claimant's pain levels were listed as 8 out of 10. Dr. Gustafson noted that her pain was primarily myofascial in nature and recommended claimant proceed with a magnetic resonance image ("MRI") of her cervical spine. Interestingly, Dr. Gustafson indicated in his dictated report that claimant was released to return to regular duty. The ALJ notes, however, that later in the dictated report, Dr. Gustafson recommends no use of the right upper extremity. The ALJ further notes that in the WC164 form dated October 29, 2014, Dr. Gustafson continued claimant's work restrictions that included no lifting.

18. The ALJ resolves this conflict to find that Dr. Gustafson was continuing claimant's work restrictions as of October 29, 2014 and did not release claimant to return to regular employment. This is supported by the later reports from Dr. Gustafson that continued claimant's work restrictions.

19. In that regard, claimant returned to Dr. Gustafson on December 2, 2014. Dr. Gustafson noted in his dictated report as of this date that claimant was on restricted duty that included no use of the right upper extremity.

20. Dr. Gustafson eventually placed claimant at maximum medical improvement ("MMI") as of February 19, 2015 and provided claimant with a permanent impairment rating.

21. Respondents presented the testimony of Ms. Salchenberger, the Human Resources Coordinator for employer. Ms. Salchenberger testified she had claimant sign the form on June 2, 2014 acknowledging her restrictions to let claimant know that employer was aware of her restrictions and claimant was aware that employer was

providing claimant with work within those restrictions. Ms. Salchenberger testified that upon being hired, claimant was presented with the employer's attendance policy for which she signed. Ms. Salchenberger testified that the employer attendance policy requires an employee to call in one-half hour before a shift and talk directly to a supervisor. Ms. Salchenberger testified claimant last worked for employer on June 18, 2014, before she no showed for work on June 19, June 20 and June 23, 2014. Ms. Salchenberger testified claimant did not call in again for work to her knowledge. Ms. Salchenberger testified she considered claimant to have abandoned her job with employer. The ALJ finds the testimony of Ms. Salchenberger to be credible and persuasive.

22. Respondents presented the testimony of Mr. Huisjen, the plant manager for employer. Mr. Huisjen claimant was provided with the same pay and same hours after her injury as she had before her injury. Mr. Huisjen testified claimant was given work within her restrictions. Mr. Huisjen testified he did not recall claimant asking to be changed to a different job. Mr. Huisjen testified after June 18, 2014, he did not receive any calls from claimant. The ALJ finds the testimony on Mr. Huisjen to be credible and persuasive.

23. The wage records entered into evidence at hearing demonstrate that claimant worked less hours, and earned less money due to the lower hours, than she did prior to the injury. However, the records demonstrate that claimant was paid the same hourly rate after the injury ($8 per hour) as she was prior to the injury.

24. The ALJ credits the testimony of Mr. Huisjen that claimant was provided with the same number of hours after her injury as she was before her injury. Furthermore, claimant testified at hearing that she would leave work because her work was aggravating her injury, which would account for her reduction in hours. Nonetheless, employer provided claimant with work in her restrictions and claimant voluntarily leaving work or calling in to avoid work because of her subjective complaints do not establish a basis for temporary partial disability benefits where, as here, the ALJ finds claimant voluntarily reduced her hours without any medical authorization to do so.

25. Based on this finding, the ALJ determines that claimant has failed to prove that it is more probable than not that her reduction in wages for the period of April 15, 2014 through June 18, 2014 was related to her work injury. Instead, the ALJ determines that claimant's reduction in earnings was based on her own decision to reduce her hours with employer, and not related to her work injury.

26. With regard to the issues of TTD presented before the court, the ALJ determines that respondents have proven that it is more probable than not that claimant committed a volitional act by failing to show up for work after June 18, 2014 and finds claimant was responsible for her termination of employment as of June 18, 2014.

27. Therefore, the ALJ determines that claimant's request for TTD benefits after June 18, 2014 is denied based on claimant being responsible for her termination of employment.

28. However, the medical records document that claimant's work restrictions from Ms. Herrera increased as of June 26, 2014. Pursuant to the Colorado Supreme Court holding in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004), claimant is entitled to TTD benefits if her condition worsens after she is responsible for her termination of employment, as evidenced by increased work restrictions.

29. The ALJ credits the medical records from Ms. Herrera and Dr. Gustafson that show an increase in claimant's work restrictions and finds that claimant has demonstrated that it is more probable than not that she is entitled to an award of TTD benefits commencing June 26, 2014 when her work restrictions increased from the restrictions that were in place when claimant was terminated from her work with employer.

30. Claimant's TTD benefits then continue until they are terminated by law. The Colorado Workers' Compensation Act allows for the TTD benefits to be terminated when an injured worker is released to return to regular employment by the attending physician. The ALJ finds that Ms. Herrera and Dr. Gustafson are the attending physician in this case. The ALJ notes Ms. Herrera is not a "physician", but her reports, including the September 9, 2014 report, list Dr. Gustafson as the "Supervising MD" and are co-signed by Ms. Herrera and Dr. Gustafson. Therefore, the restrictions set forth by Ms. Herrera are ostensibly the restrictions set forth by Dr. Gustafson, the "attending physician". The ALJ finds claimant was released to return to regular employment by Ms. Herrera on September 9, 2014. Therefore, claimant's right to TTD benefits end on September 9, 2014 when she is released to return to regular employment by the attending physician.

31. Claimant's restrictions then increase again as of October 9, 2014 that include no use of the right upper extremity and no lifting, carrying, or pushing/pulling. The ALJ finds that claimant then re-establishes her right to TTD benefits based on the restrictions set forth by Ms. Herrera and Dr. Gustafson as of October 9, 2014. These restrictions remained in place until claimant was placed at MMI as of February 19, 2015. Therefore, claimant is entitled to TTD benefits for the period of October 9, 2014 through February 19, 2015.

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. 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).

4. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that 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." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

5. As found, claimant voluntarily decided to stop showing up for work because she felt work was causing her pain. However, employer had provided claimant with work within her restrictions. As found, claimant's act of refusing to show up for

work represents a volitional act that claimant reasonably knew were result in her termination of employment. Therefore, respondents have established by a preponderance of the evidence that claimant committed a volitional act that resulted in her termination of employment.

6. Claimant is therefore not entitled to TTD benefits after June 18, 2014 when she voluntarily left her employment with employer.

7. However, in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) the Colorado Supreme Court held that in cases where it is determined that the claimant is responsible for his or her termination of employment, the statutory provisions of Sections 8-42-103(1)(g) and 8-42-105(4) are not a permanent bar to receipt of temporary disability benefits. In *Anderson*, the claimant suffered a worsened condition causally related to the industrial injury as evidenced by increased work restrictions after claimant's termination of employment that prevented claimant from working. The court held in *Anderson* that because the worsened condition and not the termination of employment caused the wage loss, the claimant was entitled to temporary disability benefits. See *Anderson, supra.*

8. In this case, claimant likewise had increased work restrictions as set forth by Ms. Herrera in Dr. Gustafson's medical office, her authorized treating physician, as of June 26, 2014. Therefore, claimant had then re-established the right to TTD benefits by virtue of a worsened condition as of June 26, 2014.

9. Section 8-42-105(3), C.R.S. provides, in pertinent part, that temporary total disability benefits shall continue until the first occurrence of any one of the following:

(a) The employee reaches maximum medical improvement;

(b) The employee returns to regular or modified employment;

(c) The attending physician gives the claimant a written release to return to regular employment;

10. As found, claimant was released to return to regular employment by Ms. Herrera as of September 10, 2014. Therefore, as found, respondents get to cut off TTD benefits as of September 10, 2014 pursuant to Section 8-42-105(3)(c), C.R.S.

11. However, Ms. Herrera then provided claimant with restrictions that included no lifting, carrying, pushing or pulling as of October 9, 2014. The fact that Ms. Herrera may have indicated that claimant was working at this time is puzzling, but does not negate the fact that increased work restrictions were set forth by Ms. Herrera as of this date.

12. Therefore, as found, claimant is then entitled to an additional award of TTD benefits for the period of October 9, 2014 through February 15, 2015 when claimant was placed at MMI.

13. With regard to the issue of temporary partial disability benefits, in order 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).

14. As found, claimant was under restrictions that were being accommodated by employer for the period of April 15, 2014 through June 18, 2014. The ALJ finds claimant worked less hours during this period of time based on her voluntary decision to work fewer hours, despite the fact that employer was accommodating her restrictions. Therefore, claimant has failed to establish by a preponderance of the evidence that her injury contributed to some degree to a temporary wage loss.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits for the periods of June 26, 2014 through September 10, 2014 and from October 9, 2014 through February 15, 2015 based on the stipulated AWW of $311.20.

2. Claimant's claim for TPD benefits for the period of April 15, 2014 through June 18, 2014 is denied and dismissed.

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: January 5, 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

I. A determination of the true opinion of DIME physician Dr. Miguel Castrejon regarding maximum medical improvement (MMI) and permanent impairment, and once determined,

II. Whether Respondents have proven by clear and convincing evidence that they have overcome the opinion of the Division Independent Medical Examiner.

FINDINGS OF FACT

Based upon the evidence presented at hearing and the deposition testimony of Dr. Castrejon, the ALJ enters the following findings of fact:

1. On September 17, 2014, Claimant reported to Employer that he injured his low back cleaning carpets on September 16, 2014. Claimant was referred to and was seen at Concentra Medical Centers where he reported to Dr. Stephen Danahey that he had severe lower back pain after cleaning carpets all day and moving heavy furniture in order to complete the cleaning. Dr. Danahey documented tenderness of the lumbar spine and decreased range of motion in all planes. He diagnosed Claimant with a lumbar strain and provided Claimant with work restrictions of 10 pounds lifting, no bending, and standing no more than two hours per shift.

2. Claimant was also seen by Dr. Randall Jones in follow-up on October 6, 2014. Claimant explained at this time that his condition had worsened after being on his feet for two hours at work the day prior. Because Claimant's condition had yet to improve with physical therapy, Dr. Jones referred him to Dr. Brian Polvi for chiropractic treatment.

3. Claimant underwent an MRI of the lumbar spine on October 12, 2014. The MRI was interpreted as being normal, i.e. without evidence of degenerative disc disease, herination or stenosis.

4. Dr. Brian Polvi first examined Claimant on October 20, 2014. Dr. Polvi performed a physical examination of Claimant, revealing a positive Yeoman's maneuver indicative of sacroiliitis. Dr. Polvi explained that the maneuver was "positive for producing bilateral, prominent left sacroiliac joint pain…." He further noted that the Hibb's maneuver performed "also revealed bilateral sacroiliac joint dysfunction." Dr. Polvi diagnosed Claimant with left sacroiliac joint dysfunction and a myofascial strain of the lumbosacral and gluteal region.

5. Because of ongoing pain complaints and a lack of improvement with conservative care including chiropractic treatment, Claimant was referred to Dr. Jeffery Jenks for consideration of injections into the lumbar spine. On November 26, 2014 Dr. Jenks found that Claimant presented with symptoms of persistent low back pain and left leg pain along with potential facet syndrome. In making these findings, Dr. Jenks also noted symptom magnification. Dr. Jenks recommended left L4-5 and L5-S1 facet injections and a left SI joint injection, which were authorized. In reevaluating Claimant on December 10, 2014, following these injections, Dr. Jenks noted that Claimant reported the injections made his symptoms worse. Dr. Jenks noted that he had no further treatment recommendations and that Claimant was likely at maximum medical improvement.

6. Following the trial of injection therapy by Dr. Jenks, Claimant returned to and continued his treatment with Concentra seeing both Dr. Danahey and Dr. Ginsburg in December 2014. Both physicians noted that claimant's pain complaints had not resolved. Consequently, they continued prescriptions for pain management treatment.

7. On December 19 and 31, 2014 an investigator from Advantage Investigations attempted video surveillance of Claimant at the request of respondents. Video taken on December 31, 2014 shows claimant (as identified by both Dr. Castrejon and Dr. Hattem) performing various postural maneuvers in an attempt to open his car after locking his keys inside. Review of the video demonstrates Claimant to be able to assume and maintain various postures which depict his lumbar range of motion in this video and establishes further that Claimant is able to work on unlocking his car without any obvious signs of pain or discomfort. Claimant climbs on top of his vehicle, bends and twists through a complete range of motion and places himself in numerous awkward positions in an attempt to get a coat hanger inside of his vehicle through a closed window and door.

8. Claimant followed-up with Dr. Jones with Concentra on January 8, 2015. Dr. Jones referred Claimant for delayed recovery to Dr. Albert Hattem; however, prior to seeing Dr. Hattem, Claimant saw Dr. Jenks again on January 28, 2015. Dr. Jenks performed an exam revealing a positive straight leg test. He explained that he wanted to perform an EMG of Claimant's lower extremity to rule out radiculopathy prior to placing Claimant at MMI.

9. An FCE was conducted on January 29, 2015 at Select Physical Therapy. At the FCE, Claimant presented with substantial limitations and pain complaints. Claimant presented as unable to crouch due pain, unable to crawl, unable to life more than 10 pounds and only able to walk at a slow pace for a few minutes on a treadmill with the support of hand rails.

10. Claimant next saw Dr. Jones on February 5, 2015. At this evaluation, he continued to report ongoing low back pain and was provided 10 pound lifting restrictions. Dr. Jones declined further follow-up appointments instead deferring any further treatment or determinations of MMI to Dr. Hattem and Dr. Jenks.

Claimant saw Dr. Jenks on February 18, 2015 at which time Dr. Jenks noted ongoing pain behaviors. Although he continued Claimants prescriptions, Dr. Jenks did not provide further treatment recommendations pending the outcome of the previously recommended and requested EMG. The EMG was conducted on March 10, 2015 by Dr. Jenks. It was interpreted as a normal study without evidence of lumbosacral radiculopathy or peripheral neuropathy. In his EMG report, Dr. Jenks noted there was no further treatment to offer Claimant.

11. Claimant saw Dr. Hattem on March 12, 2015. Following his evaluation, Dr. Hattem noted that Claimant's condition had not improved despite multiple interventions. Dr. Hattem found that Claimant's subjective pain complaints were "far in excess" of objective findings on physical examination. Nonetheless, Dr. Hattem delayed placing Claimant at MMI following this evaluation, noting he had not yet reviewed Claimant's EMG results.

12. In advance of any further evaluations by Dr. Hattem or Dr. Jenks, Respondents sent both physicians copies of the December 19 and 31, 2015 surveillance videos. On March 16, 2015, Dr. Jenks composed a letter to respondents' counsel regarding his review of the surveillance. Dr. Jenks stated that the actions by Claimant in the surveillance video contradicted his presentation at office visits, contradicted the findings of the FCE and evidenced that Claimant magnified his complaints of pain and disability to a "very large extent." Based on his review of the video, it was Dr. Jenks recommendation that Claimant be placed at MMI with no impairment or permanent restrictions.

13. Claimant returned to Dr. Hattem on April 30, 2015. In his subsequent report, Dr. Hattem discussed his review of the December, 2014 surveillance video stating, "It is my opinion that [claimant's] activity level demonstrated in this video was not consistent with his activity level demonstrated during the functional capacity evaluation completed at Select Physical Therapy on January 29, 2015. It was also not consistent with his reported significant low back pain during clinical examinations. It is therefore my opinion that [claimant] does not qualify for an impairment rating. His subjective complaints are out of proportion to negative objective testing. His current complaints are also not consistent with the activity demonstrated during a surveillance video."

14. Respondents filed a Final Admission of Liability consistent with the March 16, 2015 report of Dr. Jenks. The admission indicated claimant had reached MMI as of March 16, 2015, admitted for no permanent impairment and denied maintenance medical care. Claimant objected to the Final Admission, requesting a DIME. The DIME was conducted by Dr. Miguel Castrejon on July 28, 2015. In his DIME report, Dr. Castrejon found Claimant had reached MMI on April 30, 2015 with 11% whole person impairment. In evaluating Claimant, Dr. Castrejon noted a normal neurologic examination, no evidence of facet mediated pain, focal tenderness over the SI joint but negative SI joint stressing maneuvers and normal EMG and MRI results. Nonetheless, Dr. Castrejon assigned 11% permanent impairment.

15. The Division of Workers' Compensation IME program issued a notice of completed DIME on July 22, 2015. Respondents challenged the opinion of Dr. Castrejon regarding MMI and impairment filing an Application for Hearing on August 6, 2015.

16. Dr. Castrejon was not provided copies of the December 19 and 31, 2014 video surveillance tape.; however, Dr. Castrejon noted in his DIME report the opinions of Dr. Hattem and Dr. Jenks in their discussion of the surveillance video and stated that he retained the right to alter or reconfirm his opinion on review of the video.

17. A second round of surveillance was conducted in August, 2015. On August 20, 2015, video was taken of claimant helping to move a bed mattress. In advance of hearing, Respondents took the deposition of Dr. Castrejon on November 16, 2015 and a copy of the deposition transcript was taken into evidence at hearing. At the deposition, Dr. Castrejon was presented with both the December 31, 2014 surveillance video and the August 20, 2015 surveillance video. In both instances, Dr. Castrejon identified Claimant as the individual featured in the videos. Additionally, Dr. Castrejon provided a detailed description of the activities Claimant engaged in during videotaping. After careful review of the video tape, the ALJ finds Dr. Castrejon's description of the movements/postures/activities Claimant engaged in while trying to open his vehicle precise and accurate.

18. After being provided an opportunity to review the surveillance videos, Dr. Castrejon was asked to reconsider his opinions on MMI and impairment. With respect to the August 20, 2015 video, Dr. Castrejon testified that he did not see evidence of an individual who was experiencing back pain. Dr. Castrejon estimated the subject mattress Claimant helped lift and carry to be a queen size, which based upon experience weighed "probably between 20-30 pounds."

19. Based on the December 31, 2014 video, Dr. Castrejon testified that Claimant had no permanent physical impairment for loss of range of motion. Dr. Castrejon testified that, based on Claimant's abilities as demonstrated in the video, it would have been difficult to provide an impairment rating under Table 53 of the AMA Guides because Claimant likely had no Table 53 diagnosis that extended beyond six months. With respect to impairment for range of motion loss, Dr. Castrejon testified that after reviewing the video there is no impairment for range of motion loss because his range of motion measurements could not be corroborated based upon Claimant's activities as demonstrated in the video surveillance. In short Dr. Castrejon testified that, "I think if I had all this information, I likely would have concluded the Claimant had achieved MMI for a lumbar strain that probably did not go beyond the six-month period, with no ratable impairment." Concerning MMI, Dr. Castrejon testified that Claimant likely would have been at MMI as of the date of the December 31, 2014 video

20. Dr. Hattem testified regarding his evaluations of Claimant and his review of the surveillance video. Dr. Hattem's testimony corroborated the opinions of Dr. Castrejon in his deposition. Dr. Hattem testified that there was no objective evidence of an injury to

the lumbar spine based on the negative MRI and EMG. Based on the lack of objective evidence of injury, Dr. Hattem, like Dr. Castrejon was unable to find any impairment under Table 53 of the AMA Guides. Dr. Hattem also testified that the activities demonstrated by Claimant in the December 31, 2014 surveillance video demonstrated full range of motion and evidenced that Claimant would not have any permanent impairment for loss of range of motion. Lastly, Dr. Hattem testified that, on review of the surveillance video, his initial determination of MMI could be amended to December 31, 2014.

21. The ALJ finds Dr. Castrejon's and Dr. Hattem's testimony regarding MMI and the absence of permanent impairment, based upon the evidence presented, including the video surveillance tape, credible and persuasive.

22. Claimant testified at hearing regarding the two surveillance videos of him taken on December 31, 2014 and in August of 2015. He explained that on December 31, 2014 he had accidentally locked his car keys inside his vehicle. Claimant is a single father with sole custody of his child and he testified that he needed his vehicle to pick up his child from school.

23. Claimant testified that he knows the activities performed on December 31, 2014 were outside the restrictions provided to him by his authorized treating physician. His testified that his concern over the welfare of his child outweighed the restrictions placed on his physical activities. Claimant testified that this particular incident did cause a flare up of his ongoing back pain and that the activities performed were not pain free.

24. Claimant testified that he had previously viewed the surveillance video from August of 2015 showing him lifting a mattress. He explained that the mattress was not very heavy because it was a sponge/foam type of mattress and he had assistance carrying the light mattress.

25. Based on the evidence presented, the ALJ is not persuaded by Claimant's testimony. Claimant's professed concern for his child's welfare as the impetus to ignore his restrictions and engage in physically demanding activity is incredible. If Claimant were as restricted and his low back condition as disabling as he wants the ALJ to believe, the ALJ is convinced that he would have found alternatives to lifting and carrying a queen sized bed mattress and picking his daughter up from school rather than spending considerable time involved in physically demanding activity to break into his vehicle to retrieve his keys. Moreover, while Claimant testified that these activities caused him pain, there is no evidence that Claimant was in any pain while attempting to retrieve his keys or lifting/carrying the mattress in the video submitted. Rather, the video surveillance establishes that Claimant's movements were fluid and that he was able to get into and maintain awkward positions for sustained periods of time. Such objective evidence suggests a lack of pain. This cannot be reconciled with Claimant's subjective testimony to the contrary. Consequently, the ALJ finds Claimant's testimony unreliable and unpersuasive.

26. Respondents have proven by clear and convincing evidence that it is highly probable that Dr. Castrejon's original opinion concerning permanent impairment was incorrect. The ALJ finds that Dr. Castrejon erred in his decision to assign Table 53 and associated range of motion impairment for Claimant's September 16, 2014 lumbar sprain/strain and his opinions in this regard have been overcome.

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, Dr. Castrejon and Dr. Hattem are credible witnesses and their testimony is both persuasive and consistent with the medical records and video surveillance tape submitted in this case. Conversely, Claimant's activity level, as demonstrated in the video surveillance, is not consistent with his activity level demonstrated during the functional capacity evaluation completed at Select Physical Therapy on January 29, 2015, nor is it consistent with his reports of significant low back pain during clinical examinations. Finally, Claimant's current complaints are also inconsistent with the activity demonstrated during a surveillance video. Consequently, Claimant's testimony is incredible and unconvincing.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004). This decision does not 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)

Overcoming the DIME

D. A DIME physician's findings of causation, MMI and impairment are binding on

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

E. In this case, Claimant asserts that the opinions of Dr. Castrejon are ambiguous and that a threshold determination of what constituted the actual opinion of Dr. Castrejon regarding MMI and impairment 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, Dr. Castrejon's initial DIME report gave a MMI date of April 30, 2015 and provided claimant a whole person impairment rating. He acknowledged that he did not have the video surveillance tape yet chose to assign MMI and impairment without it after discussing the activities contained thereon with Claimant. While Dr. Castrejon specifically stated he reserved the right to alter his opinions following review of any surveillance video, he clearly and unambiguously placed Claimant at MMI with 11% whole person permanent impairment. Consequently, the ALJ finds, as a matter of fact, that at the conclusion of the DIME, Dr. Castrejon concluded that Claimant was at MMI with impairment. Accordingly, Respondents, who contested those opinions, properly filed their application for hearing and the burden to overcome those opinions by clear and convincing evidence rested with them.

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. Castrejon's opinion regarding MMI and impairment, as expressed in his July 8, 2015 DIME report, 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.

G. In this case, once the application for hearing was filed, Respondents provided Dr. Castrejon the opportunity to review the surveillance video of Claimant in its entirety at his November 16, 2015 deposition. On reviewing the surveillance video, Dr. Castrejon testified that the video did further inform his opinion with respect to maximum medical improvement and impairment, and Dr. Castrejon revised/changed his opinions regarding MMI and permanency. Dr. Castrejon's revised opinions are consistent with the March 16, 2015 report of Dr. Jenks, which served as the basis for respondents' Final Admission of Liability, and the testimony of Dr. Hattem at hearing. Additionally, Dr. Casterjon's findings are consistant with the medical history of this claim which consistantly recorded pain behaviors and complaints in excess of the objective findings, and in particular, in excess of the negative MRI and EMG. As noted above, in order to overcome the Division IME, Respondent must show that it is highly probable that Dr. Castrejon erred in his conclusions, as expressed in July 8, 2015 DIME report that Claimant reached MMI with 11% whole person impairment. Based on Dr. Casterjon's deposition testimony, the medical opinions of Dr. Jenks and Dr. Hattem and the surveillance video, the ALJ concludes that Dr. Castrejon's original opinions concerning MMI and impairment were based upon an incomplete understanding of the case. Indeed, Dr. Castrejon admitted that he did not have the video surviellance tape in question. Once he was afforded the opportunity to veiw the video, Dr. Castrejon retracted his opinions, concluding that Claimant's reached MMI earlier than opined in his previously and without impairment. Consequently, the ALJ fiinds and concludes that Dr. Castrejon's original opinions regarding MMI and impoairment were highly probably incorrect. Accordingly, the Respondents request to set aside Dr. Castrejon's opinion that Claimant reached MMI on April 30, 2015 with 11% whole person impairment is GRANTED. The DIME opinions as expressed by Dr. Castrejon on July 8, 2015 have been overcome.

Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment

rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, the ALJ adopts the unrefuted testimony of Dr. Castrejon and Hattem to conclude that Claimant reached MMI on December 31, 2014 without impairment.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Castrejon's opinions regarding MMI and permanent impairment as expressed July 8, 2015 is GRANTED. Claimant reached MMI on December 31, 2014. The 11% whole person impairment assigned by Dr. Castrejon is set aside and replaced by his amended opinion of 0% impairment..

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: January 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 pursuant to Section 8-43-303, C.R.S.?

- 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 May 9, 2015 and ongoing, with the exception of September 8, 2015 through September 28, 2015 when claimant returned to work for Durango Joe's, a subsequent employer.

- Whether claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") for the period of September 18, 2015 through September 28, 2015?

- Whether claimant has proven by a preponderance of the evidence that penalties should be assessed against respondents for their failure to file either a Notice of Contest of an admission of liability prior to March 19, 2015?

- The parties stipulated to an average weekly wage ("AWW") of $782.00 for the period of December 26, 2013 through July 31, 2015 and an AWW of $955.03 as of August 1, 2015.

- The parties stipulated that respondents have agreed to pay for claimant's ongoing reasonable medical benefits necessary to cure and relieve claimant from the of the work injury, including the left SI joint radiofrequency ablation recommended by Dr. Lewis.

- The parties stipulated that claimant sustained a work related injury on December 26, 2013 as a result of being jerked in a harness while on the roof, and another work injury when he slipped and fell in the parking lot the following day and that both of those injuries are treated as one admitted injury with a date of injury of December 26, 2013.

- The parties stipulated that insurer received Dr. Jernigan's October 27, 2014 report placing claimant at maximum medical improvement ("MMI") with a 16% whole person impairment rating on November 5, 2014.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of and in the course of his employment with employer on December 26, 2013. Claimant was employed as a maintenance technician with employer. As indicated above, claimant's injuries arise from being jerked in a harness and falling in a parking lot the following day. These

injuries are to be treated as one admitted injury with a date of injury of December 26, 2013.

2. Following claimant's injury, claimant was referred for medical treatment with Mercy Medical Center. Claimant was initially evaluated by Dr. Graham with Mercy Medical Center on December 27, 2013. Dr. Graham noted claimant's report of injury associated with a slip on ice and diagnosed claimant with a lumbar strain with radiculopathy. Dr. Graham noted claimant's medical history included a prior work related injury and recommended claimant undergo a course of physical therapy and provided medications including skelaxin, and Valium. Dr. Graham also took claimant off of work for the period of December 27 through December 31. Claimant testified that after his injury he was off of work for four (4) days before being provided with work within his restrictions.

3. Claimant returned to Mercy Medical Center on December 31, 2013 and was evaluated by Dr. Jernigan. Dr. Jernigan noted claimant reported he was still feeling pretty sore and stiff. Dr. Jernigan recommended claimant continue his physical therapy and, if his symptoms continued to cause him problems, they would need to refer claimant for a magnetic resonance image ("MRI") of the lumbar spine.

4. Claimant returned to Dr. Jernigan on January 6, 2014. Dr. Jernigan noted claimant's ongoing complaints and indicated that his modified duty should be increased to 10 pounds with only 4 hours of work per day. Claimant returned to Dr. Jernigan on January 14, 2014 and reported some slow improvement with his low back. Dr. Jernigan recommended claimant undergo an MRI of the lumbar spine and continue physical therapy.

5. The MRI was completed on January 23, 2014 and showed minimal posterior disc bulging at the L4-L5 level with a central and right disc protrusion at the L5-S1 level with mild canal stenosis and moderate narrowing of the lateral recess and moderate right and severe left neural foraminal narrowing.

6. Following the MRI, claimant returned to Dr. Jernigan on January 24, 2014. Dr. Jernigan noted claimant was continuing to work, but was limited to only 4-6 hours per day. Dr. Jernigan referred claimant to Spine Colorado for physiatry evaluation. Dr. Jernigan also continued claimant's physical therapy.

7. Claimant underwent a bilateral L5 transforaminal injection on February 10, 2014 under the auspices of Dr. Bohachevsky. Claimant reported after the injection he had increased pain which improved he next day for about 6 hours. Claimant then developed lower extremity numbness and tingling which persisted for several hours.

8. Claimant testified at hearing that he was off of work for four days after his December 26, 2013 work injury. Claimant also testified he was off of work for a couple of days after his February 2014 injection. This testimony is supported by the medical records from Dr. Jernigan that indicate claimant was to be off of work for February 10 and February 11, 2014.

9. Claimant continued to treat with Dr. Jernigan and Dr. Bohachevsky and eventually, on June 4, 2014 underwent a radiofrequency ablation ("RFA") neurotomy treatment under the auspices of Dr. Lewis. In connection with the RFA treatment, Dr. Jernigan took claimant off of work for the period of June 3 through June 8, 2014. Claimant was released to restricted duty effective June 8, 2014 that limited his lifting to 40 pounds.

10. Claimant reported improvement following the RFA procedure. Claimant eventually underwent an L5-S1 interlaminar injection on September 8, 2014. Claimant again reported some improvement following the injection. Dr. Bohachevsky noted that claimant could have additional injections as a part of maintenance care.

11. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Jernigan on October 27, 2014. Dr. Jernigan noted in the October 27, 2014 report that claimant was at MMI as of October 7, 2014. Dr. Jernigan provided claimant with a permanent impairment rating of 16% whole person. Dr. Jernigan also recommended ongoing maintenance medical care that included "extensive future care." Dr. Jernigan specifically mentioned additional medical treatment that could include a repeat SI RFA, repeat epidurals, physical therapy or other structural therapy such as massage therapy and potential surgical intervention.

12. As indicated above, the parties stipulated that respondents received the October 27, 2014 report on November 5, 2014. However, the evidence establishes that the first admission of liability ("FAL") was filed on March 19, 2015.

13. Claimant filed a workers' claim for compensation on December 5, 2014. The Division of Workers' Compensation issued a letter to employer inquiring about insurance on December 12, 2014. Employer had Ms. Cadrain respond to the inquiry with information regarding the insurer and the response was stamped received by the Division of Workers' Compensation on December 19, 2014.

14. Claimant filed an amended application for hearing on March 3, 2015 endorsing various issues for hearing, including compensability, average weekly wage, temporary total disability ("TTD"), temporary partial disability ("TPD"), average weekly wage ("AWW"), penalties and permanent partial disability.

15. The Director of the Division of Workers' Compensation issued an Order to Show Cause on March 11, 2015 requiring insurer to issue either an admission of liability or a notice of contest within 15 days of the date of the Order. The FAL was then filed on March 19, 2015. The FAL admitted for a period of temporary partial disability benefits for the period of December 27, 2014 through February 15, 2014 and listed a total amount of TPD benefits paid to be $1,290.25. With regard to ongoing medical treatment the FAL admitted for "further claim related treatment through October 26, 2015 per Dr. Jernigan's medical report of October 27, 2014." It is unclear from the record the basis of insurer's claim to be able to cut off maintenance medical treatment as of October 26, 2015 as indicated on the FAL.

16. Claimant filed an objection to the FAL on March 24, 2015 and noted issues that still needed to be resolved included TTD, penalties, maintenance medical care and AWW. The objection to the FAL is stamped as being received by the Division of Workers' Compensation on March 24, 2015.

17. During this time, claimant continued to treat with Dr. Lewis and Dr. Jernigan. Notably, shortly after being placed at MMI, Dr. Jernigan referred claimant back to Dr. Lewis on November 3, 2014 for consideration of a repeat RFA. Dr. Jernigan noted on November 21, 2014 that claimant's request for an SI ablation was denied. Dr. Jernigan followed up with a letter to the insurer on January 7, 2015 requesting reconsideration of the repeat RFA.

18. Claimant returned to Dr. Lewis on January 29, 2015. Dr. Lewis recommended another RFA procedure focusing on the left sacroiliac joint.

19. Claimant returned to Dr. Jernigan on February 12, 2015 and reported he was continuing to worsen. Dr. Jernigan took claimant off of work for the period of February 12, 2015 until February 20, 2015. Dr. Jernigan noted that claimant's case should be reopened due to the worsening of claimant's symptoms and marked the MMI date as unknown on the WC164 form.

20. Claimant returned to Dr. Lewis on February 17, 2015 and reported his prior RFA had resulted in a decrease in pain of 70-80% that lasted 4 ½ months, followed by a return of his symptoms. Dr. Lewis noted he was recommending a repeat RFA and if he received a positive result, claimant could be a candidate for an SI joint fusion.

21. Claimant continued to treat with Dr. Jernigan who consistently reported that claimant's MMI date was unknown. Claimant eventually underwent an epidural steroid injection ("ESI") with Dr. Bohachevsky on March 30, 2015. Claimant reported significant relief following the ESI when he returned to Dr. Jernigan on April 13, 2015. Dr. Jernigan again referred claimant to Dr. Lewis.

22. Claimant returned to Dr. Jernigan on April 27, 2015 and noted he was struggling to work more than 32 hours per week due to increased right SI pain. Dr. Jernigan also noted limited range of motion on examination. Claimant returned to Dr. Jernigan on May 4, 2015 and again provided claimant with work restrictions that included no lifting more than 20 pounds and work hours of up to 6 hours per day.

23. Claimant returned to Dr. Bohachevsky on May 12, 2015 who noted that claimant's second RFA had helped about fifty percent, but also noted that claimant's stabbing pain had returned. Dr. Bohachevsky recommended another left SI joint injection which was accomplished on June 9, 2015.

24. In response to an inquiry from claimant's attorney, Dr. Jernigan issued a report answering specific questions regarding claimant's medical treatment. Notably, Dr. Jernigan indicated that since claimant was placed at MMI, he was definitely worsening and recommended claimant's case be reopened as of February 3, 2015. Dr.

Jernigan further noted that claimant's current course of treatment was intended to improve claimant's condition and was not intended to maintain claimant.

25. Claimant returned to Dr. Jernigan on May 20, 2015. Dr. Jernigan noted that claimant needed to stop working due to his inability to work his full hours. Dr. Jernigan continued claimant on restrictions, including the 20 pounds of lifting and 6 hours per day, and again indicated that his MMI date was unknown.

26. Claimant returned to Dr. Jernigan on July 8, 2015 and reported no significant changes in his physical condition. Dr. Jernigan recommended claimant return to Dr. Lewis for an RFA and Dr. Cotgageorge. Dr. Jernigan continued claimant's restrictions. Claimant continued his treatment with Dr. Jernigan on July 22, 2015. Dr. Jernigan noted claimant continued to struggle and the SI ablation had begun to wear off. Dr. Jernigan continued claimant's restrictions.

27. Claimant returned to Dr. Jernigan on August 4, 2015. Dr. Jernigan noted claimant's continued complaints and recommended additional treatment including acupuncture and consultation with a psychologist. Claimant returned to Dr. Jernigan on August 21, 2015. Dr. Jernigan noted claimant was scheduled for a repeat ESI and reported that claimant was "clearly worse" than he was at the time of MMI.

28. Claimant underwent a repeat ESI injection at the L5-S1 level on August 24, 2015.

29. Claimant continued to treat with Dr. Jernigan throughout the Fall of 2015. Dr. Jernigan continued claimant on work restrictions during this time and limited claimant to working no more than six hours per day. Claimant returned to Dr. Jernigan on October 14, 2015. Dr. Jernigan noted claimant was having issues with getting approval for his medical appointments, including the SI ablation procedure and acupuncture. Dr. Jernigan at this point indicated that claimant was restricted to "no work from October 14, 2015".

30. Claimant was referred by respondents to Dr. Scott of an independent medical examination ("IME") on September 16, 2015. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott indicated in his report that claimant's diagnosis for his work related injury would be left sacroiliac joint dysfunction with pain and discopathy at L5-S1 with disc pain. Dr. Scott opined that claimant's case would not need to be reopened because the treatment including the left sacroiliac joint radiofrequency ablation could be performed as maintenance medical treatment.

31. Dr. Jernigan testified at hearing in this matter. Dr. Jernigan testified that following claimant's injury, he diagnosed claimant with a lumbar disk injury and sacroilitis. Dr. Jernigan testified that claimant's MRI results supported this diagnosis. Dr. Jernigan testified that when he put claimant at MMI as of October 7, 2014, it was because claimant had significant improvement following the RFA and the ESI and he didn't think there was further invasive procedures that would be recommended.

32. Dr. Jernigan testified that after he placed claimant at MMI, his referral for the second RFA was denied and by January 7, 2015, it was clear to Dr. Jernigan that claimant was getting worse. Dr. Jernigan testified that even after the second RFA was completed, it was his opinion that claimant was no longer at MMI because the repeat RFA was only partially effective.

33. Dr. Jernigan testified that claimant's care since February 3, 2015 was designed to get claimant better as opposed to maintenance treatment. Dr. Jernigan testified that claimant's treatment has partially made claimant better, but has not resolved his problem. Dr. Jernigan testified he was recommending the repeat RFA because it was common for the results of an RFA procedure to wear off. Dr. Jernigan testified he sent the request for the second RFA procedure within one month of having placed claimant at MMI. Dr. Jernigan testified the purpose of the repeat injections and recommended massage therapy was to deal with flare ups. Dr. Jernigan testified he first saw claimant post MMI on January 26, 2015 and between October 27, 2014 and his follow up visit on January 26, 2015, he was actively trying to get the insurance company to authorize the RFA procedure. Dr. Jernigan testified he opined claimant's claim should be reopened on February 3, 2015 because the RFA hadn't been authorized.

34. Dr. Scott testified at hearing consistent with his IME report. Dr. Scott testified that while claimant may need additional medical treatment, he would classify the additional treatment as maintenance medical treatment. Dr. Scott testified there was no evidence that claimant's underlying back problem or SI joint problem had deteriorated since being placed at MMI. Dr. Scott testified that claimant's symptoms that returned after MMI would be expected and the appropriate treatment would be to repeat the ablation procedure. Dr. Scott testified that this treatment, including the repeat of the ablation procedure would be considered maintenance medical treatment.

