ISSUES

- Did the claimant prove by a preponderance of the evidence that her need for bilateral knee replacement surgeries were proximately caused by the industrial injury of February 12, 2003?

- Is the respondent entitled to an order determining the issue of maximum medical improvement?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 through 12 were received in evidence. Respondent's Exhibits A through R were received in evidence.

2. On February 12, 2003 the claimant was employed by the respondent as a probation officer. On March 4, 2003 the respondent filed a General Admission of Liability admitting the claimant sustained an injury on February 12 and that the respondent is liable for medical benefits "for bilateral knee contusions, left knee bursitis and right knee abrasions." On May 26, 2010 the respondent filed a General Admission of Liability admitting for temporary total disability benefits from May 7, 2003 through June 1, 2003.

3. The claimant testified as follows. On February 12, 2003 she fell on concrete at work and landed on both knees. After this injury she experienced symptoms of constant knee pain, difficulty walking up and down stairs and "limited walking time." She received treatments including cortisone injections, "gel injections" and surgery to one of the knees although she could not recall which one. Although the claimant received some temporary relief from treatment her symptoms have "steadily gotten worse."

4. The claimant testified that she never had these symptoms before the injury. She now desires to undergo bilateral total knee replacement (TKR) surgeries.

5. The claimant was seen by Cynthia Kuehn, M.D., on February 12, 2003. Dr. Kuehn noted the claimant's history was noncontributory with no history of a knee injury. Dr. Kuehn noted "mild swelling and mild diffuse patellar tenderness" of the right knee. There was a "very superficial abrasion" just inferior to the right patella. There was moderate tenderness over the left suprapatellar bursa which was "enlarged." Dr. Kuehn diagnosed bilateral knee contusions, left knee bursitis secondary to trauma and a right knee abrasion.

6. On February 19, 2003 the claimant was seen by David Blair, M.D. Dr. Blair noted slight swelling of the right knee and "a little more in the left knee." There was resolving ecchymosis in the left knee just inferior to the patella. Dr. Blair's impression was "resolving bilateral knee contusions."

7. In March 2003 Dr. Blair's impression was "persistent symptoms of bilateral knee contusions" and he referred the claimant for an orthopedic evaluation.

8. The claimant was seen by orthopedist Christopher Isaacs, D.O., who referred the claimant for MRI's of both knees. The MRI's were performed on April 11, 2003. With respect to the left knee the radiologist's impressions included the following: (1) Subchondral marrow changes within the medial femoral tibial compartment, consistent with areas of osteochondral defects and associated avascular necrosis; (2) Extensive changes of patellofemoral osteoarthritis, with osteochondral defect involving the lateral patellar cartilage, the medial inferior trochlear cartilage, and severe thinning of the patellar cartilage, with near complete denudation; (3) Questionable small nondisplaced partial thickness tear of the posterior horn of the medical meniscus; (4) Prepatellar bursitis and soft tissue edema; (5) Mild pes anserine strain.

9. With respect to the right knee the radiologist's impressions included the following: (1) Severe osteoarthritis of the medial femoral tibial compartment, with large osteochondral defect involving the central weight bearing portion of the medial femoral condyle with full thickness cartilage loss; (2) Moderate to severe patellofemoral osteoarthritis with severe thinning of the patellar cartilage; (3) Degenerative tear of the posterior root of the medial meniscus.

10. On May 7, 2003 Dr. Isaacs performed left knee surgery described as arthroscopy, partial medial meniscectomy, chondroplasty, excision of prepatellar bursa and soft tissue mass. In the operative report "indications" Dr. Isaacs noted his examination was consistent with prepatellar bursitis and torn medical meniscus. He also noted the MRI confirmed these diagnoses as well as revealing the presence of a chondral defect.

11. On May 21, 2003 Dr. Blair referred the claimant for 12 physical therapy (PT) visits.

12. On January 11, 2005 the claimant was seen by a physician at Kaiser and reported experiencing "blurry vision." The claimant advised that she was walking 3 miles per day. She was assessed as having cataracts in both eyes and the physician recommended removal of the right cataract.

13. On June 2, 2005 the claimant completed a health questionnaire. She reported ongoing problems with her back, neck shoulder, vision and that she was experiencing headaches. The claimant reported that her hobbies included "long walks." The claimant also completed a pain diagram that requested her to mark all areas of her body where she felt discomfort. The claimant marked the back of her head, the shoulders, the low back and the back of both legs above the knees. The claimant did

not mark the knees. The claimant did report that she had sustained a work-related fall on "both knees," had surgery on one knee and that surgery was "pending" on the other knee.

14. On June 17, 2005 Stephen Hessl, M.D., examined the claimant for treatment of neck and back pain. Dr. Hessl noted that on June 2, 2005 Dr. Kuehn examined the claimant for reports of neck pain, headaches, back pain and vision problems. Dr. Kuehn recommended an ergonomic evaluation of the claimant's work station. Dr. Hessl assessed myofascial pain syndrome secondary to ergonomic conditions at work. He referred the claimant for PT. Dr. Hessl noted that in the past Mr. Jeff Coverly had provided the claimant PT for a knee injury. Therefore, he "agreed" to refer the claimant to Coverly for treatment of her current condition.

15. In December 2005 the claimant underwent a preoperative physical prior to cataract surgery. The claimant gave a history that she was able to climb a flight of stairs without difficulty and walk 6 city blocks without stopping.

16. On December 27, 2005 the employer notified the claimant she was to be suspended for alleged misconduct relating to the performance of her duties. On March 22, 2006 the claimant resigned from her job with the employer stating that her physicians had advised her to seek employment in a less stressful environment. The claimant's resignation did not mention knee problems.

17. On October 24, 2007 the claimant was seen by Susan Schiff, M.D., for follow-up treatment of her diabetes. Dr. Schiff noted that the claimant was complaining of knee problems "for many years" but the problems were "worse over the last year." The claimant attributed the start of her knee problems to "a fall on concrete about 5 years ago." Dr. Schiff's records do not indicate that she provided any treatment for the knee problems.

18. On February 19, 2010 the claimant returned to Dr. Blair and reported her left knee never returned to the condition that it was prior to the 2003 injury and that her right knee symptoms were worse. Dr. Blair noted that the right knee MRI from April 2003 showed "severe" medial compartment degenerative changes, "moderate to severe" patellofemoral degenerative changes and a degenerative tear to the medial meniscus. Dr. Blair stated that the plan in 2003 had been to operate on the left knee and after rehabilitation proceed with "scoping the right knee." However the claimant's care was "interrupted by problems with her job" and she left the employment in March 2006. The claimant advised she did not know she could continue medical treatment on her claim after she left work. Dr. Blair observed the claimant had a significantly antalgic gait. Mild effusion was detected in both knees. Dr. Blair stated the insurance adjuster had approved an evaluation by Douglas Foulk, M.D., of Panorama Orthopedics. The purpose of the evaluation was to determine what symptoms were "referable to her fall seven years ago at work" and recommend treatment.

19. Dr. Foulk examined the claimant on February 23, 2010. The claimant reported to Dr. Foulk that after the 2003 injury and since the left knee surgery she has

continued to experience "persistent, daily dull and sharp knee pain." Dr. Foulk assessed bilateral osteoarthritis of both knees and bilateral knee pain. He opined the osteoarthritis was "present in 2003 but was exacerbated by [the claimant's] injury at work." He recommended a series of 3 Orthovisc injections. He also stated that if these injections were not successful she might require total knee replacement (TKR).

20. On June 6, 2011 the claimant returned to Dr. Blair. He noted that the claimant reported she had undergone viscosupplementation injections but they "really did not help." He further stated that at "her last visit bilateral total knee replacement was recommended as the only remaining treatment for her symptoms."

21. On December 12, 2011 J. Tashof Bernton, M.D., performed an independent medical examination (IME). Dr. Bernton is board certified in internal medicine and occupational medicine. He took a history from the claimant, reviewed medical records and performed a physical examination. Dr. Bernton opined to a reasonable degree of medical probability that although the claimant does require TKR surgeries the need for them "is not because she slipped and fell on the pavement in 2003." Instead, Dr. Bernton opined the need for surgery is because "she has osteoarthritis which is a progressive disorder." In support of these opinions he noted that the 2003 MRI's showed "severe osteoarthritic changes" that were present before the fall in February 2003 "and were in no way caused by it." Dr. Bernton further opined that although the claimant gave a history of "increasing disability" since the injury that "history is not consistent with the information in the chart." In this regard he noted the claimant was seen by Dr. Hessl in June 2005 and reported to him that she had PT for a past knee injury. However, she did not report any current knee problems. He also observed that after 2005, when the claimant sought treatment for other issues she did not seek treatment for her knees until 2010. Dr. Bernton explained that the claimant's "disease continued to progress, and in 2010 she presented with increasing pain and disability." Dr. Bernton stated that the date of maximum medical improvement (MMI) is difficult to ascertain from the information currently available. However he opined that "at the latest" the claimant reached MMI by February 12, 2004, one year after the date of injury.

22. On March 25, 2012 Dr. Blair issued a report concerning the cause of the claimant's need for bilateral TKR's. Dr. Blair noted that he had reviewed medical records and interviewed the claimant on February 26, 2012 and March 9, 2012. The claimant reported that since the February 12, 2003 injury she had been unable to do many activities that she could do before the injury. These activities included hiking, long walks and attending concerts and sporting events. Dr. Blair noted that medical records from before the injury did not reveal any complaints of knee problems or arthritis. He further noted that in October 2007 while undergoing a diabetic check at Kaiser the claimant complained of "knee problems for many years" that had gotten worse over the last year. Dr. Blair observed that when the claimant sought treatment for neck and back pain in 2005 she completed an intake form stating that in the past she fell on both knees, had surgery on one knee and that surgery on the other knee was pending. Dr. Blair disagreed with Dr. Bernton regarding the cause of the need for TKR's. He stated that while the "degenerative processes were obviously going on for years," the available

evidence indicates the claimant was asymptomatic prior to the 2003 injury. Moreover, Dr. Blair stated that the MRI's revealed bone bruising consistent with the mechanism of the injury and opined that trauma sufficient to produce these MRI findings would be likely to "exacerbate an already existing arthritic process." Dr. Blair opined the claimant sustained a "permanent aggravation of a previously asymptomatic preexisting condition," is not at MMI and needs the bilateral TKR's to reach MMI.

23. On December 9, 2012 Robert Messenbaugh, M.D., issued a report concerning a records review of the claimant's case. Dr. Messenbaugh is board certified in orthopedic surgery and level II accredited. Dr. Messenbaugh's review included the preceding reports of Dr. Bernton and Dr. Blair. Dr. Messenbaugh opined that this is a "difficult and controversial case." Based on his review Dr. Messenbaugh wrote that the claimant had "severe and advanced bilateral knee arthritis prior to her" February 12, 2003 injury. He opined it was "improbable" that the claimant had no symptoms of this condition prior to the injury. Dr. Messenbaugh also opined that the claimant "may well have sustained bilateral knee anterior contusions with the creation or aggravation of the left knee prepatellar bursitis that was surgically treated, but that her preaccident chronic knee osteoarthritis was not created or permanently aggravated by her fall." Dr. Messenbaugh disagreed with Dr. Blair regarding the interpretation of Dr. Foulk's opinion. Dr. Messenbaugh read Dr. Foulk's use of the word "exacerbation" rather than "aggravation" as demonstrating that Dr. Foulk believes the February 12 incident to have resulted in a temporary aggravation of the claimant's pre-existing condition. He opined that the claimant most likely reached MMI for the injury-related conditions by February 12, 2004 and to the extent the claimant reported knee symptoms in 2005 and thereafter they were consistent with the "natural progression and worsening" of the arthritis she had before the fall. Dr. Messenbaugh opined the claimant's TKR surgeries should be provided through her "private insurance."

24. On October 30, 2013 Dr. Messenbaugh performed an IME. In this connection he took a history from the claimant and conducted a physical examination. The claimant told Dr. Messenbaugh that she did not have any knee pains prior to the February 12, 2003 injury. Dr. Messenbaugh stated that the claimant stopped working for the employer in 2006 and that it "sounds as though she stopped working for reasons other than her knees." Dr. Messenbaugh noted that the claimant stated that her job was stressful, she was having visual problems and "her overall health was an issue." Dr. Messenbaugh stated that his opinions regarding the cause of the claimant's need for TKR surgeries remained the same as expressed in his December 2012 report. Specifically, he stated that he believes the claimant's need for TKR's is "due to her severe bilateral knee arthritis which predated her fall of February 12, 2003 and not due to the fall itself or any injuries [the claimant] might have sustained at the time of her fall."

25. On January 7, 2014 Lawrence Varner, D.O., performed an IME. Dr. Varner took a history, performed a physical examination and reviewed medical records. The claimant reported bilateral knee pain "directly related to an on-the-job injury of 02/12/13" when she was walking on an uneven surface and fell forward onto both knees. The claimant reported that the knee pains limited her activity significantly. These activities included going up stairs, walking and standing. Dr. Varner wrote the

claimant left her position as a probation officer "in March 2006 because of ongoing knee pain, which precluded her from fully performing her job duties." Dr. Varner assessed bilateral severe osteoarthritis of the knees with "obvious antalgic gait and clinical varus deformities." He opined the claimant's prognosis is poor without the recommended TKR surgeries. Dr. Varner stated that the claimant "did have degenerative arthritis in bilateral knees preceding" the February 2003 injury. However he opined that although the claimant "would likely have eventually developed some mild symptoms consistent with arthritis," she would not have required the bilateral TKR's recommended after the 2003 injury.

26. On February 19, 2014 Dr. Messenbaugh issued a report concerning his review of Dr. Varner's January 7, 2014 report. Dr. Messenbaugh disagreed with Dr. Varner's opinion concerning the cause of the need for TKR surgeries and stated that the opinions he expressed in the December 2013 report remained unchanged.

27. On August 14, 2013 Caroline Gellrick, M.D., conducted an IME of the claimant. She took a history, reviewed medical records and performed a physical examination. Dr. Gellrick opined the MRI's of the claimant's knees showed pre-existent osteoarthritis. She opined that although the fall on February 12, 2003 caused a temporary aggravation of the osteoarthritis resulting in pain and swelling, the need for the TKR surgeries is "not work comp compensable." In support of her opinions Dr. Gellrick noted that the claimant had been seen in by a physician in January 2005 and reported she was walking 3 miles per day but did not mention any knee symptoms. Dr. Gellrick stated that this record lends "credence that the patient was asymptomatic, particularly in 2005, from her work-related injury of 2003."

28. Dr. Messenbaugh testified at the hearing. His opinions remained consistent with those he expressed in his written reports. He agreed with Dr. Gellrick's opinions. He admitted he saw no medical records indicating that the claimant complained of knee symptoms prior to the injury in February 2013.

29. The claimant failed to prove it is more probably true than not that the need for bilateral TKR surgeries was proximately caused by the industrial injury of February 12, 2003. To the contrary, the credible and persuasive evidence establishes that the need for bilateral TKR surgeries is probably the result of the natural progression of the claimant's pre-existing osteoarthritis.

30. The ALJ credits and gives the most weight to the opinions of Dr. Bernton, Dr. Messenbaugh and Dr. Gellrick. These physicians persuasively opined that the need for the TKR surgeries probably resulted from the claimant's pre-existing arthritis of the knees, and not the effects of the February 2003 injury. These physicians agree that the claimant had significant bilateral degenerative arthritis of the knees that pre-dated the industrial injury. Their opinions in this regard are corroborated by the 2003 MRI reports and even the opinions of Dr. Blair and Dr. Foulk. Doctors Bernton, Messenbaugh and Gellrick persuasively opined that the need for the TKR surgeries is most likely the result of the progression of the pre-existing arthritis and not the industrial injury.

31. Dr. Bernton persuasively noted that although the claimant reported progressive disability after the industrial injury, that report is not supported by the medical records. Dr. Bernton's opinion is corroborated by several medical records. For instance, in January 2005 the claimant told her Kaiser physician that she was walking 3 miles per day. In June 2005 the claimant completed a pain diagram but did not mark the knees as producing any pain, although she reported surgery was "pending" on one of her knees. In December 2005 the claimant reported she was able to climb a flight of stairs without difficulty and walk 6 city blocks without stopping. Moreover, when the claimant resigned her employment in March 2006 she did not mention knee problems but instead attributed her decision to a stressful work environment. As Dr. Bernton noted, between 2005 and the early 2010 (more than 7 years after the date of injury) the claimant did not actually seek any additional treatment for her knees.

32. Dr. Bernton's conclusions are corroborated by the persuasive opinions of Dr. Messenbaugh and Dr. Gellrick.

33. The opinions of Dr. Blair are not given as much weight as those of doctors Bernton, Messenbaugh and Gellrick. Dr. Blair's opinion is partially based on the claimant's history that since the February 2003 injury the claimant had been unable to do many activities she was able to perform before the injury. These activities included hiking and taking long walks. However, as found above, the medical records indicate that in 2005, nearly 2 years after the injury, the claimant was able to walk 3 miles. In June 2005 the claimant reported her hobbies included "long walks." In December 2005 the claimant reported being able to go up a flight of stairs and walk 6 city blocks without stopping. Although Dr. Blair places great emphasis on the absence of symptoms prior to the injury, he does not persuasively explain the claimant's failure to seek any treatment for her knees between 2005 and 2010.

34. The opinions of Dr. Varner are not given as much weight as those of doctors Bernton, Messenbaugh and Gellrick. Dr. Varner's opinions appear to be based on a less than complete understanding of the claimant's true history. As found above, the claimant reported to medical providers that as late as 2005 she was able to take 3 mile hikes, walk up stairs and walk 6 city blocks without stopping. Moreover, contrary to Dr. Varner's report the persuasive evidence establishes that the claimant did not resign her job with the employer because of knee problems. Instead she cited stress. Dr. Varner does not persuasively explain why his opinion is consistent with the claimant's failure to seek any treatment for her knees between 2005 and 2010.

35. The ALJ gives little weight to the opinion of Dr. Foulk insofar as it affects the causation determination. Dr. Foulk's use of the term "exacerbation" makes it difficult to determine whether he agrees with the views of doctors Bernton, Messenbaugh and Gellrick or with those of doctors Blair and Varner.

36. The claimant's testimony that after the injury she experienced a steady worsening of her symptoms that included difficulty climbing stairs and walking is not credible and persuasive. That testimony is inconsistent with medical records

documenting that she was able to walk substantial distances and climb stairs as late as 2005.

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.

CAUSE OF NEED FOR PROPOSED TKR SURGERIES

The claimant argues she has proven it is more probably true than not that the need for bilateral TKR surgeries was proximately caused by the injuries she sustained on February 12, 2003. In support of this proposition she cites her own testimony and the opinions of Dr. Blair, Dr. Varner and Dr. Foulk. The respondents contend the claimant failed to prove any causal connection between the need for the surgeries and the February 2003 injury. They rely principally on the opinions of Dr. Messenbaugh, Dr. Bernton and Dr. Gellrick.

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. 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). 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 the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107

P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001). However, the mere fact that a claimant experiences a symptom after an industrial injury does not require the ALJ to conclude that the symptom was caused, aggravated or accelerated by the industrial injury. Rather, the occurrence of a symptom after an industrial injury 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. 1985); *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).

For the reasons stated in Findings of Fact 29 through 36, the ALJ concludes the claimant failed to prove it is more probably true than not that her need for bilateral TKR surgeries was caused, aggravated or accelerated by the industrial injury of February 12, 2003. Rather, the ALJ is persuaded by the medical records and the opinions of doctors Bernton, Messenbaugh and Gellrick that the need for the TKR surgeries is most likely the result of the natural progression of the claimant's pre-existing osteoarthritis. The opinions of other physicians are not given as much weight for the reasons stated in Findings of Fact 33 through 35. The claimant's relevant testimony concerning the steady worsening of her symptoms after the date of injury is not credible for the reasons stated in Finding of Fact 36. For these reasons the claim for bilateral TKR surgeries must be denied.

RESPONDENT'S REQUEST FOR A DETERMINATION OF MMI

In its position statement the respondent requests an order finding that the claimant has reached MMI for her industrial injury of February 12, 2003. The respondents rely on the opinions of Dr. Bernton, Gellrick and Messenbaugh for the proposition that all of the injury-related conditions have stabilized and the claimant does not need further treatment to reach MMI. The respondent's request is denied.

At the commencement of the hearing the issues were specifically discussed. Counsel for the respondent stated on the record that it was "correct" that the respondent was not raising the issue of MMI even if some of the evidence might pertain to that issue. Thus, the issue of MMI was not properly submitted for consideration and was affirmatively waived by the respondent.

Even if the issue had been before the ALJ he would have lacked jurisdiction to consider it since there is no credible evidence that an authorized treating physician

(ATP) has placed the claimant at MMI, and there is no credible evidence that the issue of MMI has been submitted to a Division independent medical examiner (DIME) for consideration.

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." Further, § 8-42-107(8)(b)(I), C.R.S., provides that an "ATP shall make the determination as to when the injured employee reaches" MMI. Section 8-42-107(8)(b)(II), C.R.S., provides for the selection of a DIME physician to contest an ATP's finding of MMI or, in certain circumstances, the ATP's failure to place the claimant at MMI (24-month DIME). Section 8-42-107(8)(b)(III), C.R.S., provides that a "hearing on this matter [MMI] shall not take place until the finding of the independent medical examiner has been filed with the division." Absent an ATP and/or DIME physician's finding of MMI the ALJ lacks jurisdiction to determine a dispute concerning the existence of MMI. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

ORDER

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

1. The claimant's request for bilateral total knee replacement surgeries is denied.

2. The respondent's request for an order determining the issue of maximum medical improvement is denied.

3. Issues not resolved by this order are reserved for future determination.

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

DATED: March 16, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

1. Whether the claimant is entitled to temporary total disability (TTD) benefits from March 13, 2014, through April 9, 2014?

2. Whether the claimant is entitled to TTD benefits from May 1, 2014, through June 17, 2014?

3. Whether the claimant's injuries include her back and other body parts as mentioned in the opinion of Dr. Timothy Hall, the division sponsored independent medical examiner (DIME)?

4. Whether the issue of the claimant's back being related to this claim was previously litigated and resolved in the claimant's favor?

The ALJ resolved issues 1, 2, and 3 above favorably for the claimant and thus does not render a decision on issue 4 as it is now moot.

FINDINGS OF FACT

1. On March 13, 2014 Dr. Richard Nanes, the claimant's authorized treating physician (ATP) for her work related left knee injury, declared the claimant to be unable to work beginning that date, due to her left knee total knee replacement being quite painful, as well as requiring diagnostic tests to determine the nature of her back pain. Specifically, Dr. Nanes observed that the claimant was "only able to flex her left knee to 90◦ and extension is mildly limited and these movements are very painful for the patient."

2. Dr. Nanes erroneously attributed her back pain at the time to the work injury based upon a misreading of a prior Summary Order issued by this ALJ.

3. Nonetheless, the ALJ finds that the Division independent medical examination (DIME) opinion of Dr. Hall asserts that the back symptomatology is related to the claimant's underlying work related total knee replacement as a result of her altered gait. The ALJ finds that Dr. Hall's opinion on this issue is credible and

persuasive and the ALJ finds that the claimant's back symptoms are related to the claimant's work injury of March 13, 2005.

4. On April 8, 2014 Dr. Nanes returned the claimant to modified duty effective April 10, 2014.

5. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including March 13, 2014 through and including April 9, 2014 as a direct result of her work related injury of March 13, 2005.

6. On May 1, 2014 the claimant's work related left total knee replacement became unstable and while the claimant was hanging curtains from a bed the knee buckled causing the claimant to fall, striking the headboard and injuring her head, neck, and shoulders.

7. This is consistent with the claimant's history of having problems with her knee giving out on her a number of times previously. The knee instability had already been documented previously by the surgeon Shawn Nakamura, M.D., on August 26, 2013, observing: "I definitely think she has flexion instability."; "I also think she tore her PCL…."; and, "She does have slight instability in extension, particularly medial. Positive instability in flexion. Positive anterior and posterior instability in flexion. When she ambulates, when the knee gets into flexion, she feels like she is going to fall." Dr. Nanes also found a lot of play in the knee as of October 23, 2012.

8. The claimant sought treatment on May 1, 2014 at the Emergency Department that same day at the St. Thomas More Hospital. The claimant was referred back to Dr. Nanes.

9. The claimant was seen by Dr. Nanes later that same day. Dr. Nanes took the claimant off of work from and including May 1, 2014 and the claimant was continued off work up to and including June 17, 2014, which was the day prior to the claimant having work related revision surgery on the left knee, and on which day the respondent began paying the claimant TTD benefits as a result of that surgery.

10. Dr. William Ciccone, the respondent's IME doctor, agreed that there was documented knee instability before the claimant's May 1, 2014 fall and that the instability would not have resolved on its own before the June 18, 2014 surgery by Dr. Nakamura.

11. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including May 1, 2014 through and including June 17, 2014 as a direct result of her work related injury of March 13, 2005.

12. Dr. William Ciccone opined that an altered gait from a knee injury could cause back pain. He stated that it would be expected to get worse over time as was determined by Dr. Hall in his report.

13. The ALJ finds that the claimant's back has been injured, along with her head, shoulders, neck, and upper extremities, as a result of the fall that occurred in October of 2012. This was specifically part of the opinion by the DIME physician. The ALJ finds the opinions of Dr. Hall with respect to the relatedness of the back, head, shoulders, neck, and upper extremities, to be credible and persuasive. In addition, as a result of the claimant's latest fall, on May 1, 2014, the claimant suffered further injury to her back. Most likely the back pain stems from a combination of these events. Either way, the ALJ finds that the claimant has established that it is more likely than not that the claimant's current back issues, as well as her head, shoulders, neck, and upper extremities issues, are causally related to her industrial injury of March 13, 2005.

14. The ALJ finds that the claimant has established that it is more likely than not that the claimant's current medical issues with her back, head, neck, and shoulders are related to her industrial injury of March 13, 2005 and that the respondent is responsible for the payment of medical treatment related to these issues.

15. The respondent, at the time of the hearing, had not received a bill for the ED services received by the claimant on May1, 2014 and thus, understandably, had not paid it by the time of the hearing. The ALJ finds that the respondent is responsible for the payment of the May 1, 2014 ED visit as it was causally related to the claimant's industrial injury.

16. The ALJ finds that the respondent has paid for the claimant's MRI of March 26, 2014.

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 (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.

2. 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).

3. 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).

4. 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*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

5. 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).

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). This includes 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).

7. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to TTD benefits from and including March 13, 2104 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

9. 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).

10. 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.

11. The claimant seeks medical benefits in the way of payment for the March 26, 2014 low back MRI and the claimant's May 1, 2014 visit to St. Thomas More Hospital. As found, the respondent paid for the MRI, making that issue moot. It is noted that it has generally been held that payment of medical services is not in itself an admission of liability. *Ashburn v. La Plata School District*, W.C. No. 3-062-779 (May 4, 2007).

12. Payment for the May 1, 2014 hospital visit pivots on whether the fall that morning occurred due to the claimant's left knee buckling as a result of her industrial injury. As found above, the claimant has established by a preponderance of the evidence that the ED visit was as a result of the industrial injury. The ALJ concludes that the respondent is therefore liable for payment of the ED bill.

13. The claimant seeks treatment for her shoulders, neck, headaches, left thumb, and right hand.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that her current issues involving her back, head, shoulders, neck, and upper extremities are related to her industrial injury and that the respondent is responsible for payment of medical care to cure or relive the claimant from the effects of these issues.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant TTD benefits from and including March 13, 2104 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

2. The respondent shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of her conditions to her back, head, shoulders, neck, and upper extremities as found herein.

3. The respondent shall pay for the claimant's emergency department visit to St. Thomas More Hospital on May 1, 2014.

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

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

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

DAE: March 5, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

PROCEDURAL BACKGROUND

On January 2, 2014 ALJ Harr issued Findings of Fact, Conclusions of Law and Order in this matter. He determined that the Division Independent Medical Examination (DIME) physician had issued equivocal reports regarding the causation of Claimant's right knee chondromalacia patella disease process. After resolving the ambiguity ALJ Harr concluded that the DIME physician ultimately determined the emerging symptoms in Claimant's right knee were not related to her admitted left knee injury. ALJ Harr then reasoned that Claimant failed to overcome the DIME physician's opinion by clear and convincing evidence and to show that any permanent disability from her right knee condition was a component of the admitted left knee injury. Finally, he denied and dismissed Claimant's request for benefits related to the right knee condition.

Claimant appealed ALJ Harr's Order to the Industrial Claim Appeals Office (ICAP). She asserted that ALJ Harr erred in his interpretation of the DIME physician's report. Claimant contended that the DIME physician's ultimate opinion was that her right knee symptoms were attributable to the admitted left knee injury. She also argued that, because Respondents did not contest the DIME physician's right knee findings, ALJ Harr was jurisdictionally barred from considering the issue of the compensability of Claimant's right knee condition. Recognizing the ambiguity in the DIME physician's report, the ICAP rejected Claimant's contention that the DIME report compelled a determination that her right knee condition was attributable to the admitted left knee injury. The ICAP noted that ALJ Harr reasonably concluded that the emerging symptoms from the chondromalacia disease process in Claimant's right knee were not related to her admitted November 1, 2007 left knee injury.

Claimant appealed the ICAP's decision to the Colorado Court of Appeals. On December 11, 2014 the court set aside the ICAP's Order affirming ALJ Harr's decision and remanded the matter with directions. The Court of Appeals concluded that ALJ Harr properly determined that the DIME physician's opinion was ambiguous. However, the court reasoned that the record did not support ALJ Harr's finding that the DIME physician had ultimately excluded Claimant's right knee symptoms as a component of the admitted left knee injury. The court thus remanded the matter with instructions to "(1) reconsider and make record-supported findings regarding the meaning of the follow-up DIME report and (2) conduct such additional proceedings as may thereafter be necessary and appropriate." The ICAP subsequently set aside ALJ Harr's January 2, 2014 Order and remanded the matter for further proceedings consistent with the opinion of the Court of Appeals. Because ALJ Harr is no longer employed by the Office of Administrative Courts, the matter has been assigned to ALJ Peter J. Cannici to issue Findings of Fact, Conclusions of Law and Order on Remand.

ISSUE

Whether the May 28, 2013 follow-up DIME report of Division Independent Medical Examination (DIME) physician William Watson, M.D. reflects that Claimant's right knee injury was a component of her admitted left knee injury.

FINDINGS OF FACT

1. Employer operates a food catering business where Claimant worked as a Catering Manager. On November 1, 2007 Claimant sustained an admitted injury to her left knee. She slipped on a wet or greasy floor and twisted her left knee.

2. Claimant underwent left knee treatment over several years that included two surgical procedures. On June 16, 2010 John S. Hughes, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI).

3. Claimant challenged the MMI determination and sought a DIME. Dr. Watson performed the DIME on November 23, 2010. He concluded that Claimant had not reached MMI and required additional conservative left knee treatment. Dr. Watson also determined that Claimant suffered right knee symptoms that were related to her November 1, 2007 left knee injury. He specifically explained:

> [Claimant] first complained of right knee pain to Dr. Robinson on 02/01/2010 and again on 05/05/2010 to John Hughes, and finally Dr. Lynn Parry on 08/10/2010. Within a reasonable medical probability, I feel the right knee symptoms were due to her altered gait and excessive weightbearing, which were caused from the 11/10/2007 accident. I believe she needs x-rays of the right knee along with MRI and should be seen in followup by her orthopedic surgeon.

4. Claimant subsequently underwent additional left knee treatment that included a third surgery on September 26, 2012 to address her left knee degenerative joint disease. Charles Gottlob, M.D. placed Claimant at MMI on February 28, 2013.

5. On May 28, 2013 Claimant underwent a follow-up DIME with Dr. Watson. Dr. Watson concluded that he agreed with Dr. Gottlob's February 28, 2013 date of MMI. He no longer recommended a right knee evaluation and provided only a left knee impairment rating. Dr. Watson did not condition MMI upon treatment of the right knee. However, he commented that his opinion regarding Claimant's right knee was unchanged from his November 23, 2010 report. Accordingly, Dr. Watson's May 28, 2013 follow-up DIME report was ambiguous.

6. Resolving the ambiguity in the follow-up DIME report reflects that Dr. Watson ultimately determined the emerging symptoms from the chondromalacia patella disease process in Claimant's right knee are related to her left knee injury. In his November 23, 2010 report Dr. Watson explained that Claimant's right knee symptoms were caused by her altered gait and excessive weight-bearing as a result of her November 1, 2007 admitted left knee injury. He also recommended additional

evaluation of Claimant's right knee condition. However, in his follow-up DIME Dr. Watson no longer recommended a right knee evaluation, placed Claimant at MMI and provided only a left knee impairment rating. Dr. Watson did not condition MMI upon treatment of the right knee. Nevertheless, Dr. Watson stated in his follow-up DIME report that his opinion regarding Claimant's right knee was unchanged from his November 23, 2010 report. He thus maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury. Accordingly, Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee 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. 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). If the DIME physician offers ambiguous or conflicting opinions concerning MMI 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).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. As found, resolving the ambiguity in the follow-up DIME report reflects that Dr. Watson ultimately determined the emerging symptoms from the chondromalacia patella disease process in Claimant's right knee are related to her left knee injury. In his November 23, 2010 report Dr. Watson explained that Claimant's right knee symptoms were caused by her altered gait and excessive weight-bearing as a result of her November 1, 2007 admitted left knee injury. He also recommended additional evaluation of Claimant's right knee condition. However, in his follow-up DIME Dr. Watson no longer recommended a right knee evaluation, placed Claimant at MMI and provided only a left knee impairment rating. Dr. Watson did not condition MMI upon treatment of the right knee. Nevertheless, Dr. Watson stated in his follow-up DIME report that his opinion regarding Claimant's right knee was unchanged from his November 23, 2010 report. He thus maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury. Accordingly, Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury.

ORDER

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

Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury.

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: March 30, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his April 24, 2010 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Truck Driver. His duties involved driving and unloading trucks.

2. On April 24, 2010 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. While he was assisting with the unloading of 2,500 pound pipes, the rigging support came loose and the pipes fell. The pipes struck Claimant and he injured his head, face, neck, back, ears and sinuses.

3. Claimant subsequently received medical treatment from Authorized treating Physician (ATP) Cathy Smith, M.D. On May 25, 2010 she diagnosed Claimant with the following: (1) a facial bone fracture that was improving; (2) a closed head injury, including loss of consciousness, headaches and dizziness; (3) a lumbar strain that had resolved and (4) a right shoulder strain and contusion that had resolved. Dr. Smith noted that a CT scan of Claimant's head was normal and a CT scan of his cervical spine was normal. Moreover, an MRI of Claimant's lower back revealed degenerative disc and joint disease but nothing acute.

4. On June 17, 2010 Dr. Smith determined that Claimant had reached Maximum Medical Improvement (MMI) and assigned a 0% impairment rating. She discharged Claimant to medical maintenance follow-up with ENT Specialist Sanjay K. Gupta, M.D. for an evaluation of his nasal fracture and deviated septum. On July 9, 2010 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Smith's MMI and impairment determinations.

5. On October 21, 2010 Claimant underwent surgery with Dr. Gupta to repair his nasal obstruction. He followed-up with Dr. Smith on December 1, 2010 and reported minimal pain. Dr. Smith noted that Claimant had returned to full-duty employment. Claimant subsequently continued to receive maintenance treatment from Drs. Smith and Gupta until August 2011.

6. On August 3, 2011 Dr. Smith again determined that Claimant had reached MMI with no permanent impairment. She recommended maintenance care that consisted of two visits with Dr. Gupta within the next year as well as nasal spray for

three additional months. Dr. Smith remarked that Claimant was working full duty employment.

7. Claimant testified that his April 24, 2010 industrial injuries never completely healed. However, he explained that he learned to accommodate his symptoms and continued to work. After reaching MMI Claimant first worked for A&W Water Supply hauling water to fracking sites. He then worked for MCP Trucking driving, loading and unloading a tractor trailer.

8. Claimant explained that by September 2013 he began suffering episodes of headaches and ringing in his ears. He remarked that he also became clumsy and would spontaneously fall.

9. On March 25, 2014 Claimant's previous counsel drafted a letter to Dr. Gupta inquiring, in part, whether Claimant had suffered a worsening of condition. Dr. Gupta replied that Claimant "continues to have nasal sinus and breathing issues that vary with time. As [Claimant] states his symptoms have not substantially improved. He may benefit for re-evaluation for his claim and impairment evaluation."

10. On November 12, 2014 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall also testified at the hearing in this matter. Dr. Fall explained that on April 24, 2010 Claimant sustained a mild closed head injury, a nasal fracture, a mild lumbar strain and a mild right shoulder strain. On October 21, 2010 Claimant underwent nasal surgery. Claimant acknowledged that, after he reached MMI, he was released to regular duty and returned to work for A&W Water Supply in the capacity of hauling water to fracking sites. He then began driving, loading and unloading a tractor trailer for MCP Trucking. However, Claimant ceased working in September 2013 when he experienced severe symptoms of headaches, vertigo, neck pain, tingling, falling and clumsiness.

11. Despite Claimant's increased symptoms, Dr. Fall determined that Claimant remained at MMI as determined by Dr. Smith on August 3, 2011. She explained that Claimant's September 2013 symptoms were not directly or proximately caused by his April 24, 2010 industrial injury. Dr. Fall noted that Claimant "may require further evaluation to determine the exact diagnosis of his multiple neurological and musculoskeletal symptoms" through his primary care physician. She explained that the medical documentation revealed that Claimant's April 24, 2010 complaints had resolved and he returned to full duty employment. In fact, he continued to work full duty until he suffered acute symptoms in September 2013. Dr. Fall remarked that Claimant's September 2013 symptoms were not related to his April 24, 2010 industrial injury because of the temporal proximity of the symptoms three years after the industrial injury.

12. Claimant has failed to establish that it is more probably true than not that his condition has worsened and he is entitled to benefits. The records reveal that Claimant returned to full duty employment after reaching MMI on August 3, 2011. He continued to work full duty until he experienced acute symptoms in September 2013. The temporal proximity of the symptoms more than two years from the date of MMI suggests that the

onset of acute symptoms was not related to the initial industrial injury on April 24, 2010. Moreover, the March 25, 2014 note from Dr. Gupta does not reflect that Claimant suffered a worsening of symptoms after reaching MMI but instead provides that Claimant's symptoms had not substantially improved. Finally, the persuasive report and testimony of Dr. Fall reflects that Claimant did not suffer a worsening of condition after he reached MMI on August 3, 2011. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a

claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that his condition has worsened and he is entitled to benefits. The records reveal that Claimant returned to full duty employment after reaching MMI on August 3, 2011. He continued to work full duty until he experienced acute symptoms in September 2013. The temporal proximity of the symptoms more than two years from the date of MMI suggests that the onset of acute symptoms was not related to the initial industrial injury on April 24, 2010. Moreover, the March 25, 2014 note from Dr. Gupta does not reflect that Claimant suffered a worsening of symptoms after reaching MMI but instead provides that Claimant's symptoms had not substantially improved. Finally, the persuasive report and testimony of Dr. Fall reflects that Claimant did not suffer a worsening of condition after he reached MMI on August 3, 2011. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

ORDER

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

Claimant's request to reopen his April 24, 2010 Workers' Compensation claim 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: March 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

PROCEDURAL BACKGROUND

On December 22, 2014 *nunc pro tunc* December 19, 2014, PALJ Jeffrey A. Goldstein entered an Order that limited the issues for hearing. He ordered that the following issues are stricken from the Claimant's December 4, 2014 Application for Hearing because the Office of Administrative Courts lacks jurisdiction to hear them: compensability, medical benefits (including reasonable and necessary), average weekly wage, disfigurement, permanent partial disability, permanent total disability. He ordered that these issues are closed pursuant to C.R.S. § 8-43-203(2)(b)(II)(A) unless reopened pursuant to C.R.S. § 8-43-303. PALJ further ordered that a hearing shall proceed on the Claimant's most recent Application for Hearing on the issue of temporary disability benefits.

ISSUES

The sole issue remaining for adjudication at hearing is:

1. Whether the Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits, in addition to those already received pursuant to the Amended Final Admission of Liability dated July 30, 2014.

FINDINGS OF FACT

1. The Claimant suffered a compensable injury on March 31, 2010 while in the course and scope of employment with Aspen Skiing Co., LLC.

2. Both the Claimant and Efren Vargas, the Human Resources Director for Aspen Skiing Co., testified that the Claimant voluntarily left the employment of Aspen Skiing CO., LLC on April 10, 2010. The Claimant voluntarily left seasonal employment with the Employer on April 10, 2010 and then moved and worked as a cashier at Mesa Verde National Park.

3. On April 13, 2010, the Claimant advised Dr. Kim Scheur that he was leaving Aspen tomorrow to go to another job near Cortez, Colorado (Exhibit 8).

4. At a July 1, 2010 medical appointment with Dr. Robert Goodman, the Claimant advised that he was working at Mesa Verde at the coffee bar (Exhibit 12). The Claimant testified that once he moved, which occurred right after he left the employ of Employer, he began working at the new job at Mesa Verde and the work was within any work restrictions. The Claimant continued to work at this job until the day before his surgery.

5. The Claimant underwent surgery on July 28, 2010. Beginning on that date, he was paid temporary total disability benefits up to and through May 14, 2014, his date of maximum medical improvement (MMI) (Exhibit 1). The Claimant testified that he received temporary disability benefits throughout the period as set forth in the Amended Final Admission of Liability dated July 30, 2014.

6. Dr. James O. Maher determined the Claimant reached MMI on May 14, 2014 (Exhibit 11).

7. Dr. Linda A Mitchell, MD performed an IME for purposes of an impairment evaluation of the Claimant's shoulder on June 19, 2014 and she agreed with the MMI date of May 14, 2014 (Exhibit 1).

8. Respondents filed an Amended Final Admission of Liability on July 30, 2014 discontinuing temporary disability benefits as of that MMI date (Exhibit 1). The Claimant did not timely challenge the finding of MMI.

9. Temporary disability benefits were discontinued because the Claimant reached MMI on May 14, 2014.

10. The court received no persuasive evidence of entitlement to additional temporary disability benefits after the date of MMI.

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. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201, 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*. Pursuant to statute, temporary total disability benefits may cease at 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 employee a written release to return to regular employment; or

(d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

In this case, the Claimant established that he suffered an injury and that he has missed work and suffered a wage loss. However, pursuant to the Claimant's own testimony, he received TTD benefits related to this wage loss from July 28, 2010 through May 14, 2014 as set forth in the Amended Final Admission of Liability dated July 20, 2014. The Claimant was then placed at MMI by Dr. James O. Maher on May 14, 2014 when Dr. Maher provided an impairment rating for the Claimant. As of the date of MMI, the TTD benefits terminated and the Claimant did not prove that he was entitled to benefits after the day he was placed at MMI. The Claimant did not timely challenge the finding of MMI by invoking the Division IME process after receipt of the Amended Final Admission of Liability of July 30, 2014. Under CRS § 8-43-203(2)(b)(II)(A), the Claimant is therefore estopped from challenging MMI. The court has heard no evidence which would persuade it that any award of temporary disability benefits is due after MMI other than the amounts already admitted in the Amended Final Admission of Liability.

The Claimant also failed to prove that he was entitled to receive TTD benefits at any point prior to July 28, 2010 as he voluntarily left seasonal employment with the Employer on April 10, 2010 and then moved and worked as a cashier at Mesa Verde National Park. On April 13, 2010, the Claimant advised Dr. Kim Scheur that he was leaving Aspen tomorrow to go to another job in another area of Colorado. At a July 1, 2010 medical appointment with Dr. Robert Goodman, the Claimant advised that he was working at Mesa Verde at the coffee bar. The Claimant himself testified that he began this job right after leaving the employ of Employer and worked there continuously until the day before his surgery. Therefore, there was no period of time where the Claimant suffered a wage loss due to his work injury prior to July 28, 2010. Rather, the Claimant was paid through his last day of seasonal employment, then he moved and changed jobs and received wages through July 27, 2010.

ORDER

It is, therefore, ordered that:

1. The Claimant's claim for additional TTD benefits, beyond those set forth in the Amended Final Admission of Liability dated July 30, 2014, is denied and dismissed

2. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525, 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: March 19, 2015

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

ISSUES

- Did the respondents prove by clear and convincing evidence that the DIME physician erred in assessing any impairment rating for the claimant's low back injury?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 4 were received into evidence. Respondents' Exhibits A through K were received into evidence. The depositions of Karen Knight, M.D., and Eric Ridings, M.D., were received into evidence.

2. The claimant was involved in an admitted work-related motor vehicle accident (MVA) on September 6, 2011.

3. The claimant testified as follows. On the date of injury he was driving a flat bed truck. He collided with a Toyota RAV 4 that made an improper left-hand turn in front of him. Later that night he began to experience low back pain. The next morning it hurt worse. He did not have any low back pain prior to the MVA. Since the date of the injury his back pain has gone up and down.

4. The claimant was seen by a chiropractor on September 19, 2011. At that time the claimant reported he felt achy two days after the MVA.

5. The claimant was seen at Premier Urgent Care on September 25, 2011. He told the triage nurse that the accident was on the September 8 and his back pain started on September 10. Apparently the claimant was seen by John Torres, M.D., and referred for physical therapy (PT).

6. On September 28, 2011 the claimant was seen by Miles Hein, PT, at Action Potential Physical Therapy. The claimant gave a history of an MVA on September 6, 2011 followed by the onset of pain 2 days later. PT Hein noted tenderness of the "right SI joint and glute region." Hein noted decreased range of motion (ROM) with "lumbar spine side bending approximately 50%."

7. On December 14, 2011, the claimant reported to the physical therapist that he had "just minor pain" on his right side. On January 4, 2012 the claimant told the physical therapist that his lawyer thought he needed an MRI.

8. The claimant testified that his lawyer sent him for an examination by David Richman, M.D.

9. Dr. Richman examined the claimant on January 24, 2012. The claimant gave a history of the MVA on September 6, 2011 and reported experiencing low back pain approximately one and a half hours after the accident. The claimant reported his pain was 1 to 2 on a scale of 10 (1-2/10) and it was worse with prolonged sitting. However, the claimant continued to work full duty as a truck driver without restrictions. On physical examination the lumbosacral lordosis was slightly reduced. ROM was slightly limited in forward flexion. On extension ROM was "moderately limited" with some increased discomfort." Right and left bending were within normal limits. There were "palpable knots" that were painful which Dr. Richman opined were "muscular/soft tissue" in nature. Dr. Richman assessed "chronic lumbar strain with myofascial pain and trigger points." He also assessed possible "facetogenic pain." Dr. Richman recommended continued PT with "aggressive myofascial approach" and trigger point injections. Dr. Richman referred the claimant to In Motion for PT.

10. Between July 25, 2012 and November 19, 2012 the claimant underwent approximately 25 PT sessions. On November 19, 2012 the claimant was released from physical therapy with therapeutic "goals sufficiently met to allow patient to continue independently." The low back ROM was reported to be 90-100% of normal and pain was "decreased" from 8 to 2.

11. Dr. Richman examined the claimant on November 27, 2012. Dr. Richman noted the claimant reported that his left low back pain "comes and goes" and in the past week he had only 1 mild episode of left low back discomfort. The claimant's pain index was "0" on the date of examination. Dr. Richman's "back exam" was normal, including full active and passive ROM in flexion, extension, lateral flexion and rotation. Dr. Richman's assessed "low back pain resolved." Dr. Richman opined the claimant was at maximum medical improvement (MMI) with no impairment, no restrictions, and no maintenance care needed.

12. On April 19, 2013 Karen Knight, M.D., performed a Division-sponsored independent medical examination (DIME) of the claimant. Dr. Knight has expertise in physiatry and neuromuscular medicine and is Level II accredited. In a DIME report dated May 8, 2013 Dr. Knight reviewed medical records, recorded the history given by the claimant and noted the results of a physical examination. The claimant reported a history of an MVA on September 3, 2012 [sic] (although the Division IME Examiner's Summary Sheet reflects a date of injury of September 6, 2011). The claimant also reported the onset of back pain at the time of the injury and that it was worse the next morning. Left-sided back pain persisted and on the date of examination the claimant rated his pain as 6 on a scale of 10 (6/10). On physical examination the claimant demonstrated "decreased lordosis" of the spine. The claimant was non-tender "and without apparent spasms" over the bilateral buttocks, greater trochanteric bursae, sacro-iliac joints and the paraspinal musculature. Flexion was recorded as 70 degrees, extension was 7 degrees, right lateral flexion was 30 degrees and left lateral flexion was 35 degrees. Straight leg raise was "negative for neural tension bilaterally." X-rays were

performed that reportedly revealed a slight scoliotic curve, advanced degenerative disc disease most severe at L5-S1 and severe facet arthropathy at L4-5 and L5-S1.

13. In the May 2013 DIME report Dr. Knight made the "clinical diagnosis" of low back pain which she stated "may or may not be related to injury." Dr. Knight stated the x-rays showed "advanced degenerative changes which may have been aggravated by the accident." Dr. Knight observed that the claimant made "consistent" pain reports and had "ongoing left sided pain which is life limiting." Dr. Knight opined the claimant had not reached MMI and recommended he undergo an MRI to determine if he has "treatable causes for his left sided low back pain."

14. Dr. Richman was provided with a copy of Dr. Knight's DIME report. On July 4, 2013, Dr. Richman wrote, "MRI is not warranted for uncomplicated low back pain." Dr. Richman opined the claimant did not have instability or radiculopathy and that only conservative treatment was warranted.

15. Despite the views expressed on July 4, 2013, Dr. Richman referred the claimant for a lumbar MRI. The MRI was performed on August 2, 2013. The radiologist's impressions included the following: (1) Mild degenerative changes of the L4-5 disc space with moderate to advanced arthropathy of the facet joints, worse on the right, but without evidence of nerve root impingement; (2) Mild degenerative changes of the facet joints at L5-S1, a normal disc space and no evidence of nerve root impingement.

16. On October 11, 2013 the claimant was seen at Concentra by Daniel Peterson, M.D. Dr. Peterson noted that Dr. Richman had retired and the claimant was seen for a referral to "PM&R for eval and facet blocks." Dr. Peterson noted the MRI was "positive." He assessed "lumbosacral strain" with "evidence of facet syndrome and L sided low back pain." Dr. Peterson referred the claimant to Jeffrey Wunder, M.D., "for injection procedure." Dr. Peterson "anticipated" MMI in 3 months.

17. Dr. Wunder examined the claimant on October 28, 2013. The claimant told Dr. Wunder his pain started on the day of the accident. The claimant reported his pain was in the left lumbar area and he described it as constant, aching and fluctuating. Dr. Wunder noted it was impossible to tell if the claimant had muscle spasms because of "adipose." Dr. Wunder stated that the claimant's facet findings were contradictory with pain on flexion and not extension, but positive findings on left sided facet loading but not right-sided facet loading. Dr. Wunder assessed mechanical low back pain, "underlying degenerative disk disease/spondylosis/facet arthropathy" and morbid obesity. Dr. Wunder noted that because of significant arthrosis in the facet joints he recommended a medial branch block at the left L4-5 facet" that "may result in radiofrequency facet neurotomy."

18. On November 25, 2013 Dr. Wunder reported that he attempted a medial branch block at the left L4-5 facet but the procedure was terminated because the claimant became hypoxic. Dr. Wunder opined the claimant had severe apnea and is

not a candidate for interventional injections. He recommended the claimant return to the DIME physician for reassessment.

19. On February 3, 2014 Dr. Knight conducted a follow-up DIME. The claimant reported his pain was now "only on the left side" and was 3/10 on the date of examination. He further reported his worst pain in the last week was 10/10. On physical examination Dr. Knight noted decreased lordosis of the spine. The claimant was non-tender "and without apparent spasms" over the bilateral buttocks, greater trochanteric bursae, sacro-iliac joints and the paraspinal musculature. Flexion was recorded as 70 degrees, extension was 10 degrees, right lateral flexion was 5 degrees and left lateral flexion was 7 degrees. Straight leg raise was "negative for neural tension bilaterally." Dr. Knight stated the claimant's ROM was worse than on her previous examination. Dr. Knight noted the claimant had undergone a lumbar MRI on August 2, 2013 that showed advanced facet arthropathy at L4-5 and mild degenerative changes of the facet joints at L5-S1. She further noted the claimant had undergone an attempted diagnostic injection that was aborted because of the claimant's sleep apnea and inability to tolerate the prone position. Dr. Knight recorded a "clinical diagnosis" of low back pain. She further stated the claimant has "history, physical exam findings and radiographic findings consistent with low back pain secondary to facet arthropathy." She explained the claimant had no back pain before the injury and his MRI findings were consistent with moderate facet arthropathy at L4-5. However, Dr. Knight acknowledged that "MRI and X-rays do not diagnose pain generators" and consequently the claimant underwent the aborted diagnostic injection. Because the claimant was not able to "undergo interventional treatment of his facet," Dr. Knight stated that "we are unable to confirm that this is his pain generator." Nevertheless. Dr, Knight stated that it would be reasonable to rate him as II.C as "rhizotomy was the road he was going down."

20. Dr. Knight opined the claimant reached MMI on November 25, 2013 because his underlying medical condition did not allow "for further treatment exploration." Dr. Knight assessed 7% impairment for a specific disorder of the lumbar spine based on "II.C L4-5 Facet arthrop" and 16% impairment for reduced ROM in the lumbar spine. The overall combined impairment rating was 22% whole person under the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (AMA Guides).

21. On September 2, 2014 Eric Ridings, M.D., conducted an independent medical examination (IME) of the claimant. The IME was conducted at the respondents' request. Dr. Ridings is board certified in physical medicine and rehabilitation. Dr. Ridings took a history from the claimant, reviewed medical records including the DIME reports and performed a physical examination.

22. In the IME report Dr. Ridings opined the claimant's correct injury-related diagnosis is "a simple lumbar strain complicated by symptom magnification and the patient's comorbidities, including marked obesity." Dr. Ridings agreed with Dr. Richman that the claimant reached MMI for the industrial injury on November 27, 2012. Dr. Ridings noted that on November 27, 2012 Dr. Richman documented the claimant's pain

level at 0/10 with "1 mild episode of left low back discomfort in the past week." Dr. Ridings further noted that Dr. Richman documented "normal tone in the areas of complaint," full ROM in all planes of the lumbar spine and that Dr. Richman diagnosed "resolved" low back pain. Dr, Ridings opined that the original modesty of the claimant's symptoms, the delay in the onset of symptoms of a "couple of days" and his excellent response to physical therapy support the conclusion the claimant suffered a "lumbar strain injury rather than anything more serious." Dr. Ridings further opined that Dr. Richman correctly assigned 0% impairment because the claimant had "normal muscle tone" and consequently would not have a "Table 53 diagnosis" under the AMA Guides. Dr. Ridings further explained that if there is no Table 53 diagnosis ROM cannot be used in rating impairment of the spine.

23. On physical examination Dr. Ridings noted tenderness to palpation in the left low lumbar area from the L4-5 level down through the L5-S1 level. With relaxation in prone position the claimant "had normal tone throughout his low back."

24. Dr. Ridings noted that the claimant's "history to me today was that the worst movement of his back for causing left-sided low back pain is right side bending, followed by lumbar forward flexion." Dr. Ridings opined that this is "not consistent with left SI joint dysfunction, as both of those movements actually open up the left-sided facets. Facet loading to the left today produced pain in a horizontal band across his left low back, not in a typical distribution I would expect for specific pain coming from the facet joint, which would typically be significant at that particular location and radiate down in to the buttock."

25. Dr. Ridings wrote that Dr. Knight was "in error in almost every portion of her discussion of the patient's diagnosis and impairment rating." Dr. Ridings opined that although Dr. Knight apparently diagnosed the claimant's pain generator as the L4-5 facet joint, she "did not support this conclusion with any relevant facts." Dr. Ridings explained that Dr. Knight's physical examination did not document any tenderness or increased muscle tone which Dr. Ridings would have expected if the claimant had "unremitting pain from facet joint inflammation for 2 ½ years." Dr. Ridings stated that Dr. Knight correctly remarked that MRI findings and x-ray findings do not diagnose pain generators, but it appeared to Dr. Ridings that Dr. Knight relied "entirely on those imaging studies" to diagnose L4-5 facet arthropathy. This was true even though Dr. Knight acknowledged that she could not confirm that the L4-5 facet was the pain generator. Dr. Ridings opined that the degenerative changes noted on MRI and x-ray findings do not correlate with the claimant's history or physical examination findings.

26. Dr. Ridings testified by deposition on December 4, 2014. Dr. Ridings explained that in order to rate spinal impairment under Table 53 of the AMA Guides there must be a diagnosis based on objective findings followed by objective findings of impairment. Dr. Ridings opined that Dr. Knight does not "clearly state an opinion" as to the claimant's pain generator. Dr. Ridings stated that insofar as Dr. Knight assessed low back pain, that condition is a symptom, not a diagnosis. He further opined that insofar as Dr. Knight diagnosed facet mediated pain she failed to support that diagnosis. Dr. Ridings opined there is "no objective evidence" to support the diagnosis of facet

arthropathy as the pain generator, but there are multiple reasons to believe that it is not the pain generator. He explained that on his examination and elsewhere in the medical records the claimant reported more pain when bending forwards, which would typically not cause any pain in the facet joints. Dr. Ridings also stated the claimant has more left-sided low back pain when bending to the right side, which is the opposite of what one would expect if the pain were caused by left-sided facet arthropathy. Dr. Ridings opined his examination was consistent with muscular etiology and inconsistent with pain coming from the facets on the left side.

27. With regard to the MRI findings Dr. Ridings noted that facet arthropathy identified by imaging does not correlate well with the presence or absence of pain as demonstrated by studies involving anesthetic facet blocks. In this case Dr. Ridings pointed out that on MRI the claimant's right-sided L4-5 facet arthropathy is more severe than the left side, although Dr. Knight indicates that the left-side facet is the pain generator.

28. Dr. Ridings testified that the claimant's correct diagnosis is a lumbar strain injury, which would be rated by applying Table 53 II (B) of the AMA Guides. Dr. Ridings explained that in order to assign impairment for a soft tissue injury under Table 53 II (B), the patient must exhibit both 6 months of medically documented pain and "rigidity." Dr. Ridings testified that under Table 53 "rigidity" refers to increased muscle tone and that on his examination the claimant did not exhibit increased muscle tone. Therefore, the claimant is not entitled to an impairment rating under Table 53 II (B). Dr. Ridings also noted that Dr. Knight did not find any increased muscle tone.

29. Dr. Ridings testified that if the claimant does not have a Table 53 diagnosis then it is improper to assign an impairment rating for reduced ROM.

30. Dr. Ridings testified that if a person has a lumbar strain and it resolves the strain "doesn't come back anymore." He further stated "there are many reasons this man had low back pain, particularly his weight." Thus, Dr. Ridings opined that any complaints the claimant currently has are not related to the industrial injury.

31. Dr. Knight testified by deposition on December 8, 2014. Dr. Knight testified that she believes the claimant's correct diagnosis is facet arthropathy leading to axial low back pain. Dr. Knight opined that the claimant's MVA did not cause the facet arthropathy but instead aggravated it. She explained that facet change is a "progressive phenomenon" that people can live with "just fine until they have a precipitating event that can lead to persistent pain."