35. With regard to claimant's work, claimant testified at hearing that he continued to work for employer up until May 8, 2015. Claimant testified his employer attempted to make reasonable accommodations, but claimant could not continue to perform the work of his employer due to his physical limitations. Claimant's testimony is found to be credible and persuasive. Claimant signed a general settlement and release indicating his final day of employment with employer was May 8, 2015.

36. Claimant testified that after he quit working for employer, claimant attempted to return to work within his restrictions by applying for and accepting a job with Durango Joe's working as a barista. Claimant testified he worked for 2 days at Durango Joe's working four hour shifts on both days, but he could not complete the work and had to quit due to his workers' compensation injury. Claimant's testimony regarding his work at Durango Joe's is found to be credible and persuasive.

37. Ms. Spratta, a claims adjuster for insurer testified at hearing in this matter. Mr. Spratta testified she was familiar with claimant's case as she took over as the claims handler for the case in March 2015. Ms. Spratta took over claimant's case for a previous employee who was no longer employed by insurer. Ms. Spratta testified she became the claims adjuster after the FAL was filed by insurer in this case.

38. Ms. Spratta testified that in her review of the file, no admission of liability or a notice of contest was filed until the FAL was filed on March 19, 2015. Ms. Spratta testified she was unaware why no admission or notice of contest was filed until March 19, 2015 and testified that according to the claim notes, there was an entry on January 8, 2015 in which the adjuster acknowledged receiving notice from the state advising insurer that action needed to be taken regarding the filing of the notice of contest or an admission of liability.

39. The ALJ credits the opinions and testimony of Dr. Jernigan and finds that claimant has proven by a preponderance of the evidence that he has sustained a worsening of his condition after being placed at MMI that would allow claimant to reopen his case. The ALJ credits claimant's testimony at hearing regarding his physical condition as being credible and persuasive and notes that the medical records document claimant's condition having worsened to the point that Dr. Jernigan has revoked the prior finding of MMI.

40. The ALJ therefore determines that claimant's case should be reopened pursuant to Section 8-43-303, C.R.S. based on a worsened condition.

41. The ALJ credits the records entered into evidence at hearing along with claimant's testimony at hearing and finds that claimant has proven that it is more likely than not that he is entitled to an award of TTD benefits for the period of May 9, 2015 through September 18, 2015 and from September 29, 2015 through ongoing. The ALJ credits the opinion of Dr. Jernigan that claimant was not at MMI as of February 3, 2015 and finds that claimant was under restrictions at the time he stopped working for Employer. The ALJ credits the testimony of claimant at hearing and finds that claimant was unable to perform the functions of his job due to the work restrictions set forth by Dr. Jernigan and is therefore entitled to an award of TTD benefits commencing May 9, 2015.

42. The ALJ credits the records entered into evidence at hearing along with claimant's testimony at hearing and finds that claimant has proven that it is more likely than not that he is entitled to an award of TPD benefits for the period of September 18, 2015 through September 28, 2015, representing the period of time claimant attempted to return to work for Durango Joe's. The ALJ credits claimant's testimony at hearing that he attempted to return to work for Durango Joe's as an attempt to find work within his restrictions as set forth by Dr. Jernigan. The ALJ credits claimant's testimony that he could not perform the functions of this job due to his work injury and he necessarily had to abandon his attempt to return to work due to his physical restrictions from his work injury.

43. According to the wage records from Durango Joe's, claimant earned $144.27 while employed with Durango Joe's for the pay period of September 16, 2015 through September 30, 2015. The ALJ credits claimant's testimony that the dates he was actually employed were September 18, 2015 (noted on the pay stub to be claimant's hire date) through September 28, 2015.

44. The ALJ credits the records entered into evidence at hearing along with claimant's testimony at hearing and finds that claimant has proven that it is more likely than not that he is entitled to an award of TTD benefits beginning again on September 29, 2015 after his attempt to return to work had failed. The ALJ credits the claimant's testimony at hearing along with the medical records and finds claimant continued to be under work restrictions that prohibited claimant from returning to work after September 29, 2015.

45. In this case, claimant was taken off of work for 3 days immediately after the injury from December 27 through December 31, 2013. Claimant was again taken off of work for several days after his injection in February 2014 (from February 10 through February 11, 2014). The ALJ finds respondents should have filed either an admission of liability or a notice of contest following the three days of lost time pursuant to Section 8-43-101(1). Therefore, respondents are subject to penalties pursuant to Sections 8-43-203(1)(a) and 8-43-203(2)(a).

46. The ALJ finds insurer liable for one days compensation for failing to make the appropriate filings with the Division of Workers' Compensation. The ALJ notes that he has discretion to award "up to" one days compensation and has considered awarding less than one day's compensation. However, when considering the fact that insurer also failed to timely admit liability for the permanent impairment benefits, the ALJ finds that the full award of one day's compensation for 365 days is appropriate in this case.

47. The ALJ notes that claimant was not regularly missing a significant amount of time from work during the period of time in which respondents failed to admit or deny liability in this case, with indemnity benefits totally only $1,290.25 being paid during this time. However, the ALJ finds that sufficient evidence has been presented to allow for the full penalty of one days compensation for 365 days based on the absolute failure of insurer to make any appropriate filings in this case despite paying indemnity benefits and having received an impairment rating for claimant from the authorized treating physician until the FAL was filed on March 19, 2015.

48. In this case, the ALJ notes that claimant was eventually paid his temporary disability benefits on or about March 19, 2014. Nonetheless, no admission of liability was filed admitting for the indemnity benefits. The ALJ finds that the claimant was established that the admission of liability should have been filed within 20 days of claimant missing three days from work, or by January 19, 2014. Section 8-43-203(2)(a) further limits the penalty to 365 days of up to one day's compensation.

49. The ALJ determines that claimant has proven that insurer failed to notify the Division of Workers' Compensation in a timely manner pursuant to Section 8-43-203(1)(a) as to whether claimant's claim was admitted or contested. The ALJ finds that insurer is liable for one days compensation for 365 days, with 50% of the penalty to be paid to the subsequent injury fund pursuant to Section 8-43-203(2)(a).

50. Claimant also argues that respondents are subject to penalties under Section 8-43-304, C.R.S. (the general penalty provision) for failing to admit or deny liability for this work injury until the FAL was filed on March 19, 2015. Respondents argue that claimant's claim for penalties for this alleged violation is precluded by the one year statute of limitations. Because the ALJ determines that claimant is precluded from the general penalty provision set forth under Section 8-43-304(1) based on the more specific penalty provision established under Sections 8-43-203(1) and 8-43-203(2), the ALJ need not consider the statute of limitations defense raised by respondents in their position statement.

51. However, Section 8-43-304(1) applies to "Any employer or insurer, or any officer or agent of either, or any employee or any other person who 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…"(emphasis added). In this case, insurer's failure to timely file the admission of liability pursuant to Section 8-43-101(1) has a specific penalty provision established in Section 8-43-203(2)(a).

52. Claimant argued that respondents are subject to penalties for failing to file an FAL or request a Division-sponsored Independent Medical Examination ("DIME") within 30 days of the date of receiving the PPD report from Dr. Jernigan. The parties stipulated respondents received this medical report on November 5, 2014. Respondents argue that claimant must establish that respondents knew or reasonable should have known of the penalty violation because the penalty was cured within 20 days of the filing of the March 3, 2015 application for hearing when they filed the March 19, 2015 FAL.

53. Notably, claimant alleges that respondents waived the right to raise any affirmative defenses at the commencement of the hearing. However, the ALJ notes that the respondents Case Information Sheet listed various affirmative defenses and, based on the fact that these defenses were listed on the Case Information Sheet, will consider the affirmative defenses raised by respondents.

54. The ALJ credits the testimony of Ms. Spratta at hearing along with the claim notes and finds the claimant has established that respondents knew or reasonably should have known of the penalty violation prior to the filing of the application for hearing. According to Ms. Spratta's testimony, the prior adjuster was advised by the Division of Workers' Compensation no later than January 8, 2015 of the need for taking action on the claim. Nonetheless, no filings were made by insurer for another 78 days when the FAL was filed.

55. The ALJ finds insurer is liable for penalties for failing to timely file appropriate paperwork either admitting to the impairment rating provided by Dr. Jernigan or requesting a DIME. The ALJ credits Ms. Spratta's testimony that there was no malice nor any nefarious intent by insurer in failing to properly request a DIME evaluation or file the admission of liability and timely providing claimant with his PPD

benefits. Nonetheless, the ALJ takes this into consideration as to the extent of the penalty that is warranted and not into consideration as to whether a penalty should be assessed in the first instance. The ALJ further finds that the actions of insurer were not reasonable considering the fact that they received the impairment rating from Dr. Jernigan on November 5, 2014 but did not file anything with the Division for almost six months until March 19, 2015.

56. The ALJ concludes that claimant has demonstrated by clear and convincing evidence that respondent knew or reasonably should have known of the facts giving rise to the penalty violation prior to the application for hearing being filed. The ALJ notes that insurer was advised by the Division of Workers' Compensation that they were required to file appropriate documentation through the January 8, 2015 notice from the Division of the issues with the claim. Therefore, the ALJ finds that claimant has demonstrated by clear and convincing evidence that insurer knew or reasonably should have known that they were in violation of the act.

57. The ALJ determines that insurer is subject to penalties for failure to timely file an admission of liability or apply for a Division IME following receipt of the impairment rating from Dr. Jernigan pursuant to W.C.R.P. 5-5(E). The ALJ determines that this penalty began to run 30 days from insurer's receipt of the impairment rating on November 5, 2014. The ALJ determines that the penalty period ends with the filing of the FAL on March 19, 2015, representing a period of 103 days (December 5, 2014 through March 18, 2015).

58. The ALJ takes into consideration the fact that insurer failed to properly make filings on multiple occasions with regard to this claim in determining the extent of the penalty, including the fact that insurer was put on notice by the Division of Workers' Compensation in December 2014 and January 2015 of the need to make filings associated with this claim.

59. The ALJ determines that insurer is liable for penalties to claimant for failing to either file a FAL or request a Division IME at a rate of $50.00 per day with 50% of the penalty being paid to the subsequent injury fund.

CONCLUSIONS OF LAW

1. 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., 2012. 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., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has proven by a preponderance of the evidence that he has sustained a change in his condition that is causally connected to his original compensable injury. As found, the opinions expressed by Dr. Jernigan in his reports and testimony at hearing are found to be credible and persuasive in determining this issue. As found, claimant's claim is reopened based on a worsening of his condition.

5. 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).

6. As found, claimant has proven by a preponderance of the evidence that he had a medical incapacity evidenced by his restricted body function that resulted in an impairment of his wage earning capacity when he left his employment with employer as of May 9, 2015 through September 18, 2015 and from September 29, 2015 and

ongoing. Claimant is therefore entitled to an award of TTD benefits for these two periods of time.

7. Furthermore, claimant is entitled to an award of TPD benefits for the period of time claimant worked for Durango Joe's from September 18, 2015 through September 28, 2015. Because claimant was under work restrictions, and was earning less money when he worked at Durango Joe's, claimant is entitled to an award of TPD benefits. See *Edgar v. Halliburton Energy Services*, W.C. No 4-971-336 (December 22, 2015).

8. Based on the stipulated AWW of $955.03, and considering the 11 days claimant was employed with Durango Joe's, the ALJ calculated claimant's TPD benefits to equal $901.59 ($955.03 times 52 divided by 365 for a daily wage rate of $136.06, times 11 days (September 18 through September 28) equals $1,496.66 minus $144.27 from Durango Joes equals $1,352.39 (x 2/3) equals $901.59).

9. Section 8-43-101(1), C.R.S. provides that the insurer 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 insurer 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.

10. 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 the indemnity benefits on or about March 19, 2014, but was no admissions of liability admitting for the indemnity benefits were filed by the insurer with the Division of Workers' Compensation acknowledging the indemnity benefits paid.

11. As found, insurer is liable for one days compensation for the 365 day period between when insurer should have notified the Division of Workers' Compensation (January 20, 2014) and when the first admission of liability was filed (March 19, 2015). While this represents more than 365 days, the penalty from this section of the statute is limited to 365 days.

12. The penalty pursuant to Sections 8-43-203(1) and 8-43-203(2) is based on claimant's AWW at the time of the violation of $782.00. The amount of the penalty is therefore $40,664.00, with 50% of the penalty paid to claimant through his attorney and 50% of the penalty paid to the subsequent injury fund.

13. Section 8-43-304(1), C.R.S. provides that penalties of up to $1,000 per day may be ordered if a party "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.

14. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

15. However, this section of the statute only applies to a violation of the statute, "for which no Section In this case, the issue of insurer's failure to file an admission of liability or to contest the claim is barred by the statute of limitations.

16. With regard to the claim for penalties under Section 8-43-304(1) for failing to admit or deny liability of the claim, claimant is limited to the penalty provision established by Sections 8-43-203(1) and 8-43-203(2).

17. With regard to the penalty claimant has brought pursuant to the failure of the insurer to file an FAL or request a Division IME, W.C.R.P. 5-5(E) provides in pertinent part:

> For those injuries required to be filed with the Division with dates of injury on or after July 1, 1991:
>
> (1) Within 30 days after the date of mailing or delivery of a determination of impairment by an authorized Level II accredited physician, or within 30 days after the date of mailing or delivery of a determination by the authorized treating physician providing primary care that there is no impairment, the insurer shall either:
>
> (a) File an admission of liability consistent with the physician's opinion, or
>
> (b) Request a Division Independent Medical Examination (IME) in accordance with Rule 11-3 and §8-42-107.2, C.R.S.,

18. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondents committed a violation of the statute, rule or order, penalties can be imposed only if respondents actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and 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).

19. The court of appeals has set stands to employ in determining an appropriate penalty in workers' compensation cases, including (1) the degree of reprehensibility of employer/insurer's conduct; (2) the disparity of the harm suffered by claimant and the fine imposed; and (3) the difference between the penalty awarded and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

20. In this case, it is significant that insurer committed multiple violations for failing to make the appropriate filings with the Division of Workers' Compensation regarding the admission of liability and the payment of the permanent partial disability benefits. However, claimant did eventually receive his PPD award, albeit much later than it should have been paid. Considering the circumstances of this penalty, and the potential penalty exposure, along with the reprehensibility of the conduct in this case, the ALJ determines that a fine of $50 per day is appropriate.

21. As found, claimant is entitled to an award of penalties for insurer's failure to file an FAL or request a DIME following receipt of the impairment rating from Dr. Jernigan in violation of W.C.R.P. 5-5(E). As found, the penalty period commenced on December 5, 2014 (30 days after the insurer received notice of the impairment rating from Dr. Jernigan, pursuant to the stipulation) and ended on March 18, 2015 (the day before the FAL was filed) representing a period of 103 days. As found, insurer shall pay claimant penalties in the amount of $50 per day. This equates to a total penalty of $5,150.00. The ALJ hereby order that 50% of this penalty shall be paid to the subsequent injury fund pursuant to Section 8-46-101.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits commencing May 9, 2015 and continuing until September 18, 2015 and from September 29, 2015 and continuing based on the stipulated AWW.

2. Respondents shall pay claimant TPD benefits for the period of September 18, 2015 through September 28, 2015.

3. Insurer shall pay claimant penalties for violation of Section 8-43-203(1) in the amount of one day's compensation for each day based on an AWW of $782.00 that was in effect at the time of the violation, for a period of 365 days. This amounts to a total penalty of $40,664.00. Insurer shall pay 50% of the penalty to the claimant as the aggrieved party and 50% of the penalty to the Subsequent Injury Fund as required pursuant to Section 8-43-203(2)(a), C.R.S.

4. Insurer shall pay a penalty of $5,150.00 for failure to file the failure to file a timely FAL or request a Division IME pursuant to W.C.R.P. 5-5(E) within 30 days of the

receipt of the permanent impairment rating from Dr. Jernigan. Insurer shall pay 50% of the penalty to claimant as the aggrieved party and 50% of the penalty to the Division of Worker's Compensation cash fund as required by Section 8-43-304(1), C.R.S.

5. Insurer shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: Insurer 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.

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

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

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

DATED: February 2, 2016

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

ISSUES

- Did Claimant suffer a compensable injury to his low back and right knee on August 25, 2014 arising out of and in the course and scope of his employment?
- If Claimant sustained a compensable injury, is he entitled to temporary total disability benefits from December 8, 2014 and continuing?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?
- Is the knee surgery proposed by Dr. Hewitt is reasonable and necessary, as well as related to the industrial injury?

PROCEDURAL ISSUES

Prior to the hearing, Respondents filed a motion to take the post-hearing evidentiary deposition of Lloyd Thurston, M.D., which was granted on August 11, 2015. Claimant filed a motion to take the post-hearing evidentiary deposition of Brian Beatty, M.D., which was granted on August 25, 2015. These depositions were taken on October 7 and 9, 2015, respectively.

The parties stipulated that Claimant's average weekly wage at the time of the injury entitled him to the maximum temporary total disability rate of $881.65 per week. This stipulation was accepted by the ALJ.

FINDINGS OF FACT

1. Claimant began working for Respondent-Employer in April, 2014. He performed general labor, as well as operating machinery. He worked at different job sites. In August, 2014, he was working at a job site at 33rd and Peoria in Aurora, Colorado.

2. On August 25, 2014, Steve Barr was Claimant's supervisor. That day, Claimant unloaded an asphalt cutter from a truck at the job site. This machine weighed approximately 800 pounds and to get it off the truck required the use of a hydraulic ramp. After he got the asphalt cutter down, Claimant aligned the machine, placing the blade on the pavement. He made a cut which was approximately 26 to 30 feet in length.

3. Claimant testified Mr. Barr came to the job site when he was almost finished with that cut and yelled at him because the job was taking so long. He finished the cut after Mr. Barr left.

4. Claimant credibly testified that he was injured when the cutter blade got caught as he was trying to move the machine, which did not turn. He felt pain in his right knee and low back. Claimant said he not feel well after he was injured. Claimant loaded the asphalt cutting machine back onto the truck, but was still in pain. The ALJ finds that the physical activity of working with a machine of this size caused pain in Claimant's right knee and low back.

5. Claimant testified he told Steve Barr that he hurt his low back and knee, once the latter returned to the job site. Mr. Barr said he did not look too bad and Claimant requested a "report", so he could go to the doctor. Mr. Barr kept putting him off.

6. Claimant testified he had never injured his knee and low back prior to 8/25/14.

7. Claimant testified that he continued to work in pain, which increased over time. After a two to three week period of time, Claimant began working in the central yard. Claimant worked with Dave Moser and also told the superintendent for the company (Todd) that he suffered an injury. Todd told him he would report the claim. The ALJ infers that the Employer was aware of Claimant's injury.

8. Claimant was initially examined by Brian Beatty, D.O.[1] on October 16, 2014. His chief complaints were low back and right knee pain. Tenderness was noted upon palpation over the paralumbar musculature. No sensory deficits were documented in the lower extremities. Dr. Beatty's diagnoses were right knee sprain with patellar tendinitis and lumbar strain. On the M-164, Dr. Beatty noted that his objective findings were consistent with the mechanism of injury. For work restrictions Claimant was noted to be at full duty.

9. Dr. Beatty next evaluated Claimant on October 23, 2014, at which time he found tenderness in the paralumbar muscle and along the patellar tendon anteriorly. Dr. Beatty diagnosis was lumbar strain and tendonitis in the right knee. Dr. Beatty also issued work restrictions, including: lifting-10lbs; repetitive lifting-5lbs; carrying & pushing/pulling-10lbs. Claimant was restricted from crawling, kneeling, squatting and climbing. The ALJ infers that Claimant could not perform the laborer/machine operator job at Employer with these restrictions.

10. Claimant returned to Dr. Beatty on October 30, 2014. Claimant reported his symptoms were about the same. Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Claimant's physical restrictions were the same as 10/23/14. Claimant began a course of physical therapy. Claimant received physical therapy at Rocky Mountain Physical Therapy from October 30, 2014 through December 19, 2014.

11. Claimant was next seen by Dr. Beatty on November 13, 2014. Dr. Beatty prescribed Naprosyn, as well as making a referral for an MRI of the lumbar spine and right knee. He also referred Claimant to Dr. Primack.

---

[1] The ALJ infers Dr. Beatty/Rocky Mountain Medical Group was an ATP for Employer.

12. An Employer's First Report of Injury was completed on or about November 20, 2014 by Laurie Mattics, Corporate Safety Admin for Employer. The E-1 listed the date/time of injury as 8/25/14 at 11:00 a.m. This report specified that the injury occurred while Claimant was using the target saw and the blade got stuck. The employer representative who was notified was Steve Barr.

13. Dr. Beatty referred Claimant for an MRI of the right knee, which he underwent on November 21, 2014 and was read by Eduardo Seda, M.D. Dr. Seda's impression was mild degenerative changes in the patellar cartilage with mild subchondral edema; focal edema in the superior lateral corner of the infrapatellar fat pad, suspected fat pad impingement.

14. An MRI of Claimant's lumbar spine was also done on 11/21/14. Dr. Seda noted a normal disc signal and no disc narrowing at L1-2, L2-3 and L3-4. There were no disc bulges or protrusions and no joint or foraminal changes at these levels. At L4-5, there was mildly dark T2 disc signal and no disc narrowing; a small central disc bulge mildly indenting the dural sac without root sleeve deformity was found. At L5-S1, mildly dark T2 disc signal was noted, with no disc narrowing; a small central disc bulge extending into the epidural fat without dural sac or root sleeve deformity. No joint or foraminal changes were noted at the last two levels. Dr. Seda's impression was degenerative disc and joint changes.

15. Dr. Beatty examined Claimant on December 2, 2014. At that time, he complained of low back and right knee pain without numbness, tingling or weakness. On examination, tenderness was noted over the paralumbar muscles, with pain on right and left side bending. Dr. Beatty's diagnoses were right knee sprain, with patellar tendinitis and lumbar strain. Dr. Beatty's treatment plan included physical therapy, medications and a knee brace. Claimant's restrictions remained the same.

16. Claimant was terminated on December 8, 2014. The employee separation form said the employee was laid off by the company with reason given: "reduction in force". The ALJ finds that Claimant was not responsible for the termination of his employment.

17. Claimant testified that he was told that he was being laid off because he had too many doctors' appointments.

18. A Worker's Claim for Compensation was prepared on or about December 9, 2014. In the description of injury, Claimant specified that he was pulling an asphalt cutter, felt pain and heat in right knee and low back. The right knee and low back were the parts of the body listed as injured.

19. Claimant was examined by Michael Hewitt, M.D. on December 15, 2014. In his examination, Dr. Hewitt noted significant anterior knee pain when attempting to squat at approximately 30 degrees. Mild medial and lateral joint line tenderness, mild tenderness along the patellar tendon, no calf tenderness; all were noted. Dr. Hewitt

diagnosed chondromalacia patella. Dr. Hewitt performed an injection of Depo-Medrol and lidocaine in the right knee. He also prescribed Naprosyn.

20. Claimant returned to Dr. Beatty on 12/16/14. Claimant reported his back still hurt, but felt a little better. His right knee felt a little worse. Dr. Beatty noted tenderness on palpation over the paralumbar muscles. His diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Claimant was to continue with physical therapy, Naprosyn and a knee brace. Claimant's restrictions were the same. Claimant's MMI status was unknown.

21. Claimant was evaluated by Usama Ghazi, D.O. on December 23, 2014 to whom he was referred by Dr. Beatty. At that time, Claimant had complaints of pain at L3-S1, as well as in the bilateral SI joints. He also had pain in the peripatellar and subpatellar region. Dr. Ghazi found tenderness with patellar grind and positive apprehension sign. Tenderness was also noted at the midline at the L3-4, L4-5 and L5-S1 interspinous ligaments, worse with extension. Dr. Ghazi found there was no suggestion of poor effort on examination or inconsistent behaviors.

22. Dr. Ghazi's diagnoses were patellofemoral syndrome with chondral fissuring of the patella and infrapatellar fat pad edema-pain worsened by intra-articular steroid injection; low back pain secondary to sacroliliits as well as interspinous ligament pain; L4-L5 annular tears-possible secondary cause of his midline and buttock pain. Dr. Ghazi administered an interspinous ligament bursa injection under ultrasound guidance. Dr. Ghazi also referred Claimant for 8 visits of medical massage for the knee and low back.

23. Dr. Beatty examined Claimant on December 30, 2014, at which time he reported his knee pain was worse. He had undergone an injection in his low back one week before, with no improvement. On examination, tenderness was noted upon palpation and Claimant had difficulty squatting due to knee pain. Dr. Beatty's diagnosis was the same as 12/16/14 and Claimant was to continue with massage therapy and medication.

24. Claimant reported a worsening of right knee pain on January 20, 2015 when he saw Dr. Beatty, who noted that additional injections were denied. Tenderness was noted in the low back; Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar sprain. Claimant's work restrictions were continued.

25. Dr. Hewitt saw Claimant for a follow-up on January 26, 2015. This was approximately one month after the cortisone injection and Claimant noted mild improvement during the lidocaine phase, but no improvement from the cortisone. He continued to complain of interior knee pain with the sensation of catching. Since he had received conservative treatment, Claimant expressed an interest in proceeding with the arthroscopy.

26. There was no evidence before the ALJ that a request for authorization of an arthroscopy (which is required) was sent by Dr. Hewitt's office to Insurer.

27. Claimant was next evaluated by Dr. Beatty on the February 3, 2015, at which time he reported that his knee pain was the same, but his low back pain was worse. Claimant related he was losing his balance and had worsening leg strength. Restrictions in his range of motion were noted, as well as difficulty squatting due to knee pain. Dr. Beatty noted Claimant was awaiting authorization for medication, massage and injections (Dr. Ghazi), as well as a right knee surgery.

28. Lloyd Thurston, D.O. examined Claimant at the request of Respondents on April 22, 2015. He reviewed the mechanism of injury, noting that Claimant stated he injured his right leg and low back on 8/25/14 when he was pulling an asphalt cutting machine backwards when it bound, kicked back and twisted him right to left. Dr. Thurston also related Claimant stated he had injured his right knee and low back approximately one week earlier following the same machine onto a truck. (There was no reference to this earlier injury in any of the medical records.)

29. Upon examination, Dr. Thurston noted Claimant exhibited many pain behaviors, including moaning and groaning when his right knee was touched. There was moderate tenderness and apprehension with patellar compression. Dr. Thurston opined that Claimant's subjective symptoms were excessive. This was based upon the mechanism of injury, the severity of the subjective right knee and low back pain, the complete lack of subjective improvement, the negative imaging studies and the complete lack of response to appropriate conservative care.

30. Dr. Thurston also believed the knee surgery recommended by Dr. Hewitt was not reasonable, necessary, or related to the alleged injury. This was based upon his examination of Claimant, as well as his lack of response to conservative treatments. He also disagreed with the diagnosis of chondromalacia patella, based upon minimal MRI findings.

31. Dr. Thurston opined Claimant's medical evaluation and treatment to date was reasonable. Dr. Thurston stated that Claimant's knee and low back symptoms were consistent with right knee sprain and low back strain, as documented by Dr. Beatty. However, he felt the current severe right knee and low back symptoms were not consistent with the 8/25/14 injury. The ALJ credits Dr. Thurston's conclusion that Claimant suffered a compensable injury.

32. Dr. Thurston testified as an expert in family medicine, the specialty in which he was board-certified. He was Level II accredited pursuant to the W.C.R.P. Dr. Thurston believed Claimant was an accurate historian, but he had exaggerated pain behavior that was out of proportion to what the medical records demonstrated. Claimant had positive Waddell signs and an altered gait that could not be explained. Dr. Thurston had no reason to think that Claimant didn't suffer an injury, however, it was much less severe than Claimant thought. Dr. Thurston stated Claimant was at MMI and did not require any additional treatment. He believed Claimant should have been taken off work for a week.

33. Dr. Thurston agreed that Claimant had objective signs of injury to his knee and low back. He also agreed that Claimant did not demonstrate exaggerated pain behaviors when he was evaluated by Dr. Beatty and Dr. Ghazi. Dr. Thurston testified he trusted Dr. Hewitt would not offer knee surgery if he didn't think it would be beneficial. However, Dr. Thurston read Dr. Hewitt's report to say that if Claimant continued to have symptoms he could justify doing surgery, not that he was recommending surgery.

34. Dr. Beatty re-examined Claimant on August 6, 2015, at which time he reported his symptoms were the same, if not a little worse. On examination, Dr. Beatty found tenderness upon palpation over the paralumbar musculature and noted Claimant had a mild antalgic gait. Claimant had difficulty squatting due to knee pain. Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Dr. Beatty renewed Claimant's medications and gave him a knee brace. Claimant continued to have work restrictions of: lifting- 10 lbs; repetitive lifting-5 lbs; carrying and pushing/pulling-5lbs. Claimant was restricted to one (1) hour per day of walking and standing. He was to do no crawling, kneeling, squatting and climbing.

35. Claimant returned to Dr. Beatty on September 3, 2015. Similar symptoms were noted as at the 8/6/15 appointment and an examination was deferred. Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Claimant was to continue with his independent home exercise program and his medications were re-filled. Claimant work restrictions were continued.

36. Dr. Beatty testified as an expert in occupational medicine, the specialty in which he was board-certified. He was Level II accredited pursuant to the W.C.R.P. Dr. Beatty testified there was objective evidence of trauma to Claimant's knee, including edema underneath the kneecap and inflammation at the prepatellar fat pad. This was documented by the MRI. Dr. Beatty testified that Claimant's work restrictions were supported by the MRI results.

37. Dr. Beatty credibly testified that he would have expected Claimant to improve with treatment. However, Claimant's worsening symptoms could be the result of depression and his anxiousness about his situation. Dr Beatty testified that Claimant did not demonstrate any inconsistent behaviors, nor did he show poor effort when examined. Dr. Beatty opined that Claimant should be re-evaluated before additional treatment was provided. Dr. Beatty's recommendations regarding future treatment were both credible and reasonable.

38. The ALJ found the opinions expressed by Dr. Beatty were more persuasive than those expressed by Dr. Thurston. Dr. Beatty examined Claimant on multiple occasions and correlated his recommendations with objective findings. The ALJ also notes Dr. Thurston testified that he could not rule out that Claimant was injured as alleged. Dr. Thurston also opined that Claimant's treatment had been reasonable up to the date of his evaluation.

39. Claimant continued to treat with Dr. Beatty though October of 2015[2] and nothing in the record indicates that his work restrictions were lifted or that he was released to return to regular work. Dr. Beatty concluded Claimant was not at MMI at the time of his last evaluation on October 8, 2015[3].

40. The ALJ finds that Claimant sustained a compensable industrial injury on August 25, 2014 while employed by Sema Construction.

41. The ALJ finds that Claimant requires medical treatment to cure and relieve the effects of his 8/25/14 industrial injury.

42. The ALJ finds that Claimant is not at MMI.

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

CONCLUSIONS OF LAW

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

General

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. 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).

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).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

---

[2] Dr. Beatty confirmed this in his deposition, taken on 10/9/15.

[3] *Id.*

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant contends that he sustained a compensable injury on August 25, 2014. The ALJ agrees.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, Claimant's testimony supported his claim that his injury was one that arose out of and was in the course and scope of his employment. In this case, Claimant credibly testified that he was using a heavy asphalt cutter on August 25, 2014 while working alone at the project located at 33rd in Peoria. There was no contrary evidence submitted by Respondents which contradicted that Claimant was performing that specific job task, at that location, at the date and time as he alleged.

Claimant also testified that he told the supervisor (Mr. Barr) he was injured. This was corroborated by the Employer's First Report of Injury. The administrative assistant for Employer documented that Claimant had reported the injury (Finding of Fact No. 12). Although there was a dispute as to when Claimant told Mr. Barr, no evidence was submitted to contradict that a report of injury was made. Records from the Employer supported this and Claimant was sent to the ATP for the company for treatment of his injury.

As found, the asphalt cutter which being used by Claimant at the time the injury occurred was of sufficient size and weight to cause such an injury. As described by Claimant, the mechanism of injury is plausible; namely that the cutter got stuck, he was trying to move it and this caused stress to be put on his low back and right knee. In addition, Claimant's MRI provided objective evidence of injury to the right knee, including focal edema in the superior lateral corner of the infrapatellar fat pad, suspected fat pad impingement. The ALJ was persuaded that Claimant injured his right knee as he described.

Likewise, the MRI of Claimant's lumbar spine showed degenerative disc and joint changes. However, these were asymptomatic before 8/25/14. As found, working with a machine of this size could cause the low back pain as described by Claimant. The medical reports prepared by Drs. Beatty and Ghazi also supported this conclusion. No evidence was adduced at hearing which directly contradict ted this. (Dr. Thurston

testified that there were objective signs of injury to the low back and he could not rule out such an injury.) Accordingly, the ALJ concluded that the evidence supported the claim of an injury to the lumbar spine.

The ALJ has considered Respondents' argument that Claimant's lack of credibility required the claim to be denied. In particular, Respondents contended that he didn't like operating the asphalt cutter alone and Claimant's supervisor yelled at him immediately before the alleged injury. This presumably upset him and gave him a motive to report an injury. Respondents also pointed to the fact that Claimant also took pictures of the asphalt cutter before the injury and then equivocated as to why he took the pictures.

However, Claimant was credible in his description of how the injury occurred. His descriptions were consistent in what was reported to the Employer (as reflected in the E-1), in what he told Dr. Beatty and the other authorized treating physicians and through his testimony at hearing. As found, while this issue of Claimant's credibility raised questions about the subject injury, sufficient evidence was admitted for the ALJ to conclude that Claimant was injured as alleged. (See Findings of Fact Nos. 2-6). Claimant satisfied his burden of proof. Therefore, it is determined that Claimant was injured while working for Employer on August 25, 2014.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable work injury. Respondents are therefore liable for medical benefits, including the treatment by Dr. Beatty and his referrals.

As found, Dr. Beatty's testimony was persuasive that Claimant needed to be returned to Dr. Hewitt and Dr. Ghazi to evaluate Claimant's current treatment needs. Claimant requires further evaluation and potentially treatment from these physicians. In his deposition, Dr. Beatty opined that there needed to be a reassessment of Claimant's knee and low back condition, since time had elapsed since the last evaluations by Drs. Ghazi and Hewitt. The ALJ credited this testimony.

At this juncture, there is insufficient evidence for the ALJ to determine whether Claimant requires an arthroscopic procedure to his right knee. The last record by Dr. Hewitt was not clear on whether a request for authorization of surgery was made. That issue is reserved until the evaluations recommended by Dr. Beatty, *supra,* are completed.

Temporary Total Disability Benefits

Claimant seeks an award of TTD benefits commencing on December 8, 2014 and continuing until terminated by law. The ALJ concludes Claimant is entitled to the requested award of benefits.

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

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 the case at bench, Claimant established that he was disabled as a result of the 8/25/14 industrial injury. As found, the ATP (Dr. Beatty) issued work restrictions for Claimant on October 23, 2014. (Finding of Fact No. 9). These restrictions were not lifted by Dr. Beatty. As found, Claimant's job duties required him to lift more than 10lbs and he would not have been able to perform his job duties. Claimant has not returned to work since his lay-off and his work restrictions remain in force. Because Claimant had documented evidence of physical injuries to his knee and lumbar spine, work restrictions and an inability to resume his prior work, the ALJ has determined he was disabled.

Finally, the ALJ notes that in their Position Statement[4], Respondents did not argue Claimant's termination as a defense to TTD benefits, although this was raised as an affirmative defense in the Response to Application for Hearing. There was no evidence before the Court that Claimant engaged in volitional conduct which made him

[4] Claimant listed this as an issue to be adjudicated in his Position Statement.

responsible for his termination. This is required for Respondents to establish this defense. 8-42-103(1)(g), C.R.S.; *Anderson v. Longmont Toyota, supra.* The written evidence related to the termination from Employer specified that the termination was due to a reduction in force. Therefore, the ALJ concludes that Claimant was not responsible for his termination. Respondents are required to pay TTD benefits to Claimant at a rate of $881.65 per week from 12/8/14 and continuing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury while working for Employer and is entitled to wage and medical benefits under the Colorado Worker's Compensation Act.

2. Respondents shall provide reasonable and necessary medical treatment to Claimant to cure and relieve the effects of the 8/25/14 industrial injury.

3. Respondents are liable for the treatment provided by Dr. Beatty and those health care providers to whom he referred Claimant.

4. Claimant's request for authorization of knee surgery is denied (without prejudice).

5. Respondents shall pay TTD benefits to Claimant at a rate of $881.65 per week from 12/8/14 and continuing until terminated by law.

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

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

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

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 7, 2016

Digital signature

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

ISSUE

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of disfigurement benefits?

FINDINGS OF FACT

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

1. At the hearing Respondent's Exhibits A through C were admitted into evidence. The only exception is that the Final Admission of Liability contained in Exhibit A was withdrawn by Respondent's counsel. Thus, only the medical documentation contained in Exhibit A was admitted into evidence.

2. Claimant sustained a compensable shoulder injury on November 19, 2014. Because of the shoulder injury Claimant was required to take an agility test to determine his fitness to return to duty. As a part of the agility test Claimant was required to climb over a barrier. Claimant fell while climbing over the barrier and injured his left lower extremity. The lower extremity injury occurred on November 23, 2014.

3. Respondent does not dispute that the left lower extremity injury is a compensable consequence of the November 19, 2014 shoulder injury. However, Respondent contends that the Claimant did not sustain any permanent disfigurement as a result of the fall.

4. Claimant testified as follows. After the fall from the barrier he was put on light duty. He received treatment that included physical therapy (PT) and an MRI. He was given an "option" for surgery.

5. Claimant testified that as a result of the left lower extremity injury his knee and foot are still painful. Claimant testified that he currently takes 1000 milligrams of Naproxen per day to treat the pain.

6. Claimant testified that he walks with a limp as a result of the injury to his left lower extremity. At the hearing Claimant demonstrated his gait by physically walking back and forth across the courtroom. The ALJ finds that Claimant appeared to walk with a slight but noticeable limp.

7. On June 17, 2015 Clarence, Ellis, M.D., examined Claimant in follow-up for the left lower extremity injury. Dr. Ellis noted Claimant continued in PT and was "steadily improving." However, Claimant "continued" to complain of pain with walking. Dr. Ellis recorded his observations that Claimant was not in "acute distress" and

appeared to "walk in a fairly normal fashion." Claimant exhibited "mild discomfort with palpation of the foot." Dr. Ellis assessed "traumatic plantar fasciitis with some continued improvement with conservative treatment."

8. Dr. Ellis examined Claimant on July 29, 2015. Claimant continued in PT. Claimant reported that the discomfort in his heel was improved and his pain was "75% better." Dr. Ellis observed that Claimant was not in "acute distress," that the left foot and ankle appeared "reasonably normal," and that Claimant walked "in a reasonably normal manner." Dr. Ellis noted that Claimant was restricted from running and jumping.