32. Dr. Knight testified that facet arthropathy is her diagnosis because it is supported by her physical examination, the MRI findings and the x-ray findings and is the "most likely diagnosis" considering the available data. She stated that the diagnosis is supported by the physical examination because the claimant had positive findings on "extension" of the back and on "rotation" of the back. Dr. Knight admitted that the facet pain could not be confirmed as the claimant's pain generator because in the presence

of sleep apnea he was not able to undergo the medial branch block. Dr. Knight admitted that lumbar strain could be the claimant's correct diagnosis.

33. Dr. Knight testified that she stands by her permanent impairment rating of 22% whole person. She opined that her diagnosis of facet pain entitles the claimant to a rating under Table 53 because he was "on the road to rhizotomy." She also opined that based on the claimant's 6 months of documented back pain he would be entitled to a Table 53 rating even if he had undergone the branch block and a rhizotomy was unwarranted. She stated that "rigidity" is not a requirement for a Table 53 rating and she did not consider it in her impairment rating. She explained that rigidity "means no movement." Dr. Knight stated that many people with facet arthropathy do not have hypertonicity. She explained that it is common for persons not to exhibit hypertonicity 12 months out from an MVA.

34. Dr. Knight stated that because an MRI shows facet arthropathy does not mean that the arthropathy is symptomatic.

35. The ALJ takes administrative notice of Table 53 (II) (B) and (C) of the AMA Guides. Specifically, the ALJ notes that both of these sections contain the following statement: "Unoperated with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm." The ALJ further notes that the principle difference between Table 53 (II) (B) and (C) is that section (B) applies when there are "none to minimal" changes on "structural tests" while section (C) applies where there are "moderate to severe" changes on structural tests including an unoperated herniated nucleus pulposus with or without radiculopathy. See CRE 201; *Mendicelli v. Nor-Mar, Inc.*, WC 4-785-226 (ICAO October 6, 2010) (contents of AMA Guides are subject to administrative notice in accordance with CRE 201 and § 8-43-210, C.R.S.).

36. The respondents proved it is highly probable and free from serious doubt that the DIME physician, Dr. Knight, erred in assigning an impairment rating for the claimant's lumbar spine.

37. Dr. Ridings credibly and persuasively testified as follows. Under Table 53 (II) (B) the claimant must exhibit 6 months of pain *and* rigidity in order to receive an impairment rating for a specific disorder of the spine. The term "rigidity" refers to increased muscle tone as demonstrated by physical examination. Dr. Ridings did not find any increased muscle tone and neither did Dr. Knight. Therefore, there is no basis to award a Table 53 (II) (B) impairment rating. Without a specific disorder impairment ratable under Table 53 ROM impairment may not be used to assign an impairment rating. Since the claimant has no Table 53 impairment ROM may not be considered and the claimant's impairment rating is 0%.

38. The ALJ infers from the contents of the AMA Guides (Finding of Fact 35) that Table 53(II) (B) and (C) both require "rigidity" in order to assess an impairment rating. Although Dr. Ridings' and Dr. Knight differed as to whether the claimant's correct diagnosis is a lumbar sprain ratable under Table 53 (II) (B) or facet arthropathy

ratable under Table 53 (II) (C), the distinction is immaterial since either diagnosis requires a finding of "rigidity" to assess an impairment rating. Dr. Ridings credible opinion supports the inference that regardless of the precise diagnosis no impairment may be assigned under Table 53 (II) (B) or (C) because there was no rigidity of 6 months duration.

39. Dr. Ridings' opinion that there is not 6 months of rigidity is supported by his examination of September 2, 2014 in which he found "normal tone in the areas of complaint." Dr. Riding's opinion that the claimant did not display any rigidity is corroborated by Dr. Richman's November 27, 2012 which notes a normal back examination and determines the claimant is not entitled to any impairment rating.

40. Dr. Knight did not document the existence of rigidity as defined by Dr. Ridings. Indeed, Dr. Knight stated that "rigidity" is not a requirement for a Table 53 rating and she did not consider "rigidity" when assigning her impairment rating. Dr. Knight's opinion on this issue is substantially less persuasive than the opinion of Dr. Ridings' opinion concerning the necessity of finding "rigidity." Further, Dr. Knight's opinion that rigidity is not required is contrary to the express language of Table 53 (II) (B) and (C) which both expressly require 6 months of pain and rigidity in order to assess impairment.

41. Dr. Ridings credibly and persuasively opined that the claimant is not entitled to any impairment rating under the circumstances of this case. His opinion is corroborated by Dr. Richman's persuasive report of November 27, 2012. It is highly probable and free from serious doubt that the claimant's impairment rating is 0%.

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

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and

inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

OVERCOMING DIME FINDING REGARDING IMPAIRMENT

The respondents contend that they have overcome the DIME physician's impairment rating by clear and convincing evidence. Relying principally on the opinions of Dr. Ridings they argue that the claimant's correct diagnosis is a lumbar strain injury that does not warrant any impairment rating under Table 53 (II) (B). They also argue that Dr. Ridings correctly determined that the claimant did not display "rigidity" which is a prerequisite to an impairment rating under Table 53, and that without a Table 53 rating ROM may not be used to rate impairment. The ALJ agrees that the respondents proved by clear and convincing evidence that no impairment rating may be assessed in this case.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In the case of *Medina-Weber v. Denver Public Schools*, WC 4-694-444 (ICAO August 27, 2008) the panel applied these general criteria to an ALJ's decision to overturn a DIME physician's finding of cervical impairment under Table 53 of the AMA Guides. In *Medina-Weber* the ALJ found, among other things, that the cervical impairment rating was overcome by clear and convincing evidence because Table 53 requires a finding of "spasm or rigidity" regardless of whether the claimant displays limited ROM. The ALJ found the DIME physician's report did not contain a finding of spasm or rigidity even thought the DIME physician conceded the claimant would not be eligible for a Table 53 rating unless there was a finding of rigidity or spasm.

Deleon v. Whole Foods Market, Inc., W.C. No. 4-600-477 (ICAO, November 16, 2006), addressed the proper evidentiary standard for determining a claimant's impairment rating after an ALJ finds that a portion of the DIME physician's impairment rating has been 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. The ICAO further stated that when applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence."

As determined in Findings of Fact 36 through 40, the ALJ is persuaded that it is highly probable and free from serious doubt that the DIME physician, Dr. Knight, erred is assessing an impairment rating for a specific disorder of the spine and for lost ROM. Regardless of whether the claimant's correct Table 53 diagnosis falls under section (II) (B) as contended by Dr. Ridings or (II) (C) as contended by Dr. Knight, the credible and persuasive evidence establishes that both sections require a finding of "rigidity" to assess specific disorder impairment. Dr. Ridings credibly and persuasively opined that the evidence does not establish 6 months of rigidity because his findings and those of Dr. Knight do not establish increased muscle tone on examination. Dr. Knight did not persuasively refute that "rigidity" is a requirement for a Table 53 rating, or that rigidity refers to increased muscle tone. Rather, she simply stated that despite the plain language of Table 53 (II) (B) and (C) "rigidity" is not a requirement for a rating and she did not consider it when assigning her rating. Further, Dr. Ridings credibly and persuasively opined that impairment may not be assigned for ROM limitations unless the claimant is entitled to a Table 53 specific disorder impairment.

As determined in Finding of Fact 41, it is highly probable and free from serious doubt that the claimant's correct impairment rating is 0% and he is not entitled to any permanent partial disability benefits. Section 8-42-107(8)(d), C.R.S. In light of these findings ALJ need not consider the respondents' other arguments that the DIME's impairment rating was overcome by clear and convincing evidence.

ORDER

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

1. The claim for permanent partial disability benefits is denied.

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

DATED: March 24, 2015

DIGITAL SIGNATURE:

David P. Cain

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

PROCEDURAL BACKGROUND

On September 4, 2014, pursuant to a telephone prehearing conference with PALJ Patricia Clisham, WC 4-873-873-02 and WC 4-854-583-03 cases were consolidated for hearing purposes.

ISSUES

The issues for determination in WC 4-873-873-02 are:

1. Whether the Claimant proved, by a preponderance of the evidence, that the arthroscopic surgery to the left wrist to debride and repair a central triangular fibrocartilage tear is reasonable, necessary, and related to the admitted October 12, 2011 industrial injury.

2. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary partial disability or temporary total disability benefits from October 12, 2011 and ongoing.

3. If the Claimant proved he suffered a compensable injury and that he is entitled to temporary disability indemnity benefits, whether the Respondents' proved that the Claimant is responsible for his termination of employment and resulting wage loss.

4. The issue of authorized provider was endorsed by Claimant on his Application for Hearing and Notice to Set in this claim, however, no evidence was presented by the parties on this issue and so this issue is deemed withdrawn for the purposes of this Order.

5. The issue of penalties for failure to report and for failure to provide a list of treatment providers was not endorsed in the Claimant's Application for Hearing and Notice to Set in this claim and it does not appear to have been added by motion or order. The penalties issue was raised for the first time in the Claimant's Case Information Sheet filed on October 30, 2014 in Colorado Springs and received on November 12, 2014 by the Denver Office of Administrative Courts. The claim was not properly endorsed and is not considered for the purposes of this Order.

The issues for determination in WC 4-854-583-03 are:

6. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable right knee injury in the course and scope of his employment with the Employer on June 27, 2013.

7. If the Claimant proved he suffered a compensable injury on June 27, 2013, whether the Claimant proved, by a preponderance of the evidence, that he requires medical treatment to cure and relieve the effects of a June 27, 2013 injury.

8. If the Claimant proved he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary partial disability or temporary total disability benefits from June 27, 2013 and ongoing.

9. If the Claimant proved he suffered a compensable injury and that he is entitled to temporary disability indemnity benefits, whether the Respondents' proved that the Claimant is responsible for his termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant is a 37-year old man with a January 13, 1977 date of birth (Respondents' Exhibit E, p. 12).

2. The Claimant is well-muscled and very athletic (Claimant's Exhibit 4, Findings of Fact #1). The Claimant is 5' 10" tall and weighs 285 pounds. He has the build of a weight-lifter (Respondents' Exhibit F, p. 19).

3. The Claimant has played competitive flag football for several years. He primarily plays offensive line, defensive line, and linebacker positions. The flag football games are played without pads. As an offensive lineman, the Claimant primarily blocks the opposing defensive lineman by keeping his arms extended and his wrists dorsiflexed. Once he contacts the opposing defender, he must maintain contact. Claimant also lifts weight, including bench pressing up to 225 pounds (Claimant's Exhibit 4, Findings of Fact #1).

4. On March 17, 2011, the Claimant suffered an admitted injury arising out of, and in the course and scope of his employment with a different employer, Coca Cola Refreshment USA. The injury occurred when the Claimant attempted to move a vending machine by tilting the dolly back towards himself. The vending machine caused an ulnar deviation of the left wrist and also struck the left wrist. Approximately two weeks later, the Claimant reinjured the left wrist when a co-employee slammed a cooler door onto the left wrist. (Claimant's Exhibit 4, Findings of Fact #3).

5. The Claimant was hired by the Respondent Employer on April 22, 2011 to work as a driver/salesman (Respondents' Exhibit D, p. 12).

Pre-Existing Medical Conditions

6. The Claimant has a long history of right knee pain and injuries. On October 9, 2004, the Claimant presented to the Memorial Hospital Emergency

Department complaining of right knee and ankle pain following an accident while employed by Best Buy. According to the Claimant, there was an attempted robbery at the store. The assailant pulled a gun. The Claimant was in the direct line of fire. He dove to get out of the way and rolled his ankle and twisted his knee in the process. The Claimant reported being unable to walk due to the pain. The emergency room physician opined, "He definitely could have injured the metatarsals as well as his knee" (Respondents' Exhibit F, pp. 20-21).

7. The Claimant injured his right foot and knee on September 24, 2007, in the course and scope of his employment with Deep Rock Water. The Claimant reported stepping out of his truck carrying a five gallon container of water, when the step broke resulting in a twisting injury to the knee (Respondents' Exhibit J, pp. 70-71). The Claimant initially treated for the September 24, 2007 injury on October 8, 2007, complaining of right knee pain, right ankle pain, and right arm pain and numbness. The Claimant developed a fever, inflammatory polyarthritis of unclear etiology and joint pain over the next several weeks. The Claimant was diagnosed with polyarthralgias, prescribed Indocin and Dilaudid, and instructed to follow up with Dr. Porterfield (Respondents' Exhibit J, pp. 61-63). On October 15, 2007, the Claimant returned to the hospital complaining of fever, night sweats, and increasing pain in the entire right side of his body, and expanding to the left. The Claimant was admitted to Memorial Hospital for one week, where he underwent a complete work-up. It was eventually determined the Claimant was suffering from poly arthritis, most likely secondary to atypical rheumatoid arthritis versus Stills disease versus other. The medical opinions were conflicting on the relatedness of the Claimant's arthritis to the September 24, 2007 work injury (Respondents' Exhibit J, pp. 64-102).

8. With respect to the September 24, 2007 injury, the Claimant eventually underwent a Division IME, performed by Dr. Edward Fitzgerald on May 23, 2008. Dr. Fitzgerald opined the Claimant suffered a medial collateral ligament sprain and a posterior tibial tendon tear in the September 24, 2007 accident, from which he was not at MMI. Dr. Fitzgerald opined that it was medically plausible that the injury triggered an episode of reactive arthritis. However, Dr. Fitzgerald noted that he was not a specialist in rheumatology and his statements about the inflammatory arthritis were not at a reasonable degree of medical probability, but rather based on his review of relevant literature (Respondents' Exhibit H).

9. On August 5, 2008, the Claimant saw Dr. Timothy O'Brien on referral from Dr. Michael Baker for evaluation of his right knee pain. On examination, Dr. O'Brien noted "subjective complaints of right knee pain and right ankle pain with no objective signs of injury." (Respondents' Exhibit P, pp. 149-152). Dr. O'Brien recommended an MRI of the right knee which he reviewed with the Claimant on October 13, 2008. The MRI was read as showing patellofemoral chondromalacia. He referred the Claimant for viscosupplementation. If that did not work, Dr. O'Brien recommended evaluation by Dr. David Walden for consideration of a tibial tubercle osteotomy. At this point, Dr. O'Brien still could not make a causation determination with respect to his work injury because he had still not been provided with past medical records (Respondents' Exhibit P, p. 153).

10. The Claimant failed to improve. Dr. O'Brien referred the Claimant to orthopedic surgeon, Dr. Michael Simpson. Dr. Simpson initially continued to treat the Claimant conservatively without reported benefit. On February 16, 2009, Dr. Simpson performed an arthroscopy of the right knee with microfracture of the femoral trochlear. He also performed an arthroscopic partial synovectomy with excision of the medial parapatellar plica (Respondents' Exhibit P, pp. 161-162). At the time of surgery, Dr. Simpson identified a Grade III chondral defect of the femoral trochlear, as well as hypertrophic synovitis of the medial plica syndrome (Respondents' Exhibit P, p. 165).

11. On August 12, 2009, Dr. Simpson noted that the Claimant still complained of burning pain in his knee with difficulty squatting and kneeling. This was documented on and FCE. Dr. Simpson advised the Claimant that at his young age, he was not a candidate for a patellofemoral replacement, but if his pain worsened, then that could be something that could be in the future for him. Dr. Simpson noted the Claimant was at MMI (Respondents' Exhibit P, pp. 163-164).

12. On March 10, 2010, the Claimant saw Dr. David Walden to address the reasonableness and necessity of a Fulkerson (tibial tubercle) osteotomy. Dr. Walden noted the Claimant was not happy with the results of his prior knee surgery and that he was a candidate for viscosupplementation as maintenance treatment to provide pain relief and maximize the result from his surgery. Dr. Walden opined that the proposed Fulkerson osteotomy was considered a "salvage procedure" that could improve function in someone more debilitated that the Claimant. Dr. Walden opined that it was not currently contemplated, but could be considered in the future as a work-related procedure if the Claimant's situation deteriorates (Respondents' Exhibit P, pp. 165-168).

13. On May 7, 2010, the Claimant settled his right knee injury claim against Deep Rock, in addition to the benefits previously admitted and paid (Respondents' Exhibit C, P. 11).

14. On June 7, 2010, the Claimant underwent arthroscopic left knee surgery performed by Dr. Wiley Jinkins for a left knee torn lateral meniscus with evidence of chondromalacia (Respondents' Exhibit I).

October 12, 2011 Claim

15. While employed by the Employer, the Claimant delivered and stocked sleeves of 4 half-gallon cartons of ice cream. The Claimant's duties with the Employer required him to use his left arm. In an Order issued by ALJ Stuber in a claim naming both his prior employer Coca Cola and this current Employer, ALJ Stuber found that the Claimant felt sharp pain in his left wrist extending up his forearm from the very first day he stocked ice cream cartons (Claimant's Exhibit 4, Finding of Fact #5).

16. The Claimant did not originally report the left wrist pain to Employer, but instead contacted his prior employer Coca Cola. On May 4, 2011, less than 2 weeks after he began his employment with the Respondent Employer, the Claimant reported the injury to his previous employer Coca Cola and was referred to Concentra where he

was seen by Dr. Suzanne Malis who noted the prior history of an injury with the vending machine (Claimant's Exhibit 4, Findings of Fact #6).

17. Dr. Malis referred the Claimant to Dr. Timothy Hart. Dr. Hart first evaluated the Claimant for his left wrist on June 22, 2011. On that date, the Claimant reported that, "overall, his left wrist is slowly improving over time". The Claimant reported still being able to go to the gym and work out (Respondents' Exhibit P, p. 169). On physical exam, the Claimant's bilateral wrists demonstrated dorsiflexion to 60 degrees, palmer flexion to 60 degrees, 20-30 degrees of radial and ulnar deviation, full supination and pronation, full circumduction, good pinch, grip, and grasp. Based on the physical exam, Dr. Hart noted the only pertinent finding was tenderness to palpation in the area of the FCU tendon. He did not have a specific diagnosis and noted the pain was "persistent but only with very specific activities." Dr. Hart referred the Claimant for an MRI of the left wrist and forearm (Respondents' Exhibit P, p. 170).

18. The MRI of the Claimant's left wrist and forearm performed on July 14, 2011 were read as showing bone edema/effusion of the distal ulna, joint effusion, and mild synovitis of the ulnar and radial joints, and TFCC scarring or sprain, with no evidence of any ligament or TFCC tear (Claimant's Exhibit 4; Respondents' Exhibit P, p. 170).

19. The Claimant continued treatment with Dr. Hart. Subsequently, the Claimant began complaining of severe left elbow pain, worsened when his elbow was in a flexed position. Dr. Hart opined the Claimant suffered from compression of the ulnar nerve at the left elbow, caused by the duties of his employment at the Respondent Employer (Respondents' Exhibit P, p. 174).

20. Dr. Hart referred the Claimant to Dr. William Griffis who saw the Claimant for EMG testing on September 20, 2011 for symptoms of pain radiating through the left elbow and forearm into the hand which had been present for several months, starting when his left wrist was injured by the vending machine. Dr. Griffis diagnosed the Claimant with moderately severe left cubital tunnel syndrome (Respondents' Exhibit L, pp. 108-109).

21. The Claimant subsequently filed two workers' compensation claims, one against Coca Cola and one against Respondents, for his alleged wrist and elbow injuries.

22. On November 15, 2011, the Employer completed an Employer's First Report of Injury with an injury/illness date of 10/12/2011. The report indicates the Claimant reported to his supervisor that while performing normal job duties, he experienced pain in his left wrist and sought medical attention (Respondents' Exhibit D).

23. Coca Cola had the Claimant examined by Dr. Eric Ridings for purposes of an independent medical examination on April 10, 2012. Dr. Ridings opined that the Claimant's cubital tunnel syndrome symptoms were not related to the injuries he had while working at Coca Cola, and that only the wrist injury was related to the May 17,

2011 claim with Coca Cola and the Claimant was at MMI for the wrist injury with no permanent impairment. Dr. Ridings concluded that the mechanism of injury with the injuries at Coca Cola were not related to any ulnar nerve injury at the elbow. With respect to the treatment for the cubital tunnel syndrome, Dr. Ridings suggested the Claimant either pursue this through a new workers' compensation claim against Employer or pursue it outside the workers' compensation system (Claimant's Exhibit 4, Finding of Fact #17; Respondents' Exhibit N).

24. The Respondent Employer had the Claimant examined by Dr. Wallace Larson for purposes of an independent medical examination related to a reported injury to his left wrist. The Claimant reported continued problems with his left wrist after a March 17, 2011 incident where a vending machine he was installing came down on his wrist. Then, about one month later the Claimant reported slamming his left wrist in a vending machine which caused a sharp, shooting pain from the ulnar side of his left wrist up toward his elbow. The Claimant reported that it was getting better and then he left work at Coca Cola and went to work for Employer. With the repetitive use of his left arm to place ice cream into the cooler, the Claimant reported that he began to experience sharp pain in his wrist which shot up into his elbow. The Claimant reported that "he did not have any new pain; he had the same pain that he had experienced while working at Coca Cola." Dr. Larson found the Claimant has "mild residuals of contusion to the left wrist as a result of the work-related injury [at Coca Cola]. Dr. Larson opined that the Claimant does not need a cubital tunnel release surgery as a result of a work-related injury. Dr. Larson opined that cubital tunnel syndrome is typically not work-related, and it was not medically probably that the Claimant's need for medical treatment for this condition was related to his employment at Coca Cola or at the Employer (Claimant's Exhibit 4, Finding of Fact #18; Respondents' Exhibit K).

25. Following a May 20, 2012 hearing on consolidated applications for hearing, involving Coca Cola and this Respondent Employer, ALJ Martin Stuber entered his July 9, 2012 Findings of Fact, Conclusions of Law, and Order holding that the Claimant proved, by a preponderance of the evidence, that he suffered an occupational disease of aggravation of his left wrist in the course and scope of his employment with the Respondent Employer. ALJ Stuber also ordered Blue Bell Creameries to pay for all of Claimant's reasonably necessary medical benefits by authorized providers for the occupational disease to Claimant's left wrist under the WC 4-873-873-01 claim. However, ALJ Stuber further held the Claimant failed to prove, by a preponderance of the evidence, that the left elbow surgery recommended by Dr. Hart was reasonably necessary to cure or relieve the Claimant from the effects of the occupational disease to the left wrist and the claim for authorization of that surgery was denied and dismissed (Claimant's Exhibit 4),

26. The Claimant returned to Dr. Hart on July 23, 2012 reporting ongoing left arm problems. On that exam, the Claimant had some mild ulnar-sided left wrist pain, but this was provoked most significantly with manipulation and purposeful tapping of the left elbow ulnar nerve through the left cubital tunnel. On physical exam, the Claimant had full range of motion of his left wrist. He was very slightly tender to direct palpation of the left wrist, but most of his symptoms resulted from provocative tests of the left elbow. Dr.

Hart notes, "Apparently somewhere along the way, a judge has approved surgery for his left wrist.[1] There was never any intention to do surgery on the left wrist. I think his only predominant injury is at the left cubital tunnel with ulnar nerve compression" (Respondents' Exhibit P, p. 175).

27. On August 20, 2012, Dr. Hart noted that there was approval for a left elbow ulnar nerve decompression and subcutaneous transposition surgery (Respondent's Exhibit P, p. 176). On August 21, 2012, Dr. Hart performed a left elbow ulnar nerve decompression and subcutaneous transposition for the diagnosis of left cubital tunnel syndrome (Respondents' Exhibit P, p. 177-178).

28. On September 5, 2012, Dr. Hart saw the Claimant for post-surgical follow up noting that the Claimant was working in a range of motion program and "the numbness, tingling, and burning in his hand has resolved completely." Dr. Hart also noted that the Claimant was to continue with a home therapy program because he can no longer afford the therapy "because work comp had denied coverage despite having approved surgery" (Respondents' Exhibit P, p. 181).

29. On September 17, 2012, the Claimant reported that "the numbness and tingling in his left arm has resolved" and "he has full range of motion of the elbow." Dr. Hart noted that he had documented approval for the surgery, but "retroactively, after the surgery was completed, they denied coverage for the surgical procedure." Dr. Hart released the Claimant to return to work with no restrictions and no impairment, with instructions for the Claimant to return on an as needed basis (Respondents' Exhibit P, p. 182).

30. On September 18, 2012, the Claimant returned from a leave of absence to his regular job with the Employer (Respondents' Exhibit Q, p. 193).

31. The Claimant continued to work his regular job until he suffered an ACL injury while playing football which was reported on January 27, 2013 (Respondents' Exhibit Q, p. 195). The Claimant was placed on medical leave of absence, not work related, effective January 28, 2013 (Respondents' Exhibit Q, p. 197). Per Dr. Wiley Jinkins, the Claimant was unable to work due to a right knee injury until at least April 25, 2013 pending surgery authorization (Respondents' Exhibit Q, p. 199). On April 24, 2013, the Claimant underwent a recertification DOT physical at Concentra which noted the Claimant had to do a squat test, bending test and anything else needed to see if the Claimant could do all functions of his job (Claimant's Exhibit 1). The Claimant returned to work from this medical leave of absence effective April 29, 2013 (Respondents' Exhibit Q, p. 200). At hearing, the Claimant conceded in testimony that he did not lose his job for requiring the leave of absence for this non-work related injury.

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[1] To the extent that this refers to ALJ Stuber's order, this is an incorrect interpretation of Judge Stuber's July 9, 2012 Order which only ordered the Respondents to pay for treatment that was reasonable, necessary, and related to the October 12, 2011 accident. He did not order left wrist surgery for the residuals of the wrist injury. Additionally, Judge Stuber also specifically found that the cubital tunnel release surgery was not authorized.

32. On July 16, 2013, the Claimant reported a leg injury that allegedly occurred on June 27, 2013 when he slipped and fell on water on the floor in the receiving area at a Safeway store (Claimant's Exhibit 3 – also see below for findings of fact related to this 6/27/13 claim). The Claimant testified at the hearing that he never missed any work for this fall.

33. The Claimant worked his regular job with the Respondent Employer until February 19, 2014, when his employment with the Employer was terminated for "Insubordination resulting in theft of time" (Respondents' Exhibit Q, p. 201).

34. After his employment with Employer was terminated, the Claimant returned to Dr. Hart on March 12, 2014, alleging ongoing complaints of left wrist pain. The Claimant advised Dr. Hart that "he continues to work for [Employer]." The Claimant acknowledged continuing to work out in the gym, but alleged left wrist pain only occurring with work activities, not at the gym. On physical exam, the Claimant had full dorsiflexion, plantar flexion, radial and ulnar deviation, full supination, and pronation, full circumduction, good pinch, grip and grasp. He was not tender or swollen to the ulnar aspect of the left wrist. He had full range of motion of the left wrist. X-rays demonstrated no acute or chronic changes. Despite a completely normal physical exam, Dr. Hart ordered repeat MRI of the left wrist (Respondents' Exhibit P, p. 184-185).

35. At the hearing, when questioned about the gap in medical care and in complaints about left upper extremity pain, the Claimant testified that he did not "push the medical issue" with Employer and pursue a workers' compensation claim actively because he felt that his job was threatened due to a hostile working relationship with his supervisor Cyron. The Claimant conceded that prior workers' compensation claims for injuries and the non-work related leave of absence for the football injury did not result in the termination of his employment, but he nonetheless testified that he felt he would lose his job.

36. After his employment with Employer was terminated, the Claimant applied for a position with Lincare and was hired on May 13, 2014 (Respondents' Exhibit R, p. 222). In May of 2014, the Claimant signed a statement that he could meet the job duties, including the physical demand which would require frequent lifting and moving up to 10 pounds and occasional lifting and moving up to 25 pounds (Respondents' Exhibit R, pp. 212-213). The Claimant testified at the hearing that his employment with Lincare was terminated due to failure to pass a vocabulary test and not due to physical demands.

37. A repeat MRI of the left wrist was performed on October 16, 2014, and was interpreted by musculoskeletal trained radiologist, Dr. Kelly Lindauer, the same radiologist who interpreted the July 14, 2011 MRI. The October 16, 2014 MRI was read as showing a partial thickness tear of the central TFCC disc that had developed since the first MRI with the remainder of the scan essentially unchanged with no cartilage, bone or ligament pathology noted (Respondents' Exhibit G, p. 41).

38. Dr. Hart saw the Claimant in follow up on October 20, 2014 and reviewed the MRI results. On physical exam, the Claimant complained of pain with ulnar deviation. Dr. Hart documented a positive ulnar impaction test. Otherwise, the Claimant's physical exam was completely normal, including full dorsiflexion, palmar flexion, radial and ulnar deviation of the left wrist, good pinch, grip, and grasp. Despite normal physical findings, Dr. Hart requested prior authorization of an arthroscopic surgery of the left wrist to debride and repair the partial thickness TCFF tear in treatment of "wrist pain" (Respondents' Exhibit G, p. 42).

39. On October 30, 2014, Dr. Gwendolyn Henke performed a Rule 16 Review of Dr. Hart's request for prior authorization of a left wrist surgery (Respondents' Exhibit G). Based on her review of the medical records and ALJ Stuber's July 9, 2012 FFCLO, Dr. Henke opined the proposed left wrist surgery is not reasonable, necessary, or related to the occupational injury of October 12, 2011.Dr. Henke opined, "regarding causality, according to the Section of Cumulative Trauma Conditions in the Colorado Division of Workers' Compensation Medical Treatment Guidelines, there is no quality evidence available for specific risk factors for the development of TCFF pathology. Additional non-evidence based risk factors such as occupational repetitive motions must be present for four hours of the workday in order to consider a diagnosis of cumulative trauma condition." Dr. Henke opined that "the finding of a partial thickness central tear of the TFCC is not confirmation of an occupational disorder. Rather, Dr. Henke opined that the Claimant's positive ulnar variance could be associated with this type of tear and the Claimant's many years of weight lifting and playing sports could contribute to degenerative changes caused by ulnar impaction syndrome. Additionally, Dr. Henke opined, that with regard to the proposed surgery being reasonable and necessary, conservative management is always the first treatment for TFCC disorders. This would include a 3-month trial of immobilization, anti-inflammatories and steroid injections, which have not been done (Respondents' Exhibit G).

40. Dr. Henke testified on the second day of the hearing in this matter consistent with the opinions expressed in her report. Dr. Henke further credibly explained that as a result of the Claimant's congenital ulnar impaction syndrome, the TCFF is pinched between the carpal bone and the ulna bone due to the excessive length of the ulna. Over time, this pinching wears a hole in the TCFF cartilage and arthritis can further impact the condition. Dr. Henke testified that surgical repair of the Claimant's TCFF is not reasonable and not necessary. Moreover, Dr. Henke opined that if the TCFF tear were work-related that she would have expected to see ongoing symptoms yet when the Claimant returned to work at Employer after his cubital tunnel release surgery, there is no evidence in the medical records that the Claimant had pain complaints while actually working for Employer. Instead, the Claimant did not return to Dr. Hart with left wrist pain until after his employment was terminated. Dr. Henke credibly testified it is not medically probable the surgery being requested by Dr. Hart is related to the October 12, 2011 occupational disease. Dr. Henke's testimony that it is not medically probable the Claimant's employment with the Respondent Employer caused or substantially and permanently aggravated the Claimant's central partial thickness TCFF tear is credible and persuasive. Dr. Henke's testimony that Dr. Hart failed to explain how the Claimant's employment with the Respondent Employer caused

the new TCFF tear documented on MRI some eight months after the Claimant's employment was terminated is credible and persuasive.

41. Dr. Timothy O'Brien who testified as an expert in orthopedic surgery also addressed Dr. Hart's request for arthroscopic repair of the partial thickness tear of the TCFF in his report and testimony. Dr. O'Brien testified that Dr. Hart is a partner in his practice. Dr. O'Brien credibly testified that, in his opinion, it is not medically probable the new TCFF tear documented on the October 16, 2014 MRI is causally related to the Claimant's employment with Employer. Dr. O'Brien pointed to the medical report of Dr. Hart on September 5, 2012 noting that the numbness, tingling and burning the Claimant had complained of was completely resolved. Dr. O'Brien found that this was evidence that the symptoms caused by the ulnar nerve deviation condition were resolved by the cubital tunnel release. Dr. O'Brien credibly testified that it is medically probable the new TCFF tear documented on October 16, 2014, is related to the Claimant's activities outside of work, including weight-lifting and competitive flag football. He testified that the work activities are insignificant compared to the Claimant's weightlifting activities. Additionally, Dr. O'Brien credibly testified the surgery being requested by Dr. Hart is not reasonable and necessary, for the same reasons given by Dr. Henke. He also opined that the procedure Dr. Hart proposes is to shave off fronds on the partial thickness tear which he does not believe will relieve the Claimant's symptoms or fix the problem.

42. Dr. Hart had released the Claimant to return to work, without restrictions and without impairment, on September 17, 2012. Neither Dr. Hart, nor any physician, has restricted the Claimant's work activities since September 17, 2012, in connection with the October 12, 2011 injury.

43. The Claimant presented no credible evidence that he lost any time from work as a result of the October 12, 2011 injury.

June 27, 2013 Claim

44. The Claimant alleged he injured his right leg and lower back on June 27, 2013, in the course and scope of his employment with the Respondent Employer when he slipped and fell in a pool of water in front of a Safeway store where he was delivering product (Claimant's Exhibit 3; Respondents' Exhibit E).

45. An Employee Injury/Accident Investigation form, including an Employee Statement and Supervisor's Investigation was completed on July 26, 2013 (Claimant's Exhibit 3) as was the Employer's First Report of Injury (Respondents' Exhibit E). It was determined that the Claimant did slip and fall while performing work activities. However, there is no indication that there was a resulting work injury.

46. The Employee Injury/Accident Investigation bears the Claimant's signature in two places. In the employee statement, the Claimant indicates he injured his "right leg", not his right knee, in the accident. In the Supervisor's Investigation section the injury is listed as the right leg/lower back. The Employee Injury/Accident Report

indicates no medical treatment was provided for the alleged injury and the Claimant lost no time as a result of it (Claimant's Exhibit 3).

47. The Claimant did not initially file a worker's claim for compensation. The Claimant alleges he requested medical treatment for his alleged injuries, but was not provided a Rule 8 list of providers. However, in the Employee Injury/Accident Investigation form, the Supervisor's Investigation notes that the Claimant did not receive first aid in house. Was not treated by anyone away from the worksite and was not treated in an emergency room. This form was completed on July 26, 2013 a month after the alleged incident on June 27, 2013 (Claimant's Exhibit 3).

48. The Claimant's testimony regarding the reporting of the alleged injury and his request for medical treatment was equivocal. The Claimant initially testified he did not seek medical treatment for the alleged injury because of conflict with his supervisor, Cyron, and fear that his employment would be terminated if he requested medical treatment.

49. However, the Employer's Branch Manager Kevin McDevitt credibly testified that Cyron had no hiring or firing authority. He also credibly testified that Cyron had not been the Claimant's supervisor since May 2012, some thirteen months prior to the alleged accident of June 27, 2013. The Branch Manager credibly testified that Cyron did not work at the Employer's Colorado Springs location for the five months pre-dating the termination of the Claimant's employment. Moreover, as set forth above in the facts related to the consolidated claim, the Claimant had never been subject to inappropriate work treatment as the result of filing prior claims or requesting medical leaves of absence.

50. The Claimant's testimony that he was fearful his employment with the Respondent Employer would be terminated if he reported an accident and requested medical treatment is not credible. The Claimant reported a contested October 12, 2011 accident with the Respondent Employer, without recourse. The Claimant lost time from work for the non-work-related left elbow surgery from August 20, 2012 through September 18, 2012, without recourse (Respondents' Exhibit Q, p. 192-193(. The Claimant lost time from work for a non-work-related knee injury from January 28, 2013 through April 29, 2013, without recourse (Respondents' Exhibit Q, p. 197, 200).

51. The Claimant's testimony that he consistently requested, and was denied, medical treatment for his alleged June 27, 2013 accident is not credible. Further, the Claimant had health insurance as a term of his employment with the Respondent Insurer (Respondents' Exhibit E).

52. The Claimant suffered an ACL injury while playing football which was reported on January 27, 2013 (Respondents' Exhibit Q, p. 195). The Claimant was placed on medical leave of absence, not work related, effective January 28, 2013 (Respondents' Exhibit Q, p. 197). Per Dr. Wiley Jinkins, the Claimant was unable to

work due to a right knee injury until at least April 25, 2013 pending surgery authorization (Respondents' Exhibit Q, p. 199)..

53. The Claimant returned to work on April 29, 2013 (Respondents' Exhibit Q, p. 200) based on an April 24, 2013 "Commercial Driver Fitness Determination" performed at Concentra Medical Centers (Claimant's Exhibit 1).

54. The Claimant filed an Application for Expedited Hearing on July 28, 2014 listing a June 20, 2013 injury (presumably referring to the alleged June 27, 2013 slip and fall injury).

55. Thus, the Claimant did not file a worker's claim for compensation or seek any medical treatment for his alleged June 27, 2013 injury, within or outside the workers' compensation system until after his employment with the Respondent Employer was terminated on February 19, 2014. The Claimant continued to work his regular job, without restrictions until his employment was terminated for "insubordination resulting in theft of time" (Respondents' Exhibit Q, p. 201). The Claimant did not any lose time from the alleged injury and did not work under any restrictions following this alleged injury until after his employment with the Respondent Employer was terminated.

56. On October 29, 2014, Dr. Timothy O'Brien evaluated the Claimant at Respondents' request. Dr. O'Brien prepared a report dated October 29, 2014 (Respondents' Exhibit F), and testified as an expert in the field of orthopedics and orthopedic surgery on the third day of the hearing in this matter on December 1, 2014. Based on his prior treatment of the Claimant, Dr. O'Brien is in a position to offer opinions on the Claimant's current knee condition as it relates to his prior knee conditions. Based on his familiarity with the Claimant, his review of the medical records, and his October 29, 2014 examination of the Claimant, Dr. O'Brien credibly opined there was no work injury of any significance on June 27, 2013. The incident was so minor, it did not result in the need for medical treatment, and any alleged injury healed or abated within a week of June 27, 2013 (Respondents' Exhibit F, p. 37). At the hearing, Dr. O'Brien testified credibly in accordance with his October 29, 2014 report that the Claimant's current right knee complaints are the result of the natural progression of his pre-existing knee osteoarthritis, documented as Grade III at the time of Dr. Simpson's surgery in 2009. Dr. O'Brien's testimony that knee cartilage cannot be replaced through treatment, and the expected course of the Grade III degeneration is continued degeneration, with, or without treatment, is credible and persuasive. Dr. O'Brien's testimony that the incident of June 27, 2013 did not result in the need for medical treatment, lost time from work, or permanent physical impairment is credible and persuasive.

57. The truck driven by the Claimant is very large, weighing approximately 32,000 pounds, being 35' long and 13' wide. Mr. McDevitt credibly testified it is against the Employer's policies for route drivers to drive their delivery trucks in residential areas. Due to their size, the trucks pose a risk to people and property if driven in residential areas. Driving off route also takes the drivers away from their work duties. As the result of review of the GPS tracking records associated with the Claimant's truck, the

Employer discovered the Claimant had continued to drive his delivery truck off route, and take extended breaks, in violation of his supervisor's instructions. Mr. McDevitt testified that the Claimant's employment records contain evidence of prior verbal warnings not to use a company vehicle for personal reasons. Mr. McDevitt testified credibly that as a result of the GPS records showing the Claimant's truck going to the same off-route address 4 times between January 11, 2014 and February 8, 2014, the Claimant's employment with the Respondent Employer was terminated for "theft of time."

58. Mr. McDevitt testified that when the Claimant was terminated, he made a verbal statement that because he was being fired by Employer, now he is going to have to file a worker's compensation claim. Mr. McDevitt testified that because of this statement, the Claimant's file was reviewed and, at that point, he was first made aware of the alleged June 27, 2013 slip and fall and the investigation report. He testified that there was no indication in the file that the Claimant requested medical treatment for that incident, but if the Claimant had requested medical treatment, the Claimant would have been encouraged to seek treatment.

59. After the termination of his employment with the Respondent Employer, the Claimant worked for "The Cantina" stocking vending machines. He subsequently applied for, and was hired as a salesman, driver, for Lincare, a medical equipment provider. In his application for Lincare, the Claimant indicated he was an "arena football player" (Respondents' Exhibit R, p. 205). In connection with his employment with Lincare, the Claimant acknowledged, under penalty of perjury, that he was capable of performing the physical demands of the job, including lifting up to 25 pounds, frequently standing, walking, and using hands to finger, handle, or feel (Respondents' Exhibit R, P. 213). The Claimant verified under penalty of perjury, that he was not restricted in his employment activity for the position he was applying for and could perform the essential functions of the job (Respondents' Exhibit R, P. 211). In addition to working for The Cantina and Lincare, the Claimant continued to operate his own business, "Your Sports Pack", an online retail company offering a variety of sports memorabilia and clothing. No physician restricted the Claimant's work activities following the June 27, 2013 incident.

CONCLUSIONS OF LAW

Generally

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

interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Each of the Claimant's claims will be considered separately below:

October 12, 2011 Claim

Medical Benefits - Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165

Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The October 12, 2011 accident is an admitted claim. Dr. Hart previously attributed the Claimant's wrist complaints to cubital tunnel syndrome and performed a left elbow surgery in treatment of those complaints. According to Dr. Hart's records, the elbow surgery initially resolved the complaints. The Claimant was released to regular duty on September 17, 2012. The Claimant worked his regular job without seeking additional treatment or complaining of pain until after his employment with the Respondent Employer was terminated. During this time, the Claimant continued to lift heavy weights and play competitive football. Although the Respondents' expert witness Dr. O'Brien had issues with causation of the Claimant's initial wrist complaints to the October 12, 2011 accident, the parties agreed that the claim was admitted and compensability is not an issue for this case. The Claimant has received medical treatment for the claim, including left elbow surgery. The Claimant now seeks left wrist surgery recommended by Dr. Hart for debridement and repair of a partial thickness triangular fibrocartilage tear

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).

As found, the written opinions and testimony of both Dr. Henke and Dr. O'Brien that the surgery now being requested by Dr. Hart is not reasonable, necessary, or related to the October 12, 2011 work injury are credible and persuasive.

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).

Of particular importance in the Claimant's case is analysis of whether or not he has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines and whether or not proposed treatment is calculated to address that cumulative trauma injury.

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.

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.

Per, Rule 17, Exhibit 5 (D)(1)(b), the clinician is responsible for documenting specific information regarding repetition, force, other risk factors and duration of employment. Refer to risk factors as listed in the tables entitled 'Primary Risk Factor Definitions and Diagnosis Based Risk Factors.' A formal jobsite evaluation may be required. Information must be obtained regarding other employment, sports, recreational, and vocational activities that might contribute to, or be impacted by CTC development. Activities such as hand operated video games, crocheting/needlepoint; baseball/softball playing musical instruments, home computer operation, golf, tennis, and gardening are included in this category. Duration of these activities should be documented.

As found, Dr. Henke credibly testified Dr. Hart did not perform this causation analysis required by the Medical Treatment Guidelines and did not explain how the

Claimant's current need for surgery, if any, is related to his employment, which terminated 8 months prior to his request. As found, Dr. Henke and Dr. O'Brien credibly testified the surgery being requested by Dr. Hart is not reasonable and necessary and is outside the Medical Treatment Guidelines for cumulative trauma disorder. The request is denied and the claim dismissed.

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*.

On August 20, 2012, Dr. Hart noted that there was approval for a left elbow ulnar nerve decompression and subcutaneous transposition surgery (Respondent's Exhibit P, p. 176). On August 21, 2012, Dr. Hart performed a left elbow ulnar nerve decompression and subcutaneous transposition for the diagnosis of left cubital tunnel syndrome (Respondents' Exhibit P, p. 177-178). On September 5, 2012, Dr. Hart saw the Claimant for post-surgical follow up noting that the Claimant was working in a range of motion program and "the numbness, tingling, and burning in his hand has resolved completely." Dr. Hart also noted that the Claimant was to continue with a home therapy program because he can no longer afford the therapy "because work comp had denied coverage despite having approved surgery" (Respondents' Exhibit P, p. 181). On September 17, 2012, the Claimant reported that "the numbness and tingling in his left arm has resolved" and "he has full range of motion of the elbow." Dr. Hart noted that he had documented approval for the surgery, but "retroactively, after the surgery was completed, they denied coverage for the surgical procedure." Dr. Hart released the Claimant to return to work with no restrictions and no impairment, with instructions for the Claimant to return on an as needed basis (Respondents' Exhibit P, p. 182). While the Claimant missed work for cubital tunnel release surgery, the requisite causal connection between the October 12, 2011 injury and the time lost from work for this surgery was not established by the Claimant since the credible and persuasive medical professionals in this case find the cubital tunnel syndrome symptoms unrelated to the work injury. Therefore, the time lost due to this surgery was not as a result of any disability caused by the work injury.

On September 18, 2012, the Claimant returned from a leave of absence to his regular job with the Employer (Respondents' Exhibit Q, p. 193). The Claimant continued to work his regular job until he suffered an ACL injury while playing football which was reported on January 27, 2013 (Respondents' Exhibit Q, p. 195).

The Claimant was placed on medical leave of absence, not work related, effective January 28, 2013 (Respondents' Exhibit Q, p. 197). Per Dr. Wiley Jinkins, the Claimant was unable to work due to a right knee injury until at least April 25, 2013 pending surgery authorization (Respondents' Exhibit Q, p. 199). On April 24, 2013, the Claimant underwent a recertification DOT physical at Concentra which noted the Claimant had to do a squat test, bending test and anything else needed to see if the Claimant could do all functions of his job (Claimant's Exhibit 1). The Claimant returned to work from this medical leave of absence effective April 29, 2013 (Respondents' Exhibit Q, p. 200). So, the Claimant did not suffer a wage loss related to this medical leave of absence that is in any way related to any disability he suffered as a result of the October 12, 2011 injury.

Then, on July 16, 2013, the Claimant reported a leg injury that allegedly occurred on June 27, 2013 when he slipped and fell on water on the floor in the receiving area at a Safeway store (Claimant's Exhibit 3 – also see below for findings of fact related to this 6/27/13 claim). The Claimant testified at the hearing that he never missed any work for this fall and he worked his regular job with the Respondent Employer until February 19, 2014, when his employment with the Employer was terminated for "Insubordination resulting in theft of time" (Respondents' Exhibit Q, p. 201).

In any event, after his employment with Employer was terminated, the Claimant applied for a position with Lincare and was hired on May 13, 2014 (Respondents' Exhibit R, p. 222). In May of 2014, the Claimant signed a statement that he could meet the job duties, including the physical demand which would require frequent lifting and moving up to 10 pounds and occasional lifting and moving up to 25 pounds (Respondents' Exhibit R, pp. 212-213). The Claimant testified at the hearing that his employment with Lincare was terminated due to failure to pass a vocabulary test and not due to physical demands.

In conclusion, the need for the Claimant's surgery for cubital tunnel release was not causally related to the Claimant's October 12, 2011 work injury and, so, any time lost from work due to this surgery did not result in wage loss due to a disability caused by the work injury. Since the Claimant was returned to full duty with no restrictions after recovery from the cubital tunnel release surgery as of September 17, 2012, neither Dr. Hart, nor any physician, has restricted the Claimant's work activities in connection with the October 12, 2011 injury. While the Claimant missed time from work for non-work related injuries between September 18, 2012 and the date his employment was terminated on February 19, 2014, none of the wage loss is causally related to the October 12, 2011 work injury Thus, The Claimant presented no credible evidence that he lost any time from work as a result of the October 12, 2011 injury which would entitle him to temporary disability benefits and this claim is denied and dismissed.

July 27, 2013 Claim

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Here, the Claimant failed to present credible medical evidence that the June 27, 2013 incident where he slipped on a wet floor has precluded him from performing his regular work. In fact, the Claimant continued to work his regular job with the Employer for almost eight months, until his employment was terminated. After termination of his employment with the Respondent Employer, the Claimant sought work very similar to the work he performed for the Respondent. No physician has restricted the Claimant from working his regular job. At most, the Claimant sustained only a temporary

aggravation of his pre-existing degenerative knee joint disease as a result of the June 27, 2013 accident. The evidence does not establish that the Claimant requires any further medical treatment from this accident, as distinguished from treatment for his pre-existing degenerative knee joint condition.

The ALJ is not persuaded that the June 27, 2013 industrial accident precluded the Claimant from working or resulted in a disability. Nor is the ALJ persuaded that the industrial injury caused a permanent aggravation of the Claimant's pre-existing condition. See *Eisenach v. Industrial Commission,* 633 P.2d 502 (Colo. App. 1981)(evidence supported finding that Claimant suffered only a temporary aggravation of a preexisting condition**).**

Remaining Issues

The Claimant failed to prove that a slip and fall that he alleges occurred on June 27, 2013 resulted in a compensable injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issues regarding temporary disability benefits (including the defense of responsible for termination), medical benefits and penalties are moot. As found, Claimant has failed to prove that he was unable to return to his usual job due to the effects of the work injury. Consequently, Claimant is not "disabled" within the meaning of section 8-42-105, C.R.S. and is not entitled to TTD or TPD 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). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused Claimant to leave work, and Claimant missed more than three regular working days.

ORDER

It is therefore ordered that:

1. The request for approval of the surgical recommendation of Dr. Hart is denied and dismissed. The Claimant has not established that the surgery is related to the admitted October 12, 2011 accident or is reasonably necessary to cure and relieve the Claimant of the effects of the admitted work injury.

2. The Claimant's request for TTD/TPD from October 12, 2011 and ongoing is denied and dismissed.

3. The Claimant's June 27, 2013 accident, W.C. No. 4-854-583, did not result in the need for medical treatment or result in a disability. The claim is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman 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: March 24, 2015

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

ISSUES

The issues to be determined by this decision are:

1) Whether Claimant's claim for permanent total disability benefits (PTD) is barred by doctrine of claim preclusion;

2) Whether is able to earn any wages; and

3) Whether Respondent is entitled to offset Claimant's PTD based on Claimant's receipt of pension benefits funded by Employer pursuant to a collective bargaining agreement.

FINDINGS OF FACT

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

1. On January 26, 2012, while working for Employer, Claimant, an industrial refrigeration technician, injured his right and left shoulders when he slipped down a ladder through a manhole. Claimant had just finished taking readings from a roof top cooler and was descending a vertical ladder when his foot slipped on a rung; he fell approximately six feet. Claimant was able to catch himself on the ladder as he fell. As a result, Claimant's arms were forcefully abducted over his head.

2. On January 30, 2012, Claimant treated with Dr. Christian Updike, who referred Claimant for a right shoulder MRI and to an orthopedic surgeon.

3. On January 31, 2012, Claimant underwent the right shoulder MRI, which revealed a full thickness rotator cuff tear, acromial fracture, and a torn biceps tendon.

4. On February 20, 2012, Claimant treated with Dr. Eric Stahl, an orthopedic surgeon, and reported severe pain in his shoulders; Claimant also reported popping and weakness in his right shoulder. Dr. Stahl reviewed the right shoulder MRI and recommended right shoulder surgery.

5. On March 13, 2012, Dr. Stahl performed arthroscopic rotator cuff repair and a subacromial decompression on Claimant's right shoulder.

6. On April 23, 2012, Dr. Stahl referred Claimant for a left shoulder MRI.

7. On May 3, 2012, Respondent filed a General Admission of Liability admitting to an average weekly wage (AWW) of $1,334.71 and the maximum temporary total disability rate (TTD) of $828.03 per week. However, the Respondent claimed a 50% reduction in TTD benefits for a "safety rule violation." Section 8-42-112(1)(a) and (b). Therefore, Respondent paid Claimant TTD benefits at the rate of $414.02 per week beginning March 13, 2012. Also, on March 13, 2012, Claimant had right shoulder surgery.

8. On May 24, 2012, Claimant underwent a left shoulder MRI, which revealed full thickness tears of the supraspinatus and infraspinatus, high grade tearing of the subscapularis, superior migrating of humeral head, and a biceps tendon tear with retraction.

9. On May 31, 2012, Dr. Stahl reviewed Claimant's left shoulder MRI and noted that Claimant had a massive rotator cuff tear that is not likely repairable. Dr. Stahl added that it is uncertain if Claimant will ever be able to return to his job as a refrigeration technician due to the heavy lifting, pushing, and pulling the job required.

10. On June 28, 2012, Dr. Stahl noted that Claimant continued to have bilateral shoulder pain and that Claimant is unable to lift overhead or perform any type of job responsibilities.

11. On September 5, 2012, Claimant treated with Dr. Stahl, who maintained Claimant's work restrictions, recommended Claimant continue physical therapy, and referred Claimant to Dr. James Johnson.

12. On September 7, 2012, Claimant treated with Dr. Steve Danahey and completed a pain diagram, noting pain in both shoulders, down both arms, and in his upper back and neck. Dr. Danahey noted that Claimant had significantly limited range of motion in both shoulders, recommended Claimant continue physical therapy, and referred Claimant to Dr. Randy Burris.

13. From September 11, 2012, through February 4, 2013, Claimant attended 17 physical therapy sessions.

14. On September 25, 2012, Dr. Burris noted that Claimant had elevated pain in both shoulders and had difficulty with overhead lifting. Dr. Burris noted that Claimant was likely at maximum medical improvement and did not require any additional treatment. Dr. Burris did refer Claimant to a rehabilitation specialist, Dr. Scott Primack, regarding a possible maintenance program.

15. On October 15, 2012, Claimant treated with Dr. Johnson, who took over Claimant's care as Dr. Stahl retired. Dr. Johnson recommended Claimant continue physical therapy.

16. On October 16, 2012, Claimant treated with Dr. Primack, who noted that Claimant had a posttraumatic stiff right shoulder. Dr. Primack recommended Claimant continue physical therapy and undergo a functional capacity evaluation (FCE).

17. On October 23, 2012, Dr. Burris referred Claimant for a FCE and maintained Claimant's work restrictions at no lifting more than 10 pounds and no overhead lifting.

18. On October 31, 2012, Claimant underwent a FCE. Claimant was placed in the light duty work category with work restrictions including lifting ten pounds occasionally from the floor to his waist, lifting five pounds occasionally from his waist to shoulder level, maximum carry of 30 pounds, and maximum push/pull of 50 pounds. The functional testing was valid.

19. On November 14, 2012, Dr. Johnson noted that Claimant's left shoulder presented a very difficult situation and that he was uncertain what could be done to improve Claimant's left shoulder condition. It was determined Claimant's left shoulder is irreparable. Dr. Johnson noted that Claimant aggravated his shoulder lifting 30 pounds during the FCE.

20. On November 20, 2012, Dr. Primack noted that Claimant had stiffness and limited motion in both shoulders. Dr. Primack recommended additional physical therapy.

21. On December 18, 2012, Claimant treated with Dr. Burris, who noted Claimant is at MMI pending release from Dr. Primack. Dr. Burris maintained Claimant's work restrictions of no lifting greater than ten pounds and no reaching above his shoulders.

22. On January 8, 2013, Dr. Primack placed Claimant at MMI and assigned Claimant a 13% right shoulder upper extremity impairment rating based on Claimant's range of motion loss and a 13% left shoulder upper extremity impairment rating based on range of motion loss.

23. On February 11, 2013, Respondent filed a Final Admission (FAL) of Liability based on Dr. Primack's January 8, 2013, MMI report and impairment ratings. Respondent claimed a 50% reduction in Claimant's TTD benefits from March 13, 2012, through December 8, 2012, because of an alleged safety rule violation. Respondent admitted for post-MMI medical benefits.

24. On March 7, 2013, Claimant objected to Respondent's February 11, 2013, FAL and requested a Division independent medical evaluation (DIME). Dr. Caroline Gellrick was selected as the DIME physician.

25. On February 12, 2013, Dr. Burris noted that he agreed with Dr. Primack's MMI date and impairment rating. Dr. Burris gave Claimant permanent work restrictions per the functional capacity evaluation, including no lifting greater than 30 pounds, no pushing or pulling greater than 50 pounds, and limited overhead activities to an occasional basis (less than 33% of the time). Dr. Burris did not recommend any

maintenance treatment. That same day, Claimant completed a pain diagram and reported bilateral shoulder pain, neck and upper back pain, and chest pain.

26. On June 18, 2013, Claimant completed an "Activities of Daily Living" worksheet as part of his application for long-term disability benefits through MetLife. Claimant noted that he takes care of himself and helps around the house with chores and light yard work, with no lifting. Claimant also noted that he walks two miles per day and runs errands.

27. On June 21, 2013, Dr. Gellrick performed the DIME. Dr. Gellrick noted the following symptoms and conditions: that Claimant continues to have pain, discomfort, and weakness in both shoulders; that Claimant has "popping in both shoulders; that Claimant's bilateral shoulder pain extends into Claimant's neck; that Claimant has neck pain; that Claimant "cannot reach out and cannot reach up with his arms to do simple tasking even in the kitchen;" that Claimant "cannot sleep;" that Claimant gave up "activities of heavy lifting;" that he "cannot do yard work like he used to;" and that Claimant is limited in his ability to do daily activities as a result of his ongoing issues with his shoulders and neck.

28. On physical examination, Dr. Gellrick noted the following: that Claimant has scapular winging on the left; that Claimant has tenderness at the base of his cervical spine radiating from both shoulders across his trapeziums to his neck at the C6-7 level; that Claimant has positive crepitus in both shoulders that is audible and palpable; that Claimant has limited cervical range of motion; that Claimant has weakness in both shoulders; and that Claimant has severe limitations in range of motion in both shoulders.

29. Dr. Gellrick agreed with Dr. Burris' regarding Claimant's' MMI date and work restrictions. Dr. Gellrick noted that Claimant was functionally impaired and lacked the ability to reach above shoulder height and work overhead. Dr. Gellrick recommended maintenance treatment, including access to a home exercise program at a local gym and access to NSAIDs through Dr. Burris.

30. Regarding Claimant's right upper extremity impairment, Dr. Gellrick assigned Claimant 19% impairment for range of motion loss, 6% for crepitus and 4% for loss of strength. In regard to Claimant's left shoulder, Dr. Gellrick assigned Claimant 17% impairment for range of motion loss, 6% for crepitus, and 4% for loss of strength.

31. Per the Colorado Division of Workers' Compensation Impairment Rating Tip Guidelines, Dr. Gellrick also found Claimant had impairment to his cervical spine. Dr. Gellrick noted that in accordance with the Impairment Rating Tips, a cervical spine rating can be considered in cases of severe shoulder pathology. Dr. Gellrick noted that Claimant had massive rotator cuff tears in both shoulders and lack of function, thus she assigned Claimant 5% whole person cervical spine impairment for range of motion loss. Dr. Gellrick added that Claimant's shoulders should be considered a whole person injury because of the massive rotator cuff tears and the significant impact on Claimant's

function, with limitations, loss of strength, and lack of ability to work above chest level. Dr. Gellrick assigned Claimant 33% whole person impairment.

32. On July 26, 2013, Claimant completed an Application for the Social Security Administration. Claimant noted that he is disabled from his January 26, 2012, work-related injuries and that he has had four heart attacks. Claimant stated that he wakes up, does personal hygiene, makes coffee and maybe does a few things around the house. Claimant noted that: his shoulder/arm conditions affect his sleep; that he can't pull the cord to start his lawn mower; and that reaching is extremely painful with or without anything in his hands. The Social Security Administration awarded Claimant disability benefits effective October 2013 in the amount of $2,083.00 per month.