9. On October 15, 2015 Dr. Ellis again examined Claimant. Claimant reported that his "discomfort" increased after the last therapy session but overall he was "significantly better" than he was at the time of the injury. Dr. Ellis observed Claimant was in no "acute distress" and the feet and ankles looked "normal." The range of motion in the ankles looked "reasonable." There was still tenderness over the bottom aspect of the left heel. Dr. Ellis placed Claimant at maximum medical improvement (MMI) without impairment. Dr. Ellis imposed permanent restrictions of no running or jumping. Dr. Ellis recommended maintenance treatment to include Naproxen for one year, follow-up with "Dr. Mazzola if needed," and replacement of "orthotics one time in the next 2 years."

10. Claimant testified that he never demonstrated his walk for Dr. Ellis. Rather, Claimant stated that he remained seated on the examining table and did not even stand during the physical examinations performed by Dr. Ellis.

11. Claimant proved it is more probably true than not that as a result of the industrial injury to his left lower extremity he has sustained serious, permanent disfigurement to a part of the body normally exposed to public view. Specifically, Claimant proved it is more probably true than not that he walks with a slight but noticeable limp as a result of the injury to his left lower extremity.

12. The ALJ credits Claimant's testimony that he walks with a demonstrable limp as a result of the industrial injury. Claimant's testimony that he walks with a limp as a result of the injury is corroborated by Dr. Ellis's medical records insofar as those records establish a diagnosis of traumatic plantar fasciitis that resulted in permanent restrictions against running and jumping and a prescription for pain medication and orthotics.

13. The ALJ further notes that none of Dr. Ellis's medical records state that Claimant was able to walk without a limp. Rather, Dr. Ellis always qualified his description of Claimant's gait. On June 17, 2015 Dr. Ellis stated Claimant's walk was "fairly normal." On July 29, 2015 Dr. Ellis stated that Claimant walked in a "reasonably normal" fashion. The ALJ infers from Dr. Ellis's use of these qualifying phrases that he was unable to describe Claimant's gait as "normal." Finally, on October 15, 2015, the date of MMI, Dr. Ellis did not directly comment on Claimant's gait.

CONCLUSIONS OF LAW

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

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

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

Section 8-42-108(1), C.R.S., allows compensation for serious, permanent disfigurement "about the head, face, or parts of the body normally exposed to public view." Public view means "accessible or shared by all members of the community." *See Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986).

As determined in Findings of Fact 11 through 13 Claimant proved it is more probably true than not that the industrial injury has caused him to walk with slight but noticeable limp. This limp is generally visible to the community whenever Claimant walks in public. Claimant has sustained, serious, permanent disfigurement within the meaning of the Act.

The ALJ concludes Claimant is entitled to an award of $3500 for his disfigurement.

ORDER

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

1. Respondent shall pay claimant $3,500 as compensation for disfigurement.

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: January 6, 2016

DIGITAL SIGNATURE:

David P. Cain

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that bilateral hearing aids are reasonable, necessary, and causally related to his January 9, 2015 work injury.

FINDINGS OF FACT

1. On January 9, 2015 Claimant slipped and fell on ice while walking into work at Front Range Airport. Claimant hit his head, back, and neck on the ground and loss consciousness.

2. When Claimant came to he was being assisted into an ambulance and was bleeding from both ears. The ambulance report provides that he suffered a laceration to the back of his head and had blood in both ears.

3. At the time he suffered the work injury, Claimant suffered from pre-existing bilateral hearing loss and he was wearing bilateral hearing aids. The hearing aids stopped working due to being soaked with blood and were repaired under warranty.

4. Claimant alleges that following the work injury, his hearing loss increased significantly due to his injury.

5. Following his fall, Claimant was admitted to the hospital and was discharged on January 15, 2015 with noted skull base fracture, temporal bone fracture, mastoid fracture, and hemotympanum. It was noted on discharge that ENT wanted Claimant to see audiology for formal hearing test. *See* Exhibit J.

6. On January 28, 2015 Claimant was evaluated by Greg Reichhardt, M.D. Dr. Reichhardt noted tenderness to palpation over the mastoid regions bilaterally and noted that Claimant appeared to have blood either in the ACs or in the middle ear. Dr. Reichhardt provided the impression of traumatic brain injury, mastoid fractures with hemotympanum, new onset numbness of digits one and two, T12 compression fracture, trauma to the chronically un-fused coccygeal segment, hallucinations, and non-displayed fracture of S3 with a small avulsion fracture of the superior aspect of the coccyx. Dr. Reichhardt did not assess hearing loss. *See* Exhibit 9.

7. On March 11, 2015 Claimant was evaluated by Douglas Peller, D.O. Claimant also underwent bilateral hearing exam performed by Kristine Moore, Au.D. The notes from the visit are difficult to decipher. *See* Exhibit 7.

8. On July 7, 2015 Claimant was evaluated by Dr. Reichhardt. Claimant reported concern with his hearing and that he had additional hearing loss from the accident above what he had prior to the accident. Claimant reported that Dr. Peller felt that Claimant needed a new hearing aid above what he had before and that Dr. Peller felt it would be work related. Dr. Reichhardt did not make any new assessment of hearing loss. *See* Exhibit 9.

9. On July 16, 2015 Dr. Moore authored a letter "to whom it may concern," noting that Claimant had a diagnosis of right ear moderate to profound mixed hearing loss and left ear mild to profound sensorineural hearing loss. She noted that Claimant had been examined by herself and Dr. Peller in March of 2015. Dr. Moore opined that the hearing evaluation completed at their facility in March indicated a decrease in hearing since February of 2015. Dr. Moore noted that Claimant's current in the canal hearing aids were approximately two years old and that at the limits of their range, they did not provide sufficient amplification for Claimant's current hearing loss. Dr. Moore opined that Claimant would benefit from more powerful behind the ear binaural hearing aids. *See* Exhibit 7.

10. On July 21, 2015 Claimant underwent a neuropsychological assessment performed by Suzanne Keneally, Psy. D. Dr. Keneally opined that the testing found Claimant to be functioning in the average to above average range with no indication of any residual cognitive impairment associated with his January 9, 2015 workplace injury. Dr. Keneally noted only one test in the very mildly impaired range, and only 1 point below the low average. Dr. Keneally opined that the one test "Speech Sounds Perception" where Claimant had a very mildly impaired performance was most likely due to Claimant's hearing difficulties and not due to cognitive dysfunction. *See* Exhibit 8.

11. On July 22, 2015 Claimant was evaluated by Dr. Reichhardt. Dr. Reichhardt noted that he was sent hearing tests from February 24, 2014 and February 3, 2015. Dr. Reichhardt opined that Claimant had a decrease in hearing across most frequencies during that time frame except for perhaps the lower frequencies in the left ear. Dr. Reichhardt noted that Claimant's audiologist opined that there had been a decrease in Claimant's hearing since 2015 and Dr. Reichhardt noted that he did not have the expertise to say whether or not the decrease in hearing was suggestive of post-traumatic involvement or just a progression of Claimant's rather severe hearing loss. Claimant reported to Dr. Reichhardt that his hearing was stable from 2000 up until the injury. Dr. Reichhardt noted that it would be helpful to have Dr. Peller review reports and determine whether or not the change in hearing pre- and post-accident is post-traumatic in nature or due to the natural progression of Claimant's hearing loss over time. *See* Exhibit 9.

12. On September 23, 2015 Claimant was evaluated by Dr. Reichhardt. Dr. Reichhardt opined that Claimant had reached maximum medical improvement on August 5, 2015 and Dr. Reichhardt recommended six follow up visits with a physician, four follow up visits with a physical therapist, coverage of medications, and any

necessary laboratory tests to monitor for side effects of medication as maintenance treatment. Dr. Reichhardt provided an impairment rating of 9% whole person for spinal impairment and olfactory sensory loss. Dr. Reichhardt did not provide any impairment for hearing loss related to the work injury nor did he recommend hearing aids as a maintenance medical benefit. *See* Exhibit 9.

13. On August 6, 2015 Alan Lipkin, M.D. issued a report addressing Claimant's hearing loss after performing a medical record review. Dr. Lipkin noted that Claimant had significant bilateral pre-existing sensorineural hearing loss and used hearing aids prior to the work injury. Dr. Lipkin noted that serial audiograms revealed bilateral sloping to a severe sensorineural hearing loss with gradual deterioration in hearing noted in audiograms of 2011, 2012, 2013, and 2014. Dr. Lipkin noted that Claimant had recent audiograms performed on February 3, 2015 and on March 11, 2015 that were consistent with Claimant's gradual deterioration in hearing over time. Dr. Lipkin opined that the post-injury audiograms were not consistent with any acute damage due to Claimant's January 9, 2015 work injury. Dr. Lipkin noted that Claimant had a further audiogram on July 8, 2015 that showed additional deterioration of hearing again more consistent with gradual sensorineural drop than with an injury related drop in hearing. Dr. Lipkin noted he was unable to say that the injury led to deterioration in hearing and opined that it was more likely an ongoing gradual deterioration in hearing related to heredity or presbycusis. Dr. Lipkin opined that the necessity for new hearing aids could not be substantiated on an injury-related basis. *See* Exhibit O.

14. Dr. Lipkin testified at hearing consistent with his report. Dr. Lipkin noted that Claimant had significant nerve loss in both ears in lower speech frequencies in September of 2003 and that Claimant's hearing loss was severe and sloping and got worse at hertz increases. Dr. Lipkin opined that with the results from the 2003 testing, it would be common for the hearing to gradually worsen and that Claimant's audiograms showed gradual worsening over the years.

15. Dr. Lipkin reviewed the audiograms from 2014 prior to the work injury and from 2015 after the work injury and opined that there was a slight worsening over the year between tests. Dr. Lipkin opined that the worsening from 2014 to 2015 was not related to Claimant's work injury and that it was more likely due to the same gradual process of hearing loss that Claimant has shown over the last decade.

16. Dr. Lipkin opined that if Claimant's slightly worsening hearing shown from the 2014 to the 2015 tests was due to a traumatic loss or injury it would show up differently on the testing. Dr. Lipkin noted a traumatic hearing loss would show up immediately after the event and wouldn't continue to get gradually worse later. He also noted that Claimant's hearing loss is almost exclusively nerve type loss and that although Claimant was bleeding from the ears due to the work injury, bleeding from the ears alone does not establish damage was done to the actual ear canal at the time of the fall.

17. Dr. Lipkin is found credible and persuasive. His opinions are consistent with Claimant's medical records and history of audiograms showing sloping bilateral sensorial neural hearing loss beginning in 2003 and gradually worsening. Dr. Moore noted loss between February and March of 2015 but did not note or review the gradual worsening shown by audiograms from 2003 through 2015. Dr. Lipkin's causation assessment is credited over the opinion of Dr. Moore which simply notes hearing loss over a period of one month and does not review the hearing loss shown over the prior 12 years. Further, Dr. Lipkin's opinion that the hearing loss is not causally related to the work injury is consistent with Dr. Reichhardt's treatment records and maintenance medical benefits recommendations which do not note hearing loss aggravated by the work injury.

18. Claimant testified at hearing that prior to his work injury his hearing was stable and manageable. Claimant testified that he had hearing tests between 2000 and 2014 that showed his hearing was stable. Claimant believes his hearing has gotten worse since the accident and is having a harder time hearing conversations with or without ambient noise. Claimant is credible that his hearing has gotten worse following the work injury. As shown by testing, it has gotten gradually worse since January 9, 2015. However, Claimant is not credible that his hearing over the past several years has been stable. Rather, the audiograms show that his hearing did not remain stable but gradually worsened over the years on a sloping basis and continues to do so.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim*

Appeals Office, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Medical Benefits

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." *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). 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).

Claimant has failed to meet his burden to establish that bilateral hearing aids are reasonable and necessary to cure and relieve the effects of his work injury or to prevent further deterioration of his condition. Claimant has failed to establish that he suffered any hearing loss due to his work injury on January 9, 2015. Rather, it is found persuasive that Claimant had significant pre-existing bilateral hearing loss that gradually worsened from 2003 through 2015 and after his injury continued to gradually worsen. Claimant has not shown that the injury aggravated, accelerated, or combined with his pre-existing hearing loss to produce the need for new and stronger bilateral hearing aids. Rather, the opinion of Dr. Lipkin is persuasive that the hearing loss measured between 2014 and 2015 and between February of 2015 and March of 2015 was not shown on testing to be due to an acute injury and continued to show gradual sloping hearing loss consistent with Claimant's history and the progression of Claimant's bilateral hearing loss.

Additionally, the recommendation for more powerful bilateral hearing aids made by Dr. Moore simply notes mild sloping to profound hearing loss bilaterally with a decrease in hearing since February of 2015 which is consistent with Claimant's extensive history of gradual decrease in hearing from 2003 to 2015. Dr. Lipkin agrees with Dr. Moore that there has been decrease in hearing since February of 2015. Although Dr. Moore recommends more powerful hearing aids, she does not explicitly

opine or outline that the hearing loss from February of 2015 was caused by an acute injury or that it was due to the work injury on January 9, 2015. It also is unclear as to whether Dr. Moore reviewed the audiograms from 2003 through 2014 and prior to the work injury to compare the continued gradual hearing loss Claimant experienced with the hearing loss in 2015 that was noted. Overall, Dr. Lipkin presented credibly and persuasively that the hearing loss continues to be consistent with the progression of hearing loss Claimant has shown over the years and that the hearing loss was not due to the acute work injury on January 9, 2015 and his opinion is more persuasive than Dr. Moore's.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that bilateral hearing aids are reasonable, necessary, and causally related to his January 9, 2015 work injury.

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

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

DATED: January 20, 2016

/s/ Michelle E. Jones

Michelle E. Jones
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 he sustained a compensable injury to his right shoulder arising out of and in the course of his employment on February 7, 2015.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits, including right shoulder surgery recommended by Dr. Michael Simpson.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of Temporary Total Disability (TTD) benefits from February 8, 2015 through March 14, 2015.

IV. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause.

Because the ALJ finds and concludes that Claimant failed to establish the he sustained a compensable injury to his right shoulder on February 7, 2015, this order does not address issues II-IV outlined above.

FINDINGS OF FACT

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

1. Claimant was hired by Employer as a floor worker at an hourly rate of $8.23. Claimant's job duties as a floor worker included sweeping the floor and making French fries.

2. On February 7, 2015, Claimant was making French fries when he ran out of product. Consequently, he walked to the back of the restaurant to get more fries from the freezer. As he was walking down a narrow hallway Claimant testified he felt a pop and saw a bright flash of light. Claimant testified that he thought his hair was on fire.

3. It was discovered that a live electrical wire was hanging from the ceiling next to a metal freezer. Claimant testified that the wire "hit" him on the shoulder but he was unsure if after making contact with the wire he pushed it against the metal freezer. An in store video camera captured the incident.

4. The incident was witnessed by several co-employees, including Paul Hughley, a

crew trainer for Employer. Claimant made statements to his coworkers following the incident, but he did not remember what they were.

5. Paul Hughley, credibly testified that he witnessed the alleged incident. Mr. Hughley testified that he was walking past Claimant when he brushed up against the metal freezer door causing a wire hanging from the ceiling to flash and pop. Mr. Hughley testified that Claimant turned around and asked him what happened and if his hair was on fire. Mr. Hughley further testified that Claimant did not look to be in any pain and made no complaints about injuring his right shoulder. Rather, according to Mr. Hughley, Claimant simply appeared surprised. Mr. Hughley then testified that Claimant jokingly stated that he should have fallen and flopped around on the floor. Mr. Hughley testified that Claimant later stated that he was going to own the store, which Mr. Hughley interpreted as Claimant's intention to "sue." Additional witness statements corroborate Mr. Hughley's testimony. According to Jessica, last name illegible, both she and Mr. Hughley asked Claimant if he was alright to which Claimant respond: "yea, but I should fall on the floor and flop around." Claimant "seemed fine and unharmed after the incident" according to this co-worker.

6. Following the incident, Claimant reported to Bennett Johnson, the on duty manager. Mr. Johnson asked Claimant if he needed and "ambulance and medics to check him out". Claimant responded affirmatively, so an ambulance was called. According to Mr. Johnson's statement Claimant also joked to him that he "should've 'fell on the floor and flopped like a fish' to make it look more real." He also reportedly stated that he was "gonna own this bitch", meaning the store, cause he was injured and was going to sue the store.

7. Claimant testified that the whole incident was embarrassing and he was emotionally worked up. Only after additional time had passed and he had calmed down did Claimant notice pain and aching in his right shoulder. He denies making any statement about flopping on the floor. Claimant's testimony is contradicted by multiple witnesses who provided statements consistent with one another. The ALJ credits the statements of Jessica, last name unknown, Bennett Johnson and Paul Hughley to find that Claimant made multiple comments following the incident that he should have flopped around on the floor and that he would own the store secondary to his claim of injury to his right shoulder. To the extent that Claimant's testimony contradicts these witnesses, his testimony his incredible.

8. An ambulance crew arrived after which Claimant refused EMT care. According to Claimant, he did not go to the ER in the ambulance out of concern for his girlfriend having to work and being without a car during her shift should she have to pickup him up at the ER later. Claimant's girlfriend picked him up and took him to the Emergency Room at Memorial Hospital. According to the medical reports from Memorial Hospital ER, Claimant was first evaluated by a nurse at 12:38 AM on February 8, 2015, approximately 3 hours after the incident occurred. Based upon the evidence presented, the ALJ finds Claimant's treatment in the ER, three hours after the incident and after

refusing EMT care at the scene over his professed concern that he did not want to leave his girlfriend without a car, non-emergent in nature.

9. In the ER, the following history of the incident was recorded by Registered Nurse, Rebecca Ahis: "About 2130, pt was @ work and went to open a walk-in freezer. Sts he was touched by a wire hanging from it and felt a shock, then **jerked** away. Sts his right shoulder hurts." (emphasis added) A similar history was documented by the ER physician, Dr. Laurence J. Cohen. Dr. Cohen provided the following history: "At about 9:00 tonight, the patient was at work and he was in a commercial freezer. There was a wire hanging down that touched his right shoulder. He felt and saw an arc, and felt like his shoulder dislocated, which it has done in the past." Claimant complained of right shoulder pain and tingling sensation at the fingertips. Claimant denied Morphine for pain. An x-ray of the right shoulder revealed "no evidence of acute fracture or dislocation." Claimant reported that he thought he dislocated his shoulder and that it went back in. RN Ahis' examination of the right shoulder revealed the following: "No redness, burn marks, edema noted." Moreover, RN Ahis documented that Claimant was "able to take off 2 layers of clothing w/o (without) problem." Dr. Cohen noted that Claimant's skin was negative for color change, rash or edema. Moreover, Dr. Cohen documented that Claimant demonstrated normal range of motion in the shoulder. Nonetheless, Dr. Cohen felt that it was possible that Claimant could have dislocated his shoulder if he had experienced a "significant shock" so he gave Claimant a sling and swathe." He also referred Claimant to Dr. Michael Simpson for orthopedic evaluation and recommended additional physician follow-up.

10. Mr. Hughley testified that he examined the wire which had a bit of black around it. According to Mr. Hughley, it looked like the wire shorted out. Mr. Hughley stated that he could see where it touched up against the stainless steel door. Based upon Mr. Hughley's observation, the ALJ finds that while the wire likely touched Claimant's shoulder, he probably pushed the exposed portion of the wire onto the freezer sending electrical current into the metal door which caused the wire to short out, creating the popping sound and flash of light referenced by Claimant and Mr. Hughley. Based upon Mr. Hughley's testimony in combination with the lack of observable changes to the skin surrounding Claimant's right shoulder, i.e. redness, rash, edema or burn marks, the ALJ is not convinced that Claimant was directly subjected to electrical current sufficient to dislocate his right shoulder as suggested.

11. Claimant first reported to his designated provider, EmergiCare, on February 8, 2015, upon his discharge from the ER. Claimant again reported that he was walking by a freezer when a loose hanging wire struck his shoulder, causing it to dislocate. Dr. Rosemary Greenslade referred Claimant for physical therapy, noted that Claimant may need an MRI if his shoulder instability persists, and stated that there was evidence of a labral/rotator cuff injury. She instructed Claimant that he was not to lift more than one pound with the injured extremity. Claimant's past medical history was noted as unremarkable.

12. Claimant has a long pre-existing history of pain complaints to his right shoulder

secondary to shoulder dislocation injuries. Claimant's medical records establish that Claimant had pain in his right shoulder from a dislocation in 2007. On October 10, 2008, Claimant suffered a recurrent dislocation of his right shoulder while playing football. He was treated by Dr. Robert Keaney at Community Hospital of the Monterey Peninsula. Upon admission, Claimant reported 7 prior dislocations of the shoulder since April 2007. X-rays were obtained and a dislocation confirmed. Claimant was medicated with Morphine, Ativan and Reglan for pain. Attempts to reduce the dislocation were unsuccessful. Consequently, conscious sedation was introduced after which traction and counter traction was applied to the shoulder resulting in a "fairly easily obtained reduction." Post reduction x-rays were obtained which confirmed a restored glenohumeral relationship. It also demonstrated a "Hill-Sachs" deformity. Claimant was instructed to follow up with Dr. Gollogly for an orthopedic evaluation. Dr. Greenslade did not have Claimant's past medical records documenting prior dislocations and treatment for the same in her possession when she evaluated Claimant on February 8, 2015.

13. Claimant confirmed that he has dislocated his shoulder multiple times in the past. He also testified that he could not remember if he underwent an orthopedic evaluation in the past. Finally, Claimant testified that he could not remember if he informed his physicians about his specific past shoulder injuries.

14. Claimant returned to Dr. Greenslade on February 11, 2015. He reported to Dr. Greenslade that his right shoulder continued to have constant pain and that he has been getting headaches since the incident on February 7, 2015. Dr. Greenslade's report from this encounter date notes that an MRI completed February 9, 2015 demonstrated an anterior labral tear and a Hill-Sach's lesion confirming dislocation. As noted above, Dr. Greenslade did not have Claimant's prior medical records demonstrating that prior radiographic imaging in 2008 revealed the presence of a Hill-Sach's deformity.

15. Claimant was first evaluated by Dr. Michael Simpson's on February 18, 2015. Claimant explained to Dr. Simpson that he had recently moved to Colorado and had done construction work prior to moving. Claimant reported the same story to Dr. Simpson that he told all of the other providers, specifically that he was walking past a hanging live wire when it came in to contact with his right shoulder. Claimant indicated that it felt to him like the shoulder dislocated and went back in to place, a sensation Claimant was familiar with because it has happened to him previously, yet which in the past required Morphine for pain and conscious sedation for reduction.

16. Claimant reported to Dr. Simpson that he did have a previous shoulder dislocation in California, but he had been asymptomatic since the last time it occurred. Physical examination revealed anterior laxity of his shoulder. Dr. Simpson, after reviewing the MRI, taking a history, and performing a physical exam, diagnosed Claimant with "History of prior right shoulder dislocation with recent subluxation/dislocation in the course of industrial or work-related accident." Regarding causation, Dr. Simpson noted: "By the patient's report, the treatment of disorder appears to be causally related to the injury sustained. He is unsure whether it was

witnessed incident or not. He states he thinks it was on video camera. He denies any prior issues with his shoulder other than **a** prior dislocation which he states it has been completely asymptomatic prior to that (emphasis added). Based upon the evidence presented, the ALJ finds that Claimant did not provide Dr. Simpson with an accurate history concerning the condition of his shoulder and the number of dislocations he had prior to February 7, 2015. Moreover, Dr. Simpson there is no credible evidence to suggest that Dr. Simpson was in possession of Claimant's prior medical records or the video tape capturing the incident on February 7, 2015 before commenting on causation. Finally, the ALJ finds Dr. Simpson's assessment and statement concerning causality to be based upon Claimant's report only. Consequently, the ALJ finds Dr. Simpson's statement attributing Claimant's need for right shoulder treatment to the February 7, 2015 incident unpursuasive.

17. Claimant returned to Dr. Simpson on March 18, 2015. Claimant had been through a course of physical therapy, but continued to have pain and a sensation of his shoulder being loose. Dr. Simpson determined that Claimant was an appropriate candidate for surgical stabilization of his right shoulder as a result of the work incident.

18. Dr. I. Stephen Davis performed a record review on April 1, 2015 to provide his opinion regarding Dr. Simpson's request for surgery. Dr. Davis concluded, "In summary, it is my opinion, to a reasonable degree of medical probability, that [Claimant] has sustained an acute injury to his right shoulder, causally related to the on the job incident as described on February 7, 2015. He elaborated that the need for the surgery was as a result of both the preexisting shoulder condition and the acute injury of February 7, 2015. Based upon the evidence presented the ALJ finds that similar to Dr. Simpson, Dr. Davis did not have Claimant's prior medical records, including his imaging studies or the video surveillance tape when he commented on causality. Rather, his opinions are based upon the history provided by Claimant to other providers which including Claimant's report that he was directly subjected to an electric shock.

19. As noted above, the February 7, 2015 incident forming the basis for Claimant's allegation that he sustained a compensable injury because he was shocked by an exposed wire was captured on the store's video camera. A frame by frame review of the video tape demonstrates that at 21:32:50 on the video tape Claimant and a co-worker attempt to pass by each other in a narrow hallway. Claimant is very close to a metal freezer which appears to his right. As Claimant moves to the right to allow his coworker to pass by, a flash of light can been seen in the lower right corner of the screen. Claimant is then seen moving to his left to the area vacated by his co-employee. Contrary to Claimant's description, the video tape does not demonstrate that he jerked away after the flash of light. The ALJ finds the video to demonstrate that between 21:32:50 and 21:32:52 Claimant moves fluidly to his left while looking over his left shoulder toward the metal freezer. At 21:32:53 Claimant raises his left hand to the top of his head where he touches his hair. Claimant resumes work passing in front to the camera on several occasions where he is seen touching his right shoulder area. At 21:37:15 Claimant extends his right arm/hand to open an appliance door. He retrieves a bag with his left arm and then uses his right arm to close the door at 21:37:20. At

21:37:23 Claimant raises his right hand/arm to the left as if to sneeze or cough into the area of his right elbow. At 21:37:24 Claimant transfers the bag he is carrying from his left hand to the right hand. He is seen reaching his right shoulder with the left hand at this time. At 21:40:07 Claimant is seen holding his left arm in a guarded fashion. He holds his right arm down at his side in this frame. At no time during the video tape, does Claimant display overt pain behavior.

20. Respondents requested an Independent Medical Examination (IME) with Dr. Eric Ridings on July 28, 2015. Dr. Ridings was provided with a copy of the video tape for review. Based upon the content of his report and the opinions he expressed at hearing, the ALJ finds that Dr. Ridings meticulously analyzed the video tape he was provided.

21. Claimant reported to Dr. Ridings that he had dislocated his right shoulder playing basketball two or more years back. Claimant stated that he was making a vigorous side arm pass and that his arm went well behind his back dislocating his shoulder.

22. Dr. Timothy Hall performed an IME of Claimant on October 22, 2015 at Claimant's expense. Claimant told Dr. Hall that he dislocated his shoulder approximately 2-5 years ago, although he was unsure of the timing. Claimant's representation about his preexisting condition to Dr. Ridings and Dr. Hall is inconsistent with the medical history outlined above; however, as Claimant conceded to having suffered 7 prior dislocations, the ALJ finds it probable that Claimant dislocated his right shoulder while playing basketball 2-5 years prior to the February 7, 2015 incident.

23. In his IME report, Dr. Hall explained that electrical shocks can cause anything from burns, to convulsions, to nerve injury, and to cognitive symptomatology. He indicated that it is a "completely reasonable conclusion that it was this intervening event in the cooler that precipitated the symptoms, particularly since we have such a limited understanding of what can or cannot happen with an electrical injury." Dr. Hall explained his opinion very simply: "[Claimant] was fine before walking in the cooler. Something happened in the cooler and within a very short time frame, he was having symptoms. Sometimes, this is as good as it gets. This is one of those times." Based upon the content of his report, it is probable that Dr. Hall did not have Claimant's prior medical records outlining the number of dislocations or the treatment he received for those dislocations for review at the time of his IME. As noted in his report, Dr. Hall did not see the videotape capturing the event as it occurred on February 7, 2015. Rather, he commented based upon Dr. Ridings IME report that Claimant was "clearly" shocked.

24. Dr. Ridings opined that the findings on Claimant's February 9, 2015 MRI are chronic in nature. According to Dr. Ridings, Claimant's Hill-Sachs impaction fracture finding, the lack of bone marrow edema and the presence of labral scarring are consistent with remote injury and are not acute findings. As noted above, an x-ray obtained in 2008 demonstrated the presence of a Hill-Sachs lesion. Moreover, the ALJ finds it improbable that Claimant's labral scarring would be related to an incident occurring just days before the images were obtained. Consequently, the ALJ credits Dr. Ridings' testimony over that of Dr. Hall find that the February 9, 2015 MRI findings are,

more probably than not, old and related to Claimant's prior shoulder dislocations rather than any injury allegedly sustained on February 7, 2015.

25. Dr. Ridings also testified that acute shoulder dislocations are very painful and associated with muscle spasm and swelling. The ALJ finds this opinion credible, persuasive and supported by the record as evidenced by the treatment rendered for Claimant's known dislocation in 2008. During the acute phase of that injury Claimant required Morphine and Ativan for pain and subsequent conscious sedation to achieve reduction and restoration of glenohumeral alignment. Based upon the evidence presented, the ALJ credits Dr. Ridings' testimony to find that there is a paucity of objective findings supporting the conclusion that an acute dislocation occurred in this case.

26. Dr. Ridings explained that an electrical shock could conceivably cause a shoulder dislocation; however, for this to happen he would expect to see evidence of an entry mark such as a burn on the skin and the shock must be long enough and strong enough to cause a tetanic contraction of the muscles. He also explained that a jerking motion away from the shock, especially in somebody who had a previous shoulder dislocation, can be enough to cause a recurrent dislocation. Dr. Ridings' opined that neither of these events were present based upon his review of the video tape. Based upon careful review of the video tape in question, the ALJ agrees with Dr. Ridings. As noted, the video tape does not, contrary to Claimant's suggestion, show him jerking away from any stimulus. Rather, he immediately and fluidly moves to the left to occupy the space vacated by Mr. Hughley after a spark lasting less than a second is observed. The video shows no sudden, violent movements of the body, including the arm nor does Claimant appear to be in any pain during the entire video. While Claimant reaches for his right shoulder from time to time during the length of the video, the ALJ concludes, like Dr. Ridings that this grabbing is probably for effect because Claimant was aware of the camera and he had expressed an intention to pursue legal action indicating that he would "own" the restaurant because of his claimed injury.

27. Based upon a totality of the evidence presented, including review of the video tape, the ALJ finds that Claimant was not exposed to any prolonged electrical stimulus sufficient to cause a shoulder dislocation. While Claimant's sensation of his hair being effected constitutes some evidence that he occupied the same area of an electrical field when the wire shorted out on the freezer door, there is scant evidence he was subjected to any direct electrical current. As noted there was no redness, rash or burns noted on his skin.

28. Given Claimant's history, the ALJ finds that his need for right shoulder treatment, including stabilization surgery is, more probably than not, related to the ongoing laxity in the right shoulder caused by Claimant's prior non-worked related dislocations and the persistent feeling that his shoulder will pop out rather than the incident occurring February 7, 2015.

29. Based upon the evidence presented, the ALJ finds that although an "accident",

i.e. a live wire making contact with a freezer door occurred resulting in a sensation that Claimant's hair might be alight while Claimant was performing his work duties; he failed to prove by a preponderance of the evidence that he suffered a compensable right shoulder dislocation injury resulting in disability or the need for treatment.

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), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker 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).* 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, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant's testimony was largely contradicted by the more persuasive statement/testimony of his co-workers. Moreover, because Dr. Greenslade, Dr. Simpson, Dr. Davis and Dr. Hall did not review Claimant's prior medical records and/or the video tape before commenting on causality,

the ALJ finds their understanding of the case, including the mechanism of injury incomplete. As such, the ALJ finds and concludes that the testimony of Dr. Ridings is more persuasive than the opinions expressed by these physicians.

Compensability

D. As noted, Claimant bears the burden to prove that he suffered a compensable injury. To sustain that burden, 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. The fact that claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

E. 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). 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.

F. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true 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 the 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 claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found, while the ALJ is convinced that an "accident" occurred, the ALJ is not persuaded that Claimant's need for right shoulder treatment was caused by his allegation that he was shocked by a live wire and/or he jerked away from that stimulus causing him to suffer a recurrent dislocation of the right shoulder. Consequently, Claimant has failed to prove by a preponderance of the evidence that he

suffered a compensable "injury" as defined by the aforementioned legal opinions and his case must be denied and dismissed under the circumstances. In light of this conclusion, Claimant's remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's February 7, 2015 claim for a work related right shoulder dislocation 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: January 14, 2016

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that on February 2, 2015 she sustained an injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits commencing February 4, 2015 and continuing?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable and necessary medical benefits to cure and relieve the effects of the injury?

- Did respondents prove by a preponderance of the evidence that Claimant is not entitled to an award of temporary total disability benefits because she was responsible for her termination from employment?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 5 were received into evidence. Respondents' Exhibits A through E were received into evidence.

2. Claimant worked in the Employer's meat processing facility. Her job was to cut skin from meat. Claimant explained that she worked in a standing position. Another employee stood opposite of her. Between Claimant and the other employee was a space to throw bones.

3. Claimant testified that on February 1, 2015 the man standing opposite of her threw a big bone and her in the leg. Claimant reported this incident to her supervisor but she was not seriously injured.

4. Claimant testified as follows concerning the events of February 2, 2015. Claimant was again cutting meat when the employee opposite of her threw a big cow bone that struck her in the chest. Claimant could not describe the length or weight of the bone other than to say it was heavier than her purse. Claimant recalled that the bone was thrown "hard" with an overhand motion and it felt as if a "bullet" had struck her. Claimant recalled that she was almost knocked down by the bone but remained upright because she was holding onto the desk. She almost "threw up" and felt short of breath. Another employee advised Claimant to go to the nurse.

5. At hearing Claimant testified that she still has very severe symptoms attributable to the February 2, 2015 incident. Claimant reported that she has difficulty sleeping on her left side because of pain. She also stated that she has difficulty raising her left arm and is unable to raise it above shoulder level.

6. After being struck in the chest Claimant reported to the Employer's on-site occupational health department (OHD) where she was examined by a nurse.

7. Notes from the Employer's OHD indicate Claimant was seen at the nurse's office on February 2, 2015 at 7:50 p.m. Claimant gave a history that she was doing her job when another employee "threw a bone up to the conveyer belt and it fell" hitting Claimant on the left side of her chest. Claimant reported that she "couldn't breathe air" after she was struck and complained of pain located on the left side of her chest and back. Claimant also reported nausea because she was scared by the bone. No "bruising or swelling" was observed on examination. The nurse noted Claimant was "breathing fine" when she reported to the nurse's office. The Claimant was given 2 "Pepto" tablets to ease her stomach discomfort and ice was applied for fifteen minutes to the Claimant's chest and back. Claimant requested and was given "IBU 400 mg" for pain. Claimant rested for a while and was released from care without restrictions.

8. On February 2, 2015 Claimant completed a form selecting Carlos Cebrian, M.D., as the authorized treating physician for her alleged injury.

9. Claimant returned to the OHD nurse's office at 2:45 p.m. on February 4, 2015 and was seen by Nurse Lori Chapman. According to Nurse Chapman's notes Claimant gave a history that she was "sick and having pain." Claimant also reported that on February 3, 2015 she had a fever and did not work. Nurse Chapman noted the Claimant was angry and raised her voice to the "translator and nurse." Claimant reportedly stated that it was not the nurse's business why she could not work. Nevertheless, Claimant agreed to be examined by Nurse Chapman.

10. At the 2:45 p.m. examination Claimant reported to Nurse Chapman that she was experiencing pain from above the left breast to below the breast and into her left side. Claimant also reported trouble with breathing. On physical examination (PE) Nurse Chapman noted full range of motion in both upper extremities. There was no swelling, bruising or deformity of the left shoulder or chest. Claimant's respiration was even and unlabored. Nurse Chapman noted there were no "physical findings of injury." Claimant was advised to apply ice, stretch daily and use over the counter pain medications. Nurse Chapman wrote that Claimant requested additional treatment or she would not return to work. Claimant also demanded a paper to go and see her personal physician.

11. Nurse Chapman testified at hearing. Nurse Chapman testified that on February 4, 2015 she performed a complete evaluation of Claimant's upper extremities, chest and back. However there were no findings indicative of injury. Nurse Chapman testified that she released Claimant to return to work. (See also Respondents' Exhibit A-4 containing Nurse Chapman's written release to return to regular job).

12. At 5:40 p.m. on February 4, 2015 Claimant returned to the OHD nurse's office. Once again, Claimant was seen by Nurse Chapman. According to Nurse Chapman's notes Claimant reported that she was having a lot of pain and was not going to work. Claimant also requested Chapman to provide additional treatment. Alternatively Claimant requested a "paper" to see her own doctor if Chapman refused to provide additional treatment. According to Chapman's notes Claimant was again advised there were "no finings on exam." Chapman advised Claimant she could go to work or go home.

13. Nurse Chapman testified that when Claimant returned to the nurse's office for the second time she was adamant that she could not work and demanded to see a doctor and not a nurse. According to Chapman the Claimant's behavior "escalated" and she was asked to leave the plant. However, Claimant refused to do so and security was called. Eventually the police were called to escort Claimant off the Employer's premises. Chapman opined that Claimant was insubordinate and refused to follow instructions.

14. Claimant testified that she was mistreated and humiliated by Nurse Chapman. According to Claimant Nurse Chapman gave a "bad face," used "bad words" and called Claimant a liar.

15. Chapman testified that she did not make faces at Claimant, did not use bad language towards Claimant and did not accuse Claimant of being a liar. Nurse Chapman explained that she told Claimant there was nothing objectively wrong. Nurse Chapman opined that Claimant did not want to hear there was nothing wrong with her.

16. On February 5, 2015 the Employer terminated the Claimant's employment. According to the termination document Claimant was discharged for insubordination on February 4, 2015 when she was "given numerous instructions by members of management and she refused."

17. Claimant testified that she did not know why she was terminated and that she had not done anything to justify the termination. Claimant also stated that she believes the Employer knows she has a severe injury and fired her so she could "not go after them."

18. On February 11, 2015 Dr. Cebrian examined Claimant. Claimant gave a history that on February 2, 2015 "she was hit on the left side of her chest by a small bone" that was "thrown over a belt." Claimant stated that she had trouble breathing for a week and that she "developed pain in the left side of her chest that spread into her back on the left side." Claimant stated that she had "minimal pain on the left side of her chest on the anterior aspect but most of her pain" was "over the thoracic spine" and was "going lower on the left side." Dr. Cebrian also noted that in November 2014 Claimant had pain on the left side of her chest, missed two weeks of work and was treated with antibiotics. Claimant also told Dr. Cebrian that she had experienced an "infection in her left arm."

19. On PE Dr. Cebrian noted that when he tried to palpate the Claimant she pushed his hand away. Later, Claimant allowed Dr. Cebrian to examine her but "recoiled" every time Dr. Cebrian touched her "even lightly." Dr. Cebrian recorded that Claimant was "diffusely tender on the left side of the upper chest, the left trapezius, the left upper back, the left lumbar spine and left side." Examination of Claimant's lungs revealed air entry was equal bilaterally without adventitial sounds." Dr. Cebrian noted there was no "swelling, bruising or redness." Dr. Cebrian assessed diffuse subjective complaints "out of proportion to examination findings." Dr. Cebrian opined to a reasonable degree of medical probability that Claimant's presentation was "not related to what may or may not have happened at work." Dr. Cebrian explained that Claimant had diffuse and widespread complaints "that would not be related to a small bone hitting her on the left side of the chest."

20. Medical records from Salud Family Health Centers indicate that in November 2014 Claimant was taken off of work because of a non-work-related medical condition.

21. Claimant proved it is more probably true than not that on February 2, 2015 she sustained a compensable injury arising out of and in the course of her employment.

22. The ALJ credits Claimant's testimony insofar as she stated that on February 2, 2015 she was at her work station when a co-employee threw a bone that struck Claimant in the chest and caused her to experience some pain. The Claimant's testimony that she was hit by the bone and that it caused her to experience pain on the left side of her chest is consistent with the history she provided to the OHD nurse on February 2, 2015, to Nurse Chapman on February 4, 2015, and to Dr. Cebrian on February 11, 2015.

23. The Claimant proved it is more probably true than not that the incident of February 2, 2015 caused a need for medical treatment in the form of a visit to the nurse on February 2, 2015. On February 2, 2015 the OHD nurse examined Claimant and determined it was appropriate to prescribe "Pepto" tablets for Claimant's stomach discomfort, to apply ice to the chest and back and to provide pain relief medication.

24. Claimant failed to prove it is more probably true than not that she is entitled to an award of temporary total disability (TTD) benefits commencing February 4, 2015 and continuing. Specifically, Claimant failed to prove that the industrial injury disabled her from performing the duties of her regular employment.

25. The ALJ is persuaded by the findings and opinions of the nurses and doctor who have examined Claimant that the industrial injury has not resulted in any condition that disabled Claimant from performing her regular employment. The nurse that examined Claimant on February 2, 2015 noted that Claimant was "breathing fine" and that there was no bruising or swelling. The nurse credibly determined Claimant's condition did not warrant the imposition of any restrictions and the nurse released Claimant from further care. On February 4, 2015 Nurse Chapman performed an examination of Claimant's upper extremities, chest and back. Nurse Chapman found no

evidence of injury to Claimant and credibly released Claimant to her return to regular work. Dr. Cebrian examined Claimant on February 11, 2015 and noted diffuse and widespread pain complaints that he considered out of proportion to Claimant's findings on PE. Dr. Cebrian did not impose any restrictions on Claimant's activities and the ALJ infers that he does not believe any restrictions are warranted as a result of the February 2, 2015 incident.

26. The ALJ finds it significant that Claimant did not present any credible or persuasive medical evidence or opinion to the effect that the February 2, 2015 injury caused a condition that restricted her from performing the duties of her regular job. Although the ALJ recognizes that the law permits claimants to prove disability by lay evidence alone, nothing prohibits the ALJ from considering and weighing whatever medical evidence is presented on the question of disability. Here, the great weight of the medical evidence persuasively establishes that the industrial injury did not disable Claimant from performing the duties of her regular employment.

27. Claimant's testimony that she still suffers great pain and immobility of her left upper extremity is not credible and persuasive. The medical providers have unanimously failed to identify any objective evidence that Claimant suffers from a condition that could cause her reported symptoms. Dr. Cebrian credibly noted that Claimant's symptoms were out of proportion to the objective findings.

28. Claimant failed to prove that it is more probable than not that she is entitled to an award of additional medical benefits to cure and relieve the effects of the industrial injury.

29. There is no credible and persuasive medical evidence tending to establish that Claimant needs additional medical treatment to cure or relieve any condition proximately caused by the industrial injury of February 2, 2015. Claimant has not proven that she has any identifiable ongoing medical condition that was proximately caused by the February 2 injury. Dr. Cebrian credibly opined that Claimant's symptoms are out of proportion to any objective findings. Dr. Cebrian did not recommend additional treatment of any type. On February 4, 2015 Nurse Chapman credibly opined Claimant did not need any more medical treatment and declined to provide any. As determined in Finding of Fact 27, Claimant's testimony that she is still suffering severe symptoms from the February 2 injury is not credible and persuasive.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

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

COMPENSABILITY

Claimant contends she proved by a preponderance of the evidence that on February 2, 2015 she sustained a "compensable" injury arising out of and in the course of her employment when she was struck by a bone thrown by a co-employee. Respondents argue Claimant did not sustain a compensable "injury" because even if she was hit by a bone the incident did not cause any disability nor did it necessitate medical treatment beyond the minor care she received "on the day of the incident."

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

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

sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

As determined in Findings of Fact 21 through 23, Claimant proved it is more probably true than not that she sustained a compensable injury arising out of and in the course of her employment. The ALJ credits Claimant's testimony to the extent she stated that she was performing her duties when a co-employee threw a bone that struck Claimant's chest. This evidence is sufficient to establish that the injury arose out of and in the course of Claimant's employment.

The ALJ further credits Claimant's testimony insofar as she stated that she experienced pain from this incident and as a result sought treatment at the OHD nurse's office. The ALJ is persuaded by the February 2, 2015 nurse's note that the incident caused the need for medical treatment which included the application of ice to the affected areas and the prescription of a pain medication.

Insofar as Respondents assert the claim is not compensable because the treatment provided on February 2, 2012 was minor and brief, the ALJ is not persuaded. The Respondents cite no authority for the proposition that the finding of a compensable "injury" is dependent on the particular nature or duration of the medical treatment provided, and the ALJ is not aware of any such authority.

TEMPORARY TOTAL DISABILITY BENEFITS

Claimant contends that she proved by a preponderance of the evidence that she is entitled to an award of TTD benefits commencing February 4, 2015 and continuing. The Respondents contend Claimant failed to present credible and persuasive evidence that the industrial injury resulted in any disability that prohibited Claimant from working. The ALJ agrees with Respondents.

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

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

As determined in Findings of Fact 24 through 27, Claimant failed to prove that the industrial injury of February 2, 2015 caused any condition that disabled her from performing the regular duties of her employment. As found, the nurse that examined Claimant on February 2 released Claimant to return to work without restrictions. Nurse Chapman examined Claimant on February 4, 2015 and released her to return to work without restrictions. Dr. Cebrian examined Claimant on February 11, 2015 and did not impose any restrictions. Claimant has not presented any credible or persuasive medical evidence tending to establish that the February 2 injury caused a medical condition warranting the imposition of disabling restrictions. Although medical evidence of restrictions is not required to prove disability, the absence of such evidence is a significant factor leading the ALJ to conclude Claimant failed to prove that she sustained any disability. Moreover, as determined in Finding of Fact 27, Claimant's testimony that she still suffers great pain and inability to move her left upper extremity is not credible and persuasive.

The claim for temporary disability benefits is denied. In light of this determination the ALJ need not consider whether or not Claimant was responsible for her termination from employment.

MEDICAL BENEFITS

Claimant requests an award of additional medical benefits to treat the alleged ongoing effects of the industrial injury. Claimant does not explicitly identify what type of treatment she is seeking.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant is also required to prove by a preponderance of the evidence that the condition for which she seeks 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. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 28 and 29, Claimant failed to prove that she is currently entitled to any medical treatment to cure and relieve the effects of the February 2, 2015 industrial injury. The ALJ is persuaded by Dr. Cebrian's opinion that Claimant's symptoms are out of proportion to her objective findings and that they are not related to the injury of February 2. The ALJ is further persuaded that Claimant does not need any medical treatment for the February 2 injury because none was recommended by Dr. Cebrian or Nurse Chapman. Significantly, Claimant failed to present any credible or persuasive medical evidence or opinion tending to identify a medical condition causally related to the injury of February 2 injury or suggesting a course of treatment for this hypothetical condition.

The Claimant's request for additional medical treatment is denied. Of course, Claimant remains free to make claims for future medical benefits subject to her ability to prove entitlement to such benefits.

ORDER

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

1. Claimant sustained a compensable injury on February 2, 2015.

2. The claim for temporary total disability benefits commencing February 4, 2015 is denied.

3. The claim for additional medical benefits is denied.

4. Issues not addressed by this order are reserved for future determination.

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

DATED: January 27, 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

1. Whether Claimant has established by a preponderance of the evidence that, in addition to suffering an admitted mid-back injury, he also sustained a lower back injury on March 25, 2015 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his lower back injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period March 26, 2015 until August 29, 2015 and Temporary Total Disability (TTD) benefits for the period August 30, 2015 until terminated by statute.

4. Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him and he is entitled to recover penalties because Respondents failed to provide him with a list of at least two designated treatment providers after receiving notice of his injury.

5. Whether Claimant has demonstrated by a preponderance of the evidence that Respondents dictated medical care in violation of §8-43-503(3), C.R.S., §8-43-404(5), C.R.S. and WCRP 16-5(A)(4)(a) and he is entitled to recover penalties.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,198.68.

FINDINGS OF FACT

1. Claimant worked for Employer in its Leak Detection Department. Employer is a public entity that maintains the water supply for the City and County of Denver, Colorado. The Charter of the City and County of Denver specifically provides for the creation of a board to oversee Employer to "have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all use and purposes."

2. On March 25, 2015 Claimant had traveled to a location to identify a leak in a water system. After removing a 50 pound hydraulic unit from the side cabinet of his truck he immediately experienced pain in his back.

3. Co-worker Zach Sponsal transported Claimant to Employer's Occupational Health Clinic. The Clinic provides occupational health services to employees of Employer. The Clinic is staffed by Hugh H. Macaulay, III, M.D., a physicians' assistant, nurses and an office staff.

4. Dr. Macaulay has a contract to provide medical services to Employer. The contract is bid out about every three years and is published on the internet through Bidnet. Employer also sends out Requests for Proposals for medical services. Dr. Macaulay has provided medical services to Employer for approximately 20 years. He is present at the Clinic on Mondays and Wednesdays.

5. When Claimant arrived at the Clinic on March 25, 2015 he visited Jessica Bedwell, R.N. and Authorized Treating Physician (ATP) Dr. Macaulay. Claimant completed an Injury Statement Form providing that he was experiencing pain to his right lower back. He also affirmed that he had injuries to the right side of his upper back in the thoracic area. After conducting a physical examination, Dr. Macaulay diagnosed Claimant with an acute right rib subluxation at T9/T10. He directed Claimant to Michael House at Back to Motion Physical Therapy for treatment.

6. Later on March 25, 2015 Mr. Sponsal transported Claimant to Back to Motion Physical Therapy. Claimant completed an electronic diagram delineating his injuries. The diagram revealed that Claimant was experiencing stabbing and aching pain on the right side of his back in an area that was mid-way between his hip and armpit. Claimant subsequently continued to receive medical treatment from Dr. Macaulay and undergo physical therapy.

7. On April 9, 2015 Insurer filed a General Admission of Liability (GAL). Insurer's Adjuster Teresa Manshardt testified that she handled Claimant's case and completed the GAL. She noted that the GAL did not delineate an injury to a specific body part because it was up to Dr. Macaulay to determine the appropriate compensable body parts. The GAL also noted that the case was a "medical only claim with no lost time."

8. On April 13, 2015 Claimant returned to Dr. Macaulay for an evaluation. Claimant reported that he was improving and in much less pain in the thoracic area. He believed he could return to most of his regular work duties. Dr. Macaulay "loosened" Claimant's work restrictions.

9. In an April 29, 2015 visit with Dr. Macaulay Claimant reported that he was doing well and had essentially returned to normal. Claimant noted that he could return to regular work but had some apprehension. Dr. Macaulay explained that Claimant could return to regular duty work in conjunction with continued physical therapy.

10. On May 13, 2015 Claimant returned to Dr. Macaulay for an evaluation. Claimant reported some continuing discomfort in his mid-back area. Notably, Claimant mentioned a severe headache 10 days earlier, but did not report any lower back concerns. Based on Claimant's subjective complaints, Dr. Macaulay continued physical

therapy for an additional two weeks. Claimant continued to perform regular work duties. Dr. Macaulay noted that he planned to discharge Claimant without impairment at his next visit.

11. On June 3, 2015 Claimant returned to Dr. Macaulay for an examination. He reported that he was experiencing significantly more discomfort in his mid-back area. An MRI of Claimant's thoracic spine revealed benign findings. Dr. Macaulay explained that he could discharge Claimant to full duty without restrictions. Dr. Macaulay remarked that he could assign restrictions and an impairment rating, but Employer might not accommodate the restrictions and Claimant might not have a job. After considerable discussion, Claimant decided he could return to regular work. Dr. Macaulay determined that Claimant had reached Maximum Medical Improvement (MMI).with no impairment or restrictions.

12. On July 13, 2015 Claimant returned to Dr. Macaulay for an examination. Claimant reported lower back discomfort. Dr. Macaulay responded that his records revealed Claimant's work injury was limited to his thoracic spine and related rib subluxation that had quickly improved with treatment. Dr. Macaulay subsequently determined that Claimant's lower back complaints were not work-related.

13. On July 14, 2015 Insurer filed a Final Admission of Liability (FAL). The FAL was consistent with Dr. Macaulay's determination that Claimant reached MMI on June 3, 2015 with no permanent impairment. The FAL noted that Claimant's claim involved medical benefits only with no lost time.

14. Dr. Macaulay referred Claimant to Robert L Kawasaki, M.D. for an evaluation of thoracic pain. On July 21, 2015 Claimant visited Dr. Kawasaki for an examination. Claimant reported that he initially experienced pain in his lower lumbar region into the thoracic area. He remarked that many of the physical therapy exercises seemed to aggravate his pain. Claimant reported that most of his current pain was in the lower lumbar region. After reviewing Claimant's medical records and conducting a physical examination, Dr. Kawasaki determined that Claimant's rib dysfunction had been treated appropriately and there were no objective abnormalities of Claimant's thoracic spine. Dr. Kawasaki noted that Claimant's lower back complaints were most compatible with "facetogenic pain of the lower lumbar segments." He remarked that "there does not appear to be an initial report of low back pain, and most of the treatment has been focused on the thoracic rib dysfunction." Dr. Kawasaki commented that there was no indication in the medical notes of significant facetogenic pain in the lumbar spine region. He summarized that "there does not appear to be specific injury to the lumbar spine from the 03/25/15 injury." Nevertheless, Dr. Kawasaki commented that Claimant required some treatment for his lower back pain.

15. On November 10, 2015 David W. Yamamoto, M.D. authored a letter stating that Claimant's lower back strain on March 25, 2015 constituted a work-related injury. He reported that he had been providing Claimant with medical treatment for his March 25, 2015 back injury through private insurance. Dr. Yamamoto noted that Claimant had initially completed a pain diagram "marking the lower back as part of his

injury." Moreover, an October 17, 2015 lumbar spine MRI revealed multilevel degenerative changes. Dr. Yamamoto commented that, if Claimant did not respond well to physical therapy, an evaluation with a spine surgeon to discuss an L5-S1 fusion would be appropriate.

16. On November 12, 2015 Claimant underwent an independent medical examination with Sander Orent, M.D. After reviewing Claimant's medical records and conducting a physical examination. Dr. Orent concluded that Claimant suffered an injury to his lower back on March 25, 2015. He specified that Claimant "suffered a low back strain and it is incompletely treated." Dr. Orent explained that the medical and physical therapy records are replete with Claimant's references to lower back pain. He was "puzzled" as to why Dr. Macaulay focused on Claimant's thoracic spine and commented that there was "an inaccurate assessment of the problem."

17. On November 18, 2015 Claimant underwent an evaluation with Ryan Kramer, M.D. Dr. Kramer determined that Claimant had suffered a strained lower back at work. He remarked that Claimant's "pain started with a particular task at work." Dr. Kramer also commented that Claimant had persistent back pain with no specific cause.

18. On December 2, 2015 Dr. Yamamoto testified through a pre-hearing evidentiary deposition in this matter. He maintained that Claimant's lower back injury was caused by his work activities for Employer on March 25, 2015.

19. Claimant testified at the hearing in this matter. He explained that on March 25, 2015 he experienced a large area of pain that extended from his lower back up to his mid-back area. Claimant remarked that he received medical treatment from Dr. Yamamoto. Dr. Yamamoto assigned work restrictions including no lifting, carrying or pulling in excess of 10 pounds and no repetitive lifting in excess of five pounds. Claimant noted that he has not worked anywhere since August 29, 2015. He maintained that he would like to receive additional treatment from Dr. Yamamoto because he does not trust Dr. Macaulay. Claimant had asked Employer if he could receive treatment from Dr. Yamamoto, but Nurse Cogan denied the request.

20. Dr. Macaulay testified at the hearing in this matter. He explained that he has a contract with Employer to provide medical services at Employer's Occupational Health Clinic. He works at the Clinic on Mondays and Wednesdays. Dr. Macaulay maintained that Claimant's lower back injury was not work-related based on pain diagrams, physical therapy records and physical examinations. He specifically commented that Claimant's initial pain diagram did not reveal any evidence of a lower back injury and the lumbar MRI only reflected degenerative changes. Dr. Macaulay concluded that Claimant suffered an injury to his mid-back area on March 25, 2015. He determined that Claimant reached MMI on June 3, 2015 with no permanent impairment.

21. Nurse Cogan is the supervisor of Employer's Occupational Health Clinic. She specifically oversees the nurses, physician's assistant and office staff at the Clinic. On December 30, 2015 she testified through a post-hearing evidentiary deposition in this matter. Nurse Cogan explained that her supervisor is Employer's Manager of

Health Care and Benefits Sandra Miller. Nurse Cogan remarked that Claimant completed a Personal Injury Statement on March 25, 2015. The Statement provided that Claimant was suffering pain in his right lower back but that his injuries were to his right upper back or thoracic area. Nurse Cogan commented that the information about lower back pain came from Claimant but the information involving the mid-back injury came from a drop-down menu based on Dr. Macaulay's diagnosis after examining Claimant.

22. Nurse Cogan also addressed a conversation with Claimant regarding a possible transfer of medical care to Dr. Yamamoto. She denied that she told Claimant he could not visit Dr. Yamamoto. Instead, she explained that Dr. Yamamoto had not been an approved referral from Dr. Macaulay. Nurse Cogan did not preclude Claimant from visiting Dr. Yamamoto but told him that he would be financially responsible for any medical care he received from Dr. Yamamoto.

23. Claimant has failed to establish that it is more probably true than not that, in addition to suffering an admitted mid-back injury, he also suffered a lower back injury on March 25, 2015 during the course and scope of his employment with Employer. On March 25, 2015 while Claimant was removing a 50 pound hydraulic unit from the side cabinet of his truck he experienced immediate pain in his back. Claimant completed an Injury Statement form providing that he was experiencing pain to his right lower back. He also affirmed that he had injuries to the right side of his upper back in the thoracic area. After conducting a physical examination, ATP Dr. Macaulay diagnosed Claimant with an acute right rib subluxation at T9/T10. Nurse Cogan explained that the information about lower back pain came from Claimant but the information involving the mid-back injury came from a drop-down menu based on Dr. Macaulay's diagnosis after examining Claimant. At Back to Motion Physical Therapy on March 25, 2015 Claimant completed an electronic diagram delineating his injuries. The diagram revealed that Claimant was experiencing stabbing and aching pain on the right side of his back in an area that was mid-way between his hip and armpit. Claimant continued to regularly visit Dr. Macaulay and undergo physical therapy during April and May 2015. He reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back complaints. On June 3, 2015 Dr. Macaulay determined that Claimant had reached MMI with no impairment or restrictions.

24. On July 13, 2015 Claimant returned to Dr. Macaulay for an examination. Claimant reported lower back discomfort. Dr. Macaulay responded that his records revealed Claimant's work injury was to his thoracic spine and related rib subluxation that had quickly improved with treatment. Dr. Macaulay subsequently determined that Claimant's lower back complaints were not work-related. He referred Claimant to Dr. Kawasaki for an examination. On July 21, 2015 Dr. Kawasaki determined that Claimant's rib dysfunction had been treated appropriately and there were no objective abnormalities in Claimant's thoracic spine. Dr. Kawasaki noted that Claimant's lower back complaints were most compatible with "facetogenic pain of the lower lumbar segments." He remarked that "there does not appear to be an initial report of low back pain, and there was no indication in the medical notes of significant facetogenic pain in

the lumbar spine region. He summarized that there was no specific injury to the lumbar spine of March 25, 2015.

25. In contrast, Drs. Yamamoto, Orent and Kramer determined that Claimant injured his lower back on March 25, 2015 and required additional medical treatment. The physicians commented that Claimant's medical records and physical therapy notes repeatedly referenced lower back pain. However, ATP Macaulay examined Claimant on multiple occasions from March 25, 2015 until June 3, 2015. Claimant reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back symptoms. Moreover, as Dr. Macaulay noted, Claimant's lumbar MRI only reflected degenerative changes. Accordingly, Claimant's employment did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment of his lower back.

26. Claimant has failed to prove that it is more probably true than not that he is entitled to receive TPD benefits for the period March 26, 2015 until August 29, 2015 and TTD benefits for the period August 30, 2015 until terminated by statute. On June 3, 2015 Dr. Macaulay determined that Claimant reached MMI with no impairment or restrictions. On July 14, 2015 Insurer filed a FAL consistent with Dr. Macaulay's MMI and impairment determinations. The FAL noted that Claimant's claim involved medical benefits only with no lost time. The record reveals that Claimant did not suffer a wage loss as a result of his admitted mid-back injury and did not suffer a compensable lower back injury. Accordingly, Claimant has not established a causal connection between his industrial injury and subsequent wage loss. Claimant is therefore not entitled to recover TPD benefits for the period from March 26, 2015 until August 29, 2015. Finally, because Claimant reached MMI on June 3, 2015 he is statutorily precluded from receiving TTD benefits for the period subsequent to the MMI date.

27. Claimant has failed to establish that it is more probably true than not that the right of medical selection passed to him and he is entitled to recover penalties because Respondents did not designate a medical provider after receiving notice of his injury. Generally, respondents must provide injured workers with a list of at least two designated treatment providers when they are apprised of a work-related injury. However, Section 8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B) provide that, if the employer is a "governmental entity" that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternate physician from outside its system. Because Employer is a governmental entity that has its own occupational health care system, Claimant's request to select a physician and recover penalties fails.

28. Employer is a public entity that maintains the water supply for the City and County of Denver, Colorado. The Charter of the City and County of Denver specifically provides for the creation of a board to oversee Employer to "have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all use and purposes." Employer is thus a governmental entity.

29. Employer maintains an Occupational Health Clinic. The Clinic provides occupational health services to employees of Employer. The Clinic is staffed by Dr. Macaulay, a physicians' assistant, nurses and an office staff. Dr. Macaulay has a contract to provide medical services to Employer. He is present at the Clinic on Mondays and Wednesdays. There is no requirement in §8-43-404(5)(a)(II)(A), C.R.S. or WCRP 8-1(B) that a physician must be present full-time in an occupational health care provider system. Nurse Cogan is the supervisor of Employer's Occupational Health Clinic. She specifically oversees the nurses, the physician's assistant and the office staff at the Clinic. Nurse Cogan explained that her supervisor is Employer's Manager of Health Care and Benefits Ms. Miller. The record reflects that Employer regularly provides health care services to injured employees through its Occupational Health Clinic. The arrangement thus constitutes an "occupational health care provider system" pursuant to §8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B). Accordingly, Employer properly designated health care providers from within its own system and was not required to provide an alternate physician from outside its system.

30. Claimant has failed to demonstrate that it is more probably true than not that Respondents dictated medical care in violation of §8-43-503(3), C.R.S., §8-43-404(5), C.R.S. and WCRP 16-5(A)(4)(a) and he is entitled to recover penalties. Claimant testified that he asked Employer if he could receive treatment from Dr. Yamamoto, but Nurse Cogan denied the request. Nurse Cogan denied that she told Claimant he could not visit Dr. Yamamoto. Instead, she explained that Dr. Yamamoto was not an approved referral from Dr. Macaulay. Nurse Cogan did not preclude Claimant from visiting Dr. Yamamoto but told him that he would be financially responsible for any medical care he received from Dr. Yamamoto. Nurse Cogan simply apprised Claimant that he required a referral from Dr. Macaulay if he wanted to obtain medical treatment from Dr. Yamamoto within the Workers' Compensation system. Absent a referral, Claimant would be responsible for the medical costs associated with his treatment from Dr. Yamamoto. The record does not contain any probative evidence demonstrating that Respondents ordered or directed a physician to engage in a specific course of conduct. Moreover, the record lacks evidence that a physician was influenced or compelled to engage in a specific course of conduct or treatment because of Respondents' actions. The record thus does not demonstrate that Employer dictated Claimant's medical care. Accordingly, Claimant is not entitled to recover penalties.

CONCLUSIONS OF LAW

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

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. 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 establish by a preponderance of the evidence that, in addition to suffering an admitted mid-back injury, he also suffered a lower back injury on March 25, 2015 during the course and scope of his employment with Employer. On March 25, 2015 while Claimant was removing a 50 pound hydraulic unit from the side cabinet of his truck he experienced immediate pain in his back. Claimant completed an Injury Statement form providing that he was experiencing pain to his right lower back. He also affirmed that he had injuries to the right side of his upper back in the thoracic area. After conducting a physical examination, ATP Dr. Macaulay diagnosed Claimant with an acute right rib subluxation at T9/T10. Nurse Cogan explained that the information about lower back pain came from Claimant but the information involving the mid-back injury came from a drop-down menu based on Dr. Macaulay's diagnosis after examining Claimant. At Back to Motion Physical Therapy on March 25, 2015 Claimant completed an electronic diagram delineating his injuries. The diagram revealed that Claimant was experiencing stabbing and aching pain on the right side of his back in an area that was mid-way between his hip and armpit. Claimant continued to regularly visit Dr. Macaulay and undergo physical therapy during April and May 2015. He reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back complaints. On June 3, 2015 Dr. Macaulay determined that Claimant had reached MMI with no impairment or restrictions.

8. As found, on July 13, 2015 Claimant returned to Dr. Macaulay for an examination. Claimant reported lower back discomfort. Dr. Macaulay responded that his records revealed Claimant's work injury was to his thoracic spine and related rib subluxation that had quickly improved with treatment. Dr. Macaulay subsequently determined that Claimant's lower back complaints were not work-related. He referred Claimant to Dr. Kawasaki for an examination. On July 21, 2015 Dr. Kawasaki determined that Claimant's rib dysfunction had been treated appropriately and there were no objective abnormalities in Claimant's thoracic spine. Dr. Kawasaki noted that Claimant's lower back complaints were most compatible with "facetogenic pain of the lower lumbar segments." He remarked that "there does not appear to be an initial report of low back pain, and there was no indication in the medical notes of significant facetogenic pain in the lumbar spine region. He summarized that there was no specific injury to the lumbar spine of March 25, 2015.

9. As found, in contrast, Drs. Yamamoto, Orent and Kramer determined that Claimant injured his lower back on March 25, 2015 and required additional medical treatment. The physicians commented that Claimant's medical records and physical therapy notes repeatedly referenced lower back pain. However, ATP Macaulay examined Claimant on multiple occasions from March 25, 2015 until June 3, 2015. Claimant reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back symptoms. Moreover, as Dr. Macaulay noted, Claimant's lumbar MRI only reflected degenerative changes. Accordingly, Claimant's employment did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment of his lower back.

TTD and TPD Benefits

10. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

11. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to receive TPD benefits for the period March 26, 2015 until August 29, 2015 and TTD benefits for the period August 30, 2015 until terminated by statute. On June 3, 2015 Dr. Macaulay determined that Claimant reached MMI with no impairment or restrictions. On July 14, 2015 Insurer filed a FAL consistent with Dr. Macaulay's MMI and impairment determinations. The FAL noted that Claimant's claim involved medical benefits only with no lost time. The record reveals that Claimant did not suffer a wage loss as a result of his admitted mid-back injury and did not suffer a compensable lower back injury. Accordingly, Claimant has not established a causal connection between his industrial injury and subsequent wage loss. Claimant is therefore not entitled to recover TPD benefits for the period from March 26, 2015 until August 29, 2015. Finally, because Claimant reached MMI on June 3, 2015 he is statutorily precluded from receiving TTD benefits for the period subsequent to the MMI date.

Right of Selection/Penalties

12. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $1000 per day where a party violates a statute, rule, or lawful order of an ALJ. *See Holliday v. Bestop, Inc.,* 23 P.3d 700, 705 (Colo. 2001). The term "order" as used in §8-43-304 includes a rule or regulation promulgated by the Director of the Division of Worker's Compensation. §8-40-201(15),

C.R.S.; *see Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176, 177 (Colo. App. 2002). Section 8-43-304(1), C.R.S. also requires that the fine imposed is to be apportioned, in whole or in part, by the ALJ between the aggrieved party and the workers' compensation cash fund created in C.R.S §8-44-112(7)(a), C.R.S. except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

13. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

14. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

15. Section 8-43-404(5)(a)(II)(A), C.R.S. specifies, in relevant part, that if the employer is a "governmental entity" that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternate physician or corporate medical provider from outside its own system. Similarly, WCRP 8-1(B) provides, in relevant part, that employers who are "governmental entities" that have their own occupational health care provider system pursuant to §8-43-404(5)(a)(ii)(A), C.R.S. "may designate health care providers from their own system and are otherwise exempt from the requirement to provide a list of alternate physicians or corporate medical providers."

16. As found, Claimant has failed to establish by a preponderance of the evidence that the right of medical selection passed to him and he is entitled to recover penalties because Respondents did not designate a medical provider after receiving notice of his injury. Generally, respondents must provide injured workers with a list of at least two designated treatment providers when they are apprised of a work-related injury. However, Section 8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B) provide that, if the employer is a "governmental entity" that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternate physician from outside its system. Because Employer is a governmental entity that has its own occupational health care system, Claimant's request to select a physician and recover penalties fails.

17. As found, Employer is a public entity that maintains the water supply for the City and County of Denver, Colorado. The Charter of the City and County of Denver specifically provides for the creation of a board to oversee Employer to "have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all use and purposes." Employer is thus a governmental entity.

18. As found, Employer maintains an Occupational Health Clinic. The Clinic provides occupational health services to employees of Employer. The Clinic is staffed by Dr. Macaulay, a physicians' assistant, nurses and an office staff. Dr. Macaulay has a contract to provide medical services to Employer. He is present at the Clinic on Mondays and Wednesdays. There is no requirement in §8-43-404(5)(a)(II)(A), C.R.S. or WCRP 8-1(B) that a physician must be present full-time in an occupational health care provider system. Nurse Cogan is the supervisor of Employer's Occupational Health Clinic. She specifically oversees the nurses, the physician's assistant and the office staff at the Clinic. Nurse Cogan explained that her supervisor is Employer's Manager of Health Care and Benefits Ms. Miller. The record reflects that Employer regularly provides health care services to injured employees through its Occupational Health Clinic. The arrangement thus constitutes an "occupational health care provider system" pursuant to §8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B). Accordingly, Employer properly designated health care providers from within its own system and was not required to provide an alternate physician from outside its system.

Penalties for Dictating Medical Care

19. Section 8-43-503(3), C.R.S. provides, in pertinent part, that employers, insurers, claimants and their representatives shall not dictate to any physician the type or duration of treatment or degree of physician impairment. WCRP 16-5(A)(4)(a) specifies that "[a] payer or employer shall not redirect or alter the scope of an authorized treating provider's referral to another provider for treatment or evaluation of a compensable injury." The critical inquiry is whether the record contains any probative evidence demonstrating that the respondents ordered or directed a physician to engage in a specific course of conduct. *In Re Teegardin,* W.C. No. 4-748-106(2) (ICAP, Jan. 17, 2014). Moreover, the record must include evidence that the physician was

influenced or compelled to engage in a specific course of conduct or treatment because of a respondent's actions. *Id.*

20. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Respondents dictated medical care in violation of §8-43-503(3), C.R.S., §8-43-404(5), C.R.S. and WCRP 16-5(A)(4)(a) and he is entitled to recover penalties. Claimant testified that he asked Employer if he could receive treatment from Dr. Yamamoto, but Nurse Cogan denied the request. Nurse Cogan denied that she told Claimant he could not visit Dr. Yamamoto. Instead, she explained that Dr. Yamamoto was not an approved referral from Dr. Macaulay. Nurse Cogan did not preclude Claimant from visiting Dr. Yamamoto but told him that he would be financially responsible for any medical care he received from Dr. Yamamoto. Nurse Cogan simply apprised Claimant that he required a referral from Dr. Macaulay if he wanted to obtain medical treatment from Dr. Yamamoto within the Workers' Compensation system. Absent a referral, Claimant would be responsible for the medical costs associated with his treatment from Dr. Yamamoto. The record does not contain any probative evidence demonstrating that Respondents ordered or directed a physician to engage in a specific course of conduct. Moreover, the record lacks evidence that a physician was influenced or compelled to engage in a specific course of conduct or treatment because of Respondents' actions. The record thus does not demonstrate that Employer dictated Claimant's medical care. Accordingly, Claimant is not entitled to recover penalties.

ORDER

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

1. Claimant's claim that he suffered a lower back injury while working for Employer on March 25, 2015 is denied and dismissed. Therefore, Claimant is not entitled to receive additional medical benefits.

2. Claimant's request for TPD and TTD benefits is denied and dismissed.

3. Claimant earned an AWW of $1,198.68..

4. The right of medical selection did not pass to Claimant.

5. Claimant's requests for penalties are denied and dismissed.

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

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

you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 21, 2016.

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

ISSUES

The issues addressed in this decision concern compensability, Claimant's entitlement to medical and temporary disability benefits, a determination of Claimant's average weekly wage and Respondents' entitlement to offsets. The specific questions answered are:

I. Whether Claimant established by a preponderance of the evidence that he sustained a traumatic injury to his neck, arising out of and in the course and scope of his employment on August 19, 2014.

II. Whether Claimant established by a preponderance of the evidence that the initial medical treatment he received following his August 19, 2014 accident was emergent in nature.

III. Whether Claimant established by a preponderance of the evidence that Respondents failed to properly designate a treatment provider to attend to Claimant's alleged injuries.

IV. Whether Claimant established by a preponderance of the evidence that the treatment provided to Claimant was reasonable, necessary and causally related to his alleged August 19, 2014 work injury.

V. Whether Claimant's average weekly wage (AWW) is $1,236.45, $1,362.87 or some other figure.

VI. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from August 20, 2014 and thereafter for five days, April 1, 2015 through September 29, 2015 and temporary partial disability (TPD) benefits from October 1, 2015 through October 15, 2015 as a result of the neck injury sustained on August 19, 2014.

VII. Whether Respondents are entitled, pursuant to C.R.S. § 8-42-103(1)(d)(I), to offset any TTD/TPD benefits for short-term disability benefits received by Claimant.

FINDINGS OF FACT

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

1. Claimant is employed as a hail and water loss claims adjuster for Employer.

As part of his duties, Claimant is required to travel to/from various residential and commercial properties, in order to conduct damage inspections concerning the claimed loss. Claimant's travel takes him to locations outside of Colorado Springs. Claimant is provided a company car and a gas stipend by Employer for his travel needs.

2. When he is not in the field completing inspections, Claimant works from a home office in Colorado Springs where, in addition to negotiating settlements, he prepares written damage estimates from his property inspection notes.

3. On August 19, 2014, Claimant was tasked with inspecting multiple properties in Pueblo, Colorado for hail and water damage. As part of his inspections, Claimant routinely enters crawl spaces, looks up at ceilings and climbs ladders to gain access to the property's roof. Inspections also include taking pictures which Claimant later downloads from a digital camera for inclusion in his written damage estimate. Based upon the evidence presented, the ALJ finds the aforementioned inspections detailed and physically challenging.

4. Between 2:30 and 3:00 pm on August 19, 2014, Claimant experienced a bout of dizziness while on the roof of a property he was inspecting. Claimant is a Type 1 diabetic, having been diagnosed with diabetes at age 10. Regulation of his blood sugar levels has been challenging, requiring the use of a diabetic pump during his early years, although Claimant did not feel it controlled his sugar levels well. Consequently, as an adult, Claimant attempts to manage his blood sugar levels with the use of insulin and dietary controls. Because Claimant's work schedule is highly variable, he misses meals and insulin doses. Moreover, because he frequently works at heights, Claimant utilizes food and candy bars as a precautionary means to prevent low blood sugar level events and their attendant physical/mental symptoms.

5. Upon feeling dizzy, Claimant retreated from the roof and once on the ground, drank a can of soda and ate a candy bar. Reportedly, this made him feel better, so he started the drive for home where he intended to begin the preparation of his written damage estimates for the day's inspections.

6. While driving north bound on Interstate 25, Claimant experienced an episode of syncope (short loss of consciousness) secondary to hypoglycemia. He testified that he only has a vague recollection of the events after suffering this event. Specifically, Claimant testified that he felt a "bump" while driving but kept going, exiting the interstate and traveling home. Once home, Claimant testified that he let his dog out and drank some Dr. Pepper as he was shaky, dizzy, had a headache and was generally not feeling well. According to Claimant, he fell asleep on the couch that evening. The following morning, Claimant had chest pain and his right arm was sore. He discovered that the front end of his company provided car was damaged. He testified that the damage was "not bad". He assumed that he had collided with "something" not "someone else."

7. Claimant testified that he was worried about his chest pain so he called a

friend, who took him to the emergency room at Penrose Hospital where he was treated for symptoms consistent with a chest wall contusion. The ALJ finds that although there did not appear to be an immediate threat to Claimant's life, his treatment in the ER constituted a bona fide emergency due to his previous hypoglycemia, syncope, impaired mental status and his chest pain. Claimant has proven by a preponderance of the evidence that his treatment in the ER at Penrose Hospital was emergent in nature.

8. Upon returning home from the hospital, Claimant called his supervisor to report the events that had occurred the previous afternoon, the damage to his company car and his injuries. Claimant was not provided with a list of designated medical providers from which to choose to attend to the injuries he sustained as a consequence of the collision the day before.