33. On October 22, 2013, Claimant filed a Request for Reconsideration with the Social Security Administration. Specifically, Claimant requested the Social Security Administration amend his disability onset date from April 25, 2013, to January 26, 2012.

34. On November 19, 2013, Respondent applied for a hearing to overcome Dr. Gellrick's assigned impairment ratings for crepitus and loss of strength. Respondent did not challenge the range of motion impairment assigned by Dr. Gellrick.

35. On November 27, 2013, Claimant filed a Response to Respondent's Application for Hearing and endorsed disfigurement, whole person conversion, overcoming the DIME, TTD benefits, and safety rule violation, which Respondent had previously claimed against Claimant's TTD benefits.

36. On November 29, 2013, Claimant completed a benefits election form for the Central Pension Fund. The Central Pension Fund consists of contributions made by Employer pursuant to a collective bargaining agreement with the employee's (Claimant's) representative. Claimant selected the "100% Joint and Survivor Annuity," which pays him $1,594.65 per month. That same day, Claimant completed "Application for Conversion from Disability Benefit to Normal, Special or Early Retirement" through the Central Pension Fund. In order to qualify for "Early Retirement," Claimant is required to be at least 55 years old with 10 years of service. On December 4, 2013, Claimant received a $1,779.27 check from the Central Pension Fund. This check covered time period April 1, 2013, through April 30, 2013.

37. On February 27, 2014, hearing was held before ALJ Lamphere on the issues of: a) whether Respondent overcame the permanent partial impairment ratings assigned by the Division IME physician by clear and convincing evidence; b) whether claimant's bilateral shoulder permanent partial impairment ratings should be converted to whole person ratings; c) whether the Respondent has proven by a preponderance of the evidence that Claimant willfully violated a reasonable safety rule adopted by Employer; and d) whether Claimantis entitled to disfigurement benefits under Section 8-42-108, C.R.S.

38. On April 11, 2014, ALJ Lamphere issued Findings of Fact, Conclusions of Law, and Order regarding the February 27, 2014, hearing. ALJ Lamphere found that: Dr. Gellrick did not err when she assigned Claimant additional impairment for crepitus; nor did she deviate from the AMA Guides when she assigned Claimant impairment for loss of strength and impairment for the cervical spine; and Claimant proved by a preponderance of the evidence that he sustained functional impairment beyond the arms entitling him to whole person impairment. ALJ Lamphere noted that Respondent did not present any evidence that Claimant committed a safety rule violation and, thus, found that the Respondent failed to prove by a preponderance of the evidence that Claimant's compensation should be reduced by 50% for a willful violation of a safety rule.

39. On April 28, 2014, Respondent filed a Final Admission of Liability consistent with ALJ Lamphere's April 11, 2014, Findings of Fact, Conclusions of Law, and Order. Respondent admitted for temporary disability benefits, 33% whole person impairment, and post-MMI medical benefits.

40. On May 8, 2014, Claimant objected to the Respondent's April 28, 2014, Final Admission of Liability and applied for a hearing on the issue of PTD. Hearing was initially scheduled for August 27, 2014. Per agreement of the parties, hearing was rescheduled for October 23, 2014. On October 1, 2014, a Prehearing Conference was held before Prehearing Administrative Law Judge (PALJ) Sue Purdie. PALJ Purdie vacated the October 23, 2014, hearing, struck Claimant's May 8, 2014, Application for Hearing without prejudice, and ordered Claimant to refile his Application for Hearing within seven days. On October 7, 2014, Claimant reapplied for a hearing on the issue of PTD. On October 28, 2014, Respondent responded to Claimant's Application for Hearing and endorsed offsets, issue preclusion and claim preclusion.

41. On July 1, 2014, Claimant underwent a vocational evaluation with Ruthe Hannigan, Respondent's retained vocational evaluator. In her July 17, 2014, report, Ms. Hannigan noted that based on Claimant's medical, educational, and employment history, Claimant is able to earn wages in the Denver labor market. Ms. Hannigan notes that Claimant could "upgrade his computer knowledge and skills," which "would amplify his vocational options for many other sedentary and light duty roles, since computers are common to most light duty work roles." Ms. Hannigan noted that she identified certain jobs Claimant may be able to do based on Claimant's work restrictions, including maximum lift of 30 pounds, occasional lifting of ten pounds floor to waist and five pounds waist to shoulder level, and no work above shoulder level. These jobs include security guard, usher, lobby attendant, cashier, counter and rental clerk, retail sales, order clerk, information clerk, parking lot attendant, and gaming cage worker, among others. Ms. Hannigan did not conduct any labor market research or identify any specific jobs within the current Denver labor market that Claimant may be able to work.

42. On September 23, 2014, Dr. Jerry Miklin, Claimant's cardiologist, rendered the opinion that Claimant should permanently avoid lifting more than 25 pounds and avoid highly stressful situations. Dr. Miklin also noted that Claimant should avoid

performing rigorous activity, including pushing and pulling heavy weights, on a regular basis.

43. Claimant credibly testified that he is 56 years old, graduated from Jefferson High School and completed some vocational training. Claimant first started working as an auto mechanic before starting work as an apprentice with heavy duty machinery. Claimant started working for Employer as a mechanic in 1994. In approximately 2004, Claimant was certified as a journeyman refrigeration mechanic and worked primarily at Employer's bakery plant. Claimant has not done office work, computer work, or customer service work. Claimant had four heart attacks and was given 25 pounds permanent lifting restrictions by his cardiologist. Claimant's cardiologist did not provide any overhead working or reaching restrictions. Claimant is a member of a union, the Local 1, and that Employer funded Claimant's pension, through the Central Pension Fund, pursuant to a collective bargaining agreement. Claimant receives $1,594.65 per month for his pension, $2,083.00 per month for Social Security Disability, and $322.26 per month for long-term disability.

44. Claimant credibly testified that his permanent work restrictions are no lifting greater than ten pounds from floor to waist level, no lifting more than five pounds from waist to shoulder level, no outward reaching more than six inches from his body, and no reaching or working above shoulder level. Because of Claimant's work injuries, he is in constant pain and has decreased functional ability. Claimant has lost his strength in his upper extremities. Claimant cannot hold his arms out in front of him for an extended period of time and cannot lift any weight when reaching out away from his body. Claimant is limited in his abilities to perform the activities of daily living. Claimant goes for walks, watches TV, completes some minimal household tasks, and some minimal driving. Claimant cannot put his car into drive with his right arm and cannot do laundry, cannot do much cooking or much household cleaning due to pain. Claimant lacks range of motion and strength in his arms. Claimant cannot shovel snow or mow the lawn. Claimant occasionally helps his wife do yard work picking up discarded sticks, leaves, grass, and other yard debris. Claimant has problems with rotating both arms in or out, as these motions cause increased pain, which inhibits his function. Claimant has not slept through the night since the January 26, 2012, injury. Claimant awakens every two hours because of pain or the need to adjust his position. Claimant's lack of sleep causes him to feel lethargic and affects his judgment. Claimant falls asleep frequently throughout the day.

45. Claimant must be conscious of all activity regarding his arms because of safety concerns. Claimant has to think about what he is doing with his arms before he does anything. Claimant takes longer to do simple tasks than it did prior to the injury. Claimant is unable to work as a result of his bilateral shoulder injuries and related loss of function. Additionally, Claimant is not aware of any jobs within his functional abilities and skill set. The ALJ finds claimant's testimony credible and persuasive.

46. At hearing, Dr. Primack testified regarding the extent of Claimant's shoulder conditions and Claimant's work restrictions. Dr. Primack testified that when considering

work restrictions, he considers the FCE and his examination and that the biggest concern is safety. Dr. Primack testified that pain affects function and that loss of strength affects function, both of which raise safety concerns.

47. At hearing, Ms. Hannigan testified that the sedentary work category requires exerting up to ten pounds of force occasionally and a negligible amount of force frequently. Ms. Hannigan testified that the light work category required exerting up to 20 pounds of force occasionally and up to ten pounds of force frequently. Ms. Hannigan testified that the sedentary and light categories deal specifically with weight and do not address overhead working or reaching restrictions. Ms. Hannigan agreed that Claimant's work restriction per the FCE are no lifting more than ten pounds from floor to waist and no more than five pounds from waist to shoulder level and that these work restrictions are sedentary. Ms. Hannigan testified that Claimant's cardiac work restrictions are more restrictive than Claimant's workers' compensation restrictions. Nevertheless, Ms. Hannigan testified that Claimant's cardiologist did not restrict Claimant from overhead working or reaching. Ms. Hannigan testified that nobody expects Claimant to work overhead. Ms. Hannigan testified that Claimant is not able to work every job within each of the categories she identified and that each potential job was be evaluated to determine whether it requires any overhead reaching or lifting or any prolonged use of the arms away from the body.

48. The ALJ finds that Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled. The ALJ find Claimant's testimony regarding his functional impairment credible and persuasive. Claimant is unable to reach or work overhead as a result of the work injury. Claimant has significant loss of strength in both arms and is unable to do much, if any, work with his arms extended from his body. Claimant testified credibly that he cannot lift a gallon of milk with one arm. Despite Ms. Hannigan's opinion that Claimant is capable of earning a wage, the ALJ finds that Claimant's functional impairment as a result of his work injuries prevents him from sustaining any employment. Ms. Hannigan did not identify any specific jobs within the Denver labor market that Claimant is capable of working. While she did identify certain categories of employment, Ms. Hannigan testified that Claimant is not capable of working any job that requires overhead work or prolonged use of his arms away from his body. The ALJ finds Claimant permanently and totally disabled.

49. The ALJ finds that Respondent is entitled to offset Claimant's permanent total disability benefits by $240.35 per week due to Claimant's receipt of social security disability benefits.

50. The ALJ finds that Respondent is entitled to offset claimant's permanent total disability benefits by $74.44 per week due to Claimant's receipt of long term disability benefits.

51. The ALJ finds that Claimant's benefits through the Central Pension Fund are retirement benefits. The ALJ finds that pursuant to Section 8-42-103(1)(c)(II)(B), C.R.S.

Respondent is not entitled to offset Claimant's permanent disability benefits based on Claimant's receipt of pension benefits through the Central Pension Fund.

CONCLUSIONS OF LAW

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

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness of unreasonableness (probability or improbability) of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); *CJI, Civil* 3:16 (2005). A workers' compensation claim is decided on its merits. Section 8-43-201, C.R.S. 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. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

CLAIM PRECLUSION

3. Respondent contends Claimant's claim for permanent total disability benefits is barred by the defense of claim preclusion. Issue and claim preclusion principles, although developed in the context of judicial proceedings, may be applied to administrative proceedings as well, including workers' compensation matters. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001); *Holnam, Inc. v. Indus. Claim Apps. Office*, 159 P.3d 795, 797 (Colo. App. 2006). Claim preclusion works to bar the relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604 (Colo. 2005). Claim preclusion requires a final judgment that completes the trial court's adjudicatory process. *Younger v. Merritt Equip. Co.*, 2009 Colo. Wrk. Comp. Lexis 220 (W.C. No. 5-326-355, Dec. 30, 2009), *citing Smeal v. Oldenettel*, 814 P.2d 904 (Colo. 1991). Claim preclusion protects "litigants from the burden of relitigating an identical issue with the same party or his privy and…promotes

judicial economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003). For a claim in a second proceeding to be precluded by a previous judgment, there must exist: 1) finality of the first judgment; 2) identity of subject matter; 3) identity of claims for relief; and 4) identity of or privity between parties to the action. *Cruz v. Benine*, 984 P.2d 173, 1176 (Colo. 1999).

4. No dispute exists as to the finality of ALJ Lamphere's April 11, 2014, Findings of Fact, Conclusions of Law, and Order or the privity of the parties in this litigation. Neither party appealed ALJ Lamphere's April 11, 2014, Order, thus making it a final order, and the parties in this Hearing are identical to the parties at the prior April 11, 2014, hearing. Additionally, no dispute exists as to the subject matter of both proceedings, as both proceedings involve the scope of Employer's liability for the injuries that Claimant asserts arose out of the industrial injury. The issue is whether the identity of Claimant's claims for relief exists. The ALJ finds that identify of Claimant's claims for relief does not exist, and, therefore, Claimant's claim for permanent total disability benefits is not barred by the defense of claim preclusion.

5. Claim preclusion seeks to bar the relitigation of identical claims. *Lobato, supra at* 1165-66. In the worker's compensation context, claim preclusion has been used as a defense to bar a second claim arising out of the same, previously litigated injury. In *Holnam*, the Court of Appeals barred a claimant's claim for an occupational disease when Claimant had previously litigated the same injury as an industrial injury. The Court ruled that the claim for an occupational disease was barred because there was no indication that the "injuries [were] separate and cause[d] by an intervening event." *Holnam*, *supra* at 799.

6. In this case, Claimant's claim for permanent total disability benefits is not identical to his claim for permanent partial disability benefits, which was litigated at the February 28, 2014, hearing with ALJ Lamphere. On January 8, 2013, Dr. Primack placed Claimant at MMI and assessed permanent impairment. On February 15, 2013, the Respondent filed a FAL consistent with Dr. Primack's MMI date and impairment rating. On March 7, 2013, Claimant objected to the FAL and requested a DIME. As noted on the face of the FAL, "[i]f an IME is requested, [claimant] is not required to file an application for hearing until after the IME is complete." Additionally, Section 8-43-203(2)(b)(II)(A), C.R.S. provides that "if an [IME] is requested, Claimant is not required to file a request for a hearing on disputed issues until the division's IME process is terminated for any reason." In *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006), the Court of Appeals ruled that claimant's claim for permanent total disability benefits was legally ripe for adjudication once Employer filed a final admission of liability admitting for the MMI date and impairment rating assigned by the Division IME physician

7. In this case, after receiving the Division IME's report, Respondent did not file a FAL, instead, Respondent applied for a hearing challenging the Division IME. Claimant responded to Respondent's Application for Hearing and endorsed overcoming the Division IME. The issue for the February 27, 2014, hearing before ALJ Lamphere was whether the Respondent's overcame the Division IME's findings, not permanent total

disability. The Division IME was complete when ALJ Lamphere issued his April 11, 2014 Findings of Fact, Conclusions of Law, and Order and Respondent filed the April 28, 2014,FAL. Claimant timely objected to Respondent's April 28, 2014, FAL and timely applied for a hearing on the issue of PTD.

8. Claimant's claim for PTD is not barred by the defense of claim preclusion. The issue of PTD became ripe for hearing once the Respondent filed a Final Admission of Liability admitting for the DIME's MMI date and impairment rating. When Claimant requested the DIME, the issues of MMI and Claimant's impairment rating were in dispute. Those issues were not finalized until: a) ALJ Lamphere issued his April 11, 2014, Order; and b) the Respondent filed the April 28, 2014, Final Admission of Liability.

PERMANENT TOTAL DISABILITY BENEFITS

9. Section 8-40-201(16.5)(a), C.R.S. provides that Claimant has the burden to prove that he is "unable to earn any wages in the same or other employment" in order to establish a claim for PTD.

10.To prove a claim that a claimant is permanently and totally disabled, a claimant shoulders the burden of proving by a preponderance of the evidence that he/she is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Apps. Office*, 894 P.2d 42 (Colo. App. 1995). A claimant is not required to prove that an industrial injury is the sole cause of his inability to earn wages. However, a claimant must demonstrate that the industrial injury created some disability that ultimately contributed to claimant's permanent total disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986). A claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD..*Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The question of whether a claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

11.The determination of whether a claimant is permanently and totally disabled is made on a case-by-case basis and varies according to a claimant's particular abilities and circumstance. In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to the claimant under his

particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. Because the burden of proof rests with the claimant, the respondents are not obligated to find a specific job or job offer for the claimant in order to defeat a claim for permanent total disability benefits. *Moua v. Datex Ohmeda,* WC 4-526-873 (ICAO January 30, 2004); *Chavez v. Southland Corp.,* WC 4-139-718 (ICAO September 4, 1998). However, the ALJ may consider the failure to identify specific employment opportunities when assessing the credibility of a vocational expert's opinion that a claimant is employable and can earn wages. *Gomez v. MEI Regis,* WC 4-199-007 (ICAO September 21, 1998), *aff'd., Gomez v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA1998, June 3, 1999) (not selected for publication).

12. As found, Claimant has proven by a preponderance of the evidence that he is unable to earn any wages as a result of his January 26, 2012, bilateral shoulder injuries.

OFFSET OF PENSION BENEFITS

13. Respondent contends that it is entitled to an order permitting offset of Claimant's payments from the Central Pension Fund. Claimant contends that Respondent has no right of offset.

14. Section 8-42-103(1)(c)(II), C.R.S. states:

> (II) In cases where it is determined that periodic benefits are granted by the federal old-age, survivors, and disability insurance act or employer-paid retirement benefits are payable to an individual and the individual's dependents, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero:
>
> (A)By an amount equal as nearly as practical to one-half such federal benefits; . . .
>
> (B) By an amount determined as a percentage of employer-paid retirement benefits, said percentage to be determined by a weighted average of employer's contributions during the period of covered employment divided by the total contributions during the period of covered employment; except that in permanent total disability cases all contributions made by employer pursuant to a collective bargaining agreement with the employee's representative shall be considered to have been made by the employee.

15. Additionally, Respondent contends it is entitled to an offset under Section 8-42-103 (1)(d)(1), which states:

> [i]n cases where it is determined that periodic disability benefits are payable to an employee under a pension or disability plan financed in whole or in part by Employer, the aggregate benefits payable for …

permanent total disability pursuant to this section shall be reduced but not below zero, by an amount equal as nearly as practical to Employer pension or disability plan benefits.

16. As found, claimant's initial Social Security Disability award was $2,083.00 per month, Claimant receives $322.56 per month in long-term disability benefits, and Claimant receives $1,594.65 per month in pension or retirement benefits through the Central Pension Funded, a retirement plan funded pursuant to a collective bargaining agreement. Respondent is entitled to offset Claimant's permanent total disability benefits by $240.35 per week due to Claimant's receipt of Social Security benefits. Respondent is entitled to offset claimant's permanent total disability benefits by $74.44 per week claimant's receipt of long-term disability benefits. Respondent's offset for Claimant's receipt of long-term disability shall apply so long as Claimant receives long-term disability benefits. If Claimant stops receiving long-term disability benefits, the Respondent's offset shall end.

17. Since Section 8-42-103 provides that all contributions made by Employer pursuant to a collective bargaining agreement with the employee's representative shall be considered to have been made by the employee, Respondent has no right to offset of funds paid to Claimant from the Central Pension Fund . Claimant's benefits through the Central Pension Fund are retirement benefits. Respondent is not entitled to offset Claimant's permanent total disability benefits due to Claimant's receipt of pension benefits through the Central Pension Fund. Claimant's pension benefits were funded by Employer pursuant to a collective bargaining agreement and, thus, are considered funded entirely by the employee, claimant, pursuant to Section 8-42-103(1)(c)(II)(B), C.R.S.

ORDER

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

1. Claimant's claim for permanent total disability benefits is not barred by claim preclusion.

2. Claimant is permanently and totally disabled.

3. Respondent is entitled to offset Claimant's permanent total disability benefits by $240.35 per week based on Claimant's receipt of Social Security Disability benefits.

4. Respondent is entitled to offset Claimant's permanent total disability benefits by $74.44 per week based on Claimant's receipt of long-term disability benefits.

5. Respondent shall pay Claimant permanent total disability benefits at the statutory rate commencing January 9, 2012, and continuing until terminated by law or order. Respondent may take credit against this liability based on any permanent partial disability benefits already paid to Claimant.

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

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

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

DATED: March 30, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

The issue presented for determination is whether the two level cervical disc replacement or arthroplasty surgery requested by Dr. Douglas Beard on June 12, 2014, is reasonable, necessary and related to Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant is presently 53 years old. On December 19, 2011, the Claimant suffered injuries while working for the Employer as a senior network engineer. Claimant fell approximately two feet from an elevated plank to the ground. He landed on his outstretched left arm and rolled to his left side.

2. The Employer referred the Claimant to Concentra Medical Centers. Claimant saw Dr. Rosalinda Piniero at Concentra on December 23, 2011. She initially diagnosed a left shoulder strain and suspected rotator cuff pathology.

3. Claimant underwent a course of physical therapy after the injury. He testified that physical therapy was not effective so it ceased at the beginning of February 2012. Dr. Piniero ordered a MRI of the left shoulder, which demonstrated a massive tear in the supraspinatus. Claimant was referred to Garth Nelson, M.D. for a surgical evaluation.

4. Claimant presented to Dr. Nelson on February 28, 2012. In addition to his shoulder complaints, Claimant informed Dr. Nelson that he had neck pain after the December 19, 2011 injury. At the time of this appointment, Claimant reported that the neck pain resolved. At hearing, Claimant testified that his neck pain got better after physical therapy ceased a month earlier, but that it returned again when the activity demands increased in physical therapy following left shoulder surgery, a fact supported by the post surgical therapy records.

5. Dr. Nelson diagnosed an extensive supraspinatus tear, biceps tendon dysfunction and tearing, and left posttraumatic impingement syndrome. Dr. Nelson recommended arthroscopic repair and noted that it would be five months before even semi-strenuous activity could be attempted, and seven months until strenuous activity could be attempted.

6. On April 25, 2012, Dr. Nelson performed surgery on Claimant's left shoulder. Prior to the procedure, Dr. Nelson again noted that Claimant was having ongoing neck pain since the injury and had also developed numbness in the left hand over the past "few months." Dr. Nelson diagnosed a cervical strain as a component of Claimant's work injury.

7. Physical therapy resumed on June 19, 2012. Shortly thereafter, Claimant consistently experienced difficulty with left upper extremity pronation. After several weeks, he inquired with his therapist about whether the pronation difficulties could be related to the symptoms he had been experiencing in his left neck and upper trapezius. Claimant continued to consistently report neck pain as his shoulder symptoms and dysfunction improved in therapy. He testified that his neck symptoms were worse because of increased demands in therapy as his shoulder got stronger, and he believes that his neck symptoms were more apparent at that time because his shoulder symptoms were resolving following the shoulder surgery.

8. Dr. Nelson re-evaluated Claimant on August 30, 2012. Claimant continued to complain of difficulties with left upper extremity pronation. Claimant also reported left dorsal forearm numbness, which had resolved. Dr. Nelson suspected multiple nerve group dysfunctions and requested an EMG.

9. Dr. Jeffrey Wunder performed the EMG on September 26, 2012. Dr. Wunder concluded that the EMG results were most suggestive of compressive neuropathy at the elbow in the both the ulnar and median nerves. Dr. Wunder noted no evidence of cervical radiculopathy and recommended referral to an upper extremity specialist.

10. Dr. Nelson reviewed the September 26, 2012 EMG that noted a median neuropathy, and commented that condition is "extremely rare." The EMG results also revealed no evidence of cervical radiculopathy.

11. Shortly after the EMG Dr. Nelson saw Claimant again. Dr. Nelson noted left upper extremity weakness and dysfunction and numbness in the left distal forearm that is worse when his neck pain is worse. He noted intermittent neck pain. He noted painful and limited motion in the cervical spine. Dr. Nelson recommended that Claimant see a neurologist and stated that the neurologist will likely want a cervical MRI.

12. Claimant underwent a cervical MRI on November 28, 2012. It showed severe left foraminal stenosis at C6-7; moderately severe left facet arthropathy with secondary inflammation at C2-3; moderate to severe left foraminal stenosis at C3-4 as well as mild central canal stenosis; a small central disc protrusion at C4-5, and mild bilateral foraminal stenosis; and disc osteophyte complex with mild thecal sac effacement at C5-6.

13. Dr. Nelson opined that this pathology at C6-7 is the probable significant contributor to the left forearm, wrist, and hand weakness and dysethesias. Dr. Nelson recommended a referral to a neurosurgeon and opined, "in all medical probability," that the neck is related after recalling Claimant's report of neck symptoms beginning after the injury at the initial February 28, 2012 visit and considering the mechanism of injury. Dr. Piniero also believes the neck is related to Claimant's work injury according to her December 7, 2012 report as does Dr. Paz.

14. Claimant presented to neurologist, Michael Curiel, M.D. on January 11, 2013 for an evaluation. Dr. Curiel opined that the cervical MRI findings certainly predated this injury, but that this mechanism of injury most likely aggravated the degenerative condition in his neck. Dr. Curiel did not feel that Claimant's left pronator weakness was related to the cervical spine abnormalities viewed on the MRI because there no EMG findings suggestive of cervical radiculopathy.

15. Claimant transferred care from Dr. Piniero to Dr. O'Toole at the beginning of 2013. Dr. O'Toole opined that the conditions for which Claimant is seeking treatment, including cervical pain, is consistent with the mechanism of injury. Dr. O'Toole referred Claimant to Brooke Bennis, D.O. for a physiatry consultation for his neck pain.

16. Based on the credible medical evidence, the ALJ finds that Claimant's neck symptoms are related to the industrial injury. He sustained an aggravation, exacerbation or acceleration of his pre-existing degenerative condition.

17. Dr. Bennis saw Claimant on February 8, 2013. Dr. Bennis noted several positive findings on cervical examination, particularly on the left side. Dr. Bennis' assessment included cervical strain status post fall on outstretched left arm, severe foraminal narrowing at C6-7 with facet syndrome, and cervicogenic headaches. She gave him a prescription for gabapentin to assist with neuropathic pain and scheduled a diagnostic and therapeutic transforaminal epidural steroid injection (TFESI).

18. Rebekah Martin, M.D. performed the TFESI on February 27, 2013. The injection treated the C7 nerve root. Claimant reported improvement in neck and left upper extremity pain afterwards. However, he reported ongoing and significant numbness and tingling in the fourth and fifth digits and ongoing C2-3 neck pain with headaches. Dr. Bennis recommended facet injections or medial branch blocks for the C2-3 symptoms.

19. On May 8, 2013, the Claimant followed up with Dr. Martin concerning the recommendation for medial branch blocks at C2, C3 and C4. Dr. Martin opined that Claimant has high cervical facet syndrome (C2 to C4); and probable lower trunk plexopathy with possible overlapping C7 radiculopathy and severe foraminal narrowing at C6-7 with a helpful epidural steroid injection.

20. Dr. Martin performed the medial branch blocks at C2, C3, and C4 on May 17, 2013. Claimant noted significant relief for eight hours following the medial branch blocks, a diagnostic response. Dr. Bennis noted that while his left upper extremity is getting stronger, Claimant still has difficulty with pushing the mower, riding his bicycle, and shoveling snow. Confirmatory medial branch blocks were scheduled as a precursor to possible radiofrequency neurotomy. Dr. Bennis also considered doing medial branch blocks at C5, C6, and C7, but wanted to wait until after the second set of blocks at C2, C3, and C4.

21. Left C3, C4, and C5 medial branch blocks were performed on June 14, 2013 and were again considered diagnostic. The blocks were followed by a radiofrequency neurotomy at the same levels on July 26, 2013.

22. Claimant returned to see Dr. Bennis on August 12, 2013. He reported that the radiofrequency neurotomies significantly relieved his ongoing pain and resolved his headaches, however, Claimant reported ongoing pain in the lower cervical spine and the musculature surrounding the upper trapezius and supraspinatus muscles. He also was concerned with ongoing, albeit improving, left upper extremity weakness. He noted that the C6-7 TFESI had given him five months of pain relief but had worn off. He was tender over the C5-6 and C6-7 facet joints, worse with extension and rotation around the fulcrum of the facet joints. Dr. Bennis recommended another C6-7 TFESI.

23. Dr. Martin performed the TFESI at C6-7 on September 20, 2013. On October 8, 2013, Claimant reported one-hundred percent relief for seven hours followed by gradual return of pain over the next seven days. The Claimant had tenderness in the upper cervical spine at C3-4 and more predominantly at C6-7.

24. Dr. O'Toole saw Claimant on December 26, 2013. Claimant reported aggravation of cervical symptoms from recent physical therapy treatments. His pain level was four out of ten. Dr. O'Toole referred Claimant to a spine surgeon, and indicated that Claimant may continue working without restrictions.

25. Claimant saw orthopedic spine surgeon, Douglas Beard, M.D. on January 8, 2014. Claimant reported headaches, left sided neck pain, left arm pain, and left hand pain, numbness and tingling. He complained of left upper extremity weakness. His pain ranged from four to seven out of ten. Dr. Beard's physical examination revealed crepitus with range of motion, positive Spurling's maneuver with reproduction of left upper extremity radicular symptoms, and left upper extremity and triceps weakness. Dr. Beard noted that the November 28, 2012 MRI revealed evidence of early degenerative changes at the C2-3 motion segment; disc space narrowing, osteophytic deformation and end plate irregularity at C5-6 and C6-7. At C6-7, on the left, Dr. Beard noted severe neural foraminal stenosis. Dr. Beard opined that Claimant's radicular symptoms originate from the C6-7 stenosis. Dr. Beard stated that a laminoforaminotomy would help his radicular symptoms but may not help the neck pain. He stated that a cervical arthroplasty or a fusion are also options and explained the motion preservation benefit of the arthroplasty. Dr. Beard also noted that C5-6 may also be symptomatic and that a procedure on C6-7 could increase stress on C5-6, making him more symptomatic. Dr. Beard indicated that it is difficult to tell how much of Claimant's pain generates from C5-6 or C6-7 levels alone or together. Ultimately, Dr. Beard believes it is best for Claimant to address both C5-6 and C6-7. Dr. Beard feels a two level cervical arthroplasty is the best option considering that Claimant does not have significant posterior cervical facet arthropathy. Dr. Beard noted that the LDR Artificial Disc has FDA labeling for a two level arthroplasty.

26. Claimant followed up with Dr. O'Toole on January 15, 2014. Claimant expressed to Dr. O'Toole that he would like to undergo the two level disc arthroplasty recommended by Dr. Beard.

27. On February 3, 2014, Dr. Paz performed an independent medical examination at Respondent's request. Dr. Paz concluded that it is medically probable that the foraminal stenosis at the left side of C6-7 is the etiology of the of the left upper extremity parasthesias. Dr. Paz agreed that Claimant's pre-existing cervical degenerative disc and joint disease was aggravated by the December 19, 2011 work injury. Dr. Paz opined that Claimant was not a good surgical candidate at that time because he felt Claimant's clinical symptoms were well controlled. Dr. Paz felt Claimant was at maximum medical improvement but may require maintenance treatment.

28. Claimant presented to Dr. Martin on March 13, 2014 and noted a recurrence of symptoms following the last TFESI at C6-7. He reported pain levels at 4.5 out of 10. The symptoms remained in the C7 distribution. He was interested in knowing Dr. Martin's thoughts were regarding surgery. Dr. Martin responded that due to his ongoing neurologic compromise including weakness and parasthesias, he will likely need surgery at some point in the near future.

29. On April 2, 2014, Dr. Martin performed another TFESI at Claimant's left C6-7.

30. Claimant returned to Dr. Beard on April 11, 2014. Dr. Beard reiterated that his best options were either ACDF or two level arthroplasty. Dr. Beard noted that a laminoforaminotomy is not in Claimant's best interest given his pathology. Dr. Beard recommended a repeat MRI to obtain a cleaner image.

31. Claimant saw Dr. O'Toole on April 17, 2014. He reported left arm and hand pain, numbness, and tingling and left sided neck pain. On the pain scale, Claimant reported his pain levels at 4 out of 10.

32. Claimant had the second MRI done on April 23, 2014, and returned to see Dr. Beard the following day on April 24. Dr. Beard noted that the new MRI clearly demonstrated severe neural foraminal stenosis on the right at C5-6. There is "profound and severe" neural foraminal stenosis at C6-7. Claimant was very frustrated with his ongoing condition and reported that he is suffering at work and therefore decided to take a more aggressive approach. Dr. Beard again expressed concern that if only C6-7 is treated, C5-6 will become symptomatic. Dr. Beard recommended a two level arthroplasty. Dr. Beard opined that the injury likely caused the degenerative conditions in his cervical spine to become symptomatic. Dr. Beard warned Claimant that he may encounter authorization problems with this procedure, but Claimant nevertheless wanted to proceed with the two level arthroplasty.

33. On May 15, 2014, Dr. Beard formally requested authorization for at C5-6 and C6-7 cervical arthroplasty.

34. Claimant saw Dr. O'Toole on May 8, 2014. Claimant reported pain levels at 3 out of 10 on that day. Claimant reported improvement in his symptoms since increasing his dosage of Lyrica. Dr. O'Toole supported Claimant's decision to pursue the two-level arthroplasty, however, he did note that the Division of Workers' Compensation Medical Treatment Guidelines ("MTG") provides for only a single disc arthroplasty. Dr. O'Toole cited to a study pertaining to favorable outcomes for two-level disc arthroplasty in the lumbar spine and also stated that not all reviews of cervical disc arthroplasty were favorable citing to another study.

35. Dr. O'Toole noted that Dr. Jewell's psychological assessment does not preclude Claimant from being a surgical candidate, but that Dr. Jewell is deferring to the surgeon regarding whether to perform surgery. Dr. O'Toole imposed work restrictions during the May 8, 2014 visit. Dr. O'Toole reduced Claimant's work schedule to six hours per day due to the effect Claimant's medications were having on his ability to sleep.

36. Dr. Paz performed a Rule 16 review for Respondent after Dr. Beard requested authorization for the cervical arthroplasty procedure. Dr. Paz concluded that based on the MTG, the surgery requested by Dr. Beard was not reasonable, necessary and causally related to Claimant's injury. Dr. Paz noted that the MTG allows for disc athroplasty at one level and that the spine pathology be limited to one level. Dr. Paz noted that Claimant has multilevel degenerative disc disease and multilevel degenerative joint disease. Dr. Paz also felt that the TFESI at the left C6-7 level performed by Dr. Martin in April 2014 was not documented to be either therapeutic or diagnostic.

37. Respondent denied Dr. Beard's prior authorization request for the C5-6 and C6-7 arthroplasty based on Dr. Paz's June 22, 2014 Rule 16 Utilization Review Report.

38. Claimant presented to Dr. Martin on July 31, 2014 and noted that he did "fairly well" following his last C6-7 TFESI in April 2014, however, after about four months his symptoms steadily returned in the C7 dermatome. Claimant reported that his pain level was 3.5 out of 10. Dr. Martin noted some muscular atrophy in his left triceps. She recommended additional injections to manage Claimant's symptoms while the legal system works out the surgical denial.

39. Dr. O'Toole saw Claimant on August 6, 2014 and noted that Claimant was still suffering from arm pain at the end of the day so Dr. O'Toole increased his Lyrica dosage.

40. Dr. Beard testified by deposition on September 22 and October 29, 2014. Respondents submitted transcripts from both depositions by agreement of the parties. Dr. Beard testified as an expert in orthopedic surgery, for which he has been board certified since 1994. Dr. Beard has been recommending and performing surgery since

1987. From 1987 to 1999, fifty percent of the surgeries he performed were on the spine. His practice has been exclusive to the spine since 1999.

41. Dr. Beard testified that the mechanism of injury to the C5-6 and C6-7 was likely a result of a whiplash type injury sustained by Claimant as he fell down several feet onto his outstretched left upper extremity. Dr. Beard testified that while the November 28, 2012 MRI revealed degenerative findings at C2-3, C5-6, and C6-7, the protrusion at C6-7 could certainly be traumatic. Dr. Beard testified that the pathology at C2 through C4 is related also, as there was no evidence of a preexisting symptomatic condition.

42. Dr. Beard testified that the left upper extremity symptoms are consistent with C5-6 and C6-7 pathology, which is also consistent with a whiplash mechanism of injury. Dr. Beard noted that the triceps atrophy is consistent with C6-7 pathology. There is no evidence of triceps atrophy prior to this injury. Dr. Beard testified that the cervical pathology caused weakness—affecting pronation in his left upper extremity. Claimant's pronation difficulties were discovered shortly after surgery when he started using his left upper extremity in physical therapy.

43. Dr. Beard testified that Dr. Martin's C6-7 TFESI was diagnostic and that the same was a factor in his decision to recommend surgery. While Dr. Beard discussed three surgical options, he believes the C5-6 and C6-7 arthroplasty will be the best for Claimant, who is concerned with motion preservation. While facet arthritis can be a complicating factor for cervical arthroplasty, Dr. Beard noted that Claimant's facet joints at the C5-6 and C6-7 are acceptable to "withstand or to have a satisfactory outcome from having a disk replacement on the front side." Dr. Beard explained that the recommended arthroplasty would open up the neuroforamen and release pressure on the nerve and alleviate the left upper extremity symptoms and neck pain. It will also preserve motion and the breakdown to other levels will accelerate at the usual rate rather than more quickly as is typical after fusion procedures.

44. Dr. Beard testified that FDA studies on the devices do not indicate that they are inappropriate for multiple levels. He explained by stating that the testing done is highly controlled so the response to the procedure can be accurately measured. He acknowledged that these screening criteria often result in guidelines for effective use, but that does not mean they would not be effective in other applications. Dr. Beard stated that limiting the use of the artificial disc to one level does not make common sense. In fact, Dr. Beard noted that the FDA has approved the two-level device that he intends to use on Claimant. Dr. Beard believes that surgeons would be doing these procedures "an awful lot more" if their requests were approved. Further, he absolutely believes that people would be getting multiple level artificial disc replacements but for Medicare and insurance company non-medical constraints.

45. Dr. Beard testified that multi-level disease is not a contraindication for the two level arthroplasty he is recommending. He further explained that the actual contraindication is "multi-compartment disease," which is degenerative disc disease and

very advanced facet arthropathy at the same level. Dr. Beard opined that Claimant does not have arthritic facet joints, rather the facets have mere abnormalities that do not rise to the level of multi-compartmental disease. Dr. Beard stated that Dr. Ridings' opinion that Claimant's pain is coming from the facets is not accurate because of the left upper extremity symptoms, which are symptoms of impingement.

46. Dr. Beard acknowledged that Drs. Paz and Ridings are medical experts, but feels like they have a significant disadvantage when it comes to spine surgery as they do not form these opinions based on experience in practice and in actual surgery. He suggested that anyone making the decision on whether Claimant should have this surgery should be someone who makes these decisions and recommendations frequently.

47. Dr. Beard testified that the C5-6 and C6-7 arthroplasty is reasonable, necessary, and related to the December 19, 2011 work related injury. He testified that Claimant has exhausted conservative care. He believes Claimant made a reasonable and informed decision in choosing to proceed with this procedure.

48. Dr. Beard admittedly reviewed only some of the medical records from Dr. Bennis and Dr. Martin. He reviewed none of the records from Dr. Pineiro or Concentra, and "only a couple from Dr. O'Toole." Dr. Beard's testimony demonstrated that he lacks a clear understanding of the Colorado Division of Workers' Compensation Level II Accreditation Program, or the current MTG. Despite Dr. Beard's speculation to the contrary, the MTG for Cervical Spine Injuries were revised by the Division of Workers' Compensation on February 3, 2014.

49. Dr. Paz was admitted as an occupational medicine expert with full Level II accreditation at hearing. In reviewing the MRI of November 28, 2012, Dr. Paz notes degenerative disc and joint disease with facet arthropathy at multiple levels. Dr. Paz testified regarding the LDR two level disc replacement trial referenced by Dr. Beard. The exclusion criteria set forth for a two level disc replacement by LDR, the manufacturer of the Mobi-C instrumentation, includes as Item 13 "symptomatic DDD [degenerative disc disease] or significant cervical spondylosis at more than two-levels". Dr. Paz opined that Claimant does not meet the surgical criteria established by the instrument manufacturer that Dr. Beard proposes to implant in Claimant.

50. At hearing Dr. Paz confirmed that the MRI requested by Dr. Beard and occurring on April 23, 2014 noted degenerative disc disease at multiple levels. Claimant has multi-level degenerative disc disease to at least three cervical spine levels, and multiple levels of degenerative joint disease. Dr. Paz testified that based upon his medical journal research, the current facts do not support a two level cervical disc replacement. Dr. Paz's testimony is also supported by Respondent's Exhibits T and U. Dr. Paz credibly testified that the Mobi-C trial establishes that Claimant is not a surgical candidate for a two level disc replacement, as he has degenerative disc disease at more than two levels of the cervical spine.

51. According to the Colorado MTG for Cervical Spine Injuries, a contraindication for disc replacements is “multi-level degenerative disc disease (DDD)” and “symptomatic facet joint arthrosis.”

52. At Respondent’s request, Claimant was evaluated by Eric Ridings, M.D. Dr. Ridings evaluated the studies cited by Dr. O’Toole in his May 8, 2014 report. Dr. Ridings expressed “the study quality is often severely limited.” Dr. Ridings went on to note that the literature cited by Dr. O’Toole expresses that cervical disc replacements is indicated in patients with radiculopathy or neurologic symptoms related to disc degeneration at one level, and that contraindications include multi-level disease and severe facet joint pathology.

53. Dr. Ridings further expressed the following: “In this case, it has still not been established that the patient actually has a cervical radiculopathy, which was apparently not definitely seen on the second EMG, and was not present on the first EMG, with nonspecific sensory findings in the left upper extremity and motor findings confined to the triceps. Additionally, the patient has multi-level disease.” Dr. Ridings notes significant degenerative changes at all levels of Claimant’s cervical spine, except C7-T1.

54. Dr. Ridings did conduct research himself, citing the study “Cervical Disc Replacement: A Systematic Review of Med Line Indexed Literature”, completed in 2013. The International Journal of Clinical Medicine looked at controlled trials and concluded that more intermediate and long term follow up studies are needed to prove the safety and efficacy of disc replacement. Dr. Ridings concludes that Claimant is not a candidate for a one level or two level disc replacement surgery.

55. Dr. Paz credibly testified that with the information from the Mobi-C trial, Claimant's cervical MRI findings, the history, and Claimant’s medical treatment to date, Claimant is not a candidate for a one level disc replacement, and is certainly not a candidate for a two level cervical spine disc replacement.

CONCLUSIONS OF LAW

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

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

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

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

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

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

6. The evidence establishes that LDR has labeling approval from the FDA for the two level Mobi-C cervical spine disc replacement. But the Mobi-C trials establish that a patient is not a candidate for a two level disc replacement if cervical spine degenerative disc disease exist in excess of two cervical spine levels. The medical evidence in this case indicates that Claimant has degenerative disc disease in multiple areas of the cervical spine.

7. Dr. Ridings opined that Claimant has significant degenerative changes at all levels of the cervical spine with the exception of C7-T1. Dr. Paz opined that Claimant has degenerative disc disease to at least three cervical spine levels. Dr. Beard admits that Claimant has degenerative pathology to at least three cervical spine disc levels. Further, the MRI scans and diagnoses made by Drs. O'Toole and Martin support that Claimant has degenerative changes at multiple levels of his cervical spine.

8. LDR manufactures the instrumentation which Dr. Beard suggests will be utilized in the surgical procedure for which he sought preauthorization on June 12, 2014. Based upon the surgical candidate criteria from LDR, Claimant does not qualify for the surgical procedure requested by Dr. Beard.

9. Dr. Paz also raised concerns about Claimant's lack of a diagnostic response to the April 2, 2014 TFESI at C6-7, and whether Claimant's pain generator(s) have been adequately identified. The medical records that immediately precede and follow the April 2014 TFESI reveal that Claimant's pain levels remained at the same or similar levels ranging from 4.5 out of 10 just before the TFESI on March 13, 2014, and 4 out of 10 just after on April 17, 2014. It does not appear that Claimant had any significant relief from the April 2014 left C6-7 TFESI which supports Dr. Paz's concerns regarding adequate identification of the pain generators.

10. For purposes of medical treatment under the Workers Compensation Act, the MTG developed by the Director shall be used by healthcare practitioners. Section 8-42-101(3)(b), C.R.S. An administrative law judge may consider the MTG in determining whether certain medical treatment is reasonable, necessary and related to the industrial injury, but is not required to utilize the guidelines as the sole basis for the determination. Section 8-43-201(3), C.R.S.

11. In this case, the ALJ has considered the MTG as well as the medical evidence, neither of which support a two level disc replacement procedure for this particular Claimant. As found and concluded above, Claimant's clinical presentation, medical diagnoses, diagnostic studies and the LDR criteria suggest that Claimant would not be a good candidate for a single level disc replacement let alone a two level disc replacement. Accordingly, Dr. Beard's request for authorization for such procedure is denied as unreasonable and unnecessary.

ORDER

It is therefore ordered that:

1) Claimant's request for a two level cervical disc arthroplasty is hereby denied as not reasonable and necessary.

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: March 19, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffers from a worsened condition causally related to his work injury on March 10, 2012 to allow a reopening of the claim.

2. If Claimant has established a worsening of condition, whether Claimant has established an entitlement to temporary total disability benefits from October 29, 2013 and ongoing.

3. Whether Claimant has established by a preponderance of the evidence that the MRI and epidural steroid injections recommended by Dr. Knight are reasonably necessary and related to Claimant's March 10, 2012 work injury.

FINDINGS OF FACT

1. Claimant works for Employer as a bus driver with duties including driving passengers to/from Employer's facility from Denver International Airport (DIA) and loading passengers' luggage into the shuttle bus. Claimant has been employed by Employer since approximately 2005.

2. On March 10, 2012 Claimant suffered an admitted work-related injury while so employed.

3. Following the work-related injury Claimant underwent conservative treatment at NextCare Urgent Care Center. He was referred by NextCare to Denver-Vail Orthopedics and was also referred for an MRI of his lumbar spine.

4. Claimant began treating with Pamela Knight, M.D. at Denver-Vail Orthopedics.

5. On April 5, 2012 Claimant underwent an MRI of his lumbar spine that was interpreted by Bao Nguyen, M.D. Dr. Nguyen noted that Claimant had mild-moderate central spinal canal stenosis at L4-5 due to a shallow disc bulge and borderline congenital spinal stenosis. Dr. Nguyen noted that the other remaining disc levels from T-11 through L5-S1 were unremarkable. *See* Exhibit 1.

6. On April 12, 2012 Claimant saw Dr. Knight. Claimant reported pain in his lower back that at times radiated down his left, greater than right, lower extremity down

to his calf area. Dr. Knight noted that the MRI showed evidence of a mild disc bulge shallow posteriorly at L4-5 resulting in mild to moderate central canal stenosis and noted mild narrowing of both of Claimant's lateral recesses at the L4-5 level in addition to the subarticular zones of his bilateral foramina at this region resulting in current radiculitis symptomatology. *See* Exhibit D.

7. Dr. Knight noted the MRI of Claimant's lumbar spine showed unremarkable findings at all other levels. *See* Exhibit D.

8. Dr. Knight obtained radiological films in the clinic of Claimant's lumbosacral spine that showed evidence of fairly well-preserved disc spaces with slight narrowing noted at the L4-5 space and with arthritis noted at L4-5 and at L5-S1 levels. *See* Exhibit D.

9. Claimant continued to treat with Dr. Knight. Claimant underwent physical therapy and three epidural steroid injections without improvement in his symptoms. *See* Exhibit D.

10. On August 23, 2012 Dr. Knight opined that Claimant had exhausted all conservative efforts including extensive physical therapy, medications, neuropathic pain medications, activity modification, and oral steroids without any significant relief. Dr. Knight indicated that she had nothing further to offer Claimant for conservative treatment and referred him to Scott Stanley, M.D. for surgical evaluation. *See* Exhibit D.

11. On September 6, 2012 Claimant saw Dr. Stanley Dr. Stanley recommended an L4 laminectomy and noted that Claimant wanted to move forward with this recommended surgical intervention. *See* Exhibit D.

12. Respondents initially denied authorization for the L4 laminectomy.

13. On November 19, 2012, John Douthit, M.D. examined Claimant and opined that Claimant had congenital lumbar spinal stenosis that was aggravated by the work related disc injury. Dr. Douthit opined that the disc injury from work probably caused narrowing of an already compromised congenitally narrowed spinal canal at L4-LL5 causing cauda equine encroachment and claudication. He opined that surgery to decompress the stenosis was appropriate. *See* Exhibit 6.

14. On December 31, 2012 Claimant underwent an L4 laminectomy performed by Dr. Stanley. *See* Exhibit D.

15. On January 21, 2013 Claimant saw Dr. Knight. Claimant reported he was slightly better postoperatively but had pain with sciatica symptoms down both of his lower extremities. *See* Exhibit D.

16. On January 30, 2013 Claimant saw Dr. Stanley. Claimant reported intermittent discomfort into the left gluteal region. *See* Exhibit D.

17. Claimant saw Dr. Knight on February 11, 2013 and April 8, 2013 where he reported severe pain in his left upper buttocks area radiating down his left lower extremity, as well as some sciatica involving his right lower extremity to a lesser extent. *See* Exhibit D.

18. On August 12, 2013 Claimant saw Dr. Knight. Claimant reported he felt stronger and Dr. Knight noted he was making good progress. Dr. Knight planned to set Claimant up for range of motion testing and indicated she would be placing Claimant at maximum medical improvement. She opined that Claimant may require up to four physician visits per year over the next three years, as well as intermittent medication over the next three years. She opined that Claimant may also require intermittent physical therapy visits not to exceed 12 visits total over a three year period. She opined that Claimant's work restrictions would be set at a maximum lifting, pushing, and pulling of 50 pounds. *See* Exhibit D.

19. On September 6, 2013 Dr. Knight noted that she had sent Claimant for range of motion testing for an impairment rating related to placing Claimant at maximum medical improvement. Dr. Knight noted that the impairment rating was not valid and that Claimant needed to repeat range of motion testing for his lumbosacral spine given the lack of range of motion documented for his lumbar extension, lateral flexion in comparison to Claimant's ability as she had seen in the clinic. *See* Exhibit D.

20. Dr. Knight placed Claimant at maximum medical improvement (MMI) on October 29, 2013. Dr. Knight noted that Claimant had three attempts for validity with regards to range of motion for his lumbar spine, and that she was finally able to obtain range of motion and that the impairment rating was complete. Dr. Knight assigned a 22% impairment for range of motion of Claimant's lumbosacral spine. She noted it was combined with a 10% impairment based on Claimant's surgery and continued symptomatology, resulting in a total whole person impairment of 30%. *See* Exhibit D.

21. On January 16, 2014 Respondents filed a Final Admission of Liability, admitting for a 30% whole person impairment rating as well as ongoing post-MMI medical benefits as outlined by Dr. Knights August 12, 2013 report and including up to 4 physician visits per year for 3 years, intermittent medication of gabapentin, anti-inflammatories and tramadol for 3 years, and 12 physical therapy visits over a three year period. *See* Exhibit J.

22. On February 26, 2014 Claimant saw Dr. Knight. Dr. Knight noted she had last seen Claimant on October 29, 2013. Dr. Knight noted that Claimant was still having pain and that Claimant continued to have back pain that radiates down into his tail bone in addition to his lower extremities. She noted upon examination that Claimant was showing some improvement in strength in his lower extremities. She continued his work restrictions of 50 pounds maximum lifting, pushing, or pulling. Dr. Knight noted she would see Claimant back on an as needed basis. *See* Exhibit D.

23. On June 16, 2014 Claimant saw Dr. Knight. Claimant reported he had some intermittent flare ups when he had gone up on his tramadol to six per day, but that generally he took four per day. Dr. Knight noted that Claimant functioned extremely well but had some limitations in range of motion. Dr. Knight provided Claimant a note that under the current dose of tramadol and gabapentin Claimant was not physically or cognitively impaired and would be able to apply for a commercial driver's license. She authored a note stating, "…he can function without any cognitive or physical deficits on both of these medications and has been released to full duty as a commercial driver…" *See* Exhibit 3.

24. On July 21, 2014 Claimant saw Dr. Knight. Claimant continued to report radicular symptomatology down his left lower extremity with buttocks pain and pain over his S1 joint region and facet joint on the left. Dr. Knight performed an epidural injection into his left sciatic notch/SI joint region and indicated that the next step might be a lumbar steroid epidural injection. *See* Exhibit D.

25. On September 30, 2014 Claimant again saw Dr. Knight. Claimant continued to report pain radiating into the left buttocks area and down his left lower extremity including weakness in his lower extremities with pain involving his mid to lower back area. Dr. Knight diagnosed lumbar radiculitis, lumbar degenerative disc, lumbar osteoarthritis, and myositis. *See* Exhibit D.

26. On December 4, 2014 Claimant underwent an MRI of his lumbar spine that was interpreted by Shawn Corey, M.D. Dr. Corey noted that Claimant had minimal bilateral facet joint arthropathy at T11-T12, T12-L1, and L1-2. Additionally Dr. Corey noted a small broad-based disc bulge, endplate osteophytic ridging, and mild facet joint arthropathy cause minimal bilateral neural foraminal narrowing at L2-L3. Dr. Corey also noted at L3-L4 a 2 mm anterolisthesis, an uncovered broad-based disc bulge, endplate osteophytic ridging, and mild to moderate facet joint arthropathy cause mild to moderate bilateral lateral recess stenosis and mild to moderate bilateral neural foraminal narrowing. At L4-L5 Dr. Corey noted a 2.5 mm anterolisthesis, endplate osteophytic ridging, ligamentum flavum thickening, and mild to moderate facet joint arthropathy cause moderate to severe bilateral lateral recess stenosis and moderate bilateral neural foraminal narrowing. He noted at that level a laminectomy defect prevents significant central spinal stenosis and that the bilateral traversing L5 nerve roots were mildly compressed at the lateral recesses. Dr. Corey noted at the L5-S1 level a small to medium sized broad based disc bulge, endplate osteophytic ridging, and mild to moderate facet joint arthropathy cause mild bilateral lateral recess stenosis and mild to moderate bilateral neural foraminal narrowing. He noted a small left lateral recess disc protrusion minimally displacing the traversing left S1 nerve roots. *See* Exhibit 2.

27. On December 11, 2014 Claimant again saw Dr. Knight. Claimant continued to complain of radicular symptomatology left greater than right lower extremity with back pain. Claimant reported the symptoms as moderate to severe. *See* Exhibit 3.

28. On December 18, 2014 Linda Mitchell, M.D. performed an Independent Medical Examination (IME) on behalf of Respondents. Dr. Mitchell noted that Claimant was complaining of low back pain that traveled down the back of the left leg to the knee and occasionally to the right buttock with stiffness and sharp pains in the left buttock. Claimant reported that he was not worse since the surgery, but that he had not gotten better. *See* Exhibit A.

29. Dr. Mitchell opined that Claimant had diffuse multi-level degenerative changes from L2-3 through L5-S1 on the December 4, 2012 MRI that were consistent with progressive degenerative lumbar spine disease and not with a strain type injury sustained 2 ½ years ago. Dr. Mitchell opined that Claimant's current symptoms were of a progressive degenerative nature unrelated to his injury. Dr. Mitchell did not recommend any further medical evaluation or treatment related to the March 10, 2012 injury. *See* Exhibit A.

30. Dr. Mitchell also performed range of motion testing on Claimant at the December 18, 2014 appointment. Claimant's range of motion was considerably better on December 18, 2014 than when Claimant was placed at MMI on October 29, 2013.

31. Dr. Mitchell testified consistent with her IME report and noted that Claimant's condition is not objectively worse at this time based on her physical examination findings, range of motion measurements, and radiographic studies showing degenerative changes unrelated to the work injury. Dr. Mitchell opined that Claimant's symptomatology has been consistent prior to Claimant's surgery, when placed at MMI, and currently and that Claimant had ongoing symptoms both before and after MMI.

32. Dr. Mitchell's IME report and testimony is credible and persuasive.

33. Claimant testified that the pain location had not changed since reaching MMI and admitted that the pain never went away following surgery. Claimant, however, alleges a subjective worsening of pain subsequent to being placed at MMI. Claimant's testimony is not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. 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).

Reopening and Change of Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

If an industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for

additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

In this case, Claimant has failed to meet his burden to reopen his claim and has not shown that he suffers from a worsened condition. As found above, Claimant continued to have radiculopathy and ongoing symptoms following his surgery and at the time he was placed at MMI. At the time of MMI on October 29, 2014 Dr. Knight awarded Claimant a total whole person impairment rating of 30%, which included 22% for impairment of Claimant's lumbosacral range of motion and 10% for impairment based on Claimant's surgery and continued symptomatology. It is clear from Dr. Knight's award that at the time of MMI Claimant was having continued symptomatology. It is also clear from medical treatment subsequent to MMI that the same symptomatology continued. Following MMI, Dr. Knight next saw Claimant on February 26, 2014 where she noted that he was still having pain and that he continued to have pain radiating down into his tail bone and into his lower extremities.

During the period of time subsequent to MMI where Claimant alleges a worsening of condition, the records show the same symptoms that Claimant had when treating prior to MMI and that he had when placed at MMI. Additionally, Claimant's range of motion improved greatly during the period of time he alleges a worsening. Claimant was not placed on any additional work restrictions during this period of alleged worsening and in fact was given a full duty release to work as a commercial driver during this period of alleged worsening. Dr. Knight also did not retract her opinion of Claimant's MMI date.

Claimant's testimony and the medical reports indicate subjectively that he reported a worsening during this time period. However, Claimant's testimony is not found credible or persuasive. As found above, there were significant discrepancies in the range of motion testing performed when Claimant was being placed at MMI. Even his treating physician, Dr. Knight, noted that she had seen greater ability in the clinic from Claimant than what was reported in the range of motion testing and she sent Claimant back to repeat range of motion testing for his lumbosacral spine. Additionally, while alleging he is suffering a worsening of condition, the range of motion testing performed more recently by Dr. Mitchell shows great improvement from the time Claimant was placed at MMI. Given the discrepancies, and reviewing Claimant's testimony and the evidence as a whole, the ALJ is not convinced that Claimant is credible in explaining his pain, limitations, or his alleged worsening.

Claimant argues that the December 4, 2014 MRI shows unequivocal changes in pathology and shows a worsened condition. Although multiple changes from the April 5, 2012 MRI and the December 4, 2014 MRI are noted, Claimant has failed to show that any changes are due to his admitted work-related injury. Rather, the credible testimony of Dr. Mitchell that the changes shown on December 4, 2014 MRI relate to the natural progression of aging and are degenerative changes is found persuasive. Claimant has not established a causal relationship between his work-related injury and any changes

shown between the two MRIs. Claimant has failed to show that his work-related injury caused or attributed to the degenerative changes shown over the period of two years and eight months between MRIs. Rather, it is just as likely that the changes were related solely to the degenerative process and were not accelerated by or caused by Claimant's work related injury. As found above, Respondents' expert opined credibly that the changes between the MRIs do not relate to Claimant's work-related injury and are merely degenerative changes.

Maintenance Medical Benefits

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

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 his 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).

In this case, Respondents are challenging the request for medical treatment in the form of an additional MRI and epidural steroid injections recommended by Dr. Knight. Claimant has failed to present substantial evidence to prove that the MRI or epidural steroid injections are reasonable and necessary to maintain Claimant's work-related condition or to relieve his ongoing symptoms. Claimant has failed to present evidence as to the likelihood of success of the requested treatment, and in fact, similar treatment in the past has failed and has not led to any long-term or significant pain relief. Claimant has not shown by a preponderance of the evidence that it is reasonable to be treated again with epidural steroid injections nor has he shown that it is medically necessary to relieve him from the effects of the work injury. In the final admission of liability in this matter filed on January 16, 2014, Respondents admitted for ongoing post-MMI medical benefits as outlined by Dr. Knight's August 12, 2013 report and admitted specifically to: up to four physician visits per year for three years; intermittent medication of gabapentin, anti-inflammatories, and tramadol for three years; and twelve physical therapy visits over a three year period. The medical treatment admitted to in the final admission of liability is not being challenged by Respondents and is ongoing pursuant to

the final admission of liability. However, the Claimant has failed to meet his burden to show the additional and new treatment (MRI, epidural steroid injections) recommended by Dr. Knight is reasonably necessary to relieve the effects of his work-related injury or to prevent deterioration of his work-related condition.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show a worsening of condition. His petition to reopen is denied and dismissed.