9. Claimant also contacted the local police agencies, including the Colorado Springs PD and the El Paso County Sheriff's Office to ascertain whether there had been any reports of any hit and run accidents for August 19, 2015. These agencies had no such reports. Consequently, Claimant contacted the Colorado State Patrol (CSP) and discovered that there had been a report of a motor vehicle accident (MVA) on I-25 involving a car matching his where the driver drove off. Additional investigation and conversation with the State Patrol revealed that Claimant had run into the rear of another vehicle being driven by Ryan Pearson as both cars were traveling north on I-25. Contrary to Claimant's testimony, the accident report notes that both vehicles sustained major damage. According to Mr. Pearson's statement, Claimant's car had visible front end damage and was leaking fluids. Claimant was subsequently contacted by a Trooper from the CSP and provided with a Colorado State Patrol Drivers Statement and Exchange of Information Form for completion. Claimant completed and signed the form on August 20, 2014. The form contains information detailing the accident which is consistent with Claimant's hearing testimony. It also contains an affirmative response to the question of whether Claimant sustained injuries in the accident, noting his report of a "sore chest, head and <u>neck</u>" (emphasis added). Claimant was cited for careless driving, failure to notify authorities of an accident and leaving the scene of an accident.

10. Following the accident, Claimant testified that he was placed on a "mandatory" five day leave of absence. He was subsequently notified of Employer's request for a "Fitness for Duty" evaluation to determine his ability to safely operate a motor vehicle. Claimant used five days of paid time off (PTO) to assure no decrease in his pay during the mandatory five day leave of absence (LOA). Following his LOA, Claimant returned to work conducting claims reviews only as he had not been cleared to perform inspections pending completion of his "Fitness for Duty" examination.

11. Before his "Fitness for Duty" examination, Claimant saw his personal doctor, Keith Bodrero, DO on August 29, 2014. During this appointment, Claimant complained of having a "sore neck" after hitting another driver from "behind."

12. Claimant returned to full duty work after his Fitness for Duty examination.

Although he was working full duty, Claimant continued to treat for the effects of his MVA with Dr. Bodrero who documented, as a primary complaint, Claimant's continued report of chest pain on September 19, 2014. No complaints of neck/arm pain are documented in Dr. Bodrero's treatment note from this date.

13. Claimant testified that he was "living" with right arm and lower neck pain following his MVA. The ALJ infers from Claimant's testimony, the accident report materials and the August 29, 2014 report of Dr. Bodrero that Claimant had persistent neck and arm pain which was more tolerable than his chest pain for which he sought treatment.

14. On November 18, 2014, Claimant was no longer able to tolerate his neck and arm pain. On this date, Claimant returned to Dr. Bodrero who documented that Claimant's "ribs" (chest) were "fine" but that he now had complaints of right neck, shoulder and arm pain. Physical examination (PE) revealed positive ("+") cervical spasms right greater than left. Claimant was provided with osteopathic manipulation treatment, which Dr. Bodrero documented was well tolerated and which improved Claimant's symptoms.

15. Claimant returned to Dr. Bodrero on February 2, 2015 with continued complaints of neck, shoulder and arm pain which was waking him at night and impairing his ability to sleep. Dr. Bodrero documented "severe" spasms and tenderness of the right neck with pain radiating in an area consistent with the "4 and 5 nerve roots." Dr. Bodrero provided additional osteopathic manipulation, which failed to yield perceived benefit. Consequently, Dr. Bodrero prescribed pain medication and recommended an MRI.

16. An MRI of the cervical spine was performed March 10, 2015 which revealed a "right paracentral disc herniation at C6-C7 which could affect the exiting right C7 nerve root." Although there was no definite cord deformity seen at this spinal level, the central canal was narrowed according to the radiologist's read of the MRI images. Additionally the MRI demonstrated spondylosis with mild central canal stenosis at the C5-C6 spinal levels along with left sided foraminal narrowing at C3-C4.

17. Claimant returned to Dr. Bodrero on March 16, 2015 with complaints of constant neck pain. Claimant's pain was noted to be worse with "sitting and laying down." Dr. Bodrero documented that Claimant had a C6-7 disc to the right which was the "probable cause of [his] pain." Dr. Bodrero referred Claimant to Dr. Joseph Illig for neurosurgical evaluation.

18. On March 25, 2015 Employer faxed to Dr. Bodrero's office a request for medical information which included a disability form to be completed and returned to Employer as Claimant was "requesting income replacement" from Employer under Claimant's short term disability coverage. The request contained a "Memo" outlining the essential duties of Claimant's work as: "Climbing roofs, estimating, contacting insured

and EE, walking, standing, sitting, driving, carrying ladders, inspecting houses, occ (occasional) lifting up to 40 pounds.

19. On April 1, 2015 Claimant met with Dr. Bodrero to discuss the requested disability paperwork. During this appointment, Claimant reported that he could not work because he was not sleeping at night and that his hands were going numb while sitting which was preventing him from doing desk work. Claimant testified that he had increased burning pain in his right arm around this time and that he was unable to make appropriate work decisions. He did not feel he could work. Thus, he made the decision to apply for short term disability (STD).

20. Claimant was unaware of whether he paid for STD coverage. He testified to his understanding that STD coverage was an employee benefit. Review of the STD policy reveals that Claimant did not contribute toward the cost of STD coverage.

21. Claimant was also evaluated by Dr. Illig on April 1, 2015. Dr. Illig reiterated the history of injury and completed a physical examination which revealed "absent reflexes in the brachioradialis and triceps" along with impaired upper extremity sensation. Motor testing also revealed weakness of the right triceps with "atrophy of the lateral head of the triceps on the right compared to the left." Dr. Illig reached the following impression:

> Patient has a compressive right C7 radiculopathy which According to the patient has worsened over time. He has pain and weakness. He has a disc herniation C6, C7 on the right compressing the C7 root. Do not feel that medications or physical therapy are likely [to] be of benefit. Epidural steroid will only aggravate his diabetes and will probably not be of lasting benefit therefore recommend surgery.

22. Employer required a second opinion regarding Claimant's STD claim. Consequently, he was evaluated by Dr. David Miller of High Mountain Brain and Spinal Surgery Center in Glenwood Springs on May 12, 2015. During this encounter Claimant reiterated the history of injury noting that he had had no "issues with his neck until a motor vehicle accident that occurred in 08/2014." Claimant repeated this claim during his testimony at hearing. Careful review of the medical records, including a medical record completed approximately three weeks (July 28, 2014) before the August 19, 2014 collision forming the basis for this claim supports Claimant's testimony that he had no issues or treatment for his neck prior to his August 19, 2014 MVA.

23. Claimant's STD claim was approved and he was out of work, due to the effects of his claimed injuries, from April 1, 2015 to September 29, 2015.

24. On July 20, 2015, Claimant underwent a posterior cervical formaninotomy and discectomy performed by Dr. Illig. Claimant was bothered by post-operative pain and muscle spasm which was treated with Dilaudid and Valium; however, he did well

post-operatively and by September 28, 2015 during a follow-up appointment with Dr. Illig he was allowed to return to work four hours a day beginning October 1, 2014. A 25 pound lifting restriction was imposed.

25. Based upon the evidence presented, included the medical records documenting Claimant's worsening pain and functional decline coupled with his pre-existing diabetes, making additional injection (steroid) therapy risky and contraindicated, the ALJ finds Dr. Illig's decision to proceed with surgery reasonable and necessary treatment to cure and relieve Claimant of the effects of his neck injury.

26. Consistent with Dr. Illig's September 28, 2015 report, Claimant testified that he recovered well, had no pain in his arm and returned to work, light duty conducting claims reviews for four hours per day on October 1, 2015.

27. Claimant attended a follow-up appointment with Dr. Illig on October 16, 2015, during which time Dr. Illig noted that he (Claimant) was "ready to return to work full time." The importance of "proper neck mechanics" and avoidance of heavy overhead lifting was stressed and a follow-up appointment was scheduled for four weeks.

28. Consistent with Dr. Illig's October 16, 2015 report, Claimant testified that he returned to full duty work, at full wages on October 16, 2015. On November 16, 2015 Dr. Illig liberalized Claimant's lifting restriction to 40 pounds and set a follow-up appointment for four week at which time he anticipated releasing Claimant from care without restrictions.

29. Dr. John Burris performed an independent medical examination (IME) at the request of Employer and testified at hearing. Dr. Burris testified that the most common cause of disc herniation is degeneration and that an MRI does not provide evidence of chronicity. Simply put, Dr. Burris testified that an MRI won't tell the reader whether disc herniation is acute or chronic. The ALJ infers from the evidence presented, including Dr. Burris' testimony, that there are findings consistent with the presence of pre-existing degenerative change on Claimant's MRI. Dr. Burris opined that Claimant's cervical disc herniation was a consequence of progressive degeneration; not his MVA. However, on cross examination, Dr. Burris admitted that he had limited information regarding the details of the injury and no records to support that Claimant had any prior complaints of pain or treatment directed to Claimant's neck. Furthermore, Dr. Burris admitted that in some patients, symptoms of disc herniation can manifest up to a week after injury and that if Claimant's disc herniation was present before August 19, 2014 he would have expected to see symptoms. Finally, Dr. Burris conceded that it was possible that Claimant's pre-existing degenerative disc disease was aggravated by Claimant's MVA.

30. While Claimant's recall concerning his accident is limited, there is, as noted above, an accident report completed by a Trooper from the Colorado State Patrol which contains statements documenting specific details concerning the accident. Despite Dr. Burris' indication otherwise, there is a victim statement from Mr. Pearson containing

information regarding the collision, including the speeds involved, the extent of damage to the vehicles concerned and the injuries claimed by both parties.[1]

31. Based upon the evidence presented, the ALJ finds that at the time of the accident and for several hours afterward, Claimant's mental state was considerably compromised secondary to his hypoglycemic event and subsequent syncope. Consequently, the ALJ finds Claimant's suggestion that he merely "bumped" into another car an unreliable understanding and a gross misstatement of what actually occurred. Based upon the accident materials submitted, the ALJ finds that the impact with the rear of the Mr. Pearson's car was sufficient to leave both cars with major damage and both parties complaining of neck pain and in the case of Claimant with chest pain for approximately three months, despite the fact that Mr. Pearson was traveling away from Claimant at a rate of 30 MPH when he was hit. The ALJ finds this evidence suggestive that the impact between Claimant's vehicle and the car driven by Dr. Pearson was considerable, not merely a "bump"

32. Based upon the totality of the evidence presented, the ALJ finds that the collision with the back of Mr. Pearson's car, more probably than not, caused a contusion to Claimant's chest wall[2] and aggravated Claimant's pre-existing, albeit asymptomatic, degenerative disc disease in his neck leading to cervical disc herniation which manifest itself originally as neck pain per his accident report statement and his verbal report to Dr. Bodrero on August 29, 2014. Only after Claimant's chest (rib) pain subsided did he focus on his neck and his radicular arm pain. Dr. Burris' opinion that Claimant's disc herniation is solely related to degenerative change rather than the August 19, 2014 MVA is unpersuasive.

33. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine in the form of a disc herniation at C6-C7 on August 19, 2014 after colliding with another vehicle while on this return trip to Colorado Springs after conducting property inspections in Pueblo.

34. Claimant has proven by a preponderance of the evidence that Respondents failed to properly designate a provider in the first instance to attend to Claimant's compensable neck injury.

35. Claimant presented evidence which establishes an average weekly wage of $1,429.86. Documentation entered into evidence regarding this issue consists of the wage records demonstrating Claimant's gross wages from August 30, 2013 through August 29, 2014. The injury in this case occurred on August 19, 2014. Wage records submitted into evidence for the first two weeks of August 2014 establish that Claimant

---

[1] Mr. Pearson's statement notes that he was hit from behind while traveling 30 MPH and that Claimant's car had visible front end damage and was leaking fluids. Moreover, Mr. Pearson reported that he had also sustained neck pain as a consequence of the collision. Finally, the Trooper completed accident report details the extent of damage to the vehicles as major.

[2] Likely from the use of his seatbelt as referenced by Dr. Bodrero and which the ALJ finds constitutes evidence of trauma despite Dr. Burris' suggestion otherwise.

was paid $2,678.97 leading up to the date of injury. When one performs the necessary calculation ($2,678.97 / 2 (weeks) = $1,339.48), Claimant's average weekly wage, at the time of injury was $1,339.48. However, the records also establish that Claimant was paid an Annual Incentive Plan Bonus on March 14, 2014. The Bonus was paid in two installments totaling $4,700.00. Calculating the weekly value of Claimant's bonus into his AWW calculation of his AWW increases his AWW to $1,429.86.

36. Claimant has proven by a preponderance of the evidence that he was placed on a mandatory LOA beginning August 20, 2014 and continuing thereafter for a period of an additional four days. Claimant was also incapable of working due to the effects of his compensable neck injury from April 1, 2015 through September 29, 2015. Consequently, the ALJ finds Claimant entitled to temporary total disability benefits for this time period.

37. Claimant has proven that he was returned to work in a modified duty capacity, four hours per day, as a consequence of his compensable neck injury, beginning October 1, 2015 and continuing through October 15, 2015.

38. Respondents are entitled to offset any TTD benefits paid to Claimant as a consequence of his receipt of STD benefits.

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). The ALJ has carefully considered the testimony of Claimant. Outside of his previously reported indication that he "bumped" another car, which the ALJ finds unreliable given Claimant's mental status at the time of the report, the ALJ finds Claimant to be a credible and consistent historian/witness.

Compensability

D. As found above, Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his cervical spine after colliding with another car while driving to Colorado Springs after completing his property inspections in Pueblo. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

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). 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). In this case, there is a question of whether Claimant's injuries arose out of and occurred in the course of employment, since he was driving back to Colorado Springs after having completed his last inspection of the day and he arguably had pre-existing degenerative disc disease in his cervical spine.

F. Ordinarily, an employee injured while traveling to or from work is not entitled to workers' compensation benefits because, absent "special circumstances", that employee is not within the course or scope of employment during such travel. *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967); *Mountain West Fabricators v. Madden,* 958 P.2d 482 (Colo. App. 1997), *affd,* 977 P.2d 861. However, the travel status exception applies when the employer requires the claimant to travel. *Tatum-Reese Development Corp. v. Industrial Commission,* (30 Colo. App.) 149, 490 P.2d 94 (1971). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location established for the performance of his duties, the risks of such travel become risks of the employment. *Staff Adm'rs, Inc. v. Industrial Claim Appeals Office* 958 P.2d 509 (Colo. App. 1997), *citing Martin K. Eby Construction Co. v. Industrial Commission,* 151 Colo. 320, 377 P.2d 745 (1963). Here,

Claimant's travel occurred during working hours[3]; was at the implied or express direction of Employer and Claimant was performing a service, i.e. a damage inspection requested by Employer. Moreover, traveling between the Employer's job assignments was required to complete the inspections. Consequently, as a likely inducement to accept such employment, Employer provided a vehicle and paid for the cost of fuel associated with Claimant's travel. Injuries sustained as a consequence of travel under these circumstances has been determined to be compensable. See *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); see also, *Whale Communications v. Claimants in Death of Osborn*, 759 P.2d 848 (Colo. App. 1988); *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). Based upon the evidence presented in this case, the undersigned concludes that "special circumstances" exist which brings Claimant's accident within the course of employment.

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment – related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). As noted above, the ALJ is convinced that Claimants cervical pain was a consequence of his forceful impact with the rear end of Mr. Pearson's car. As found, the ALJ is persuaded that Claimant's cervical pain arose as a direct consequence of the aggravation of his underlying pre-existing cervical degenerative disc disease occasioned by the August 19, 2014 MVA. Simply put, the aggravation of Claimant's pre-existing condition prompted by his MVA caused the need for treatment, including his posterior cervical formaninotomy and discectomy performed by Dr. Illig rather than the natural progression of Claimant's pre-existing conditions. For these reasons, the ALJ concludes that Claimant has established the requisite causal connection between his work related MVA and his cervical spine injury and subsequent need for treatment. Accordingly, the injury is compensable.

Medical Benefits

H. Respondents are liable for medical treatment reasonably necessary to

[3] Based upon the testimony of Claimant that he normally downloads pictures taken of the damages observed during his inspection after he arrives back at his office and that he intended to begin the preparation of his written damage estimates from inspections completed on August 19, 2014, the ALJ finds that Claimant's work day was not complete when the accident occurred.

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). Nonetheless, Respondents are only liable for authorized or emergency medical treatment. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). In *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990), the court held that in cases of medical emergency the claimant need not seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. *Timko v. Cub Foods* W. C. No. 3- 969-031 (June 29, 2005). The emergency exception is not necessarily limited to situations where life is threatened. *Bunch v. Industrial Claim Appeals Office* 148 P.3d 381 (Colo. App. 2006). Although the ALJ concludes from the evidence presented that Claimant's life likely was not in jeopardy, his treatment in the emergency room constituted a bona fide emergency for which treatment could be obtained without prior authorization nonetheless. Here Claimant had little recall of the events surrounding his accident, although it was apparent he had been in one, his mental capacity remained impaired and he was experiencing chest pain arm pain. In light of this these factors, it was prudent for Claimant to seek care in the emergency room without waiting for authorization from Respondents.

I. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; Yeck v. Industrial Claim Appeals Office, 996 P.2d 228 (Colo. App. 1999); Pickett v. Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973).

J. In order to assert the statutory right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 545 (Colo. App. 1987). The employer's failure to designate the authorized treating physician results in the right of selection passing to the claimant. *Id*. The employer's duty 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. See *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). Based upon the evidence presented, the ALJ concludes that Respondents failed to designate a provider to attend to Claimant's compensable neck injury. Consequently, the right of selection passed to Claimant. Here, the unrefuted evidence establishes that Claimant contacted his supervisor upon his return from the ER informing him of the

circumstances surrounding his accident, the damage to his car and his treatment in the ER. The ALJ finds and concludes that this constitutes sufficient notice to place a "reasonably conscientious supervisor that the case may involve a claim for compensation. Nonetheless, while Claimant was placed on five days leave, his manager never designated a provider. Accordingly, the right of selection passed to Claimant had he effectively chose to treat with Dr. Bodrero. The ALJ concludes that Dr. Bodrero is the authorized treating provider (ATP) in this case.

K. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, the evidence presented convinces the ALJ that Dr. Bodrero made a referral to Dr. Illig in the normal progression of Claimant's treatment once the MRI results revealed internal disc disruption for which additional treatment opinions were reasonable and necessary. Consequently, the ALJ finds and concludes that Dr. Illig is also an authorized treating physician.

L. 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). As found, the ALJ is persuaded that Claimant's cervical pain and subsequent need for treatment, including his posterior cervical formaninotomy and discectomy arose as a direct consequence of the aggravation of his underlying pre-existing cervical degenerative disc disease occasioned by the August 19, 2014 MVA. Moreover, the treatment Claimant received at the hand of Dr. Bodrero and Dr. Illig was reasonable and necessary to cure and relieve him of the effects of his compensable neck injury.

AWW

M. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best

evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the testimony and the wage records submitted into evidence. In this case, the ALJ concludes that Respondents methodology in calculating Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's true wage loss and diminished earning capacity. Instead, the ALJ notes that Claimant was a salaried employee at the time of his MVA. According to the wage records submitted, Claimant earned $2,678.97 for the first two weeks of August 2014 (through August 15, 2014), four days prior to his August 19, 2014 MVA. Dividing this figure in half to account for one week of earnings yields a figure of $1,339.48. Based upon the evidence presented, the ALJ finds this was Claimant's AWW at the time of his MVA. However, the records also reflect that Claimant was paid an Annual Incentive Plan Bonus on March 14, 2014. The Bonus was paid in two installments totaling $4,700.00. As this was money Claimant earned by meeting incentive plan goals which was paid in 2014, the ALJ concludes that it would be fundamentally unfair to exclude or prorate it from/in a calculation of Claimant's overall AWW. Accordingly, the ALJ calculates Claimant's $4,700 bonus to equal 90.38 per week ($4700.00 / 52= 90.38) which the ALJ adds to Claimant's "regular salary" to calculate an AWW of $1,429.86. The ALJ finds and concludes that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his August 19, 2014 compensable work related injury.

TTD/TPD

N. To receive temporary disability benefits, the Claimant must prove the injury caused a disability, he leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Here, Claimant was placed on mandatory leave as a consequence of his compensable injury from August 20, 2014 through August 25, 2014. Moreover, Claimant was unable to work as a direct consequence of his compensable work related injury from April 1, 2014 through September 29, 2014. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning August 20, 2014 and for an additional four days thereafter and for the period extending from April 1, 2014 through September 29, 2014 at a rate of sixty-six and two-thirds percent of her AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1). Because Claimant's period of disability lasted longer than two weeks from the date he left work as a consequence of his injury, TTD is recoverable from the date Claimant left work, i.e. August 20, 2014. See C.R.S. § 8-42-103(1)(b).

Claimant returned to work on October 1, 2015 and worked through October 15, 2015 in a modified capacity. Claimant worked and was paid for 4 hours per day per Dr. Illig's restriction rather than the 8 hours/day he worked prior to his compensable injury. Consequently, Claimant experienced a wage loss secondary to the effects of his industrial injury and thus is entitled to temporary partial disability (TPD) for the time periods extending from October 1, 2015 through October 15, 2015.

Offsets

Short Term Disability Benefits

O. Pursuant to C.R.S. § 8-42-103(1)(d)(I) the aggregate benefits payable to a Claimant for TTD shall be reduced, but not below zero, "by an amount equal as nearly as practical" to the amount of any benefits paid to a Claimant under any disability plan financed in whole or in part by the employer, subject to the following limitations:

> (A) Where the employee has contributed to the . . . disability plan, benefits shall be reduced . . . *in an amount proportional to the employer's percentage of total contributions to the employer . . . disability plan.*
>
> (B) Where the employer . . . disability plan provides by its terms that benefits are precluded there under in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in paragraph (d) shall not be applicable to the extent of the amount so precluded.

The "offsets" provided for under C.R.S. § 8-42-103(1)(d)(I) are statutory in nature. Consequently, Respondent's are entitled to apply the provisions of C.R.S. § 8-42-103(1)(d)(I) and offset the TTD benefit to be paid to Claimant if the circumstances raised by C.R.S. § 8-42-103(1)(d)(I) otherwise apply to the case. Here Claimant is entitled to TTD benefits and received periodic disability benefits under an employer sponsored disability plan which the evidence establishes he did not contribute to. In this case, the evidence presented at hearing focused on the amount of Claimant's contribution to the disability plan and the reduction in benefits provided for under the plan in the event that Claimant is found to be eligible for temporary worker's compensation" benefits rather than the amount of STD benefit paid although it is clear from the documentary evidence submitted that Claimant did not contribute to the disability plan. Consequently, the ALJ concludes that insufficient evidence was presented to determine the amount of any "offset" which respondents may assert entitlement to. Thus, the order of this ALJ is limited to an indication that the statutory provisions of C.R.S. § 8-42-103(1)(d)(I) apply to this case.

ORDER

It is therefore ordered that:

1. Claimant's August 19, 2014 neck injury is deemed compensable.

2. Respondents shall pay for all medical expenses associated with Claimant's treatment and care received through the ER at Penrose-St. Francis Hospital.

3. Dr. Bodrero is Claimant's ATP in this case. Respondent shall pay for all reasonable, necessary and related treatment resulting from Claimants August 19, 2014 injury as provided by Dr. Bodrero and any of his referrals, including Dr. Illig.

4. Respondent shall pay for all reasonable, necessary and related medical treatment, provided by Dr. Illig including, but not limited to, the posterior cervical formaninotomy and discectomy performed on July 20, 2015 and the necessary post surgical care.

5. Claimant's AWW is $1,449.86.

6. Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), beginning August 20, 2014 for a period of five days and from April 1, 2015 through September 29, 2015 at a rate of sixty-six and two-thirds percent of Claimant's average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1). Respondents are entitled to offset Claimant's TTD for STD received by Claimant during this time period.

7. Respondents shall pay temporary partial disability benefits (TPD) in accordance with C.R.S. § 8-42-106 at a rate of sixty-six and two-thirds percent of the difference between Claimant's AWW at the time of the injury and Claimant's AWW during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for the time periods October 1, 2015 through October 15, 2015.

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

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

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

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 8, 2016

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a frostbite injury proximately caused by the performance of service arising out of and in the course of his employment?

- What is Claimant's average weekly wage?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the periods April 4, 2015 through April 8, 2015 and April 10, 2015 through June 9, 2015?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary partial disability benefits?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits as a result of the alleged injury?

- Is Claimant subject to penalties for failure timely to report the injury in writing?

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 14 were received into evidence. Respondents' Exhibits A though D were received into evidence.

2. Claimant was employed as an order selector at the Employer's food storage facility. This job required Claimant to select cases of food and place them on a cart pulled by a "tugger." When the order was completely selected Claimant drove the tugger to a loading dock where he would detach and leave the cart. Claimant worked a night shift. This shift commenced at approximately 5:00 p.m. and ended 8 to 10 hours later on the following morning. Claimant's shift typically included 2 fifteen-minute breaks and 1 thirty- minute lunch period.

3. Claimant was sometimes required to select cases of food stored in a large freezer. The temperature in the freezer was typically at or below zero degrees. When working in the freezer Claimant was required to wear protective clothing including a freezer jacket and gloves supplied by the Employer.

4. Claimant testified as follows concerning his work shift commencing on the afternoon of March 25, 2015 and ending on the morning of March 26, 2015 (hereinafter the March 25 - 26 shift). Claimant was required to work in the freezer for the entire March 25 - 26 shift. Prior to the March 25 - 26 shift Claimant had not been assigned to work in the freezer for an entire shift, although he had worked in the freezer for 20 to 30 minutes at a time. While working in the freezer Claimant wore 2 pairs of gloves supplied by the Employer. During the March 25 - 26 shift Claimant was also required to wear a "scanner" device. Claimant wore part of the scanner, which he described as similar to a "printer," on his right "hand" where it was secured with a "tightening" mechanism. Claimant wore another part of the scanner on his right index finger. Claimant explained that because his fingers are "small" he wrapped tape around the outside of the gloves covering the right index finger in order to keep the scanner part in place. Claimant wore the tape around his right index finger for the entire March 25 - 26 shift.

5. Claimant did not testify to a specific amount of time that he spent inside the freezer during the March 25 - 26 shift. Rather he testified that the amount of time spent in the freezer depended on how many cases he was selecting. Claimant also testified that when he left the freezer to deliver the order he would "quickly" return to the freezer.

6. Employer "shift summary information" persuasively demonstrates that Claimant clocked in to work at 5:20 p.m. on March 25, 2015 and clocked out at 2:47 a.m. on March 26, 2015. This information also shows that Claimant selected a total of 1520 cases during the March 25 - 26 shift for an average of 179.91 cases per hour worked. The "shift summary information" record shows that on March 25-26 Claimant's "clock code" was "pick frozen" and that his "job name" was "picker/freezer."

7. Claimant testified that when he went home after the March 25 - 26 shift he realized there was something wrong with his right index finger. However, the finger was not "hurting" at that time.

8. Claimant testified that during the time period from the end of March 2015 through April 2015 he did not do anything "at home" to expose his finger to cold temperatures.

9. Claimant continued working his regular duties after the March 25 - 26 shift. He did not seek any medical treatment for his right index finger until April 1, 2015.

10. Claimant testified that prior to commencing his shift on April 1, 2015 he noticed fluid coming out of his right index finger. Consequently, he decided to seek treatment at Medcor. Claimant explained that Medcor has a facility located on the Employer's premises where employees may seek treatment for work-related and non-work-related medical problems. Claimant testified he did not know what was wrong with his finger when decided to seek treatment at Medcor.

11. On April 1, 2015 Claimant was seen at Medcor by a registered nurse. The encounter lasted 5 minutes. Claimant complained of "left [sic] index finger swelling and drainage." Claimant was unable to identify a "work related event that resulted in injury." The Medcor nurse observed "significant swelling to left [sic] index finger" and "weeping clear fluid from a couple of small breaks in skin." The nurse's impression was "left [sic] finger infection." The nurse advised Claimant that if felt his condition was "work related he should report the injury to his supervisor and return to the clinic for likely referral for abx treatment." Conversely if Claimant did not feel the condition was work related he was advised that he "should follow-up with his PCP urgently for evaluation and treatment."

12. The parties stipulated that the there was an error in transcription of the April 1, 2015 Medcor note and Claimant reported *right* index finger problems rather than left index finger problems.

13. Claimant testified that on April 3, 2015 he realized his hand was hurting. Consequently he decided to report to the emergency room (ER) at Medical Center of Aurora (MCA). Claimant further testified that he left a message with the Employer stating he would not be able to work the shift of April 3 - 4, 2015. Claimant stated that in this message he told the Employer that he realized he hurt his hand while working in the freezer and was going to see the doctor.

14. On April 3, 2015 PA Catherine Kushner examined and treated Claimant at the MCA ER. Claimant gave a history of right finger pain with onset 4 days previously. Claimant advised that he entered the refrigerator at the warehouse where he worked but denied "injuring his finger in any way." Claimant stated that after he went home from work he experienced some finger pain and noted swelling the following morning. The pain from his finger was reportedly shooting up the arm. On physical examination (PE) of the right hand PA Kushner noted distal right forefinger swelling, pain with palpation, limited range of motion and a "superficial abrasion" to the dorsal aspect with serosanginous fluid. PA Kushner's "primary impression" was "felon" with secondary impressions of cellulitis and abscess of the digit, finger infection and left [sic] forefinger pain. PA Kushner performed an "I & D" procedure and prescribed clindamycin, percocet, zofran, naprosyn and tetanus bacitracin to the finger. PA Kushner's note was attested to by Jonathan Savage, D.O.

15. On April 3, 2015 PA Kushner issued a work release excusing Claimant from work from April 3 through April 6, 2015.

16. Claimant testified as follows. He did not work between April 4, 2015 and June 10, 2015, except for one day on April 9, 2015. On June 10, 2015 the Employer offered him light duty work and he accepted the offer. He worked light duty from June 10, 2015 until July 1, 2015 when he was released to return to work at full duty.

17. On April 5, 2015 Keith Tucker, Claimant's supervisor, sent an email to various Employer personnel (including Edward Rhodes) stating that Claimant had come to work with a doctor's note indicating that Claimant needed to be off work until April 6,

2015. Tucker noted that Claimant had "called in" and mentioned he hurt his finger in the freezer and that was the reason he did not work on Friday (presumably the April 3 – 4, 2015 shift.). Tucker stated that Claimant wanted to return to work but Tucker told Claimant that he could not work until he received a "full release from the doctor."

18. Edward Rhodes (Rhodes) testified on behalf of the Respondents. Rhodes is the Employer's safety supervisor with responsibility for workers' compensation issues. At the time of Claimant's alleged injury he was the night warehouse supervisor in charge of all order selectors. Rhodes first learned that Claimant was alleging there was something wrong with his finger when he received an email from Medcor on April 1, 2015.

19. Rhodes testified that he has performed the job of order selector in the freezer. Rhodes testified that when a selector leaves the freezer the amount of time the selector is outside the freezer varies but is about 2 to 3 minutes. Rhodes stated that the Employer's records do not establish the amount of time Claimant spent inside and outside of the freezer on the March 25 - 26 shift.

20. Rhodes testified that on April 6, 2015 Claimant came into work to talk. This conversation occurred in English. Rhodes opined the Claimant was "confused" as to whether his finger problem was work-related or not. Rhodes understood Claimant had a "felon" injury that Rhodes believed to be some type of infection. Claimant suggested filing a workers' compensation claim for this condition and Rhodes advised Claimant that such a claim would probably be "investigated" because of the type of injury and Claimant's "late reporting." However, Rhodes told Claimant that he was free to file a workers' compensation claim.

21. On April 8, 2015 Claimant returned to MCA where he was examined and treated by PA Jessica Chonlahan and George Sassu, D.O. The Claimant's "stated complaint" was "wound check" and the MCA patient record describes the chief complaint as "non-urgent general care." The history indicates Claimant presented for a "right index finger injury about + 2 weeks ago from refidgator [sic] injury at work." The right distal second digit was described as necrotic with bloody discharge from tissue and was discolored to the middle phalanx. The differential diagnoses included burn, cellulitis, hematoma and laceration. The "primary impression" was "frostbite." Claimant was referred to Jonathan Sollender, M.D. for a "debridement."

22. On April 8, 2015 Claimant reported to the Employer that he sustained an injury to his finger while working in the freezer "last week." On April 8, 2015 Tucker completed and signed a First Report of Injury (First Report). The First Report states that Claimant reported a "frostbite" injury to his right "pointer finger" that occurred on March 25, 2015. Claimant stated that on March 25, 2015 "he was selecting in the freezer for one full day" but "did not notice anything was wrong with his finger until the following week when he reported it."

23. On April 8, 2015 Employer provided Claimant with a "Choice of Provider Acknowledgement." Claimant selected Concentra as the medical provider for the reported injury.

24. On April 8, 2015 PA-C Glenn Petersen examined Claimant at Concentra. The office note indicates that the "date of injury" and the "date of service" were both April 8, 2015. However, the history of present illness states that Claimant "worked for first time in cooler with gloves on for 8 hours on April 1st and numbness tip of RIF." On PE PA Petersen noted the right index finger exhibited "hard early necrotic tissue and poor capillary refill." There was a "[H]ard eschar distal phalanx with transitional area middle phalanx." PA Petersen observed Claimant was "talking fast" and was "difficult to understand at times since he [was] taking Oxycodone." PA Petersen assessed "Frostbite with tissue necrosis of finger (991.1)." PA Petersen referred Claimant to a "hand specialist" and imposed restrictions of no work in the cooler, no lifting with the right hand and no work when taking narcotics.

25. Claimant denied that he told Concentra he worked in the freezer for the first time on April 1, 2015. Claimant testified that he told Concentra that he worked in the freezer on March 25 and March 26.

26. On April 10, 2015 PA Petersen again examined Claimant. PA Petersen noted "doubt about injury and when it happened." PA Petersen "advised" Claimant to go to MCA because it was "unclear" if the claim would be "accepted or denied due to variable story of when injured and when work notified."

27. Claimant returned to MCA late in the evening of April 10, 2015. Claimant was given Norco and advised to see Dr. Sollender.

28. On April 13, 2015 Dr. Sollender examined Claimant. Claimant gave a history that on March 26, 2015 he worked in a freezer for about 7 hours while wearing gloves. Claimant reported he had "no specific issues" with his fingers or hand on that day. However, one week later around April 1, 2015 Claimant noticed some "water coming out from his right index finger." Dr. Sollender noted he could not get Claimant to explain whether he had a blister prior to April 1 because there was "some degree of language barrier." Dr. Sollender noted Claimant was seen by a "company physician" on April 1, 2015. Dr. Sollender also reviewed the MCA ER reports of April 3 and April 8, 2015. On PE Dr. Sollender observed that Claimant had a "necrotic right index fingertip" with "hypopigmented pink skin from the base of the nail proximal to the distal aspect of the middle phalanx." There was an area of "black" 1.5 cm in circumference that included part of the distal nail plate and nail bed.

29. In the April 13, 2015 office note Dr. Sollender wrote that Claimant's history and examination were "all consistent with a frostbite injury sustained from prolonged cold exposure at work." Dr. Sollender explained that there was "no other obvious cause" for Claimant's condition. Dr. Sollender further opined that Claimant never had an infected finger despite the ER diagnosis of a felon of the index finger. Dr. Sollender stated that he would oversee Claimant's work restrictions because Concentra's

restrictions were "inadequate." Dr. Sollender restricted Claimant to no use of the right hand, no work in a freezer and no exposure to any temperature below 60 degrees.

30. On April 15, 2015 Concentra physician Kirk Holmboe, M.D., completed a Physician's Report of Workers' Compensation Injury (WC 164). Dr. Holmboe marked a box indicating that the "objective findings" were consistent with "history and/or work related mechanism of injury." Dr. Holmboe stated Claimant needed referral for treatment and evaluation of "Frostbite necrosis." Dr. Holmboe imposed restrictions of no work when taking narcotics, no work in the cooler, no lifting with the right hand and no use of the right upper extremity.

31. Dr. Sollender again examined Claimant on April 20, 2015. At this examination Claimant reported the injury occurred on April 8, 2015 rather than March 25 - 26, 2015. Dr. Sollender observed that April 8 was the date the claim was filed and made "no sense" as the date of injury because Claimant had noticed drainage from the finger on April 1, 2015. Dr. Sollender commented that he could "not help [Claimant] with his reporting difficulties." Dr. Sollender remained "confident" there was a "frost bite injury" but he could not establish the exact date of injury based on "information conveyed" by Claimant. Dr. Sollender also noted that Claimant had given him FMLA paperwork to complete. However, Dr. Sollender noted that he told the Employer that he could not "in good conscience fill out FMLA paperwork for an occupational injury." Dr. Sollender continued restrictions of no use of the right hand, no work in a freezer and no exposure to any temperature below 60 degrees.

32. Claimant admitted that he told Dr. Sollender that the date of injury was April 8, 2015. Claimant explained the April 8 was the day he went to Concentra and he "wanted everything to be in order."

33. On April 21, 2015 Claimant was again seen at MCA. Claimant reported he had run out of medication and needed "pain control." Claimant advised MCA that his "workman's comp" had "not come through" and his surgeon "would not see him without it." Claimant also reported that the "workman's comp doctor instructed him to go to the ER for pain medication refill." Claimant was advised to see Dr. Sollender and that "further pain medications should be" prescribed by the "hand surgeon."

34. On May 8, 2015 PA-C Catherine Peterson examined Claimant at Concentra. PA Peterson referred Claimant to hand specialist Craig Davis, M.D., for a "second opinion" concerning evaluation and treatment of Claimant's frostbite injury. PA Peterson prescribed acetaminophen and Tramadol. She restricted Claimant to no work in the freezer, no work at temperatures below 60 degrees and no use of the right upper extremity.

35. Dr. Davis examined Claimant on June 2, 2015. Dr. Davis's report lists the date of injury as April 8, 2015. However, Dr. Davis notes that Claimant gave a history that on March 26, 2015 he was "working in a freezer which was not a part of his usual job" and "subsequently noticed some discoloration of his right index fingertip." Dr. Davis assessed "right index finger frostbite." Dr. Davis was concerned that the "wound may

communicate with the bone" resulting in a possible infection and consequent amputation of the fingertip. However, Dr. Davis thought it appropriate to continue treating the finger with daily soaks, antibiotic ointment and therapy for "desensitization and work conditioning."

36. On July 1, 2015 PA-C Lacie Esser examined Claimant at Concentra. Claimant reported that he did not have any concerns about returning to work at his regular job. There was no open wound or pain. PA-C Esser released Claimant to return to work at regular duty without restrictions.

FINDINGS OF FACT CONCERNING COMPENSABILITY

37. Claimant proved it is more probably true than not that on March 25 and March 26, 2015 he sustained a frostbite injury to his right index finger. Claimant proved it is more probably true than not that the frostbite injury was proximately caused by the performance of service arising out of and in the course of his employment as an order selector.

38. The Employer records establish that on the March 25 - March 26, 2015 shift Claimant was "clocked in" for 9 hours 27 minutes. It is probable that during this time Claimant was on break for 30 minutes and took a 30 minute lunch period.