2. Claimant has failed to meet his burden to show that the MRI and epidural steroid injections recommended by Dr. Knight are reasonably necessary to relieve the effects of his work-related injury or to prevent deterioration of his work-related condition. His request for this additional medical treatment is denied and dismissed.

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

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

DATED: March 17, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The following issues were presented for consideration at hearing:

1. Whether Claimant sustained his burden of proof to establish that he is entitled to an order awarding reasonably necessary *Grover* Medical Benefits;

2. Whether Claimant sustained his burden of proof to establish that he is entitled to an order converting Dr. Tracey Stefanon's lower extremity impairment rating to an impairment of the whole person; and

3. Whether an order should be entered apportioning Claimant's impairment rating.

At the hearing, the parties agreed:

1. To hold the issue of disfigurement in abeyance without prejudice; and

2. To litigate the issue of Grover Medical Benefits because it was admitted to by Respondents in their June 30, 2014, Final Admission of Liability.

FINDINGS OF FACT

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

1. Claimant is a 55 year-old Sergeant and Detective for Respondent working in the Crimes Against Persons' Unit where he has been employed since January 11, 1999. Prior to his employment with Respondent, Claimant served 22 years in the U.S. Coast Guard. Claimant testified that his position is primarily supervisory in nature with 90 percent of his time spent at his desk.

2. On November 1, 2011, Claimant sustained a work related injury to his left hip while learning ground arrest techniques in a training exercise. The injury was immediately reported and Claimant was referred to Occupational Health Services for medical care. The claim was admitted to by Respondents.

3. Dr. Tracey Stefanon of Occupational Health Services was assigned to serve as Claimant's Authorized Treating Physician (ATP). Claimant was ultimately

diagnosed with a torn labrum of his left hip and underwent a left hip arthroscopy and repair on March 29, 2012, with Dr. Brian White.

4. Following the March 2012 surgical repair, Claimant continued to have pain and dysfunction in his left hip as well as lower back and buttocks. On August 15, 2012, Dr. Tracey Stefanon noted,

> *…He reports that he continues to have numbness in his left lateral thigh that seems to get worse when he does cycling and this has been modified in his physical therapy program…He feels that this is intermittent and seems to get better when the physical therapist works on his lower back…*
>
> *ASSESSMENT:*
>
> 1. *Left hip strain with labral tear now, now 4 – ½ months post-op from surgical intervention including left hip arthroscopy with labral repair – stable.*
> 2. *Radicular symptoms in the left L3, L4 and L5 distribution.*
> 3. *Left SI dysfunction – improved.*

(Claimant's Hearing Exhibit 4, pp 77-78)

5. Claimant continued to receive treatment and care for left hip, left thigh, left buttock and left lower back pain and dysfunction. Dr. Stefanon consistently noted issues in these areas throughout 2012.

6. On October 12, 2012, Dr. Stefanon determined Claimant had reached maximum medical improvement (MMI) assigning a five percent (5%) impairment of the left lower extremity. Dr. Stefanon specifically noted under apportionment that, "[Claimant] has no known prior condition or injury to the left hip which would require apportionment of this current impairment." Respondent filed a Final Admission of Liability (FAL) admitting to Dr. Stefanon's report of MMI and impairment on October 16, 2012

7. Claimant objected to Respondent's October 16, 2012, FAL and requested a Division independent medical examiner (DIME). Dr. Wallace Larson was selected to serve as the DIME physician. Dr. Larson similarly opined that Claimant had reached MMI but indicated that a total left hip replacement surgery would be reasonable, necessary and related should Claimant wish to proceed. Dr. Larson assigned a 25% impairment of the left lower extremity. Respondent admitted to the findings of Dr. Wallace Larson and filed a FAL on April 19, 2013.

8. Claimant's symptoms and pain in his left hip and buttock gradually increased in 2013. Claimant was referred for additional physical therapy in July 2013. At his initial evaluation with Paul Braunlin, P.T., Mr. Braunlin noted the following:

… He injured his left hip during defensive training tactics, subsequently underwent surgical intervention…Bob states he was never 100%, had low grade posterior left gluteal muscle pain with radiation into his left groin and would have setbacks occasionally…I did talk to Dr. Stefanon during today's treatment, who then ordered and wrote a prescription for raised toilet seat and a sock aid or a reacher to help him these functional activities. He has constant left posterior hip pain, which he rates today as a 5 on a 0-10 pain scale. He will have radiation into his left groin and has low back soreness.

(Claimant's Hearing Exhibit 3, pp. 36)

9. Over the next several months, Claimant advised Dr. Stefanon and Mr. Braunlin of buttock, groin and hip pain with pain ranging from to 5-6 on the pain scale.

10. Because of the increased pain and symptoms, Claimant was ultimately referred to Dr. Kirk A. Kindsfater of the Orthopaedic and Spine Center of the Rockies. Dr. Kindsfater noted Claimant continued to suffer from debilitating pain and symptoms associated with his left hip injury and concurred with his prior surgeons that a total left arthroplasty was reasonable.

11. On December 13, 2013, Claimant proceeded with a left total hip arthroplasty with Dr. Kindsfater at Poudre Valley Hospital. On December 13, 2013, Dr. Kindsfater noted that Claimant could no longer perform his activities of daily living without difficulty and that his hip pain and dysfunction was affecting his job.

12. In the months following surgery, Claimant was required to use crutches and then a cane. He continued to have pain in his left hip, groin and buttock with problems completing his activities of daily living and significant pain while moving in his sleep. However, Claimant returned to modified work duty about one month post surgery.

13. Claimant was referred to physical therapy in April 2014. Barbara Walden, P.T. noted at Claimant's Initial Evaluation on April 3, 2014, that, "The patient demonstrates a significant antalgia with trunk compensations bilaterally. He has an increased left iliac crest height in standing. In supine, his left medial malleolus is approximately 1 inch longer than the right." (Claimant's Hearing Exhibit 3, p. 29)

14. Over the course of Claimant's physical therapy treatment in April and May 2014, Ms. Walden noted pain complaints throughout the left hip girdle as well as Claimant's lower back and groin.

15. Claimant's efforts to participate in the course of physical therapy was impeded by lower back, buttock and groin pain and gait changes following his left total hip arthroplasty.

16. On May 15, 2014, two weeks before Claimant was placed at MMI, he advised Dr. Stefanon that his left hip pain was non-existent but that he continued to have soreness elsewhere. Claimant credibly testified that his pain was in his lower back, buttocks and groin.

17. On May 29, 2014, Dr. Stefanon placed Claimant at MMI. Dr. Stefanon determined that Claimant required annual follow-up visits with the orthopedic surgeon as recommended for the arthroplasty. With regards to impairment, her findings were as follows:

CURRENT LEFT HIP:		
Range of motion impairment: Table 41, page 69, flexion of 78 degrees	*4% LEI*	
Table 42, page 70, extension of 10 degrees		*4% LEI*
Table 43, page 70, abduction 33 degrees		*3% LEI*
Table 43, page 70, adduction 24 degrees		*0% LEI*
Table 44, page 70, internal rotation 24 degrees		*4% LEI*
Table 44, page 70, internal rotation 26 degrees		*6% LEI*
LEFT ROM impairment		*21%LEI*
PRIOR LEFT HIP ROM IMPAIRMENT FROM IMPAIRMENT RATING 10/11/12	*3% LEI*	
APPORTIONMENT OF PRIOR RANGE OF MOTION (21% LEI -3% LEI)	*18% LEI*	
TABLE 45 REPLACEMENT HIP ARTHROPLASTY	*20% LEI*	
COMBINED TABLE 45 WITH APPORTIONED ROM	*34% LEI*	
Convert to Whole Person Impairment from Table 46, page 72	*14% WPI*	
There is no permanent psychological impairment due to this injury.		

(Claimant's Hearing Exhibit 4, pp. 40-42)

18. Furthermore, Dr. Stefanon clarified her findings with Respondent on June 25, 2014, that her initial finding of a 37% impairment of the lower extremity was based upon the unapportioned rating. Respondent admitted to the 37% impairment of the left lower extremity. The rating was not eligible for apportionment because the need for hip replacement was not a new injury, but a continuation of the original injury that occurred on November 1, 2011. (Claimant's Hearing Exhibit 2, p. 14)

19. Respondent filed a Final Admission of Liability on June 30, 2014, adopting and admitting to the findings of Dr. Tracey Stefanon. Respondent admitted to the 37% impairment of the left lower extremity, permanent partial disability benefits of $20,055.01 and to a credit for the $13,550.68 paid based upon the impairment rating of Dr. Wallace Larson admitted to in their Final Admission of Liability dated April 19, 2013.

20. At hearing, Claimant's testimony was credible and persuasive. His testimony is consistent with the findings of his medical providers and the medical evidence. Claimant testified that he has constant pain in his lower back and buttocks as a result of his industrial injury and left hip replacement. Claimant further stated that he used to be able to enjoy outdoor activities such as hiking and hunting but that secondary to lower back, left hip, groin and left thigh pain, he has discovered that he can no longer participate in these activities. He also cannot use ladders and scaffolding, he struggles to use stairs or to stand and walk at crime scenes secondary to a severe

increase in lower back, buttock and groin pain. Claimant cannot walk further than a few blocks or his low back pain becomes severe. He testified that his daily morning workouts were shortened because of low back pain and that he can no longer use the stationary bike because it causes a drastic increase in lower back pain.

21. Dr. Stefanon, ATP, credibly testified by deposition. Dr. Stefanon clarified her findings of impairment, concluding that the total computed impairment rating was 37% lower extremity. She testified that the pelvis and hip are not part of the lower extremity. She testified that the pelvis and hip are part of the torso. She testified that, during examinations of Claimant, the pain diagram he completed would note that he had no pain, however, during the course of the exam Claimant would discuss with the doctor parts of his body which were sore, thus contradicting his pain diagram. Dr. Stefanon testified that physical therapy notes reflected that Claimant walked with a limp because his left leg was an inch longer than the right and his iliac crest was higher on the left than on the right. Dr. Stefanon credibly opined that Claimant's left lower extremity injury extends beyond the situs of the injury to the low back and groin areas.

22. The testimony of Dr. Stefanon is credible, persuasive and consistent with the medical records as well as the Claimant's testimony.

23. It is found that the situs of the functional impairment extends past the lower extremity and into the lower back, left buttocks and groin. The record establishes that Claimant's functional and pain issues secondary to his total left hip replacement extend beyond the lower extremity into the trunk, including the lower back, buttocks and groin. It is found that Claimant now has limitations in his ability to walk, work, participate in recreational activities as well as difficulties with activities of daily living due to lower back and groin pain. As such, it is found that Claimant's 37% scheduled impairment should be convert to 15% whole person impairment.

24. The record establishes that Claimant's current and prior impairment ratings all stem from the same injury, which occurred on November 1, 2011, assigned W.C. No. 4-883-279. The record fails to establish that Claimant had any prior injuries to his lower back, groin, buttocks, left lower extremity and left hip which would allow for apportionment. Accordingly, apportionment is inapplicable.

25. Respondent may take a credit for permanent partial disability benefits previously admitted to and paid pursuant to their October 16, 2012, April 19, 2013, and June 30, 2014, Final Admissions of Liability against the 15% impairment of the whole person.

CONCLUSIONS OF LAW

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

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

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

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

3. The Findings of Fact only concern evidence that is dispositive of the issues involved. Not every piece of evidence that would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. See Magnetic Engineering, Inc., v. ICAO, 5 P.3d 385(Colo. App. 2000); Boyer v. Wal-Mart Stores, Inc., W. C. No. 4-460-359 [Industrial claim of Appeals Office (ICAO), August 28, 2001].

4. Respondents contend that Claimant's impairment rating should be apportioned based on Dr. Stefanon report that Claimant's prior range of motion measurements provided by Dr. Larsen before the left hip arthroplasty should be deducted from the 37% scheduled impairment to provide an impairment rating of 20%. Claimant contends that his impairment rating should not be apportioned, and, further, that Respondents failed to preserve the issue of apportionment by filing a timely objection to the DIME report. Claimant contends that under Section 8-42-104 (5)(a), C.R.S, Claimant's impairment rating should not be apportioned because apportion under Section 8-42-104 (5)(a), C.R.S is only applicable where there are two distinct injuries to the same body part. Claimant maintains that he never before suffered an injury to his left lower extremity, low back, left buttock and groin and therefore there is no basis upon which to apportion his impairment.

5. Claimant also contends that Respondent was required to affirmatively plead the defense of apportionment and, having failed to do so, the Judge is without authority to consider the issue of apportionment. Respondent contends that it need not affirmatively plead the defense of apportionment because in a case where the DIME physician's impairment rating is challenged the issue of apportionment constitutes an inherent element of a parties' attempt overcome the DIME on the issue of impairment rating. Respondent relies on the ICAP decision in *Hansford v, South Metro Fire Rescue District*, W.C. No. 4-693-447(2007). Claimant argued that the *Hansford, supra*, case is distinguishable from this case in that the respondent in that case seeking to apportion the claimant's impairment rating had filed a timely objection and application for hearing following receipt of the DIME report. Claimant contends that it is under those facts that

the Panel held that apportionment constituted an inherent element of the respondent's attempt to overcome the DIME by clear and convincing evidence. In this case, Claimant contends that Respondent did not file a timely objection and application for hearing, instead Respondent filed a FAL.

6. Section 8-42-107.2(2)(a)(I)(B) and (II)(b), C.R.S. states,

> *For the insurer or self-insured employer, the time for selection of an IME commences with the date on which the disputed finding or determination is mailed or physically delivered to the insurer or self-insured employer*

and

> *If any party disputes of the findings or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request on a form prescribed by the division by rule, and shall propose of entering into negotiations for the selection of an IME. Such notice and proposal is effective upon mailing via United States mail, first-class postage paid, addressed to the division and to the last-known address of each of the other parties. Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.*

7. In this case, it is concluded that Respondent did not file a timely objection and application for hearing after receiving the DIME report. Nor did Respondent raise the issue of apportionment in its response to Claimant's application for hearing. Instead, Respondent filed a FAL following receipt of the DIME report and filed a response to Claimant's application for hearing that did not raise apportionment as an issue. Since apportionment is an affirmative defense which must be explicitly pled, s*ee Kersting v. Industrial Commission,* 39 Colo. App. 297, 567 P.2d 394 (1977) *Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991); *Drywall Products v. Constuble,* 832 P.2d 957 (Colo. App. 1991), Respondent's failure to affirmatively pled apportionment deprives the Judge of jurisdiction to consider the issue.

8. Nonetheless, even if Respondent had the right to raise the apportionment issue, the Judge finds that there is no basis for apportionment of Claimant's impairment rating. Section 8-42-104 (5)(a), C.R.S. states,

> *When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "*Workers' *Compensation Act of Colorado" or a similar act from another state. The permanent medical impairment rating applicable to the* ***previous injury*** *to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the* ***subsequent injury*** *to the same body part. (emphasis added)*

9. Claimant contends that, under Section 8-42-104(5)(a), there was no credible evidence that Claimant suffered a "previous injury" to the same body parts at issue in the November 1, 2011, claim. As found, the record establishes that the

Claimant's current and prior impairment ratings all stem from the same worker's compensation injury, which occurred on November 1, 2011, assigned W.C. No. 4-883-279. The record fails to establish that the Claimant had any prior injuries to his lower back, groin, buttocks, left lower extremity and left hip, which would allow for apportionment. Accordingly, Respondent's request for an order apportioning Claimant's whole person impairment apportionment is inapplicable.

10. Claimant argues that his impairment rating should be converted from a scheduled rating to a whole person rating because the situs of Claimant's functional impairment extends beyond the left lower extremity to the buttock, groin and low back. Respondent maintains that there is no precedent for the conversion of the left lower extremity scheduled impairment to a whole person impairment rating. Respondent further contends that, even if Claimant's impairment rating was eligible for conversion, Claimant has failed to sustain his burden of proof to establish that the situs of his functional impairment extends beyond the left lower extremity to the torso.

11. The question of whether the Claimant sustained a loss at an extremity within the meaning of Section 8-42-107(2), C.R.S. or a whole person medical impairment compensable under Section 8-42-107 (8)(c), C.R.S. is one of fact for determination by the Judge. In resolving this question the ALJ must determine the situs of the Claimant's functional impairment, and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the Claimant sustained a functional impairment beyond the schedule. *Strauch v. PSL Swedish Healthcare System, supra.* Pain which limits the Claimant's ability to use a portion of the body can be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *Valles v. Arrow Moving and Storage,* W.C. No. 4-265-129 (October 22, 1998); *Brown v. City of Aurora,* W.C. No. 4-452-408 (February 8, 2002); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (June 10, 2004) Where the Claimant suffers an injury not enumerated in Section 8-42-107(2), the Claimant is entitled to whole person impairment benefits under Section 8-42-107(8), C.R.S.

12. As found, the testimony of the Claimant is credible, persuasive and consistent with the record and testimony of Dr. Tracey Stefanon. Claimant sustained his burden of proof to establish that the situs of the functional impairment effects his lower back, buttocks and groin and has severely limited his ability to perform various work, recreational and basic activities of daily living. The situs of Claimant's functional impairment was shown to extend beyond the left lower extremity into the torso. As such, conversion of the impairment from 37% lower extremity to 15% whole person is ordered.

13. As found, Respondent filed a Final Admission of Liability on June 30, 2014, admitting a 37% impairment of the upper extremity and the findings and opinions of Dr. Tracey Stefanon's May 29, 2014, and June 25, 2014, reports of MMI and impairment. Respondent may take a credit for permanent partial disability benefits previously

admitted to and paid pursuant to their October 16, 2012, April 19, 2013, and June 30, 2014, Final Admissions of Liability against the 15% impairment of the whole person.

ORDER

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

1. Claimant established by a preponderance of the evidence that he is entitled to workers' compensation benefits for a 15% whole person impairment rating under Section 8-42-107(8).

2. Respondents are entitled to an offset previously paid permanent partial disability benefits pursuant to their October 16, 2012, April 19, 2013, and June 30, 2014, Final Admissions of Liability against the 15% impairment of the whole person.

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

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

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

DATED: __March 5, 2015_____

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones
Office of Administrative Courts
1525 Sherman St. 4th floor
Denver CO 80203

ISSUES

The issues presented for determination at hearing are:

1. Whether Claimant has proven a Petition to Reopen due to suffering a worsening of condition which was causally related to his April 6, 2012 work injury to his left knee; and

2. Whether the repeat surgery initially proposed by Dr. Rajesh Bazaz is reasonable, necessary, and related to the April 6, 2012 work injury.

Findings of Fact

1. Claimant is a preloader for UPS, which involves loading packages into delivery trucks. On April 6, 2012, Claimant suffered a work-related injury to his left knee while walking backwards and pulling a cart stacked with packages. Claimant felt a "pop" in his knee, which was followed by sudden, severe pain. An MRI taken shortly after the injury revealed a medial meniscal tear and Claimant subsequently underwent meniscal repair surgery with Dr. Joseph Hsin on May 25, 2012. Claimant underwent a course of postoperative physical therapy, reporting 80-90% improvement on the date of his discharge, September 28, 2012.

2. Dr. Rick Artist, the authorized treating physician, placed Claimant at maximum medical improvement (MMI) on November 13, 2012. At the time of MMI, Claimant's only complaint was with difficulty kneeling on his left knee for more than a few minutes. Claimant had no difficulty performing his regular duties at this time. Dr. Artist discharged Claimant to full duty and opined that only Synvisc injections over the next year were appropriate as maintenance care, if necessary. Dr. Artist gave Claimant a 19% lower extremity impairment rating for the left knee. Respondents filed a Final Admission of Liability (FAL) admitting for a 19% scheduled impairment rating of the lower extremity and all reasonable, necessary, and related maintenance medical benefits after MMI on November 26, 2012.

3. On January 15, 2013, Claimant saw Dr. Artist with complaints of increased left knee catching and popping. Claimant reported the symptoms were preventing him from ambulating and Dr. Artist referred Claimant to Dr. Hsin for consideration of Synvisc injections.

4. On February 4, 2013, Claimant returned to Dr. Hsin at the recommendation of Dr. Artist for reevaluation due to complaints of crepitus. Claimant denied any pain. On this date, Dr. Hsin noted that Claimant was relatively asymptomatic and did not recommend further Synvisc injections. Dr. Hsin also stated that Claimant was not a good surgical candidate and opined that most of the current symptoms were related to arthritis. Claimant subsequently did not treat for his left knee for over one year after this visit.

5. At the request of UPS, Claimant went to see Dr. James Rafferty, the new authorized treating physician, due to complaints of worsening knee pain on February 17, 2014. Dr. Rafferty recommended reopening of the claim and referred Claimant to Dr. Hsin for further evaluation. On April 11, 2014, Dr. Hsin found Claimant was having apparent increased symptoms due to chondromalacia in the left knee and suggested additional injection treatments, which were performed during the following weeks. Claimant reported his symptoms were unchanged during a follow-up visit with Dr. Rafferty on April 25, 2014 and was referred to Dr. Rajesh Bazaz, an orthopedic specialist, for surgical evaluation.

6. Dr. Bazaz noted during the June 23, 2014, visit that he did not have medical records related to Claimant's prior surgery and his initial opinion was based upon Claimant's verbal medical history and subjective complaints. In particular, Dr. Bazaz noted that it was difficult to know the amount of arthrosis present at the time of Claimant's surgery with Dr. Hsin in 2012. Dr. Bazaz stated that it was important to know the degree of arthrosis in the knee at this time and stated that arthritis was possibly a more significant factor in the ongoing symptoms than the meniscus. After a repeat MRI study on July 10, 2014, which showed an existing medical meniscal tear with significant patellofemoral chondromalacia and degeneration of the anterior cruciate ligament, Dr. Bazaz recommended arthroscopic surgery on July 21, 2014. On this date, Dr. Bazaz also stated that he did not know the degree of contribution of the meniscal pathology versus the advanced wear to the patellofemoral compartment to Claimant's symptomatology, and expressed concern that the latter may be significantly contributing to the pathology.

7. Claimant underwent an IME with Dr. Eric Ridings on October 16, 2014. Dr. Ridings noted that Claimant weight 343 pounds. Dr. Ridings recorded a history of the injury, as given by Claimant, and indicated in his report that there were inconsistencies between Claimant's account of the progression of his symptoms and the documentation of improvement in the medical records. Specifically, Claimant told Dr. Ridings that he continued to have significantly decreased left knee function from his injury to present, though the medical records reflect that he instead had marked improvement after his surgery and upon reaching MMI. Dr. Ridings noted that Claimant had been working at his own carpet laying business for 20 years, which required kneeling, and for his brother-in-law's construction company for the past five or six years while concurrently working for

UPS. Dr. Ridings opined that, to a reasonable degree of medical probability, Claimant's current complaints of knee pain and the findings on the July 10, 2014 MRI were not related to the April 6, 2012 work injury. Dr. Ridings attributed the current complaints to degenerative arthritis, not the meniscal tear. Dr. Ridings stated that the mechanism of injury, as described by Claimant, could not have caused, aggravated, or accelerated arthritic changes in the left knee. Dr. Ridings instead indicated that it was to be expected that progressive arthritis could be expected in a middle-aged, overweight man, especially given 20 years of carpet installation. While Dr. Ridings disagreed with Dr. Bazaz's opinion that Claimant needed surgery to address complications from the original work injury, he also stated that it appeared this opinion was reasonable in light of what Claimant had conveyed to him verbally and that it was likely that his opinion would change if he were to review the extent of the medical records.

8. Respondents sent a letter to Dr. Bazaz on October 30, 2014, along with additional medical records, to which Dr. Bazaz replied on December 10, 2014. Dr. Bazaz noted that Claimant had repeated complaints of locking of the knee after his May 25, 2012, surgery, in August, September, and November of 2012. Dr. Bazaz indicated that this would relate to arthritis due to the nature and proximity of these symptoms to the surgery. Dr. Bazaz stated that, though the more recent July 10, 2014, MRI showed both meniscal pathology and arthritis, the doctor did not determine which of these two conditions was the cause of Claimant's mechanical symptoms. Bazaz believed that the mechanical difficulties experienced by Claimant were more likely due to arthritis than the meniscal pathology and stated that the previously recommended arthroscopic surgery would not likely be of any significant benefit for this reason. Dr. Bazaz further noted that the additional medical records provided did not evidence any re-injury which would be consistent with a re-tear of the meniscus, resulting in Claimant's current symptoms. The ALJ finds Dr. Bazaz's amended opinion to be credible and persuasive.

9. Claimant testified at hearing that he worked only part time for UPS and had never worked full-time. Claimant testified that he was the owner of a carpet laying business and laid carpet once or twice per month. Claimant also testified that he worked at his brother-in-law's construction business part time. Claimant testified that he was not given any permanent work restrictions upon being placed at MMI on November 13, 2012 and that he continued to work for the carpet business and the construction company, in addition to UPS, after MMI. Claimant testified that in 2014, he requested that UPS modify his job duties to make his job less strenuous. UPS modified Claimant's job duties accordingly.

10. Dr. Ridings also testified at hearing. Dr. Ridings testified that Claimant's significant weight was relevant to his ongoing symptoms, in that such weight would typically cause wear and tear, or arthritis, and loss of cartilage, in the medial compartment of the knee. Dr. Ridings testified that this would result from walking, standing, or any weight bearing activities. Dr. Ridings testified that Dr.

Hsin noted significant arthritis in the knee during Claimant's first surgical repair of the meniscus. Dr. Ridings opined that this must have been preexisting, as arthritis is not a condition which occurs suddenly and could not have been caused by simply walking backwards and experiencing pain. Dr. Ridings testified that the mechanical forces may lead to arthritis, include weight bearing and kneeling. These forces are separate and apart from Claimant's meniscus tear that was promptly repaired. Dr. Ridings testified that there was no existing medical opinion in any of the records which attributed Claimant's current complaints to his meniscal pathology.

11. Dr. Ridings noted that Dr. Hsin opined that Claimant's ongoing complaints were due to degenerative arthritis and should be addressed under Claimant's personal insurance. Dr. Ridings also noted that Dr. Bazaz opined that the current symptoms are due to arthritic changes and that surgery would not be of any benefit to alleviate these symptoms. Dr. Ridings further testified that the history given by Claimant during the IME, in respect to the progression of his symptoms after surgery, was not consistent with the medical records, which indicated 80-90% improvement after surgery and postoperative rehabilitation. Dr. Ridings credibly opined that to a reasonable degree of medical probability the surgery requested by Claimant was not related to the work injury. Dr. Ridings also credibly opined that the current symptomatology was related to arthritis, and not the work injury. The ALJ finds Dr. Ridings' opinion credible and persuasive.

Conclusions of Law

Having entered the foregoing Findings of Fact, the following Conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§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. Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings

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

3. Claimant petitions to reopen his claim based on a worsening of his condition. An injured worker may seek to reopen his claim at any time within six years from the date of injury or at any time within two years from the date of respondents' last payment of temporary indemnity benefits or the date that the last medical benefits became due and payable. Section 8-43-303(1), (2)(a)-(b), C.R.S. A workers' compensation claimant has the burden of proof in seeking to reopen a claim on the basis of a worsening of condition. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). For purposes of reopening a workers' compensation claim, a change in condition refers to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury. *Jarosinki v. Industrial Claim Appeals Office of State*, 62 P.3d 1082 (Colo. App. 2002).

4. It is found and concluded that Claimant failed to sustain his burden of proof to establish a worsening of condition casually related to the April 6, 2012, work injury. The ALJ finds Dr. Ridings' opinion regarding both causation of Claimant's current symptomatology and the reasonableness, necessity, and relatedness of the requested surgery credible and persuasive. The ALJ also finds Dr. Bazaz's opinion regarding the need for surgery and the cause of the ongoing symptoms credible and persuasive. The ALJ finds Claimant's testimony regarding the progression of his symptoms during the course of the work injury was less credible than the information contained in Claimant's medical records and the opinions of Drs. Ridings and Bazaz.

5. It is concluded based on the totality of the evidence that Claimant had preexisting, degenerative arthritis, unrelated to the original compensable injury, which was causing the progressive worsening of the symptoms. This opinion is supported by the opinions of Dr. Hsin and, more recently, Dr. Bazaz. Claimant failed to meet his burden of proof to demonstrate that his worsening

6. Dr. Ridings testified credibly and persuasively that the surgery initially requested by Dr. Bazaz, and later rescinded, was not causally related to the work injury. Furthermore, Dr. Bazaz also recanted his original opinion regarding the reasonableness, necessity, and relatedness of the arthroscopic surgery and stated definitively in his December 10, 2014 report that surgery was not likely causally related to the original meniscal pathology, but was also not likely to be of any benefit to Claimant due to degenerative arthritis. No credible or persuasive medical evidence was presented that surgery was related to his compensable injury or was reasonably necessary to relieve his ongoing symptomatology. Accordingly, Claimant has failed to meet his burden

of proof to establish that the requested procedure is reasonable, necessary, and related to his work injury.

Order

The Judge enters the following order:

1.Claimant's Petition to Reopen based on worsening condition is denied and dismissed. Reopening on this basis for additional medical and indemnity benefits is therefore denied.