39. Claimant credibly testified that on March 25 – 26, 2015 he was assigned to work in the freezer for his entire shift, and this was the first time he worked in the freezer for more than thirty minutes during any shift. Claimant credibly testified that whenever he left the freezer to deliver a cart to the loading dock he quickly returned to the freezer to select more orders. Claimant's testimony that he was outside of the freezer for only a short periods of time is corroborated by Rhodes. Rhodes credibly testified that the typical amount of time a selector was outside the freezer was 2 to 3 minutes. Claimant's testimony is also supported by evidence that he selected 1520 cases of food during the March 25 – 26, 2015 shift.

40. Claimant's testimony that he spent substantial amounts of time in the freezer is also consistent with the history he gave to the Employer and to several medical providers. The First report indicates that Claimant told the Employer that on March 25, 2015 he spent "one full shift" in the freezer. On April 8, 2015 Claimant told PA-C Petersen that he worked in the freezer for "8 hours." On April 13, 2015 Claimant told Dr. Sollender that he worked in the freezer for about 7 hours.

41. Although the exact amount of time Claimant spent in the freezer on March 25 – 26, 2015 cannot be established with certainty, the ALJ infers that Claimant spent many hours working in the freezer on March 25 – 26. The credible evidence also establishes that the temperature in the freezer was at or below zero degrees during Claimant's shift.

42. Claimant credibly testified that from the end of March 2015 through the beginning of April 2015 he did not do anything at home to expose his right index finger to cold temperatures.

43. The ALJ finds that Claimant's testimony is not rendered incredible simply because the medical records reflect that he reported several dates of injury to different medical providers. The ALJ is persuaded that during the first week after the March 25 - 26, 2015 shift Claimant was uncertain of what was wrong with his finger and the cause of the problem. It was not until April 8, 2015 that Claimant received a diagnosis of frostbite at the MCA ER. At that time Claimant affirmatively reported to the Employer that he believed his injury occurred when he was required to work in the freezer during the March 25 – 26 shift. When Claimant was seen at Concentra on April 8, 2015 PA-C Petersen recorded that the date of injury was April 8, 2015 even though he took a history that Claimant was exposed to cold on April 1, 2015. Moreover, PA-C Petersen noted that he had trouble communicating with Claimant because Claimant was talking rapidly and was on Oxycodone. Dr. Sollender also noted some difficulty communicating with Claimant. At any rate, Claimant's testimony that he was exposed to substantial periods of very cold temperatures is corroborated by the Employer's records.

44. Dr. Sollender credibly opined that Claimant's exposure to cold temperatures while working in the freezer caused Claimant to develop frostbite of the right index finger. Dr. Sollender was aware of Claimant's history, the fact that MCA initially diagnosed Claimant with an infection and the condition of Claimant's finger on April 13, 2015. On April 13, 2015 Dr. Sollender persuasively opined that all of the information at his disposal was "consistent" with a frostbite injury sustained at work and that there was no other "obvious cause" that would explain the injury. It is true that on April 20, 2015 Claimant told Dr. Sollender that the date of injury was April 8, 2015 rather than March 25 – March 26, as Claimant initially reported. Despite this discrepancy in the Claimant's history Dr. Sollender declined to sign FMLA paperwork for what he continued to believe was a work-related frostbite injury.

45. Claimant credibly testified that on April 20, 2015 he told Dr. Sollender that the date of injury was April 8, 2015 because that was the date of injury being used by Concentra and Claimant wanted everything to be consistent. The credible evidence shows that prior to April 8, 2015 Claimant regularly reported his finger condition was caused by exposure to cold on a day prior to April 8.

46. Dr. Sollender's opinion that Claimant sustained frostbite as a result of exposure to cold at work is corroborated by the "primary impression" noted by PA Chonlahan and Dr. Sassu on April 8, 2015. Dr. Sollender's opinion is also corroborated by the Dr. Holmboe's April 15, 2015 WC 164 and Dr. Davis's June 2, 2015 report.

47. The ALJ is not persuaded by Respondents' assertion that Dr. Sollender's opinion is "illogical" and therefore not credible. Respondents argue that because Claimant was wearing two pairs of gloves on March 25 – 26, 2015 it makes no sense that only his right index finger developed a frostbite injury. However, Dr. Sollender, a qualified physician, did not express any reservation about diagnosing a work-related frostbite injury despite the fact that only the index finger was involved. Respondents did not produce any credible and persuasive medical evidence that explicitly refutes Dr. Sollender's opinion. Neither did Respondents produce any credible and persuasive medical evidence to support the "logic" that if Claimant's frostbite injury was the result of

exposure to cold in the freezer he would have developed frostbite in more than one digit. The weight of the evidence produced, including the medical evidence, does not support Respondents' attack on Dr. Sollender's credibility.

FINDINGS CONCERNING AVERAGE WEEKLY WAGE

48. Employer pay records demonstrate that Claimant earned $59,020.86 for the 52 week period from March 23, 2014 through March 21, 2015. The evidence establishes that Claimant was paid by the hour and worked longer hours on some days than others. Further, Rhodes credibly testified that order selectors receive extra pay if they exceed established productivity levels. In these circumstances the ALJ exercises his discretion and determines that the fairest method of determining Claimant's average weekly wage (AWW) is to divide $59,020.86 (total earnings for one year before date of injury) by the number of weeks in a year (52) to arrive at an AWW of $1,135.02.

49. The ALJ is not persuaded by Respondents' assertion that the $59,020.86 represents 27 bi-weekly pay periods rather than 26 biweekly pay periods. The employer records reflect that during the pay period ending September 6, 2014 Claimant received 2 checks rather than the usual 1 check. This evidence does not establish that the second check resulted from Claimant working an additional pay period. Rather, the persuasive evidence establishes it is more probable that the extra check was the result of Claimant working extra hours or because he was entitled to extra pay for high productivity.

FINDINGS OF FACT CONCERNING TEMPORARY DISABLITY BENEFITS

50. Claimant proved it is more probably true than not that he is entitled to an award of temporary total disability (TTD) benefits for the periods April 4, 2015 through April 8, 2015, and April 10, 2015 through June 9, 2015 (66 days). Claimant concedes he is not entitled to any TTD benefits for April 9, 2015 because he worked that day.

51. Claimant credibly testified that, except for April 9, 2015, he did not work at all from April 4, 2015 through June 9, 2015. The ALJ infers from this testimony that Claimant did not earn any wages for this period of time. The ALJ notes that Claimant's Exhibit 13 pp. 5-6 shows that Employer made some payments to Claimant during this period of time, but Respondents do not contend that these payments were of a type that would offset their liability for TTD benefits, if any.

52. Claimant proved that the frostbite injury disabled him from performing the duties of his regular employment commencing April 4, 2015. On April 3, 2015 PA-C Kushner noted Claimant's symptoms and released him from any work until April 6, 2015. On April 5, 2015 Tucker advised Claimant he could not return to work without a "full release" from the doctor. On April 8, 2015 PA-C Petersen diagnosed a frostbite injury and credibly restricted Claimant from working in the "cooler" and lifting with the right hand. On April 13, 2015, Dr. Sollender diagnosed a frostbite injury and credibly imposed restrictions of no use of the right hand, no work in the freezer and no exposure to temperatures less than 60 degrees. The ALJ infers that these credible restrictions

precluded Claimant from effectively performing all of the duties of his regular employment, which involved some work in the freezer and some exposure to temperatures of significantly less than 60 degrees.

53. Claimant proved he left work on April 4, 2015 as a result of the industrial injury. Claimant credibly testified that he called in sick prior to the April 3 - 4, 2015 shift because his hand was hurting. Claimant's testimony is corroborated by Tucker's April 5, 2015 email stating that Claimant reported that he hurt his hand in the freezer and that was the reason he did not work last Friday, April 3, 2015.

54. Claimant proved it is more probably true than not that he is entitled to an award of temporary partial disability (TPD) benefits for the period June 10, 2015 through June 27, 2015. Claimant credibly testified that on June 10, 2015 the Employer offered light duty work and he commenced light duty work. Claimant credibly testified that he returned to regular duty when he was released on July 1, 2015.

55. Employer pay records for the pay periods ending June 13, 2015 and June 27, 2015 reflect the Claimant worked 97.44 "regular" hours and earned a total of $821.42. The ALJ infers that all of the regular hours worked during the June 13 pay period were worked on or after June 10, 2015, when Claimant commenced light duty work.

56. The ALJ is unable to determine how much Claimant earned for the period of June 28, 2015 through June 30, 2015. The employer pay records reflect that for the pay period ending July 11, 2015 Claimant worked 80.11 regular hours and 13.96 overtime hours. However, the ALJ cannot meaningfully determine how many hours Claimant worked and how much he earned (if anything) on June 28, June 29, and June 30, 2015. The Employer pay records are not sufficiently precise to determine daily earnings. Therefore, Claimant failed to prove that he earned less than the daily equivalent of the average weekly for June 28 through June 30. Therefore Claimant failed to prove entitlement to TPD benefits for the period June 28 through June 30, 2015.

FINDINGS OF FACT CONCERNING MEDICAL BENEFITS

57. Claimant did not notify the Employer that he had a work-related injury until April 5, 2015. As determined in Finding of Fact 17, on April 5 Claimant told Tucker, his supervisor, that he injured his finger in the freezer, that he had missed work because of the injury to the finger and that he was restricted from returning to work. Tucker told Claimant that he could not return to work until he received a "full release" from the doctor. On April 5, 2015 a reasonably conscientious manger would have recognized that there was a potential claim for workers' compensation benefits, including medical benefits.

58. On April 8, 2015 Employer provided Claimant with a list of designated providers. The Claimant selected Concentra as the provider to treat the injury.

59. Claimant proved it is more probably true than not that treatment by the Medcor nurse on April 1, 2015 constituted "authorized medical treatment." At the time Claimant went to Medcor he had not notified the Employer that he believed he had sustained a work-related injury. Consequently the Employer had not yet had an opportunity to give Claimant a list of physicians and/or corporate providers from which the Claimant could select the authorized provider.

60. The treatment Claimant received at Medcor was the result of a bona fide emergency. The Medcor note indicates that Claimant was experiencing drainage from the right index finger. The Medcor nurse believed the Claimant had an infection and advised Claimant to either report a work-related injury to the Employer so that he could be referred for treatment or seek "urgent" treatment from his personal physician. The ALJ infers from this state of the evidence that on April 1, 2015 Claimant had acute symptoms in the finger that required medical treatment on an urgent basis.

61. The service provided at Medcor was reasonable and necessary to treat Claimant's work-related frostbite injury. Although the nurse did not diagnose frostbite, he recognized that Claimant's symptoms and condition warranted additional treatment by qualified medical providers. For this reason the nurse instructed Claimant to obtain additional care either by reporting a work-related injury to the Employer and obtaining a referral for abscess care or by seeking treatment from a private physician if the condition was not work-related. As shown by the subsequent diagnosis of frostbite and consequent course of treatment the Medcor nurse's recommendations were an appropriate first step in the treatment of the industrial injury.

62. The Claimant proved it is more probably true than not that the treatment he received at MCA on April 3, 2015 was "authorized" medical treatment. Specifically Claimant proved this treatment was necessitated by a bona fide emergency. The ALJ finds that when Claimant went to the MCA ER on April 3 he had some suspicion but was not certain that the condition of his finger was related to his work in the freezer. PA-C Kushner's April 3 ER note states that Claimant mentioned he "entered the refrigerator at the warehouse" but "denied injuring his finger in any way." Rhodes credibly testified that when he spoke to the Claimant on April 6, 2015 Claimant still seemed "confused" about whether or not his injury was work-related. On April 1 Claimant had been told by the Medcor nurse that he needed "urgent" treatment by his personal physician if he could not identify a work-related cause for his finger problem. Claimant credibly testified that on April 3 his was experiencing pain in his finger and determined that he needed medical attention. While at the MCA ER Claimant was prescribed antibiotic and pain relieving medications, underwent an "I & D" procedure and was restricted from work. The ALJ infers from this sequence of events that Claimant's April 3 visit to the ER was the result of a bona fide emergency. The Claimant sought and was provided treatment for serious finger pain. Claimant was not certain that the pain was related to his employment. The April 3 MCA records confirm that Claimant was not sure his finger pain was work-related. The records further establish that Claimant had a serious medical condition that warranted immediate attention.

63. The April 3, 2015 MCA records demonstrate that the treatment provided was reasonable and necessary to cure and relieve the effects of Claimant's frostbite.

64. The Claimant failed to prove that the treatment he received at MCA on April 8, 2015 was authorized. By April 8, 2015 Claimant believed his finger condition was related to his work in the freezer and had reported this conclusion to his supervisor, Tucker, on April 5, 2015. Thus, as of April 5, 2015 the Employer received sufficient notice of the injury to lead a reasonably prudent supervisor to conclude Claimant's finger condition might result in a claim for benefits. This notice triggered the Employer's statutory right to participate in the selection of the authorized treating physician (ATP) by providing Claimant a list of medical providers from which the Claimant could select the ATP.

65. The treatment Claimant received at MCA on April 8 was not the result of a bona fide emergency. The Claimant's sought treatment for a "wound check" and the MCA classified the visit as involving non-urgent general care. Moreover, on April 8 Claimant was able to complete paperwork involving his claim for workers' compensation and to go to Concentra for the visit with PA-C Petersen.

66. Visits to MCA after April 8, 2015 constituted authorized medical treatment. The credible evidence establishes that Concentra became the authorized provider on April 8, 2015. On April 10, 2010 PA-C Petersen referred Claimant back to MCA, apparently because Petersen was concerned the claim would be denied and necessary treatment for Claimant's finger would no longer be available through Concentra. This referral to MCA occurred in the normal progression of authorized treatment.

67. Medical records from Claimant's visits to MCA on April 10, 2015 and April 21, 2015 show that he was provided reasonable and necessary treatment for his finger. This included a referral to Dr. Sollender on April 10, 2015.

68. On April 8, 2010 Claimant designated Concentra as the authorized medical provider. Consequently all treatment provided by Concentra is authorized. The Concentra medical records demonstrate the treatment provided by Concentra was reasonable and necessary to treat Claimant's frostbite injury.

69. On April 10, 2015 Dr. Sollender became an authorized treating physician by virtue of MCA's referral in the natural progression of authorized treatment.

70. Dr. Sollender's records establish that the treatment he provided for Claimant's frostbite has been reasonable and necessary.

71. Treatment provided by Dr. Davis was authorized by virtue of the referral from Concentra on May 8, 2015. Dr. Davis's records establish that his examination and recommendations constituted reasonable and necessary medical treatment for Claimant's frostbite injury.

CONCLUSIONS OF LAW

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

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

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

COMPENSABILITY

Claimant contends he proved by a preponderance of the evidence that he sustained a frostbite injury to his right index finger that was proximately caused by the performance service arising out of and in the course of his employment as an order selector. The ALJ agrees with Claimant's argument.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

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

Claimant was required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment and disability benefits 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. 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). 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).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

As determined in Findings of Fact 37 through 47 Claimant proved it is more probably true than not that he sustained a frostbite injury to his right index finger that was proximately caused by the performance of service arising out of and in the course of his employment as an order selector. The ALJ is persuaded by Claimant's testimony that during the March 25 – March 26, 2015 shift he was exposed to extremely cold temperatures while working the majority of his shift in the Employer's freezer. The Claimant also credibly testified that he was not exposed to cold temperatures at home during the relevant time period. Dr. Sollender credibly and persuasively opined that Claimant sustained a frostbite injury as a result of the exposure to the cold at work and that there was no other "obvious explanation" for the injury. Dr. Sollender's diagnosis of a work-related frostbite injury is corroborated by other medical opinions as set forth in Finding of Fact 46. The evidence does not contain any credible and persuasive medical evidence that directly refutes Dr. Sollender's opinion or supports Respondents' theory that if Claimant was exposed to cold at work then he would necessarily have suffered frostbite to digits in addition to the right index finger.

AVERAGE WEEKLY WAGE

Claimant contends that his AWW is $1,135.02. Respondents' argument notwithstanding, the ALJ agrees with Claimant.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As determined in Findings of Fact 48 and 49, the ALJ concludes that it is appropriate to exercise his discretion to calculate Claimant's AWW based on Claimant's total earnings for the year prior to the date of injury and dividing by 52 weeks. It is appropriate to exercise the discretion afforded by § 8-42-102(3) because Claimant's weekly hours (and therefore earnings) varied and he was entitled to extra compensation if he exceeded production goals. As found, Claimant's average weekly wage is most fairly calculated as $1135.02.

TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABLITY BENEFITS

Claimant contends that he proved by a preponderance of the evidence that he is entitled to an award of TTD benefits from April 4, 2015 through June 9, 2015 (except for the day of April 9, 2015), and an ward of TPD benefits from June 10, 2015 through June 30, 2015.

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

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

As determined in Findings of Fact 50 through 53 Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits for the periods April 4, 2015 through April 8, 2015 and April 10, 2015 through June 9, 2015 (66 days). As found, Claimant proved that during these periods of time the effects of the industrial frostbite injury disabled him from performing all of the duties of his regular employment, caused him to leave work for a period of time in excess of three shifts and resulted in an actual wage loss. Insurer shall pay Claimant TTD benefits for these periods of time at the statutory rate of sixty-six and two-thirds percent of the AWW of $1,135.02. See § 8-42-105(1), C.R.S.

Section 8-42-106(1), C.R.S., provides as follows:

> In case of temporary partial disability the "employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of injury and the employee's average weekly wage during the continuance of the temporary partial disability."

As determined in Findings of Fact 54 through 56 Claimant proved he is entitled to an award of TTD benefits for the period of June 10, 2015 through June 27, 2015. This is a period of 18 days. If Claimant had worked for the AWW for 18 days he would have earned $2918.70 ($162.15 per day x 18 days). However, the Claimant was temporarily partially disabled during this period of time and he earned only $821.42. The difference between $2918.70 and $821.42 is $2097.28. Sixty-six and two-thirds percent of $2097.28 is $1396.79. Insurer shall pay Claimant $1396.79 in TPD benefits.

MEDICAL BENEFITS

Claimant contends that the medical services rendered by all of the providers in this case were authorized, reasonable and necessary to treat the effects of the frostbite injury. At hearing Respondents took the position that only Concentra providers and their referrals were "authorized" to treat the injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A), C.R.S. gives respondents the right in the first instance to designate the physician or corporate medical provider authorized to treat the injury. Respondents exercise this right by giving the Claimant a list of physicians and/or corporate medical providers from which the claimant may select the physician to attend the injury. *Patton v. Cobb Mechanical Contractors,* WC 4-793-307 and 4-794-075 (ICAO June 18, 2010). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

The respondents' obligation to give the Claimant a list of physicians and/or providers authorized to render treatment arises "forthwith" upon notice of an injury. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987); *Patton v. Cobb Mechanical Contractors, supra*. If the Employer fails to give the claimant a list of

providers "forthwith" after notice of an injury the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office, supra*; § 8-43-404(5)(a)(I)(A). Notice of the injury occurs when the Employer has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives before the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

WCRP 8-2(A)(1) provides that a copy of "the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." The ALJ infers from this rule that the Director of the Division of Workers' Compensation (DOWC) has determined that for purposes of § 8-43-404(5)(a)(I)(A) respondents act in a "forthwith" manner if they give the claimant a designated provider list within seven (7) days after notice of the injury.

A claimant may obtain "authorized treatment" without giving notice of an injury to the Employer and receiving a list of designated providers if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The question of whether a bona fide emergency existed is one of fact and is dependent on the particular circumstances of the case. *Drumm v. Benchmark Sales Agency*, WC 4-697-010 (ICAO July 5, 2007). Application of the emergency doctrine is not limited to situations where the claimant's life is threatened. *Bunch v. Industrial Claim Appeals Office, supra*; *Drumm v. Benchmark Sales Agency, supra.*

Authorized providers include medical providers to whom the claimant is directly referred by the employer as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

The ALJ concludes the treatment Claimant received at Medcor on April 1, 2015 was "authorized." As determined in Findings of Fact 59 and 60, the treatment Claimant received at Medcor was the result of a bona fide emergency. As determined in Finding of Fact 61, the treatment was reasonable and necessary to cure and relieve the effects of Claimant's frostbite injury.

The ALJ concludes that the treatment Claimant received at MCA on April 3, 2015 was authorized. As determined in Findings of Fact 62, the treatment was sought in the context of a bona fide emergency. Claimant was developing serious pain and was not sure whether this pain was work-related or not. He had recently been informed by the

Medcor nurse that he needed "urgent" treatment from his personal physician if the finger condition was not work-related. When Claimant went to the ER he was provided various treatments including medication and "I & D" procedure. This evidence demonstrates Claimant needed prompt attention for an emergent condition that could not be positively identified as work-related. The evidence is sufficient to establish that the April 3, 2015 was "authorized" under the emergency doctrine even though Claimant had not yet reported a work-related injury to the Employer. *Cf. Drumm v. Benchmark Sales Agency, supra*.

As determined in Finding of Fact 63 the treatment provided at the MCA ER on April 3, 2015 was reasonable and necessary to cure and relieve the effects of Claimant's frostbite injury.

The ALJ concludes the treatment Claimant received at MCA on April 8, 2015 was not authorized and is not compensable. As determined in Finding of Fact 65, by April 8, 2015 Claimant had reported to his supervisor that he sustained a work-related injury to his finger while working in the freezer. This notice triggered Respondents' right to participate in selection of the ATP by giving the Claimant a list of providers pursuant to § 8-43-404(5)(a)(I)(A). On April 8, 2015 the right of selection had not passed to Claimant because Respondents still had 4 days to provide Claimant with the provider list, and they actually did so on April 8. Moreover, on April 8 Claimant selected Concentra as the authorized provider and actually was treated at Concentra on April 8. For the reasons stated in Findings of Fact 65 the ALJ also determined the visit to MCA on April 8 was not the result of an emergency and is not authorized under the emergency doctrine. Insurer is not liable to pay the cost of this visit to MCA,

The ALJ concludes that Claimant's visits to MCA on April 10, 2015 and April 21, 2015 were authorized. As determined in Finding 66 PA-C referred Claimant to MCA in the normal progression of authorized treatment. As determined in Finding of Fact 67 the treatment provided by MCA on April 10 and April 21 was reasonable and necessary to cure and relieve the effects of Claimant's frostbite injury.

The ALJ concludes that, for the reasons stated in Findings of Fact 69 and 70 the treatment provided by Dr. Sollender was authorized, reasonable and necessary to cure and relieve the effects of Claimant's frostbite injury.

The ALJ concludes that, for the reasons stated in Finding of Fact 71 the treatment provided by Dr. Davis was authorized, reasonable and necessary to cure and relieve the effects of Claimant's frostbite injury.

LATE REPORTING PENALTY

The respondents seek a penalty against Claimant because he allegedly failed timely to report the injury in writing as required by § 8-43-102(1)(a), C.R.S.

Section 8-43-102(1)(a) provides that an employee who sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." For purposes of this statute a Claimant does not

sustain an "injury" until the Claimant as a "reasonable person" would recognize the nature, seriousness and probable compensable character of the injury. *Romero v. Industrial Commission*, 632 P.2d (Colo. App. 1981). If the employee fails to report the injury in writing "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management,* WC 4-519-354 (ICAO March 6, 2003).

Section 8-43-102(1)(a) also provides as follows: "Any other person who has notice of said injury may submit a written notice to the said person in charge or to the employer, and in that event the injured employee shall be relieved of the obligation to give such notice."

The ALJ concludes that Claimant, as a reasonable person, would not and did not recognize the nature, seriousness and probable compensable nature of his finger condition until April 3, 2015. Between March 25, 2015 and April 3, 2015 Claimant's symptoms were relatively minor and did not cause him to seek medical treatment of any kind until April 1, 2015. When Claimant went to Medcor on April 1, 2015 for an evaluation of his finger he was diagnosed with an "abscess" and the diagnosis of frostbite was not even mentioned. Moreover, on April 1 the Medcor nurse noted that Claimant could not identify "any work- related event" that resulted in injury.

It was not until April 3, 2015 that Claimant began missing work because of his finger symptoms. Tucker's April 5 email establishes that Claimant called into work on April 3, 2015 and left a message stating that he hurt his finger in the freezer and that was the reason he did not work the previous Friday. The ALJ infers from this evidence that by April 3, 2015 Claimant reasonably suspected that his finger condition was caused by working in the freezer and that the injury prevented him from performing his job.

On April 5, 2013 Tucker authored an email to various persons including Rhodes, then the night warehouse manager. The email advised that Claimant had called in and reported that he sustained an injury while working in the freezer, that Claimant missed work on April 3 - 4, 2015 because of the injury and that Tucker had sent Claimant home on April 5 because Claimant had a doctor's excuse. The ALJ concludes that Tucker's April 5, 2015 email constituted a written notice of injury that was addressed to the "employer" or person in charge within the meaning of § 8-43-102(1)(a). Because this written communication was authored within 4 days of the date Claimant sustained the "injury," Claimant was relieved of the obligation to himself report the injury in writing.

However, even if Claimant was obligated to file a written report within 4 days of April 3, 2015, and even if Claimant failed to do so, the ALJ would exercise his discretion not to impose a penalty of one day's compensation for the period of April 4, 2015 through April 8, 2015 (when Claimant completed a written report of injury). There is no credible and persuasive evidence that the Respondent suffered any prejudice, such as the loss of evidence, resulting from Claimant's failure to report the injury in writing until April 8, 2015. Rather, it appears Claimant continued working until April 3, 2015. When

Claimant ceased work on April 3 he orally advised his supervisor (Tucker) of the alleged injury and Tucker advised the employer of the injury by way of the April 5, 2015 email. On April 6, 2015, the day after the email, Rhodes conversed with Claimant about the alleged injury. Thus, it appears the employer received timely notice of Claimant's alleged injury and did not suffer any adverse consequences from the fact that Claimant did not report the injury in writing until April 8, 2015.

ORDER

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

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

2. Claimant's average weekly wage is $1,135.02

3. Insurer shall pay Claimant temporary total disability benefits for the periods April 4, 2015 through April 8, 2015 and April 10, 2015 through June 30, 2015. These benefits shall be based on the statutory formula and the average weekly wage.

4. Insurer shall pay Claimant temporary partial disability benefits in the amount of $1396.79.

5. Respondents shall pay reasonable and necessary medical benefits for the medical services rendered by Medcor, Concentra, Dr. Sollender, Dr. Davis and for treatment provided by the Medical Center of Aurora, except for the visit of April 8, 2015.

6. Respondents request for the imposition of penalties for late reporting of the injury is denied.

7. 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: January 22, 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
WORKERS' COMPENSATION NO. WC 4-982-264-02

ISSUES

- Whether Claimant is entitled to Temporary Total Disability benefits (TTD) after being terminated from her employment?

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a hand bindery worker.

2. Claimant had an admitted work related accident on December 3, 2014, while lifting a crate of books.

3. Claimant was diagnosed with a thoracic strain.

4. Claimant was given work restrictions, which Employer accommodated. Claimant did not miss any work and Claimant was paid her full wage.

5. Brandon Kunath is a hand bindery manager with Employer. Mr. Kunath was Claimant's supervisor.

6. Claimant was terminated on March 26, 2015.

7. Mr. Kunath credibly testified that Employer has a policy regarding employee termination and that the policy was followed regarding Claimant's termination.

8. Claimant's employment records were accepted into evidence.

9. According to an "Employee Corrective Action Form" dated April 21, 2014, Claimant received a written warning/reprimand concerning her work on the "Starz job #39066". According to the corrective action form, Claimant "improperly taped a pocket folder," which was sent to the customer with mistakes.

10. According to an "Employee Corrective Action Form" dated August 28, 2014, Claimant received a written warning/reprimand concerning her work on the "Fair Trade Winds job." According to the corrective action form, Claimant "drilled holes on the wrong side of the entire job of Fair Trade Winds, after being shown placement by both supervisor and a previous sample." Additionally, the corrective action form noted that Claimant failed show up at work on Wednesday, August 27, 2014. Claimant also failed to call Employer to let them know she would not be coming to work on August 27, 2014.

11. According to a "Personnel Action Form" dated March 26, 2015, Claimant was terminated for "unsatisfactory work performance" and "persistent quality issues." According to the personnel form, Claimant made mistakes on two additional jobs: "Job #50904 M.W.C.U.A." – was assembled by Claimant missing three pages of the book. "Job #51016 Aircell" – Claimant placed cards in crooked. Both jobs went to the customers with mistakes.

12. Mr. Kunath credibly testified that Claimant's termination was not related to her workers compensation accident/injuries.

13. Mr. Kunath credibly testified that he did not know why Claimant made mistakes on the Fair Trade Winds job or job #50904, in which she assembled a book missing three pages.

14. However, Mr. Kunath credibly testified that Claimant was responsible for quality assurance on the jobs she worked.

15. Claimant did not properly assure the quality of the Fair Trade Winds job, Starz job #39066, job #50904, and job#51016.

16. Claimant continued medical treatment after her termination. On May 12, 2015, Claimant was released to full work/activity duty with no work restrictions.

17. Based on the totality of the evidence, Claimant has failed to meet her burden of proving entitlement to TTD benefits between March 26, 2015 and May 12, 2015.

18. Based on the totality of the evidence, Respondent has satisfied its burden of proving that Claimant was terminated for cause.

CONCLUSIONS OF LAW

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

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that 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).

It is the ALJ's sole province to assess the credibility of the witnesses. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

The Colorado Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for the termination of the employment relationship. §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.; *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008).

Whether a claimant is at fault for causing a separation of employment, so as to bar claimant from receiving disability benefits is a factual issue for determination by the ALJ. A finding of fault requires a volitional act, *or* in the alternative, the exercise of a degree of control by a claimant over the circumstances leading to the termination. §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.; *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

Under the termination statutes, an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment and, thus not entitled to disability benefits. §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.; *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008).

The ALJ finds the corrective action forms, the personnel action forms and the testimony of Mr. Kunath that Claimant was responsible for quality assurance on the jobs she worked establish that is more likely than not that Claimant exercised of a degree of control over the circumstances leading to her termination. Based upon the credible testimony and persuasive evidence presented by Respondents, Claimant was terminated for cause as of March 26, 2015.

A claimant is eligible for temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts for more than three regular working days. §§ 8-42-103(1)(a, b) and 8-42-105(1), C.R.S.; *Anderson v. Longmont Toyota*, 102 P.3d 323, 327 (Colo. 2004).

Claimant has failed to meet her burden of proving that she is entitled to TTD benefits for the time period between March 26, 2015, her termination date, and May 12, 2015, the date Claimant was released to full work/activity duty with no work restrictions.

ORDER

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

1. Claimant was terminated for cause.

2. Claimant is not entitled to TTD benefits from the date of her termination (March 26, 2015) to the date Claimant was released to full duty (May 12, 2015).

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

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

DATED: January 11, 2016

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

STIPULATION

1. The parties stipulate to an average weekly wage of $750.00

ISSUES

Based on the stipulations reached by the parties, the issues remaining for adjudication at hearing are:

1. Whether the Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 17, 2015 ongoing.

2. If the Claimant establishes that he is entitled to temporary total disability benefits, whether the Respondents have established, by a preponderance of the evidence, that the Claimant is responsible for his termination of employment and, therefore, barred from recovering temporary disability benefits under the Act.

FINDINGS OF FACT

1. The Employer was an owner/operator of a specialized commercial vehicle that provided transportation services under contracts with third-party motor carriers. The Employer had started his business about nine (9) months prior to hiring the Claimant. The Employer hired the Claimant in March of 2015 to operate Employer's commercial vehicle over the day shift. The Claimant was Employer's only employee. The Claimant's job duties included the transportation of crude oil for Bridger, LLC under the terms of an Independent Contractor Operation Agreement between Bridger, LLC and Employer.

2. The Claimant testified that he had been performing this type of run under the Bridger contract for a short time prior to his work injury. He testified that he was never told by his Employer that he had to take a specific route to deliver the oil. The Claimant would pick up crude oil and deliver it where he was directed. There was an electronic system in the Employer's commercial vehicle called "PeopleNet Fleet Manager" that provided direction to the driver. Dispatch would program and set the loads through the PeopleNet system. When the Claimant would log in to the system, the loads that the dispatcher had programmed would show up. The Claimant testified credibly that this was how he knew which sites to visit. The Claimant testified that the directions to the sites were provided by the dispatchers. Jarrett Dias, the owner/operator for Employer confirmed that when a driver logged into the PeopleNet system, the screen would display the specific lease for the run and provide a specific route.

3. Mr. Dias testified that when he drove the vehicle, he would write down the route displayed on the screen, drive to the lease, pick up his load and then return on the same route he had driven in. Mr. Dias also testified that once the driver had the information from dispatch, the driver was to check the map for that lease that would provide designated routes for the run. Mr. Dias testified that he put a book in his truck that contained the map with the designated route for the lease. The map was provided by Bridger, LLC. Mr. Dias testified that the map in question for the April 17, 2015 delivery was the same map that is found at Respondents' Exhibit C. Mr. Dias testified that he showed the Claimant where the book was and told the Claimant that he had to follow the map with designated routes. The Claimant testified that prior to the date of the hearing, he had never seen a paper map for the route that he drove on April 17, 2015 and, specifically, that he had never seen the paper map at Respondents' Exhibit C.

4. The Claimant testified that he has no memory of the events of April 17, 2015. He testified that the day prior to April 17, 2015 and the three days following are "fuzzy."

5. According to the Colorado State Patrol Traffic Accident Report (Respondents' Exhibit F) and Employer's First Report of Injury (Claimant's Exhibit 1), the Claimant was travelling westbound on Washington County Road 7 near Washington County Road L, going uphill in extremely muddy conditions. When the vehicle crested the hill, it went off the right side of the road into the ditch, and drove for over 270 feet going downhill. The Claimant apparently tried to steer back on the roadway up an embankment and the vehicle overturned landing on its right side facing west in the ditch. The Claimant suffered lacerations to the back of the head and scalp and injuries to the chest, abdomen and right shoulder. The Claimant was wearing a shoulder and lap belt and was not ejected from the vehicle. There was no suspicion that drugs or alcohol were involved.

6. Mr. Dias testified that the location of the Claimant's April 17, 2015 accident was not on a route approved by Bridger, LLC for transporting crude oil under the lease the Claimant was operating. On cross-examination, Mr. Dias conceded that because he wasn't in the truck with the Claimant, he would not know what route that dispatch would have provided to the Claimant. However, Mr. Dias testified that he does not believe that dispatch would have sent the Claimant on the route where the accident occurred on April 17, 2015 because he has done this run and he was never brought in on this route. Nevertheless, Mr. Dias could not confirm that the Claimant was not brought in by dispatch on the route where the accident occurred.

7. Mr. Dias visited the accident site and reviewed the accident report and, when he spoke to the Claimant, advised the Claimant that the road and weather conditions were contributing factors to causing the accident. Mr. Dias testified that he visited the Claimant in the hospital after his accident to see how he was doing and to wish him well. At that visit, Mr. Dias did not tell the Claimant that he had violated a rule that would result in termination from employment.

8. Mr. Dias testified that he had to let the Claimant go after the accident because the Claimant had taken a route that he was not supposed to be using. Mr. Dias testified that the routes that are set up for transporting the crude oil are chosen because they tend to be wider roads and more well-travelled roads. This way, in the event of a breakdown or other issues, it is easier to respond and provide assistance. Mr. Dias testified that this is why Bridger, LLC set up the route and developed maps. Mr. Dias testified that because it was a policy of Bridger, LLC to use the Bridger routes, it was also a policy of Employer. Mr. Dias testified that he told the Claimant to follow the Bridger routes and he told him that his employment could be terminated if he didn't follow the routes. In the Claimant's employment file, there is an "Acknowledgement Form" signed by the Claimant on March 19, 2015 that he acknowledges receipt of the Bridger Transportation, LLC Manual for Contractors and Their Drivers. By reference, the Manual is incorporated into the Independent Contractor Operation Agreement between Bridger, LLC and Employer. It does provide that "failure to adhere to and perform the Manual's terms could result in disqualification of a driver."

9. Mr. Dias acknowledged that he did not provide anything to the Claimant in writing from Employer that notified the Claimant that failing to follow a designated route was cause for termination. He testified that this was his first time in business and he thought it would be sufficient to place documents from the companies with whom his business contracted in a reference book.

10. Mr. Dias testified that he officially terminated the Claimant's employment on April 21, 2015 after speaking with the safety department for Bridger, LLC. After that conversation, he called the Claimant and spoke with him personally to notify him that he was terminating his employment.

11. With reference to a claim file note entered on April 23, 2015, the claims representative noted a conversation with Mr. Dias. The claim note indicates, "Jarrett advised that while he doesn't tell his drivers exactly which way to drive, this would not normally be a good road for travelling down." Per the claims representative notes, Mr. Dias also stated that "[the Claimant] has not rtw and has multiple injures as again, he knew he got banged up pretty bad" (Claimant's Exhibit 2, p. 2).

12. With reference to a claim file note entered on April 27, 2015, the claims representative noted that, Mr. Dias advised "[the Claimant] was not paid for the shift on 4/17/15 as he didn't finish the job. He also advised that he had to let him go as he had totaled a tractor trailer and for insurance purposes he can't retain him as an employee. Also the company that he contracts with would not allow this as well" (Claimant's Exhibit 3, p. 4). With reference to this note, Mr. Dias testified at the hearing that the main reason he had to terminate the Claimant's employment is that the Claimant didn't follow the designated route.

13. There is a significant deviation between the Claimant's testimony and the testimony of the owner-operator for the Employer regarding the extent of the instruction that the Claimant received regarding designated routes for the transport of crude oil

pursuant to the Bridger, LLC contract. Taking all of the testimony and evidence into account, the weight of the evidence does establish that as between Bridger, LLC and the Employer, there was a clear understanding that the Employer's vehicle needed to travel along designated routes that were established by two means, specific route maps provided by Bridger, LLC and instructions received by way of the PeopleNet system that was located in the Employer's vehicle, which in turn, received pre-loaded information regarding the deliveries and routes to take to accomplish those deliveries. However, as between the Employer and the Claimant, while there was a clear understanding about the use of the PeopleNet dispatch system, the Employer did not take sufficient steps to establish a clear understanding regarding the use of maps and designated routes indicated on those maps. Nor did Employer make it clear to the Claimant that the failure to follow this particular requirement was grounds for termination.

14. After the motor vehicle accident on April 17, 2015, the Claimant was restricted from returning to work and he testified that this has not changed from the date of the accident until the date of the hearing. This is confirmed in the medical records provided as exhibits for this case.

15. On April 27, 2015, the Claimant saw Dr. Robert Nystrom at Concentra. Dr. Nystrom noted that subsequent to a roll over MVA on April 17, 2015, the Claimant first received medical treatment at the Emergency Room and then was seen at Workwell and was seen by Dr. Durbin. Care was transferred to Dr. Nystrom. Dr. Nystrom examined the Claimant and assessed the Claimant with concussion with moderate (1-24 hours) loss of consciousness, scalp laceration, back strain, scapula fracture and strain of shoulder, right. Dr. Nystrom referred the Claimant for a CT scan of the right shoulder including the scapula and he prescribed medications. His activity status was listed as "no work" (Respondents' Exhibit E, pp. 27-30).

16. On September 21, 2015, the Claimant saw Dr. Nystrom who noted that the Claimant had another CT of his shoulder that showed a healing scapula fracture but persistent diastases between the glenoid and scapula. Dr. Nystrom referred the Claimant for additional massage therapy, an optometry referral and additional physical therapy. At this point, the Claimant's activity status was listed as "no work" and his anticipated date of MMI was 6-8 months (Respondents' Exhibit E, pp. 31-34).

CONCLUSIONS OF LAW

Generally

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

rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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

Temporary Disability Benefits

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

TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant suffered an admitted work injury and established 7that he has missed work and suffered a wage loss. The Claimant suffered injuries in a roll over motor vehicle accident that occurred on April 17, 2015. Because the Claimant did not complete his shift and delivery on April 17, 2015 due to his injury, he was not paid for work performed on that day and suffered a wage loss from April 17, 2015 to the present. The parties stipulate that the Claimant's average weekly wage for the purposes of calculating a wage loss and any temporary disability benefits was $750.00.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for his termination.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The Claimant sustained a disabling injury on April 17, 2015 in a work related motor vehicle accident. Per the testimony of Mr. Dias, the owner of the Employer, he terminated the Claimant's employment on April 21, 2015. Although the Claimant worked on April 17, 2015, because he did not complete his delivery and his shift that day, the Claimant was not compensated for work performed on April 17, 2015 and his wage loss begins that day. The Respondents contend that the Claimant is "responsible" for this termination and is not entitled to TTD benefits. Relying upon the testimony of Jarrett Dias, the owner of the Employer, the Employer contends that the reason the Claimant is not working for the Employer any longer is that he failed to transport crude oil on a designated route. Mr. Dias testified that, per Bridger, LLC policy, this is a violation that results in termination of employment. Mr. Dias testified that he had advised the Claimant in the use of the PeopleNet dispatch equipment in the Employer's vehicle and that the Claimant was required to travel along designated routes per maps provided by Bridger, LLC.

The Claimant testified that he was familiar with the use of the PeopleNet dispatch equipment which, once he logged in, would provide his deliveries and his routes. However, in contrast with Mr. Dias' testimony, the Claimant testified that he had never seen the Bridger, LLC map with designated routes prior to the day of the hearing. He testified that he was not aware of a specific requirement to use maps indicating designated routes and that the failure to do so would result in the termination of his employment.

While the map with designated routes was admitted as Respondents' Exhibit C, there is no written evidence that the Claimant received a copy of this document on or before April 17, 2015. Nor is there any written or documentary evidence establishing that the Claimant received specific instructions that would have advised him that failure to follow designated routes on a provided map would result in his termination. There is only conflicting testimony regarding whether or not the Claimant was provided a map with designated routes. Although there is evidence in Respondents' Exhibit A that the Claimant signed a document acknowledging receipt of the Bridger Transportation Manual for Contractors and Their Drivers and that he agreed that failure to follow the Manual's terms "could result in disqualification of a driver, or termination of the ICOA, by Carrier," no part of the Manual was offered into evidence. Thus, the ALJ has no way to determine if the Manual contained instructions to the Claimant that would put the Claimant on notice that he was required to use routes designated in the Bridger maps.

It is clear that the Claimant's use of the route for his crude oil delivery on April 17, 2015 was not a designated route. Nevertheless, it has not been established that the Employer took reasonable steps to ensure that the Claimant understood that a requirement of his employment was that he must use designated routes set out in maps provided by Bridger, LLC for the transport of crude oil in the Employer's vehicle.

Alternatively, for the purposes of this claim, the totality of the circumstances must be considered in determining whether the Claimant committed a volitional act warranting termination. The fact that an employer discharged an employee, even in

accordance with the employer's policy, does not establish that the Claimant acted volitionally, or exercised control over the circumstances of termination for the purpose of barring the Claimant from receiving TTD benefits pursuant to the Workers' Compensation statutes. See *Gonzalez v. Industrial Commission,* 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994*)(*cited with approval in *Kneffer v. Kenton Manor,* W.C. 4-557-781 (ICAO 3/17/04); *Bookout v. Safeway, Inc.,* W.C. 4-798-629 (ICAO 12/15/2010)(claimant not at fault for termination for violating "no call – no show" policy when wrongly incarcerated); *Hall v. Wal-Mart Stores, Inc.,* W.C. 4-601-953 (ICAO 3/18/04)(The respondents cannot adopt a strict liability personnel policy which usurps the statutory definition of "responsibility" for termination where the claimant engaged in a fight it at work but did not provoke assault); *Bonney v. Pueblo Youth Service Bureau,* W.C. 4-485-720 (ICAO April 24, 2002)(Claimant was not responsible for failure to comply with the employer's absence policy if the claimant was not physically able to notify the employer); *see e.g., Bell v. Industrial Claim Appeals Office, 93 P .3d 584,* (Colo. App. 2004)(The claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights).

Therefore, even if the Claimant was terminated for failing to deliver product using a route designated by the Contractor Bridger, LLC, this is alone is not sufficient to establish termination for cause which would bar the Claimant from receiving temporary disability benefits. The Claimant must have reasonably known that failing to travel along designated routes would have been a violation of the Employer's rule warranting termination. There was no persuasive evidence establishing that the Claimant's failure to use a designated delivery route would result in his termination. No written Employer rules were admitted nor was any portion of the Contractor Bridger, LLC's Manual admitted. Again, there was only conflicting testimony, and the testimony of Mr. Dias was not more credible than that of the Claimant.

Ultimately, there was no persuasive evidence that the Claimant understood that use of a designated route set forth on a map supplied by Bridger, LLC was a required condition of his continued employment. Rather, the weight of the evidence established that both Mr. Dias and the Claimant relied heavily on the information input by dispatch into the PeopleNet system for determining the route to take for transporting the crude oil. Finally, there was no persuasive evidence to establish by a preponderance of the evidence what route the PeopleNet system actually provided to the Claimant on April 17, 2015. Because no persuasive evidence established the route provided by dispatch, the Respondent also failed to establish by a preponderance of the evidence that the Claimant deviated from that route and engaged in a volitional act in violation of company policy.

For the alternative reasons stated above, the Respondents have not established that the Claimant was responsible for his termination and he is not barred from receiving temporary disability benefits.

ORDER

It is, therefore, ordered that:

1. The Claimant met the initial threshold to establish he was entitled to temporary disability benefits.

2. The Respondents failed to prove that the Claimant was terminated for cause from his employment.

3. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing April 17, 2015 and ongoing until terminated by order, agreement or operation of law pursuant to the statute.

4. Pursuant to the stipulation of the parties, the average weekly wage is $750.00 which results in a corresponding TTD rate of $500.00.

5. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525, 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: January 21, 2016

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

ISSUES

The parties requested that the sole issue to be determined is compensability.

FINDINGS OF FACT

1. On May 28, 2015 the claimant was an employee of the respondent-employer working on assignment as a machine operator.

2. When the workload would subside in her primary duties due to the machine being down or a lack of materials, the claimant would be assigned to "float" duties at the oven or furnace.

3. On May 28, 20915 such was the case and the claimant was working at the oven.

4. The claimant retrieved a tray of cylindrical-like parts containing five parts and was carrying the tray towards the oven. The tray weighed approximately 20 to 25 pounds.

5. As the claimant approached the furnace with the tray, she was unaware that someone had placed a platform-like object on the floor in front of the furnace.

6. The claimant's shoe caught underneath the platform causing the claimant to fall forward towards the furnace. As a result of the claimant losing her balance one end of the tray struck the furnace and the other end forcefully jabbed the claimant in her left pelvic area. She also hurt her right forearm and right elbow.

7. After the claimant's fall she got up and went to the assembly table and told Mr. Derrick (?) that she got hurt. He asked her if she could finish her shift and she did.

8. Benita Snow, a co-worker of the claimant's, was present at the time of the injury and corroborated the claimant's version of the mechanism of injury. He told the claimant to report the injury.

9. On May 29, 2015 within 10 minutes of beginning work the claimant informed someone at work that she had a large purple clot-like area on her pelvic area. She could not urinate and her abdomen and back hurt.

10. The claimant felt like her insides were coming out.

11. The claimant was sent immediately to the hospital.

12. The claimant had a CT scan completed, which revealed that the claimant suffered from a left inguinal hernia.

13. The claimant was told to ice the area.

14. The claimant was then seen at Concentra on June 8, 2015. She was referred for a surgical consult with Dr. David Brown.

15. The claimant was last seen by Dr. Brown on September 9, 2015. Dr. Brown opines that the claimant is in need on a surgical repair of her inguinal hernia.

16. The ALJ finds the claimant to be credible.

17. The ALJ finds that the claimant has established that it is more likely than not that she suffered a left inguinal hernia as a result of an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

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

6. The ALJ concludes, as found above, that the claimant is credible.

7. The ALJ concludes that the claimant has established, by a preponderance of the evidence, that she suffered an injury on May 28, 2015, that arose out of and occurred in the course of her employment with the respondent-employer that resulted in the claimant suffering from a left inguinal hernia that requires surgical repair.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable and she is entitled to all benefits commensurate with the Act.

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: January 21, 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 he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that 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 a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary disability benefits commencing April 17, 2015 and continuing until terminated by law or statute?

FINDINGS OF FACT

1. Claimant is employed with employer as a carpenter. Claimant testified at hearing that he has worked for employer since approximately 2005 or 2006, originally starting as an employee of a temp service before being hired full time by employer after approximately 10 months. Claimant testified that since being hired by employer he has performed various job duties including driving a bobcat and other work from when the construction project is started to when the job is finished. Claimant testified his job with employer requires heavy lifting, including lifting 50-60 pounds or heavier.

2. Claimant testified he began experiencing back pain in February 2013 and reported his back pain to Ms. Powers, the controller and benefits manager for employer. Claimant testified Ms. Powers did not refer claimant for medical treatment. Claimant testified another co-worker recommended massage therapy and claimant was able to return to work following the massage.

3. Claimant testified that on Friday, April 17, 2015, he felt pain in his back while he was working on the construction project at First Presbyterian Church. Claimant testified that while working at the project, claimant was contacted by "Justin" who requested claimant go to Lincoln Park to help prepare the park for a local Arbor Festival.

4. Claimant testified that when he got to Lincoln Park, he helped put up a temporary "snow fence" for the festival. Testimony at hearing established that employer will volunteer on occasion to help set up for various festivals, including putting up fencing materials that include posts hammered into the ground with orange colored plastic fencing to establish areas for the festival.

5. Claimant testified that while at the park, he used a T-Post driver that weighed approximately 25 to 30 pounds to drive posts into the ground. Claimant explained that a T-Post driver is a tube with handles on either side that helps drive the posts into the ground.

6. Claimant testified that he then went back to First Presbyterian Church, took off his sweatshirt, and began working on the punch list. Claimant testified he then had to go up on a ladder and stretch and began feeling pain in his back when he bent over for calking. Claimant testified he reported the back pain to his supervisor, Mr. Mendenhall, but did not request to be referred for medical treatment. Instead, claimant testified he told Mr. Mendenhall he thought the pain would go away with ibuprofen.

7. Claimant testified he returned to work on Monday, April 20, 2015 and continued to work on the punch list but was still experiencing back pain. Claimant testified the reported the continued pain to Mr. Mendenhall. Claimant testified Mr. Mendenhall did not refer him to a physician. Claimant worked again for a full day on April 21, 2015 and testified his pain was getting worse. Claimant testified he took more ibuprofen that night, but couldn't sleep. Claimant testified his wife took him to the emergency room ("ER") at approximately 3:30 or 4:00 a.m. on April 22, 2015.

8. According to the ER records, claimant reported he works in the construction industry and does a lot of heavy lifting. Claimant reported that lately at his construction job he has had to lift heavy doors and place the doors in the fame by himself. Claimant reported he was doing a significant amount of straining while doing this and yesterday, he developed pain in his right lower back and gluteal area after lifting heavy objects. Claimant was diagnosed with acute back pain and radiculopathy. Claimant testified he was given injections at the ER and discharged with instructions to follow up with his family physician. The records document claimant was provided with injections for low doses of ketamine, Dilaudid, and Toradol and was discharged with a prescription for additional medications.

9. Claimant followed up with his personal physician, Dr. Seppi, on April 23, 2015. Dr. Seppi noted that claimant had been seen in the ER for right lower back and buttock pain that had started several days ago. Claimant reported that after his injections at the ER, his pain had now returned. Claimant reported he does construction work, but indicated he did not remember a specific injury. Dr. Seppi recommended conservative care and referred claimant to physical therapy.

10. Claimant was evaluated by Ms. Ford, the physical therapist, on April 30, 2015. Claimant reported to Ms. Ford that his pain began on April 17, 2015 when he was out in the rain due to a work project, and upon returning to work indoors, began feeling pain in the right lumbar region and eventually into his right buttocks. Claimant reported the pain worsened over the next 2 days to the point that he eventually sought treatment in the ER.

11. Claimant returned to Dr. Seppi on May 1, 2015 and reported 80% improvement with the physical therapy. Dr. Seppi released claimant to return to light duty work.

12. Claimant was evaluated by Dr. Campbell on May 6, 2015 and reported worsening back pain despite his physical therapy. Dr. Campbell noted that there was no know original injury, "but seemed to worsen a few weeks ago". Dr. Campbell referred claimant for x-rays of the lumbar spine and recommended medications including cyclobenzaprine and ibuprofen.

13. The x-rays performed on May 6, 2015 showed degenerative listhesis at the L5-S1 level with an arthrolisthesis of L5 relative to S1.

14. Claimant returned to Dr. Seppi on May 11, 2015 and reported ongoing symptoms in his lower back and right extremity that had been waxing and waning. Based on his ongoing symptoms, Dr. Seppi recommended claimant undergo a magnetic resonance image ("MRI") of his lumbar spine. Dr. Seppi also recommended claimant continue with ongoing physical therapy.

15. Claimant was evaluated by Dr. Gebhard, an orthopedic surgeon, on June 4, 2015. Dr. Gebhard noted that claimant reported complaints of six weeks of low back pain and right leg pain that began without incident or injury. Dr. Gebhard performed a physical examination and reviewed claimant's x-rays. Dr. Gebhard diagnosed claimant with an L5-S1 spondylolisthesis with resultant right leg radiculopathy and weakness.

16. Claimant underwent the MRI on June 5, 2015 that demonstrated a broad based disc extrusion causing severe right and moderal left foraminal stenosis at the L5-S1 level.

17. Claimant returned to Dr. Gebhard on June 11, 2015, following the MRI. Dr. Gebhard noted claimant was also complaining of mechanical symptoms feeling like something is popping and moving around in his low back. Dr. Gebhard noted claimant was not interested in pursuing surgery at this time and discussed with claimant proceeding with an injection into the lumbar spine.

18. On July 28, Dr. Gebhard performed a right sided L5-S1 epidural steroid injection. On September 3, 2015, Dr. Gebhard performed a bilateral L5-S1 epidural steroid injection.

19. Dr. Gebhard testified by deposition in this matter. Dr. Gebhard testified that it was his recollection that claimant indicated that there was not one specific event that caused claimant's symptoms. Dr. Gebhard testified, however, that claimant's work with employer could have aggravated his underlying pre-existing condition. Dr. Gebhard testified that a person working nine to ten years in heavy construction could cause an aggravation of an underlying spondylolisthesis. Dr. Gebhard testified it was medically probable in this case that claimant's work experience aggravated his spondylolisthesis. Dr. Gebhard testified that at this point, he was recommending claimant undergo surgery to treat his spondylolisthesis.

20. Dr. Gebhard testified that he sees approximately twenty to thirty cases each year involving a diagnosis of L5-S1 spondylolisthesis. Dr. Gebhard testified that of the 20-30 cases of L5-S1 spondylolisthesis he sees each year, approximately two of the cases are related to a work injury.

21. Respondents presented the testimony of Mr. Esqueda, a shop manager for employer, at hearing. Mr. Esqueda testified he worked at Lincoln Park setting up the safety netting ("snow fence") for the Arbor Festival. Ms. Esqueda testified he put up approximately 500 feet of safety netting for the festival and worked with seven other employees, including claimant. Mr. Esqueda testified claimant was present at Lincoln Park helping set up for the Arbor Festival for approximately one hour. Mr. Esqueda testified claimant was using zip ties to attach the safety netting to the posts and pulling plastic rolls. Mr. Esqueda testified claimant did not use the T-Post driver. The ALJ finds the testimony of Mr. Esqueda to be credible and persuasive.

22. Respondents presented the testimony of Ms. Powers, the controller and benefits manager for employer, at hearing. Ms. Powers testified she met with claimant on approximately June 13, 2015 when claimant informed her that he felt his symptoms were related to his work duties. Ms. Powers testified she asked claimant if there was a specific injury, and claimant indicated there was not a specific injury. Ms. Powers testified she had originally met with claimant to discuss his inquiry regarding his vacation time because claimant said he was going to have surgery and would need 12 weeks off. Ms. Powers testified when she told claimant would try to get claimant some extra time off so he could have 8 weeks off, he inquired whether his injury could be a workers' compensation claim. Ms. Powers testified this was the first she had heard of claimant's back condition being related to work. Ms. Powers testified claimant later told her he thought he hurt with back working at First Presbyterian Church. Ms. Powers testified claimant indicated to her on June 14, 2015 that he was upset because he was out money for co-pays for his medical treatment. Ms. Powers filed a workers' compensation claim on June 23, 2015 based on claimant's statements. The ALJ finds the testimony of Ms. Powers to be credible and persuasive.

23. Mr. Mendenhall, a superintendant for employer, testified at hearing in this case. Mr. Mendenhall testified he took over as the supervisor for the First Presbyterian Church site project for the period of time between April 13, 2015 and April 23, 2015 while another supervisor was on vacation. Mr. Mendenhall testified claimant was working on the punch list during this time and was the only employee on the job site, but was performing mostly touch up items. Mr. Mendenhall testified claimant would not be required to install doors doing this work, as a sub-contractor was responsible for this activity. Mr. Mendenhall testified on cross-examination that claimant could have moved the doors from the truck to where they would be installed, but wouldn't be responsible for installing the doors. Mr. Mendenhall testified he stopped by the job site on April 21, 2015 and noticed claimant appeared to be in pain and asked claimant if he was OK, and claimant replied that his back hurt. Mr. Mendenhall testified he asked claimant if he had hurt his back at work, and claimant replied, "No."

24. Mr. Mendenhall testified claimant called him on April 22, 2015 and told him he was being taken to the hospital and would not be in for work. Mr. Mendenhall testified he spoke with claimant on April 23, 2015 and said he was being seen by Primary Care Physicians. Mr. Mendenhall testified claimant later texted the medical record excusing claimant from work. Mr. Mendenhall testified there was another conversation later when he asked claimant if this was related to something that happened on the job, and claimant again told him, "No." The ALJ finds the testimony of Mr. Mendenhall to be credible and persuasive.

25. The underlying determination in this case comes down to whether claimant's testimony at hearing as to the onset of his symptoms and the activities he performed prior to the development of his symptoms is credible. Claimant's credibility was questioned in this case as he testified that he had reported his symptoms to his supervisor, Mr. Bowers, but admitted on the stand that in his answers to interrogatories he failed to mention Mr. Bowers. Claimant testified he was concerned about reporting his injury as a workers' compensation claim because when he had a prior injury in 2012 while working in Glenwood Springs and reported that he was hurt at work to the physician, his supervisor questioned why claimant would report a work injury when employer provides very good health insurance.

26. However, claimant's explanation for being concerned about reporting the injury as work related does not make sense in the present case when claimant reported to various providers that his pain was caused by work, but was inconsistent with the type of work that caused his pain. For instance, claimant reported to the ER physicians that his pain was caused by lifting doors at work and reported to the physical therapist that his pain was caused after he worked outside in the cold at work. Claimant also reported to Dr. Seppi that he lifts heavy objects at work, but denied a specific injury that he recalled.

27. While Mr. Mendenhall testified that claimant's job did require him to potentially perform heavy lifting, bending and stooping, and Dr. Gebhard testified this type of work could aggravate claimant's underlying pre-existing spondylolisthesis, claimant's testimony at hearing related to a specific injury while using the T-Post driver.

28. Under the circumstances of this case, and in crediting the medical records, the ALJ cannot indicate that claimant's testimony that he injured his low back while pounding in fence posts on April 17, 2015 was credible. In this regard, while this accident history appears to be consistent with a statement claimant made to the physical therapist, it is inconsistent with claimant's reported accident histories to the ER physicians, Dr. Seppi and Dr. Gebhard. Moreover, the ALJ credits the testimony of Mr. Esqueda as being more credible and persuasive then claimant's testimony at hearing.

29. The ALJ further credits the testimony of Mr. Mendenhall that claimant denied that his back condition was work related when he questioned claimant on April 21, 2015 as being credible and persuasive. The ALJ notes that claimant's indication to Mr. Mendenhall that his back condition was not related to his work appears consistent with the testimony of Ms. Powers and the employment records entered into evidence.

The ALJ finds that claimant first reported this injury to employer as related to his work with employer on or about June 13, 2015 when he inquired with Ms. Powers about possible time off for surgery. The ALJ finds that if claimant's condition was related to his work, he would have reported the injury to employer prior to June 13, 2015 as being related to his work. The ALJ further rejects claimant's contention that he was afraid of reporting his injury to his employer based on his prior experience in 2012 involving a work injury as being non-persuasive considering the overall facts of this case.

30. The ALJ likewise rejects the opinions expressed by Dr. Gebhard regarding claimant's condition being aggravated by his work for employer as not persuasive when considering claimant's testimony at hearing and the medical records entered into evidence at hearing.

31. The ALJ therefore determines that claimant has failed to demonstrate that it is more probable than not that he sustained a compensable injury arising out of and in the course of his employment with employer.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also*

Subsequent Injury Fund v. Thompson, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of an in the course of his employment with employer. As found, the testimony of Mr. Esqueda, Mr. Mendenhall and Ms. Powers presented at hearing is found to be more credible and persuasive than the testimony of claimant. As found, the medical records and in particular, the medical histories provided by claimant are determined to be more credible and persuasive regarding the onset of claimant's symptoms than claimant's testimony at hearing.

5. As found, claimant has failed to establish by a preponderance of the evidence that his work with employer, caused, aggravated, accelerated or combined with a pre-existing condition to cause the need for medical treatment.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

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

DATED: January 8, 2016

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts

ISSUES

Claimant filed an Application for Expedited Hearing and endorsed compensability and medical benefits. At the commencement hearing, the Claimant argued that he should be permitted to also raise the issue of authorized treating physician (ATP). Claimant asserted that the endorsement of medical benefits is sufficient to notify the Respondents that he intended to litigate designation of an ATP. The ALJ disagreed with Claimant's position and denied the request to address the issue of authorized treating physician.

Thus the issues to be determined are whether the Claimant suffered a compensable work injury, and if so, whether he is entitled to medical benefits to cure and relieve him of the effects of that injury.

FINDINGS OF FACT

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

1. The Employer's business includes demolishing and building new patio decks, primarily residential.

2. The Employer hired the Claimant on May 26, 2015 as a laborer. Benjamin Campbell was Claimant's supervisor.

3. Claimant worked for Employer for four days between May 26, 2015 and May 29, 2015. All of Claimant's work for Employer was performed at a private home job site where a deck was being demolished and built.

4. Claimant testified that he worked from 9:00 a.m. to 5:00 p.m. over his four days of employment. On May 26, 2015, Claimant performed trash/debris pickup, which involved moving lumber scraps to a dumpster with a wheel barrow.

5. On May 27, 2015, Claimant also performed trash/debris pickup. He also moved some boards and tools.

6. On May 28, 2015, the customer's old deck was demolished. During the morning, Claimant was catching 20-foot long wooden boards that were sawn off of the deck. He would then cut the boards in half so that they were 10 feet long, and take the boards to the dumpster. He took the boards to the dumpster one at a time. During the afternoon, Claimant was moving new 20-foot long boards from the driveway to the backyard where the new deck was being built. He moved the boards two or three at a

time. He carried them on his shoulder. On May 29, 2015, Claimant again moved boards from the driveway to the backyard.

7. Claimant testified that on May 29, 2015, he was feeling run down because it was the end of the week. He testified that he had never done that amount of physical labor before. He stated that his shoulder was sore and that he was very tired.

8. Claimant testified that on May 29, 2015, he felt like he pulled a muscle in his back on the last stack of lumber that he lifted. He stated that he asked Campbell if he could take it easy for the rest of the day. Claimant testified on cross-examination that his exact statement to Campbell was: "I told him I was hurting, I was sore, and I would like to take it easy for the rest of the day" and Campbell granted Claimant's request.

9. Claimant lived next door to Campbell, and rode him with him to work in Campbell's car on May 29, 2015. He testified that during the ride home after work on May 29, 2015, he informed Campbell that he was sore and that his back was hurting. He testified that Campbell responded by stating something to the effect of, "the first week is always the hardest."

10. Campbell agreed that Claimant may have mentioned to him on May 29, 2015 that he was a little sore. Campbell, however, disagreed that Claimant alleged a specific work-related back injury. Campbell testified that soreness was to be expected considering the physical nature of the work.

11. Claimant testified that during the weekend of May 30 and May 31, 2015, he stayed in bed, watched television and played video games, and that he was in pain on those days.

12. Claimant testified regarding the difference between pain and soreness. He testified that soreness was something that was different than pain, and that soreness did not limit him from performing his daily activities. He stated that what he felt on May 29, 2015 was pain, not soreness.

13. In his Worker's Claim for Compensation, Claimant alleged that he hurt himself through "repetitive bending, lifting, and carrying heavy pieces of lumber from 5-26-15 through 5-29-2015." Claimant testified that this was an accurate description of the manner in which he was injured.

14. Claimant testified regarding his answers to interrogatories. He testified that when he was asked regarding how he was injured at work, his answer was as follows:

> At [Employer], the first day was at the end of a project, where I carried leftover lumber to the work trailer, picked up construction trash, and carried tools. The second day I did 'demolition,' standing under the old deck while Ben Campbell as sawing the old deck apart, catching 100 lb. decking pieces, carrying the decking pieces

> to the front of the house, and threw the old decking into the Dumpster. Thursday and Friday, my job was to pick up stacks of lumber about 20' long x maybe 4" wide (for making decks), three (3) boards at a time, from a stack in the customer's driveway, turn to the left, put the stack over my right shoulder, and walk away from the driveway to the backyard of the customer. I would put the stacks of lumber in the backyard by bending down and setting the boards down carefully. Then I would go back to the driveway, pick up another stack and repeat. I did this from nine to five each of those two days. My last day of work was Friday, May 29, 2015. I didn't return to work because of my on-the-job injury.

15. When asked on cross-examination where in the interrogatory answer he identified his injury, Claimant testified that it was the continuous lifting, bending and throwing. He testified that he listed the work he did for the Employer over the four days he worked there, and that it constituted his description of his injury. He admitted that his description did not identify any acute event, including the alleged lifting incident in which he claimed he felt a muscle strain in his back. He admitted that his description did not identify when he began feeling pain.

16. On the morning of June 1, 2015, Claimant, his girlfriend Sara Dietrick, and Campbell engaged in the following text message exchange.

> Claimant: Hey man I can't hardly move [sic] my back is in a lot of pain. I have to go to the hospital
>
> Claimant: My girlfriend is taking me so I can't make it to work today, I'm sorry.
>
> Campbell: Ok well hope you feel better man
>
> Campbell: How'd you hurt your back anyways?
>
> Dietrick: He woke up and started yelling in pain. He's getting an x-ray right now.
>
> Campbell: Geez [sic] well let me know how you're doing when you know what's up
>
> Claimant: I have a torn muscle and two strains in my spine, they told me not to work till [sic] Thursday, they gave me pain killers and told me to do light stretches and no heavy lifting for few days. They said none of my vertebrae are broken but they will examine the x-rays more just to make sure. They just don't wanty [sic] muscle tearing more than it is otherwise I'll have to have surgery.

17. Neither Claimant nor Dietrick ever responded to Campbell's question regarding how Claimant hurt his back. Claimant testified that these texts represented the only communication he had with Campbell on June 1 and June 2, 2015.

18. Claimant testified that he woke up on June 1, 2015 with excruciating pain in his back. He testified that on that morning he could not bend or get out of bed. Dietrick called an ambulance. The EMTs helped Claimant up the stairs and onto a stretcher and took him to Aurora Medical Center.

19. Rural Metro Ambulance records indicated that "Pt states that he has had back pain since he woke up this morning at 0630. Pt states that pain in the middle of his back that radiates over to his left flank. Pt states that he has been having back soreness for the past week after starting his new construction job a week ago." Claimant stated that he had a cough for a week and it hurt his back when he coughed. Claimant's complaints related to the middle of his back, radiating into the left flank.

20. The Aurora Medical Center treatment notes indicate that during the initial assessment, Claimant reported pain at a level 9 out of 10 with an onset date of June 1, 2015.

21. Dr. Jonathan Savage also evaluated the Claimant. The medical notes state: "Pt arrives by ems for back pain. Pt reports that he started a new job this week building decks." Claimant presented with elevated blood pressure and shortness of breath. Dr. Savage noted paraspinal muscle tenderness in the thoracic and lumbar spine, and ordered a chest x-ray. Pain medications were administered to Claimant, and he was discharged. Dr. Savage diagnosed a back strain, and noted that at the time of discharge, Claimant "was able to ambulate in the ED (at their baseline) without difficulty." Dr. Savage recommended no heavy lifting for three days.

22. Claimant testified that the Employer's owner Ray Dertz called him on June 2, 2015, and terminated his employment. Claimant did not work for Employer after that time.

23. Claimant testified that on June 2, 2015, he could not drive his manual transmission car, because when he pushed in the clutch, he experienced shooting pain into his back. Claimant stated that he felt pain at a level of 6-7 out of 10 after trying to use the clutch. He testified that he was able to get to the store by driving his grandfather's truck, which had an automatic transmission. He testified that after he went to the store, he went back home and lied down. He testified that his pain stayed at the same level for approximately two weeks, and that he had difficulty performing activities of daily living.

24. On cross examination, Claimant was confronted with a Facebook post of him "checking in" to a live music venue also on June 2, 2015. Claimant admitted to attending a concert the night of June 2, 2015. Claimant did not have a seat at the

concert. He was able to stand in the general admission section for the entire show. He recalled purchasing a beer because he was standing near the bar.

25. Claimant testified that he spoke with Campbell personally on June 5, 2015, and that Campbell asked him how he hurt his back. Claimant testified that he told Campbell that he hurt his back from "all the heavy lifting, and all the lumber."

26. Campbell testified that the Claimant never appeared hurt during the time they worked together between May 26 and May 29, 2015, nor did the Claimant complain or mention being injured at work. According to Campbell, he knew nothing of an alleged work injury until attorneys became involved in the case.

27. Claimant also asserted in his direct testimony and in his answers to interrogatories that he could no longer engage in certain physical activities after his injury. These activities included running, hiking or other forms of exercise.

28. On or around July 16, 2015, a Facebook video post depicted Claimant running away from fireworks his friend had lit. The video then showed him lying on the ground laughing. Claimant admitted he was in the video running toward the garage to get away from the fireworks.

29. A Facebook post dated September 20, 2015 depicted Claimant hiking at Red Rocks. Claimant testified that he was not really hiking but just walking around. Claimant admitted that he was able to descend and ascend some inclines during the hike or walk. Regardless of whether he was "hiking" or simply walking around, Claimant's activities post-injury are inconsistent with his reported pain levels and inconsistent with his testimony concerning his abilities.

30. The Claimant had no additional medical treatment until August 5, 2015 when he was evaluated by physician's assistant (PA), Thanh Chau, at HealthOne. PA Chau documented that Claimant reported feeling a "pull" in his back when lifting 200 pounds of lumber from the floor and twisting to his left while working on May 29, 2015.

31. Claimant reported to Chau that his pain was a level 9 out of 10; however, he testified that his usual pain level was 3-4 out of 10. PA Chau noted elevated pain behaviors on exam, and pain on palpation to light touch. Claimant disagreed that Chau used "light touch" and instead asserted Chau was "digging in."

32. Claimant testified that his pain level during PA Chau's examination was actually a 5-6 out of 10, but his pain had increased due to the physical examination performed by PA Chau.

33. PA Chau imposed work restrictions and opined that objective findings appear consistent with the work-related mechanism of injury reported by the Claimant. However, Claimant had described a specific work-related lifting event to PA Chau whereas at other times, Claimant asserts that the four days of manual labor brought on his symptoms. It is difficult to ascertain whether Claimant alleges he suffered a specific acute injury or whether he claims he suffered a cumulative trauma condition.

34. Claimant testified that he did not consider the acute event to be separate from lifting, bending and carrying over the course of four days. He testified that his injury happened "over time." When asked whether or not he suffered an acute event, he then stated that he just "more felt it on Friday [May 29, 2015]." When asked whether he felt like he pulled a muscle on May 27 and May 28, 2015, Claimant testified that he had a sore back on those days. Upon further questioning, Claimant then again reiterated his original position that he felt no pain in his back until May 29, 2015 at the end of the day. Claimant testified that his pain on May 29, 2015 was 7 out of 10. He testified that his pain went down to 4-5 out of 10 on May 30 and 31, 2015. He then felt pain at 9 out of 10 on June 1, 2015 prompting his emergency room visit.

35. Since his work injury, the Claimant has had several different jobs. He worked for Career Strategies for two weeks starting on June 17, 2015. His job included grounds keeping, picking up trash with an extend-an-arm, cleaning windows, sweeping, mopping, using a leaf blower and wiping down washers and dryers. Claimant testified that he was able to perform this job. Claimant also testified that he has had jobs at 7-11 and T-Mobile since the injury. He currently works for T-Mobile five days per week between five and six hours per day. T-Mobile requires him to stand for most of his shift.

36. Claimant testified that he has been in constant pain since May 29, 2015. He claims that his average pain in his low back pain is at a level 3 out of 10, and that it can increase to 7 out of 10 depending upon his activities.

37. Claimant's grandfather, Dale Freeman, testified regarding his observations of Claimant. Clamant lived with his grandfather on May 29, 2015 and for a time thereafter. Freeman testified that he observed Claimant walking slowly on May 29, 2015. He further testified that he observed Claimant remain in his room for "quite a few days." He testified that Claimant continued to move slowly until he started to get better. He testified that Claimant was not able to perform his normal household duties and chores, including yardwork, for the first week after he went to the emergency room due to pain. He testified that it took several weeks for Claimant to begin being able to walk normally again. Freeman admitted that he worked full-time and was not able to watch or observe Claimant all of the time.

38. Claimant filed his worker's claim for compensation on June 12, 2015.

39. Respondents filed a Notice of Contest on July 8, 2015.

40. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury on May 29, 2015 while in the course and scope of his employment. The Claimant has also failed to prove that his pain complaints arose from work-related cumulative trauma between May 26 and May 29, 2015. The ALJ is not persuaded by Claimant's testimony concerning the alleged events leading up to his emergency room visit on June 1, 2015. The ALJ resolves the conflicting testimony in favor of Campbell in light of Claimant's other inconsistent reporting and misrepresentations concerning his physical abilities. As such, the ALJ finds that the Claimant did not report any injury to Campbell at any time. This finding is further supported by the fact that Claimant did not

respond to Campbell's direct text inquiry concerning the source of Claimant's back pain. If Claimant had injured himself on the job, it would have made sense he would have documented it in a text to Campbell. The ALJ finds that Claimant merely woke up with increased pain complaints on June 1, 2015, but no persuasive or credible evidence links such symptoms to the work Claimant performed for the Employer from May 26 through or on May 29, 2015.

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. As found above, the Claimant has failed to prove by a preponderance of the evidence that he sustained an injury on May 29, 2015 while in the course and scope of his employment. The Claimant has also failed to prove that his pain complaints arose

from work-related cumulative trauma between May 26 and May 29, 2015. The ALJ is not persuaded by Claimant's testimony concerning the alleged events leading up to his emergency room visit on June 1, 2015. The ALJ resolves the conflicting testimony in favor of Campbell in light of Claimant's other inconsistent reporting and misrepresentations concerning his physical abilities. As such, the ALJ finds that the Claimant did not report any injury to Campbell at any time. This finding is further supported by the fact that Claimant did not respond to Campbell's direct text inquiry concerning the source of Claimant's back pain. If Claimant had injured himself on the job, it would have made sense he would have documented it in a text to Campbell. The ALJ finds that Claimant merely woke up with increased pain complaints on June 1, 2015, but no persuasive or credible evidence links such symptoms to the work Claimant performed for the Employer from May 26 through or on May 29, 2015.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. As such any claim for medical benefits is also 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: January 4, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

1. Compensability;

2. Medical Benefits- reasonable and necessary; and,

3. Entitlement to temporary total disability benefits.

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

FINDINGS OF FACT

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

1. The claimant was employed at the respondent-employer's call center on June 19, 2015. She testified that she walked to a single stall bathroom located in the lobby area of the building to use the facilities. She states that she slipped and fell on water or urine while attempting to pull up her pants. The claimant states she was wearing a walking boot on her left ankle at the time of the incident. The claimant also had a lengthy medical history relating to pseudo tumor cerebri for which she had undergone brain surgery to place shunts.

2. The respondent-insurer denied liability for the incident.

3. The claimant provided detailed testimony during direct and cross examination regarding the circumstances of the incident. She maintained that she was certain that the incident had occurred within the bathroom stall and not while standing at the sink or in any other area of the bathroom. The claimant also testified that she lost consciousness and when she woke up she was in so much pain that she had to pull herself out of the restroom. The claimant testified that she called for help while in the bathroom and no one responded.

4. The paramedics were called to the respondent-employer's business on June 19, 2015. In the narrative account of what happened as documented in the

paramedic report, it is noted the claimant reported "she was in the restroom urinating when she found herself on the floor in "water." The report states that "she doesn't remember the event, states she was fine before." The paramedic report documents the claimant "denies any trauma, head pain, neck or back pain." The claimant reported concern due to the shunts in her head having potentially moved and requested to go to the hospital. The claimant was diagnosed with a syncopal episode. The paramedics did not document any evidence of physical trauma to the claimant's head or back.

5. When the claimant arrived at Penrose St. Francis Hospital on June 19, 2015, she reported slipping and falling. A CT scan of the head was performed which was reported as showing no intracranial hemorrhage or acute abnormality and showed the shunts to be in position. The claimant also underwent imaging evaluation of her lumbar spine which was reported as showing the potential for transverse process fractures. These "fractures" were later determined to be gas artifact findings in subsequent imaging completed on July 29, 2015. The records from Penrose do not document any signs of physical trauma to the claimant's head or back. The claimant was released from Penrose and instructed to follow up with her personal physicians.

6. The claimant presented to Dr. Randall Jones at Concentra on June 22, 2015. In her account of the incident to Dr. Jones she reported she had used the rest room and was washing her hands when the "next thing she knew" she was on the floor. She reported an unknown length of a loss of consciousness and stated that she "crawled out the door to call for help."

7. The claimant presented to Linnea Hughes, PA-C, also on June 22, 2015. In Ms. Hughes report the claimant states that she slipped and fell on some water on the floor and "woke up with paramedics around her." The claimant returned to Ms. Hughes on July 29, 2015 for "shunt adjustment." The shunts were reprogrammed and there is no indication of any concern regarding damage to her shunts or placement of the shunts noted in Ms. Hughes report.

8. The claimant was evaluated by Dr. Jeffrey Jenks on July 8, 2015. The claimant reported to Dr. Jenks that she was experiencing cervical, thoracic, and lumbar pain as a result of the alleged incident as well as headaches and cognitive difficulties. The claimant denied experiencing these symptoms previously, attributing her symptoms to the alleged incident of June 19, 2015. The claimant specifically told Dr. Jenks that her headaches were controlled at the time of the June 19, 2015 incident – a statement directly contradicted by a report of Ms. Hughes dated May 28, 2015. At that time, the claimant was still complaining of "chronic migraine headaches with daily pain." The claimant also reported blurry vision and was recommended to have an evaluation to

check for papilledema. Dr. Jenks discussed concerns regarding the claimant's "significant amount of pain behavior and functional overlay."

9. A security officer, Kim Nettles, was stationed at a desk in very close proximity to the bathroom where the incident took place. Ms. Nettles testified that she could hear activities in the bathroom including running water from the sink faucet and the toilet flushing. Ms. Nettles testified that if anyone had called for help from the bathroom she would absolutely have heard that individual. Ms. Nettles testified that following the incident the claimant approached the security desk in a normal fashion displaying no signs of duress and commented that she had slipped in the bathroom. Ms. Nettles testified she went into the bathroom to inspect it and the only water she saw was a small puddle on the floor under the paper towel dispenser. At no point in any of the accounts of the incident given by the claimant did she allege that she fell in front of the paper towel dispenser. Ms. Nettles testified that the claimant was behaving completely normal during her interactions with Ms. Nettles at the security desk and did not appear to be in any pain or discomfort.

10. Security video from the lobby was also admitted into evidence. It shows that the elapsed time from the claimant's exiting the view of the camera to enter the bathroom and the time that she re-entered the camera view to speak with Ms. Nettles was less than three minutes.

11. During testimony, the claimant denied any issues relating to headaches, dizziness, memory or other cognitive abnormalities prior to the alleged incident of June 19, 2015, stating that the shunts had corrected the issues she was experiencing due to the pseudo tumor.

12. The claimant also denied having experienced symptoms in her cervical, thoracic or lumbar spine prior to the June 19, 2015 incident. However, medical records from Barnes Family Chiropractic document a significant medical treatment history for these body components attributed to an auto accident of October 29, 2010. The claimant testified she had resolved her injuries for this auto accident via legal settlement.

13. In the medical records from Barnes Chiropractic, claimant described neck pain at 8/10, mid back pain at 8/10, low back pain at 8/10 and headaches at 8/10. The claimant failed to mention the October 29, 2010 auto accident to any of the medical providers who evaluated her in connection with the June 19, 2015 injury.

14. Upon cross examination, the claimant made several statements concerning her inability to specifically remember the events in the bathroom when confronted with varying accounts of injury she gave to medical providers. The claimant testified that she had not made the statements that were attributed to her and that the medical providers had written down her information incorrectly. Ultimately, the claimant acknowledged during her testimony that she really didn't know what happened in the bathroom.

15. The claimant underwent an IME at respondents' request with Dr. Eric Ridings. Dr. Ridings testified he had reviewed the medical report of claimant's expert, Dr. Rook, and in his medical opinion Dr. Rook had 1) failed to perform any causation analysis as required by Level II training and 2) Dr. Rook did not have any of the medical information concerning claimant's lengthy pre-existing history. Dr. Ridings testified that he believed Dr. Rook may have reached a different conclusion if he had access to the pre-existing medical records Dr. Ridings was able to review.

16. Dr. Ridings discussed the lack of medical evidence that the claimant experienced any trauma as documented by the medical evaluations on the date of the incident.

17. The ALJ finds Dr. Ridings analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

18. The ALJ finds that the claimant's testimony and reporting of events is unreliable and therefore not credible.

19. The ALJ finds that the claimant has failed to establish that it is more likely than not that on June 19, 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:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. There is a distinction between the terms "accident" and "injury". The term accident refers to an "unexpected, unusual or undersigned occurrence." C.R.S. § 8-40-201(1). In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. See *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). No benefits flow to the victim of an industrial accident unless an "accident" results in a compensable "injury." Compensable injuries involve an "injury" which requires medical treatment or causes disability. See *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). All other "accidents" are not compensable injuries. See *Ramirez v. Safeway Steel Prods. Inc.*, W.C. No. 4-538-161 (Sept. 16, 2003).

6. A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

7. However, where the precipitating cause of an injury is a preexisting condition suffered by the claimant, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to cause or increase the degree of injury. *See National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 763 (Colo. App. 1992). This principle is known as the "special hazard" rule. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

8. 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. *See Id.* (high scaffold constituted special employment hazard to worker who suffered epileptic seizure and fell); *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). 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 preexisting condition does not bear sufficient causal relationship to the employment to "arise out of" the employment. *Gates v. Rubber Co. v. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when preexisting condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). Claimant provided no testimony that the bathroom stall she was located in at the time of the alleged incident would constitute a special hazard. Claimant testified that the bathroom stall was a "typical" bathroom stall one would find in any location.

9. As found, the claimant's account of the alleged incident is not credible or persuasive. The claimant has provided multiple conflicting accounts of where and how the alleged incident occurred. This conflict in the accounts of the incident, coupled with the lack of any objective medical documentation that would substantiate any injury, i.e.: bruising, tenderness, etc, raises significant concerns regarding the credibility of reporting the incident.

10. The ALJ concludes that Dr. Ridings' analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

11. The ALJ concludes that the claimant's testimony and reporting of events is unreliable and therefore not credible.

12. Based on the preceding findings of fact, the ALJ concludes that the claimant has failed to demonstrate by a preponderance of the evidence that she sustained any injury on June 19, 2015 arising out of and in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: January 15, 2016

/s/ original signed by:

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

ISSUES

1. Whether 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, 2014.

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, 2014 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, 2014 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, 2014 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 2014 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, 2014 incident.

8. On April 16, 2014 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, 2014 Claimant completed a Vacation/Absence Request form stating that he was taking a leave of absence from April 29, 2014 until May 11, 2014. 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, 2014 and distributed them to the night shift employees on May 11, 2014. 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, 2014. 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, 2014 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, 2014 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, 2014. Claimant testified that on April 7, 2014 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, 2014 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, 2014.

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, 2014 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, 2014. 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, 2014 triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, 2014 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, 2014 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, 2014 until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, 2014 because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, 2014 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, 2014 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, 2014 and distributed them to the night shift employees on May 11, 2014. 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, 2014. Claimant testified that on April 7, 2014 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, 2014 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, 2014.

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, 2014 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, 2014. 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, 2014 triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, 2014 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, 2014 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, 2014 until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, 2014 because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, 2014 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, 2014 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, 2014 and distributed them to the night shift employees on May 11, 2014. 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, 2014 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, 2014 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: January 12, 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 of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of his industrial injury from a physician authorized to treat claimant for his 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?

- 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 partial disability ("TPD") benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant sustained a subsequent intervening injury?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was employed with employer as a swamper. Claimant's job duties included hooking up bridals to loads to move to other locations. Claimant testified he was at work on March 27, 2015 when he got his leg pinched between a tail roll of a truck that was backing up and a post on the man camp that he was in the process of moving.

2. Claimant testified his right lower thigh was pinched between the tail roll and a steel post that was welded to the frame of the man camp. Claimant testified his leg was pinched for approximately six seconds. Claimant testified the injury was witnessed and he reported the injury to Mr. Blanscet, the safety supervisor, who

indicated he would file a report. Claimant testified he continued to work following the injury because he was afraid he would get kicked out of the company if he was hurt.

3. Claimant testified he continued working until approximately July, 2015 when he couldn't take the pain any more. Claimant testified he went home and made a doctor's appointment.

4. The medical records demonstrate that claimant was first evaluated on June 23, 2015 at Battlement Mesa Medical Center. Claimant reported a history of having his right thigh pinched between a truck at man camp for 5 seconds one month ago with ongoing complaints of pain with ambulation. Claimant underwent x-rays of the right leg that were normal and was diagnosed with knee pain.

5. Claimant was seen by Ms. Griffith, a nurse practitioner, on June 30, 2015. Ms. Griffith noted no swelling in claimant's lower extremity, but found slight tenderness to palpation on his mid thigh area and the lateral aspect of his patella. Ms. Griffith recommended claimant undergo a magnetic resonance image ("MRI") of his right leg.

6. Claimant was examined by Mr. Zimmerman, a physician's assistant on July 6, 2015. Mr. Zimmerman noted claimant has been unable to work due to his complaints of left knee and thigh pain. The ALJ presumes that Mr. Zimmerman is referring to claimant's right knee as the initial subjective history notes claimant is following up for his right knee, and the assessment addresses right knee and thigh pain. Mr. Zimmerman recommended claimant undergo the MRI and follow up after completion of the MRI. Mr. Zimmerman took claimant off of work as of July 6, 2015 through July 20, 2015.

7. The MRI was performed on July 13, 2015 and demonstrated a posterior horn medial meniscal tear and a possible tear of the anterior cruciate ligament ("ACL").

8. Claimant was examined by Mr. Zimmerman, a physician's assistant, on July 17, 2015.[1] Mr. Zimmerman noted claimant had undergone the MRI and was continuing having difficulty with his knee. Mr. Zimmerman took claimant off of work completely and referred claimant for an orthopedic consultation.

9. Respondents obtained a records review independent medical examination ("IME") from Dr. Isaacs on July 20, 2015. Dr. Isaacs noted claimant claimed that he got his thigh pinched between a truck and a trailer on March 27, 2015, but did not seek treatment until June 23, 2015. Dr. Isaacs opined that getting claimant's thigh pinched between the truck and trailer would not have cause the knee injuries and opined that claimant would be unable to continue working for 3 months before seeking treatment if he had injured his knee on March 27, 2015.

[1] The ALJ notes that the dictated report from this visit lists the date of the visit as July 17, 2015. However, the handwritten WC164 form filled out by Mr. Zimmerman is dated July 16, 2015. The ALJ resolves this difference as finding that the examination took place on July 17, 2015.

10. Respondents' obtained an IME from Dr. Gonzales on November 10, 2015. Dr. Gonzales reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Gonzales notes in his IME report that claimant was working in the field and his thigh got caught between a man camp and a truck with his foot not planted on the ground. Dr. Gonzales notes that claimant did not initially report his injury. Dr. Gonzales noted claimant sought treatment on June 23, 2015 and complained of knee pain for one month.

11. The ALJ finds Dr. Gonzales' report to be flawed in multiple respects. Dr. Gonzales indicates that claimant did not initially report his injury, however, claimant did report the incident to his employer immediately which resulted in an investigation with Mr. Blanscet, the safety supervisor. This further ignores the fact that the incident itself was witnessed. Moreover, while Dr. Gonzales indicates that claimant sought medical treatment on June 23, 2015 and reported he had knee pain for one month, this ignores the more specific accident history he provided on June 23, 2015 of having his right thigh pinched between a man camp and a truck. The ALJ finds the report of Dr. Gonzales to have no persuasive influence in his examination of the evidence in this case.

12. Mr. Zimmerman issued a report dated November 18, 2015 that agreed with the reports from Dr. Gonzales and Dr. Issacs that claimant would most likely have needed to seek treatment for his meniscus and ACL injuries soon after the injury and would have had difficulty working in the immediate days and weeks post injury.

13. Respondents presented the testimony of Mr. Larson, the driver of the truck on March 27, 2015, at hearing. Mr. Larson testified that he was driving the truck and could not see claimant when he heard claimant say "Whoa! Whoa!" Mr. Larson testified he got out of the truck and claimant indicated he was hit in the hip. Mr. Larson testified he did not thing claimant had hurt his knee. Mr. Larson testified he continued working with claimant during the summer of that year and claimant did not seem to have pain in his knee. Mr. Larson testified that in the days after the incident, however, claimant was limping around. However, Mr. Larson testified he was later able to observe claimant jump off trailers chain down rows and walk quickly across locations.

14. Respondents presented the testimony of Mr. Nielsen, claimant's supervisor, at hearing. Mr. Nielsen testified he was present on March 27, 2015 when the incident occurred and saw the winch line was tight against claimant's leg and the post on the man camp. Mr. Nielsen testified the winch line was putting pressure approximately mid way up claimant's thigh. Mr. Nielsen testified claimant didn't appear to have injured his knee and continued to work. Mr. Nielsen denied that claimant appeared to have a limp. Mr. Nielsen testified he told claimant to report the incident to the safety supervisor.

15. Mr. Blanscet, the safety supervisor, testified at hearing that he went to the location of claimant's incident after being informed of claimant's injury on March 27, 2015. Mr. Blancet testified claimant reported getting his leg caught between the roller and the metal pin. Mr. Blancet testified claimant did not report problems with his knee. Mr. Blancet testified he say claimant continuing to work that day, but claimant was not

limping. Mr. Blancet testified he saw claimant work that summer and claimant was not limping. Mr. Blancet testified he followed up with claimant 1-2 weeks later and claimant reported he was doing OK. Mr. Blancet testified that he told claimant that if he were to need treatment he would take him to Parachute or Rifle.

16. Respondents presented the testimony of Mr. Wheeler, a co-worker with claimant, at hearing. Mr. Wheeler testified he was not present when claimant was injured on March 27, 2015, but heard about the incident two weeks later. Mr. Wheeler testified he worked with claimant after the injury and did not see claimant exhibiting signs of a knee injury. Mr. Wheeler testified approximately two months later, claimant told Mr. Wheeler that he was in too much pain to continue working. Mr. Wheeler testified he sent claimant back into the yard after this exchange and noticed claimant had a severe limp and tears in his eyes.

17. The ALJ credits the testimony of claimant at hearing and finds that claimant has established that it is more likely than not that he is sustained a compensable injury arising out of and in the course of his employment with employer. The ALJ credits claimant's testimony at hearing as being credible and persuasive regarding the incident that occurred on March 27, 2015 and his symptoms following the accident. The ALJ finds that claimant's testimony that he did not suffer from knee pain prior to March 27, 2015 is credible and persuasive. The ALJ finds claimant's testimony that he continued to work for employer after the March 27, 2015 injury because he felt he needed to continue to work in order to keep his job to be credible and persuasive.

18. The ALJ notes that the testimony from Mr. Blancet and Mr. Nielsen that claimant was not limping immediately following his injury was contradicted by the testimony of Mr. Larson, the driver of the truck that struck claimant, who indicated claimant did limp for a couple of days following the injury. The ALJ credits the testimony of Mr. Larson in this case over the contrary testimony of Mr. Blancet and Mr. Nielsen and finds that claimant was limping after his injury.

19. Claimant testified at hearing that he applied for disability benefits from Aflac and was told by the Aflac representative that he would not be entitled to benefits unless his injury was not work related. Claimant testified that he indicated to Aflac that "something happened at home" in an attempt to obtain the benefits from Aflac pursuant to this discussion. The ALJ finds claimant's testimony regarding his application for benefits from Aflac to be credible and persuasive. The ALJ notes that claimant provided a consistent accident history to his medical providers when seeking medical treatment and finds that the application for benefits from Aflac does not overcome claimant's sworn testimony at hearing.

20. The ALJ finds claimant has established that it is more likely true than not that the medical treatment he received from Mr. Zimmerman and Ms. Griffith, including the diagnostic treatment, was reasonable medical treatment necessary to cure and relieve the claimant from the effects of his work injury.

21. The ALJ finds claimant has demonstrated that it is more likely than not that he is entitled to TTD benefits beginning July 6, 2015 when he was taken off of work completely by Mr. Zimmerman. The ALJ notes that the wage records indicate claimant worked up until June 29, 2015, but finds that claimant's initial date of TTD benefits should coincide with Mr. Zimmerman taking claimant off of work completely.

22. Claimant testified at hearing that he took his medical reports to his employer and was told by his employer that he could come back when he could work. Employer argued at hearing that claimant was responsible for his termination of employment because he had abandoned his position with employer by not showing up to work. However, the medical records indicate claimant was taken off of work completely by Mr. Zimmerman as of July 6, 2015. The ALJ finds claimant was not required to return to work for employer following that time unless there was an offer of modified employment provided to claimant. The ALJ further finds that there is insufficient evidence presented at hearing to demonstrate that claimant was terminated prior to July 6, 2015.

23. The wage records entered into evidence at hearing demonstrate the claimant earned $19.352.00 in the 26 weeks prior to June 27, 2015. Claimant testified at hearing that he earned approximately $700.00 per week for employer. This appears to be supported by the wage records and the ALJ finds claimant's AWW in this case to be $744.31 per week as testified to by claimant at hearing.

24. Claimant testified that after his injury he has returned to work for a different employer in a marijuana dispensary. Claimant testified he earned $400.00 per week working for his subsequent employer. Claimant testified he is paid cash for his work with the marijuana dispensary. The ALJ credits claimant's testimony and finds that claimant is entitled to TPD benefits for the period of time following his return to work. The ALJ further finds that the physical restrictions set forth by Mr. Zimmerman have remained in place and have not been lifted.

25. The record entered into evidence indicate that employer's designated medical provider includes Grand River Health in Parachute, Colorado and Grand River Medical Care in Rifle, Colorado. The ALJ notes that this is consistent with the testimony of Mr. Blancet at hearing as to his instructions to claimant following the work injury. The ALJ further notes that Mr. Zimmerman and Ms. Griffith work with Grand River Health Clinic West at the address that is listed as a designated physician for claimant for his injuries. The ALJ finds that claimant has proven that it is more probable than not that the medical treatment from Ms. Griffith and Mr. Zimmerman is authorized medical care that is reasonable and necessary to cure and relieve claimant from the effects of his work injury.

26. Claimant denied having any subsequent injury to his right leg following the March 27, 2015 injury. The ALJ finds this testimony credible and holds that respondents have failed to prove that claimant sustained an intervening injury that would sever respondents' liability for providing ongoing workers' compensation benefits.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the ALJ relies on the testimony of claimant at hearing and finds that claimant has proven by a preponderance of the evidence that he sustained an injury to his right knee on March 27, 2015 while in the course and scope of his employment with employer. The ALJ notes that conflicting testimony was presented as to whether claimant was exhibiting signs of an injury after the March 27, 2015 incident, but credits claimant's testimony that he continued to work and attempted to not show signs of injury because he wanted to continue his work for employer, and only sought medical treatment after the pain became too great, as credible and persuasive.

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

(Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

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." "[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).

7. As found, claimant sought treatment with Mr. Zimmerman and Ms. Griffith following his work injury. As found, Mr. Zimmerman and Ms. Griffith are associated with the physicians allowed to treat claimant as designated by employer. As found, the treatment provided by Mr. Zimmerman and Ms. Griffith, including the diagnostic exams, was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

8. 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).

9. As found, claimant's testimony that he earned approximately $700.00 per week appears to be supported by the wage records entered into evidence and that ALJ finds that claimant's AWW should be $744.31 based on the wage records entered into evidence.

10. 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).

11. As found, claimant was taken off of work by Mr. Zimmerman as of July 6, 2015. As found, claimant has demonstrated that he is entitled to an award of TTD benefits as of July 6, 2015 due to claimant having a medical incapacity evidence by a restriction of body function and an impairment of earning capacity demonstrated by claimant's inability to resume his prior work.

12. Claimant subsequently returned to work for a different employer earning less money. Claimant's testimony at hearing that he earned less money than he did with employer was found to be credible.

13. Once a claimant has established a "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. *Edgar v. Halliburton Energy Services and Ace American Insurance Company*, W.C. No. 4-971-336-01 (December 22, 2015). Therefore, claimant is entitled to an award of TPD benefits for his loss of earning capacity after he returned to work for the cannabis dispensary.

14. Respondents raise an issue with regard to the award for TPD benefits in their Motion for Corrected Order correctly pointing out that claimant testified that documentation of his earnings were kept on his cell phone. This award of TPD benefits does not require respondents to pay a specific TPD amount, but simply awards TPD benefits in compliance with *Edgar v. Halliburton Energy Service, supra.* Respondents may request documentation be presented from claimant prior to awarding a specific TPD amount, but the case law established by the *Edgar* case holds that if claimant returns to work earning less money following an award of TTD benefits, he is entitled to an award of TPD benefits until terminated by law.

15. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that 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." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination.

See Padilla v. Digital Equipment Corp., 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

16. As found, respondents have failed to establish that claimant committed a volitional act that resulted in his termination of employment. As found, claimant was taken off of work completely by Mr. Zimmerman on July 6, 2014. While respondents argue that claimant abandoned his job, there was insufficient evidence to establish that claimant had position to abandon as no credible evidence of an offer of modified employment was presented at hearing. As found, respondents have failed to establish that claimant committed a volitional act that he reasonably knew would lead to his termination of employment from employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay the reasonable and necessary medical expenses provided by physicians authorized to treat claimant for his industrial injury, including the treatment provided by Mr. Zimmerman and Ms. Griffith and the diagnostic treatment, pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay claimant TTD benefits commencing July 6, 2015 and continuing until terminated by law.

3. Respondents shall pay claimant TPD benefits. Respondents are not ordered to pay any specific amount of TPD benefits pursuant to this Order.

4. Claimant's AWW is determined to be $744.31.

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

All matters not determined herein are reserved for future determination.

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

DATED: January 26, 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

1. Whether the claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with the respondent-employer;

2. If so, whether she is entitled to any and all reasonable and necessary medical benefits for her compensable injury; and,

3. If so, whether the treatment rendered at CCOM is reasonable and necessary medical treatment for the compensable injury.

FINDINGS OF FACT

1. The claimant is a case worker manager for the respondent-employer. The claimant is a professional who, in turn, supervises professionals.

2. The essential functions of the claimant's job duties include:

   a. Supervise a full range of intake and ongoing social case work services for a variety of programs.

   b. Supervise a service area consisting of support units, staffed by professional social case workers and paraprofessionals.

   c. Oversee staff scheduling.

   d. Conduct individual group conferences to set and monitor deadlines.

   e. Establish unit goals and tables.

   f. Meet with administration as needed to participate in program meetings.

   g. Organize the work within the unit to assure coverage and efficiency in case load handling.

h. Oversee the budget.

i. Determine the resources required to achieve the goals of the unit.

j. Provide written and verbal instructions to subordinates of program issues.

k. Meet with workers individually and in groups to explain rules, policies, procedures, and laws.

l. Monitor the work of subordinates and review the work of the total unit's effectiveness with regards to plans and programs.

m. Train social workers.

n. Review the performance of workers on a periodic basis and complete their annual performance reviews.

3. The claimant is not considered a word processor or an individual who does nothing but perform data entry.

4. The claimant also described a special project that she performed from January 2015 through May 2015. According to the claimant, this project required her to review numerous disks in preparation for a court proceeding. Specifically, the claimant was required to review these disks on the computer, and, because she is a professional, analyze the information on the disks.

5. According to the Employer's First Report of Injury completed by the claimant, the claimant complained that she developed bilateral upper extremity wrist pain as a result of her work activities. The claimant reported that the onset of these symptoms began on July 21, 2015.

6. Following the report of the injury, the claimant was referred to Emergicare and was seen by Dr. Bradley as the authorized treating physician. Dr. Bradley eventually referred the claimant to Dr. Primack for an evaluation. Dr. Primack indicated that he had spoken with Dr. Bradley subsequent to the referral to ascertain the purposes of the evaluation. Dr. Primack reported that Dr. Bradley was requesting a causality analysis of the claimant's upper extremity complaints.

7. As part of her treatment, the claimant had an MRI performed of her right wrist on August 24, 2015. The MRI revealed that there was no tendon sheath fluid collection. The MRI did reveal that there were three compartment joint effusions identified in the wrist.

8. On August 6, 2015, Sara Nowotny, a qualified rehabilitation counselor, performed a job analysis of the claimant's position. A job analyses is a report to provide a quantitative, accurate assessment of the physical demands of the job, either for assessing risk factors, return to work, or ergonomic considerations. With regards to the job analysis that she performed of the claimant's position, Ms. Nowotny obtained the information about the claimant's essential job functions directly from the claimant. Prior to the evaluation, Ms. Nowotny explained to the claimant that the purpose of the evaluation was to determine the physical demands of her occupation. The claimant also testified as to the job analysis evaluation. The claimant acknowledged that Ms. Nowotny asked questions to her about what the claimant did in her job. The claimant acknowledged that she provided honest, accurate information to Ms. Nowotny during this job evaluation. Ms. Nowotny spent over one hour of time questioning the claimant concerning her general work activities.

9. Ms. Nowotny was of the opinion that her job analysis accurately described the physical requirements of the claimant's general work activities.

10. The ALJ finds Ms. Nowotny to be credible and persuasive concerning the functions of the claimant's position with the respondent-employer.

11. As identified by the claimant in her job analysis, the following represent the essential functions of her job as a case worker manager:

a. Participate in staff, supervisory, and community meetings (approximately 10, one to one and a half hour meetings per week) (20-25% of work activity).

b. Process referrals on the computer (25% of work activity).

c. Case/document review, consisting of answering complaints in person, by telephone, or by computer (20-25% of work activity).

d. Attend home visits (1-3 times per month), including driving 30-50 miles a month.

e. Distributing mail by placing paperwork in employee bins outside of their cubicle (5-10% of work activity).

f. Attend court hearings (4-5 times per month) (10% of work activity).

12. According to the job analysis completed by the claimant and Sara Nowotny, the following represents the claimant's job tasks and corresponding physical demands:

a. Meeting attendance – involving taking notes by hand 2-3 pages per hour per meeting.

b. Processing referrals on computers – reviewing information approving activities primarily with mouse operation.

c. Case/document review – read and review files to verify compliance with guidelines. May circle items for change and initial/date document. Places notes on files and returns to table for storage.

d. Home visit attendance – drive to residence and communicate with clients about services or concerns.

e. Mail distribution – may occur several times a day when pages of documentation are delivered around the office to bens next to cubicle.

f. Court hearing attendance – involving preparation of documents for presentation at hearing. Sitting and listening/participating in court proceedings.

13. Based on a combination of Ms. Nowotny's interview of the claimant, as well as her measurement and observation of work activities, Ms. Nowotny determined that, on average, the claimant uses her mouse 2.1 hours per day and uses a keyboard .35 hours per day.

14. Within the Medical Treatment Guidelines for the category of Cumulative Trauma Disorder, the Division has promulgated primary risk factors and secondary risk factors associated with Cumulative Trauma Disorders of the upper extremities. *W.C.R.P. 17, Exhibit 5, Section D.3.b.* The primary risk factors and the secondary risk factors identified in the Medical Treatment Guidelines are also listed in the claimant's job analysis. Based on Ms. Nowotny's professional experience, the claimant's work activities did not rise to the level of the presence of any of the primary risk factors and secondary risk factors listed in the Medical Treatment Guidelines.

15. The ALJ finds that the claimant's testimony is consistent with the August 6, 2015 job analysis completed by the claimant and Ms. Nowotny. The claimant testified that the physical tasks that she performs vary from day to day. The claimant testified that although there are days where she may be required to mouse more than 6 hours

per day, she also stated that depending on her job functions on a particular day, she would be mousing significantly less that day, or not at all.

16. The claimant was evaluated by Dr. Primack on September 8, 2015. In his September 8, 2015 report, Dr. Primack noted that he had reviewed a "physical demands analysis." At hearing, Dr. Primack confirmed that the "physical demands analysis" that he reviewed was the job analysis performed by Sara Nowotny. In addition, Dr. Primack confirmed that the information identified in the section entitled "Right Upper Extremity" of page 2 of his report was information that he obtained directly from the job analysis. Dr. Primack opined in his September 8, 2015 report that the claimant's ongoing upper extremity problems were not related to her employment.

17. Dr. Primack provided testimony at hearing in explanation of his opinion. Dr. Primack noted that the August 24, 2015 MRI did not show any fluid along the tendons or within the tendon sheath. Although the MRI did show fluids in the wrist, the MRI did not show any fluid in the tendons, which would lead to the conclusion that the symptoms that the claimant is reporting are not because of repetitive motion. In addition, the MRI did not show that the claimant had any inflammation in the tendons of her hand. As a result, Dr. Primack was of the opinion that based on objective medical evidence the claimant did not have a pathology consistent with repetitive motion.

18. Dr. Primack was of the opinion that based on his review of the job analysis, the claimant did not have a sufficient amount of repetitive motion that would rise to the level of a compensable occupational disease. Dr. Primack testified that the job analysis indicated that the claimant had variability of job tasks. Dr. Primack noted that the claimant writes, she uses a computer, she talks, she walks, and does many other things throughout the day. Dr. Primack further testified that the variability of her tasks would result in different loads across her fingers, in different positions across her fingers, and also rest cycles. As it pertains to rest cycles, Dr. Primack noted that with the variability in tasks, the rest cycles in between the variability allows her tendons to rest. Because the tendons are allowed to rest, these tendons will not get inflamed, which is correlated with the MRI findings.

19. The claimant's counsel, during cross examination, suggested to Dr. Primack that the claimant's work activities aggravated her pre-existing de Quervain's tenosynovitis. However, Dr. Primack disagreed that the claimant properly carried the diagnosis of de Quervain's tenosynovitis. Specifically, Dr. Primack testified that in order to properly diagnose a person with de Quervain's tenosynovitis, the MRI must disclose fluids in the tendon, as well as different types of dimensions of the tendon to ascertain any changes in the size of tendons. Because the August 24, 2015 MRI did not show

these pathological findings, he reached the conclusion that the claimant did not have de Quervain's tenosynovitis. Even if the claimant did carry the diagnosis of de Quervain's tenosynovitis, Dr. Primack rendered the opinion that, because of the variability of tasks in the claimant's job activities, the claimant would not have the necessary force, load, and cycle necessary for her work activities to cause or aggravate her de Quervain's tenosynovitis.

20. The ALJ finds that Dr. Primack's analyses and opinions are credible and more persuasive than medical evidence to the contrary.

21. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant suffers from an occupational disease arising out of and occurring in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

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

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

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

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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

6. Section 8-40-201(14) C.R.S. (2015) defines “occupational disease” as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

7. An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill,* 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. The hazardous conditions of employment need not be the sole cause of the disease. The existence of a preexisting condition does not defeat a claim for an occupational disease unless it can be shown that a non-industrial cause was an equally exposing stimulus. A claimant is entitled to recovery if he or she demonstrates that the

hazards of employment cause, intensify or aggravate to some reasonable degree, the disability. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

9. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

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

11. Of particular note in the Claimant's case, as this is a right upper extremity claim, is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

12. Rule 17, Exhibit 5 (D)(3) provides that,

> The clinician must determine if it is medically probable (greater than 50% likely or

> more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related.

13. The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation.

14. As outlined above, Ms. Nowotny spent an hour obtaining information from the claimant as to her job activities, and the physical demands of each of these job activities. The claimant confirmed that she provided accurate information to Ms. Nowotny during this evaluation.

15. The claimant testified that she needs to perform certain activities frequently and repetitively. However, the claimant also acknowledged that her job activities vary on a daily basis. The claimant also acknowledged that she is a professional, who is supervising professionals. The claimant is not a word processor, or someone that does nothing but data entry. The claimant reviews and analyzes information on a regular basis. Consequently, the claimant’s job is not a position where she is continuously performing repetitive activities of her upper extremities with any kind of force or duration.

16. As outlined above, Dr. Primack reviewed the job analyses and, based on the contents of the job analyses, did not believe that the claimant’s work activities rose to the level of a compensable occupational disease. As testified to by Dr. Primack, the basis of his opinion is multi-factorial.

17. Dr. Primack’s opinion is supported by the Medical Treatment Guidelines. The claimant does not meet any primary risk factors or secondary risk factors articulated in the Medical Treatment Guidelines.

18. The ALJ concludes that Ms. Nowotny is credible and persuasive.

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

20. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffers from an occupational disease arising out of and in the course of her employment with the respondent-employer.

21. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she is entitled to medical benefits, specifically those medical benefits as provided by CCOM.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

2. The claimant's claim for medical benefits is denied and dismissed.

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

DATE: January 14, 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

W.C. I. No. 2012-008

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DIVISION OF WORKERS' COMPENSATION

IN THE MATTER OF THE APPLICATION OF:

DIVISION OF WORKERS' COMPENSATION,

Applicant,

v.

Employer/Respondent.

On October 7, 2015, the Division of Workers' Compensation (hereinafter the "Division") filed an Application for Hearing in the above-captioned matter, and the Division mailed the Notice of the Hearing set for February 3, 2016, to the Employer at its last known and regular address as follows: [redacted], the last known address on file with the Division, and the notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing.

On December 9, 2015, the Division filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist continuing its business operations for failure to maintain workers' compensation insurance as required by §§ 8-44-101 and 8-43-409, C.R.S. The Division's Motion was mailed to the Employer on December 9, 2015, at its last known address on file with the Division, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist. . Employer filed **no** timely response to the Motion nor did it file any response whatsoever. The matter was submitted for decision on January 5, 2016.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether the Employer continues business operations without maintaining workers' compensation insurance; and, if so, should the Employer be ordered to cease and desist from continuing to do business.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On October 7, 2015, the Division of Workers' Compensation filed an Application for Hearing in this matter pursuant to Office of Administrative Courts Rules of Procedure (OACRP), Rule 8, 1 CCR 104-1 and § 8-43-409(1), C.R.S.. The Division mailed a Notice of Hearing to the Employer/Respondent at its last known address on file with the Division [redacted] and the notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing. The hearing has been set for February 3, 2016, at 1:30 PM.

2. On December 9, 2015, the Division filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist ("Motion") pursuant to OACRP, Rule 17 and § 8-43-409, C.R.S. The Division's Motion was mailed to the Employer on December 9, 2015, at its last known address on file with the Division, as herein above detailed, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist.

3. Pursuant to OACRP, Rule 17, the Employer had 20 days after the date of filing of the Motion to file an objection to the Motion. Employer filed **no** timely response to the Motion nor did it file any response whatsoever.

4. The Employer failed to file a Response to the Motion for Summary Judgment. Accordingly, there are no genuine issues of material fact in dispute for hearing. The Employer failed to provide a written response with supporting documentation to the Division's Motion for Entry of Summary Judgment.

Findings

5. It is undisputed, and the ALJ finds, that the Employer employs employees for whom it must carry workers' compensation insurance under the provisions of the Workers' Compensation Act (hereinafter the "Act")..

6. The Employer does not have a policy of workers' compensation insurance in effect.

7. The Employer continues to operate its business in the absence of workers' compensation insurance coverage.

8. The Employer received legal notice of the hearing set before the Office of Administrative Courts, and the motion for Summary judgment as herein above detailed.

9. The Employer is in default of its workers' compensation insurance obligations under the Act.

Aggravating Factors

10. In an Order, dated January 18, 2012, the Director of the Division imposed a fine in the amount of $16, 405.00 against the Employer for failing to maintain workers' compensation insurance from at least April 27, 2011. The Employer did not appeal the Director's Order and the time for appeal has passed. The Director's Order was recorded as a judgment in Denver District Court Case No. 12CV2895 on May 14, 2012.

Ultimate Findings

11. There are no genuine disputed issues of material fact concerning the fact that the Employer continues to operate its business without insuring its liability for workers' compensation.

12. The Division has proven, by preponderant evidence that there is no genuine issue of disputed material fact that the Employer is aware of its obligation to insure its liability for workers' compensation and has failed to do so for a period of over 4 years, having been fined $16, 405.00 in 2012 for failing to insure its liability for workers' compensation.

13. The Division has proven, by a preponderance of the evidence that the Employer continues business operations without insuring its liability for workers' compensation.

CONCLUSIONS OF LAW

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

Jurisdiction and Notice

a. The ALJ has jurisdiction of the subject matter and over the parties to this action pursuant to the Workers' Compensation Act of Colorado.

b. As found, the Division's Motion was mailed to the Employer on December 9, 2015, at its last known address on file with the Division, as herein above detailed, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist. *See Olsen v. Davidson,* 142 Colo. 205, 350 P.2d 338 (1960); *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993).

c. As found, the Employer failed to provide a written response with supporting documentation to the Division's Motion for Entry of Summary Judgment. Accordingly, the facts set forth in the Division's Motion and in the supporting affidavit attached to the Motion for Summary Judgment are deemed undisputed. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1006 (Colo. App. 2004).

d. The Employer is in violation of § 8-44-101(1), C.R.S., by failing to maintain workers' compensation insurance for its covered employees, and is therefore subject to penalties under § 8-43-409, C.R.S.

e. . Section 8-43-409(1)(a), C.R.S., provides that an employer in default of its workers' compensation insurance obligations shall be ordered to cease and desist immediately from continuing its business operations during the period such default continues.

f. The issuance of an order requiring the Employer to cease and desist business operations while in default of its workers' compensation insurance obligations is an appropriate penalty for failure to keep workers' compensation insurance in force.

g. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to

interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents and affidavits. As further found, there were no timely responses to the Motion. 12. Summary judgment is appropriate in this matter because there are no genuine issues of material fact in dispute, and the Division is entitled to entry of judgment as a matter of law. *McCormick v. Union Pacific Resources Co.*, 14 P.3d 346, 348-349 (Colo. 2000); C.R.C.P. 56(c).

h. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the attachments to the Division's Motion for Summary Judgment support the proposition that there is no genuine issue of disputed material fact exist.

i. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, there were no timely responses to the Division's Motion for Summary Judgment. Therefore, the Division is entitled to Summary Judgment, as a matter of law.

<u>Burden of Proof</u>

j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Division has sustained its burden that there is no genuine issue of disputed material fact concerning the Employer continuing to operate a business without insuring its liability for workers' compensation; and, in doing so the Employer continues to violate a Cease and Desist Order entered in 2012 as herein above described.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Division of Workers' Compensation's Motion for Summary Judgment is hereby granted.

B. The Employer shall cease and desist immediately from continuing its business operations during the period it remains in default of its mandatory obligation to have workers' compensation insurance in force and effect.

C. The hearing in this matter, February 3, 2016, is hereby vacated.

DATED this_____day of January 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. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Granting Summary Judgment in Favor of the Division of Workers' Compensation** on this_____day of January 2016, mailed, postage prepaid, first class, or electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.sjord