2. Claimant has failed to prove by a preponderance of the evidence that the requested arthroscopic surgery is reasonable, necessary, and related to the April 6, 2012, work injury. The requested surgical procedure is therefore 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: March 16, 2015_

DIGITAL SIGNATURE:

Margot W. Jones

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

On Remand, the following issues are considered:

1. Whether Claimant proved by a preponderance of the evidence that his Petition to Reopen based on mistake or worsened condition should be granted;

2. Whether Claimant established by a preponderance of the evidence that he suffered an injury to his left knee and back on May 3, 2012;

3. Whether Claimant sustained his burden of proof to establish that he is entitled to medical benefits;

4. Whether Claimant sustained his burden of proof to establish that he is entitled to indemnity benefits; and

5. What is Claimant's average weekly wage (AWW);

STIPULATION OF FACT

The parties stipulate to the following facts in their August 21, 2013, Stipulation of Finding of Fact:

1. Claimant did not return to work at Respondent Employer after June 12, 2012; and

2. Respondent Employer nevertheless made payments to Claimant from June 13, 2012, through August 15, 2012.

FINDINGS OF FACT

1. On May 3, 2012, Claimant, a 30 year old male, had been employed by Employer for five years in the pest removal/extermination business providing services to its residential customers. Claimant's duties included outside and inside pest extermination activities. These activities required crawling, kneeling and squatting on a daily basis wearing a back pack of chemicals weighing from 45-50 pounds.

2. While at a customer's home on May 3, 2012, Claimant was outside walking on a retaining wall in the backyard when he slipped and fell approximately four and one-half feet onto rocks, striking his left knee with the full weight of his body and back pack absorbed by his knee and back. Claimant felt immediate pain in his left knee and back, attempted to complete his next customer assignment, but was unable to continue performing his work duties because of the pain.

3. Claimant previously sustained a work related injury to his left knee while employed with Employer on April 4, 2011, in claim numbered, WC# 4-853-129. Dr. Greg Smith was the authorized treating physician for this injury. The April 2011 injury involved a significant ACL tear, a tear of the meniscus and arthritic changes.

4. Claimant reported a low back strain resulting from the 2011 injury, however, he never received treatment for his back. Claimant credibly testified that he made this complaint to his physicians of low back pain, however, medical records do not reflect a record of it. Claimant credibly testified that he complained to the insurance adjuster on at least three occasions about a back injury. Claimant's testimony regarding his back pain complaintS was corroborated by the insurance adjuster who testified at hearing that his notes did reflect that Claimant complained of a low back strain. The adjuster testified that he could not recall if Claimant ever received treatment for his back. Claimant credibly testified that during his treatment for the April 2011 claim, when Claimant complained of back pain, his doctor dismissed his concerns promising that his back condition would get better when his knee condition got better.

5. Claimant underwent surgical repair, "a reconstructive surgery" of his left knee on September 19, 2011. Claimant received temporary disability benefits between April 16, 2011, and February 14, 2012. Claimant was given sedentary work restrictions which were accommodated by the Employer. Claimant was placed at maximum medical improvement (MMI) on February 15, 2012. Dr. Smith gave Claimant a 35% lower extremity rating for the left knee and recommended maintenance medical care for a six month period. Claimant was released to return to work with Employer without restrictions on February 15, 2012, by Dr. Smith. Claimant returned to his regular work duties without pain or other problems and continued in that capacity until his fall on May 3, 2012.

6. After Claimant was placed at MMI and his permanent medical impairment rated for the 2011 injury, the Insurer filed a Final Admission of Liability (FAL) dated March 13, 2012, based on Dr. Smith's 35% lower extremity impairment and denying liability for any maintenance medical treatment. That FAL purported to be based on Dr. Smith's report dated February 15, 2012, which provided for maintenance medical reatment. At hearing, Insurer's adjuster testified that the FAL denied Claimant medical maintenance benefits despite its reliance on Dr. Smith's MMI report. Claimant did not object to the FAL with regard to his back injury or Respondents' failure to admit for the maintenance medical care.

7. After the May 3, 2012, work related fall, Claimant received medical treatment from Dr. Smith under the auspices of maintenance treatment for his 2011 work injury. Following the May 2012 injury, Claimant experienced pain at a level of 7-8 on a pain scale of 10, which continued with activity through the date of hearing. When seen by Dr. Smith on May 4, 2012, Claimant's pain was noted on the lateral tibial plateau with observable swelling along the lateral margin of his left knee. Claimant was observed to walk with an antalgic gait and further demonstrated pain while walking on his toes and heels. Dr. Smith released Claimant from his regular employment duties for two days. Upon Claimant's return to Dr. Smith's office where Claimant saw a physician's assistant

on May 7, 2012, Claimant was released to return to work without restrictions. Claimant did return to his regular duties with Employer but when seen on June 12, 2012, Claimant reported that he was having more difficulty performing his full duty job because of pain in his left knee.

8. At the examination on June 12, 2012, Dr. Smith imposed work restrictions. Claimant's work restrictions were confirmed by Dr. Smith on July 11, 2012, when, after review of a functional capacity evaluation (FCE) and Claimant's job description, Dr. Smith imposed permanent work restrictions. Employer was unable to accommodate the work restrictions set on June 12, 2012, and released Claimant from his employment.

9. The parties stipulated that it is at this time, June 12, 2012, Claimant did not return to work. The parties further stipulate that Claimant was nevertheless paid during the period from June 13, 2012, to August 15, 2012.

10. Dr. Smith testified that the medical treatment provided after May 3, 2012, represented maintenance treatment under the April 2011 claim. Dr. Smith testified that Claimant's symptom represented a flare of Claimant's original 2011 injury. Dr. Smith's opinion in this regard was found to be less credible than Claimant's testimony regarding his May 2012 injury. The evidence established that after the April 2011 injury, Claimant returned to full duty with no restrictions on February 15, 2012. The evidence further established that on May 3, 2012, Claimant suffered a new injury to his left knee and low back when, while carrying a 40-50 pound backpack containing extermination chemicals, Claimant fell from a 4 and ½ foot high retaining wall on to his left knee injuring his left knee and low back.

11. Claimant's low back complaints were recorded as reported to Dr. Smith after his May 3, 2012, fall for the first time on August 30, 2012. Dr. Smith urged Claimant to follow up with his primary care provider because Claimant's complaint of a back injury occurring on May 3, 2012, was not considered a part of the claim. Claimant credible testified that he did follow up with a chiropractor for his back complaints after his August 30, 2012, appointment with Dr. Smith. Claimant continued to receive chiropractic manipulation for his back through October 2012.

12. Claimant established by preponderance of the evidence that he suffered a new work related injury to his back and left knee on May 3, 2012. It is found that Claimant's Petition to Reopen in W.C. claim no. 4-853-129-01 is denied because Claimant did not suffer a worsening of the April 2011 work injury.

13. Claimant is entitled to medical benefits to cure and relieve him of the effect of the work related injury to his back and left knee of May 3, 2012.

14. The evidence further established that Claimant was disabled from his usual employment commencing June 12, 2012, and continuing. Based on the parties' stipulation, it is found that during the period from June 13, to August 15, 2012, Claimant did not experience a wage loss because Respondents continued to pay Claimant's wages. Accordingly, it is found that Claimant did not suffer a wage loss and is not

entitled to an award of TTD during the period June 13 to August 15, 2012. Claimant is entitled to TTD benefits commencing August 16, 2012, and continuing.

15. Respondents contend that any award of TTD benefits would end on August 30, 2012, when it is Respondents' position that Dr. Smith placed Claimant at MMI. The ALJ finds no support for the conclusion that Dr. Smith placed Claimant at MMI for the May 3, 2012, work injury involving the back and left knee on August 30, 2012. Dr. Smith provided Claimant maintenance medical treatment for the May 3, 2012, injury as part of the April 2011 claim. Dr. Smith never rendered an opinion regarding whether Claimant was at MMI for a new injury occurring on May 3, 2012, involving Claimant's left knee and back.

16. Claimant's wages were paid based upon a base salary plus commission. Claimant credibly testified that his earnings at Employer fluctuated, increasing in the spring and summer when extermination work increased. Because Claimant was disabled by both the April 2011 and the May 2012 work injuries, the weeks in which he earned wages most accurately reflecting his average earnings was during the period from April 2, 2012, through May 31, 2012. Accordingly, it is found that Claimant's average weekly wage is $1,110.32 based on his earning during the two week pay periods ending April 15, 2012, through May 31, 2012. The pay periods from April 2, 2012, through May 31, 2012, total eight weeks and four days, or 8.6 weeks. Claimant's gross earnings during that period totaled $9,548.77. ($9,548.77 divided by 8.6 weeks = $1,110.32, or Claimant's AWW.)

CONCLUSIONS OF LAW

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

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of 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).

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. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. To sustain a finding in Claimant's favor, the Claimant must do more than put the mind of the trier of fact in a state of equilibrium. If the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). *See*

also, Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

4. Claimant established by a preponderance of the evidence that he suffered a work injury on May 3, 2012, when he fell on his left knee four and one half feet from a retaining wall onto rocks while wearing a 45 to 50 pound backpack containing chemicals resulting in injury to Claimant's left knee and back. Claimant was disabled from his usual employment on June 12, 2012, when his employment was terminated because of Respondents' inability to accommodate Claimant's work restrictions.

5. Claimant contends that he is entitled to an award of TTD. To obtain 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. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997). A claimant must establish a causal connection between a work-related injury and a subsequent wage loss. Section 8-42-103(1)(a), C.R.S.: *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542, 546, 546 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earnings capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with Section 8-42-105(3)(a)-(d), C.R.S.

6. The parties stipulate that Claimant did not have a wage loss during the period from June 13 through August 15, 2012, because Respondents continued to pay Claimant's wages. Thus, it is concluded that because Claimant did not suffer a wage loss from June 13, to August 15, 2012, he is not entitled to an award of TTD during that period. Claimant established by a preponderance of the evidence that he is entitled to an award of TTD commencing on August 16, 2012, and continuing until terminated by law.

7. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Here, Claimant seeks an award of medical benefits to cure and relieve him of the effects of the industrial injury of May 3, 2012. It is concluded that Claimant presented evidence by a preponderance that he has left knee and back pain caused by the May 3, 2012. Respondents shall be liable for all authorized, reasonably necessary, and related medical treatment to cure and relieve Claimant of the effects of the May 3, 2012, injuries.

8. Section 8-42-102, C.R.S. provides various methods of calculating the AWW at the time of injury. In this case, it is concluded that Claimant's average weekly wage is $1,110.32 based on his earning during the two week pay periods ending April 15, 2012, through May 31, 2012. The pay periods commencing April 2, 2012, through May 31, 2012, total eight weeks and four days, or 8.6 weeks in length. Claimant's gross

earnings during that period totaled $9,548.77. ($9,548.77 divided by 8.6 weeks = $1,110.32, or Claimant's AWW.)

9. Section 8-43-303(1), C.R.S. provides that an award may be reopened on the grounds of a change in condition. The question of whether the claimant has proved that the industrial injury was the cause of the worsened condition is one of fact for determination by the ALJ. *Hennerman v. Blue Mountain Energy*, W.C. No. 4-366-000 (November 8,2001), *citing Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000). In this case, Claimant established by preponderance of the evidence that he suffered a new work related injury to his back and left knee on May 3, 2012. It is concluded that Claimant did not suffer a worsening of the injury occurring in April 2011. Therefore, the Judge concludes that Claimant's Petition to Reopen W.C. claim no. 4-853-129-01 is denied because Claimant did not suffer a worsening of the April 2011 work injury.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen in W.C. claim no. 4-853-129-01 is denied because Claimant did not suffer a worsening of the April 2011 work injury.

2. Respondents shall be liable for TTD benefits from August 16, 2012, and continuing until terminated by law.

3. Claimant is denied TTD benefits during the period from June 12, 2012, through August 15, 2012, because Claimant did not suffer a wage loss.

4. Respondents shall be liable for authorized, reasonably necessary, and related medical treatment for Claimant's left knee and back resulting from the May 3, 2012, work injury.

5. Respondents shall pay workers' compensation benefits based upon an AWW of $1,110.33.

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: March 19, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

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

ISSUES

- Whether Respondents proved by a preponderance of the evidence that Claimant's left shoulder condition is not related to her admitted injury?
- Whether the treatment Claimant received for her left shoulder was reasonable and necessary?
- Whether respondents proved by a preponderance of the evidence that Claimant's correct scheduled impairment is 3% of the upper extremity?

STIPULATIONS

- 1. The parties stipulated that Claimant was entitled to the maximum benefit rate based on her AWW.
- 2. Additionally, the parties stipulated that, due to the unique situation of Respondents applying for a hearing rather than submitting a Final Admission, Respondents had the burden of proof at this Hearing.

PROCEDURAL NOTE

At hearing Claimant argued that although Respondents had endorsed the issue of PPD, the issue of impairment was not ripe for hearing because Claimant was not yet entitled to a DIME to determine MMI, and that MMI had to be determined before impairment. Additionally, Claimant argued that the ALJ could not determine an impairment before Claimant went to a DIME on a possible non-scheduled rating, since the shoulder was likely related to the injury and could be converted to whole person, which would affect permanent impairment. The ALJ rejected the arguments and determined that the issues of relatedness and impairment would be heard.

Claimant made a standing objection that any issue or order concerning impairment was premature because Respondents applied for hearing rather than filing a Final Admission based on the ATP's determination of MMI and impairment.

The ALJ is not persuaded. The version of W.C. Rule 5-5 in effect at the time gave Respondents the choice of applying for hearing or filing a final admission based on the ATP's determination of MMI and impairment. The ALJ acknowledges that Respondents' choice to proceed to hearing procedurally precluded Claimant from obtaining a DIME prior to hearing. *See* 8-42-107.2(2)(a)(I)(A) (for the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer . . . that includes an impairment rating issued in accordance with section 8-42-1070). However, under the controlling statute and Rule, the triggering event for Claimant to obtain a DIME has not yet occurred.

Claimant admits that the Rule change did not take effect until January 1, 2015, after the application for hearing was filed, but urged the Court to delay a decision on impairment until after a DIME in accordance with the cases she claims, without citation to authority, led to the formalized rule change.

Claimant argues that applying the then-current version of W.C. Rule 5.5 is particularly onerous because a claimant who has a shoulder injury, such as Claimant alleges here, could have either a scheduled or non-scheduled impairment. Claimant contends that because she was procedurally unable to obtain a DIME, her ability to present evidence which would support conversion or a higher impairment rating is greatly compromised. Claimant contends that to rectify this situation, the ALJ should delay considering the issue of impairment until Claimant obtains a DIME, relying on *Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000) and *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO April 26, 2010) which merely cites *Delaney*.

Again, the ALJ is not persuaded. In *Delaney*, a division of the court of appeals decided that where a claimant had undergone a DIME after the respondents had filed a final admission and before the ALJ issued her final order, the ALJ should have considered the DIME as newly discovered evidence. Here, Respondents have not filed a final admission and a DIME has not been performed. The cases are sufficiently dissimilar factually that the ALJ concludes *Delaney* is not applicable.

As of January 1, 2015, Rule 5-5(E)(1)(c) requires that if the respondents choose to dispute the scheduled rating, the respondents are required to provide notice to the claimant so that he or she can move forward to a DIME. The Rule provides

> (E) 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.,
>
> (c) In cases involving only a scheduled impairment, an application for hearing or final admission may be filed without a division independent medical examination.
>
> (i) the filing of an application for hearing by the insurer under this provision shall not prevent the claimant from seeking a division independent medical exam on the issues of MMI and/or conversion to whole person impairment. The

> claimant shall have thirty (30) days from the filing of the application for hearing to request an independent medical exam.
>
> (ii) at the time the insurer files an application for hearing under this provision it shall concurrently provide a notification to the claimant that the claimant may request a dime on the issues of MMI and/or conversion to whole person impairment, as well as a copy of the division's notice and proposal form

The ALJ notes that Rule 5-5(E)(1)(c) effective January 1, 2015 applies *only* to a scheduled impairment. Here, Claimant argues for conversion and thus the applicability of the Rule is questionable.

Claimant contends, without citing any authority to support the proposition, that the purpose of Rule 5-5(E)(1)(c) is to protect a claimant in situations like hers where a respondent tries to eliminate a DIME that would add additional credibility to conversion or a higher whole person rating. Importantly, the rule prevents the previous outcome which required the claimant, after pursuing a DIME, to overcome the clear and convincing standard which applies to reopening for error or mistake as outlined in section 8-43-303, CRS.

To the extent that Claimant's restatement of her objections to the ALJ's decision to hear the issue of impairment might be construed as a motion for reconsideration of that ruling at hearing, such motion is denied for the above-stated reasons.

At hearing, Respondents admitted that TTD was due between the time Claimant was laid off and the time she reached MMI, and that they would file an Amended General Admission stating such. Claimant thus withdrew all issues concerning TTD or TPD between May 1 and June 17, 2014, and preserved the issues of AWW and TTD for later dates.

FINDINGS OF FACT

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

1. This is an admitted claim with a date of injury of September 10, 2012. Claimant developed work-related tenosynovitis and DeQuervain's syndrome in her left wrist. Claimant was treated by Dr. John P. Mars and then referred to a surgeon, Dr. Robert Koch, for assessment. On January 18, 2013, Dr. Koch performed left DeQuervains release surgery on Claimant's left wrist and bone spur removal on Claimant's left thumb to treat her injury.

Relatedness and Treatment Reasonable and Necessary

2. Post-surgery, Claimant's authorized treating physician, Dr. John Mars, assigned restrictions on the use of her left hand. She was not allowed to work or to use her left hand from immediately following the January 18, 2013 surgery until March 12, 2014. Claimant's left wrist was initially placed in an Ace wrap and later in a brace. Claimant wore her brace at most times, but could not wear it all

the time because the brace put pressure on her surgical incision which caused additional pain.

3. Claimant is right-handed. She testified that although she was not restricted from doing so, she did not use her left arm while she was off work healing from her surgery. She understood that she was not allowed to use her left hand, and for that reason she did not use her left arm to reach forward or up, because she was not allowed to grab anything. She did not use her left hand to drive or to put on her seatbelt, and she did not cook or clean during this time as her husband performed these tasks. She testified that she choose loose clothing which she was able to put on using only her right hand, and that she did not use her left hand when she had to drive. She did not use her left arm in any manner. Rather, she rested her left arm in the sling/splint or in her lap.

4. On March 12, 2013, Claimant was released back to work on light duty "with no use of L hand." Dr. Mars did not decrease her restrictions until July 3, 2013, at which time Claimant was able to lift no more than one pound with her left hand and type with her left hand for no more than 10 minutes each hour. She was still unable to pinch or grip with her left hand or reach above her shoulder with her left arm. Claimant testified that when she returned to work, she kept her left arm in her lap, except for the minimum amount of time that she used it to type. As she was still not allowed to grip anything or carry more than a pound, she did not use her arm to lift, move her arm above her head, or reach forward to grab anything. Additionally, Claimant stated that she used her brace whenever she performed any activity.

5. After her surgery Claimant started physical therapy for her left hand and wrist. No persuasive evidence indicates that the physical therapist focused on movement of Claimant's left shoulder or elbow at this time.

6. In February and March of 2013, Claimant began feeling achiness in her left arm. That progressed to a feeling of swollenness, then stiffness, and finally her shoulder stopped moving. On March 21, 2013, Claimant reported to her outside chiropractor that she was having pain and stiffness in her left shoulder. She also reported her left shoulder pain to her physical therapist and to Dr. Mars during the same time frame. Dr. Mars' notes state that Claimant had "not been using" her shoulder. On April 27, 2013, Dr. Susskind, Claimant's family practitioner, noted "no use of left hand at work, so now left shoulder pain – about to get shoulder PT via Workers' Comp, saw Workers' Comp yesterday."

7. On June 19, 2014, Dr. Mars diagnosed claimant with adhesive capsulitis in her left shoulder and opined that Claimant's left shoulder condition "is related to her splinting the left arm due to her wrist pain." Dr. Mars noted that Claimant "is no[w] reporting reduced range of motion of the left shoulder as she has not been using it. She had reported some soreness in the shoulder in the past and this seems to have worsened." In his treatment plan, Dr. Mars stated that Claimant "has a frozen shoulder and I want the therapist to start working on this to regain range of motion. She may need to be referred back to the orthopedist for a second opinion." Finally, Dr. Mars stated, "I do feel the frozen shoulder is related

to her splinting the left arm due to her wrist pain. Maximum medical improvement remains unknown at this time as this is quite a setback with the adhesive capsulitis."

8. Dr. Mars referred Claimant to physical therapy for her left shoulder and then back to Dr. Koch for follow-up. Claimant underwent an MRI on her left shoulder which revealed supraspinatus tendonopathy and mild fraying of the superior and posterior labrum. Dr. Koch, after reviewing the MRI, agreed with Dr. Mars that Claimant's shoulder pain, stiffness, and adhesive capsulitis was related to Claimant's wrist surgery.

9. On January 30, 2014, Dr. Allison Fall performed a Respondents' independent medical examination (RIME). Dr. Fall determined Claimant had left shoulder adhesive capsulitis which was related to the immobility of her left arm after the surgery. Dr. Fall specifically stated, "I would relate the left shoulder adhesive capsulitis to the injury as [a] secondary problem which developed after the surgery due to lack of mobility." At hearing, Dr. Fall testified that shoulder stiffness is commonly felt with adhesive capsulitis. She also testified that her determination in her first report was consistent with the relatedness determined by Dr. Mars and Dr. Koch, Claimant's two treating physicians.

10. Dr. Fall later changed her opinion on relatedness when she received Claimant's personal chiropractor, Dr. Kevin Meyer's records. Dr. Fall testified that the chiropractic records showed Claimant had longstanding problems with her shoulders making it more likely that Claimant's adhesive capsulitis was related to those problems than to the wrist surgery and lack of use of her arm.

11. When asked to read particular entries on the chiropractor's chart, Dr. Fall often was unable to do so, answering, for example, "Something, I don't know the next line, then I think I see the word shoulder," ""I can't read what the word is so I can't … so maybe there is 'shoulder', I can't tell," and "I can't read it but for the word shoulder."

12. Those chiropractic records which were legible show one distinct complaint of prior left shoulder *soreness*, on June 29, 2010, as a result of a fall almost three years before Claimant developed adhesive capsulitis. The only other readable mention of the left shoulder prior to Claimant's surgery was a February 7, 2011 note which stated "Left shoulder better." Dr. Fall stated that there was one later note on August 17, 2011, that could be read as either "bilateral" or "right" shoulder. The ALJ determines that the writing is illegible and cannot determine that the left shoulder was included in this note.

13. Despite her admitted inability to read the chiropractic records, Dr. Fall amended her report to state "Based on the records of which I was not aware, there were pre-existing non-work related complaints of shoulder *stiffness*, so I cannot relate current complaints to the surgery at the wrist." Dr. Fall did not explain how Claimant's chiropractic record of left shoulder soreness close to three years prior made it more likely that her adhesive capsulitis was related to Claimant's much earlier fall than to her more recent non-use of her shoulder.

14. Contrary to Dr. Fall's claims in her two reports reversing her opinion on relatedness, the ALJ finds only one discernible mention of shoulder soreness in the chiropractic notes from years prior to the surgery, and finds no mention of left shoulder *stiffness* in the chiropractic records prior to the surgery.

15. To the extent Dr. Fall's initial opinion is consistent with the opinions of the other treating doctors; the ALJ accepts it as more credible and persuasive than her amended reports and testimony, especially as those were based at least in part on records she was unable to read. The ALJ rejects her later, amended opinion on causation as neither credible nor persuasive.

16. Dr. Mars specifically responded to Dr. Fall's report concerning a history of left shoulder stiffness. Dr. Mars wrote, "With some difficulty, I reviewed Kevin Meyer's, DC, handwritten notes. [Claimant] had been treated for neck pain, back pain and right shoulder pain on multiple occasions. The first mention of L shoulder pain is 3/3/13 which is 1½ months after her surgery." He notes on April 8, 2014 "possible adhesive capsulitis, which appears to be a new [diagnosos]. This is near 3 months post op. Therefore my position on this is unchanged and I feel her left shoulder adhesive capsulitis is due to restricted ROM post op."

17. Claimant explained her course of chiropractic care by testifying that she fell in June 2010, causing her upper back, shoulders, and neck to hurt, and so she went to a chiropractor for the first time. After that one treatment, she felt no pain in her left shoulder until a couple of months after her left wrist surgery in 2013, at which time she began feeling pain and stiffness. The ALJ finds that Claimant's testimony as to her left shoulder pain and chiropractic care prior to her left wrist surgery is credible.

18. Claimant's treating physicians, including her surgeon, diagnosed her with adhesive capsulitis as related to the lack of movement of her left shoulder after her left wrist surgery. This is consistent with Claimant's credible testimony that she did not use her left shoulder for months after her surgery because she was restricted from performing any gripping, pinching, or lifting tasks with her left hand and wrist.

19. The ALJ finds and concludes that Dr. Mars' and Dr. Koch's reports, and Dr. Fall's initial report are credible and persuasive on the issue of relatedness of the left shoulder adhesive capsulitis.

20. The ALJ finds that Respondents have failed to establish by a preponderance of the evidence that Claimant's left shoulder condition is not related to her admitted injury.

21. The ALJ finds that Respondents have failed to establish by a preponderance of the evidence that the treatment Claimant received for her left shoulder was unreasonable or unnecessary.

Impairment Rating

22. On June 17, 2014 Dr. Mars placed claimant at MMI and using the AMA Guides To The Evaluation of Permanent Impairment, third edition, revised, (Guides) assigned the following impairment ratings

- 2% upper extremity impairment for lost range of motion of the left thumb
- 5% upper extremity impairment for lost range of motion of the left shoulder
- 12% upper extremity impairment for moderate crepitus of the left shoulder
- 1% upper extremity impairment for decreased sensitivity of the radial nerve distally from the wrist surgical incision
- TOTAL 19% upper extremity impairment using the combined values chart, which converts to an 11% whole person impairment.

23. Claimant offered no further evidence on the issue of impairment, and specifically offered no evidence to support conversion of Claimant's upper extremity rating to a whole person rating.

24. Dr. Fall opined that Claimant's left shoulder range of motion restrictions could not reasonably be associated with Claimant's adhesive capsulitis because there was no previous baseline with which to make a comparison. The ALJ finds nothing in the Guides requiring a comparison to a claimant's previous baseline. Rather, Section 3.1g Shoulder provides a "normal range of motion" which actual measurements are compared against.

25. Dr. Fall also testified that in shoulder cases, the common practice is to take measurements of the contralateral side to use as a baseline to determine actual loss of range of motion. In Dr. Fall's opinion, contralateral measurements would have been very important in light of Claimant's long-standing cervical and thoracic spine issues which would have affected both shoulders, thus providing an accurate view of Claimant's actual baseline range of motion. The ALJ finds nothing in the Guides requiring a rating physician to conform to a subjective "common practice" in measuring range of motion.

26. Dr. Fall also testified that Dr. Mars' rating for crepitus was improper in this case, as no such diagnosis was made. The medical records contradict Dr. Fall's testimony. Dr. Mars noted in his June 17, 2014 examination of Claimant, "She has moderate crepitus of the left shoulder." In addition, Dr. Koch noted "clunking" in her shoulder in his August 28, 2013 report and noted Claimant "did have crepitus on range of motion" in his August 3, 2013 report. The ALJ finds it more likely than not that Claimant was diagnosed with crepitus and thus an impairment rating for crepitus was warranted.

27. Claimant testified that she does not feel her shoulder or wrist is 100%.

28. The ALJ finds Dr. Fall's criticisms of Claimant's impairment rating unpersuasive for the reasons stated in this section.

29. The ALJ finds that Respondents have not met their burden to establish by a preponderance of the evidence that Claimant's correct scheduled impairment is 3% of the upper extremity.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured litigation. § 8-40-102(1), C.R.S.

It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof.

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. § 8-43-210, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App 2000).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). It is the ALJ's prerogative to weigh the evidence, and that the ALJ might have reached a contrary conclusion is immaterial on review. *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

An employer is responsible for the direct and natural consequences which flow from a compensable injury. *Vanadium Corp. Of America,* 307 P.2d 454 (Colo. 1957); *Hembry v. ICAO,* 878 P.2d 114, 115 (Colo. App. 1995). Whether a causal connection exists between the work-related injury and subsequent injury is a question of fact. *Baca v. Helm,* 682 P.2d 474 (Colo.1984); *Hembry v. Indus. Claim Appeals Office of State of Colo.*, 878 P.2d 114, 115 (Colo. App. 1994).

There is no dispute that the injury to Claimant's wrist was compensable and that the surgery performed on the wrist was reasonable and related. Whether Claimant's adhesive capsulitis was a direct and natural consequence of the wrist surgery is the issue. Both of Claimant's treating physicians, including the surgeon who performed the wrist surgery, contend that the adhesive capsulitis is compensable because the healing process after surgery required Claimant to refrain from using her left hand and wrist, which resulted in a lack of motion of her left shoulder giving rise to the frozen shoulder.

Claimant credibly testified that she complied with her restrictions for no use or limited use of the left hand during the healing process after the surgery of her left wrist. This is consistent with the treating doctors' conclusions that her frozen shoulder stemmed from the wrist surgery.

As found above, Claimant had only one incident of shoulder soreness prior to her frozen shoulder, which occurred more than two and one-half years before her left wrist surgery. At that time, she did not feel any shoulder stiffness, which is commonly felt with adhesive capsulitis. The ALJ finds and concludes that the adhesive capsulitis that Claimant experienced in her left shoulder was the result of lack of movement of the shoulder following her left wrist shoulder, and not due to some pre-existing condition.

As to impairment the ALJ finds and concludes that the upper extremity impairment rating given by Dr. Mars is appropriate given the evidence presented at hearing.

ORDER

IT IS THEREFORE, ORDERED THAT:

1. Claimant's left shoulder adhesive capsulitis is related to the original workers' compensation injury.

2. The medical care and treatment Claimant received for her left shoulder injury is reasonable and necessary.

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

4. Respondents must file a final admission within 20 days of this Order.

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

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

DATED this 18th day of March, 2015.

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that a spinal cord stimulator trial as recommended by Bryan G. Wernick, M.D. is reasonable, necessary and causally related to her May 17, 2012 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Phlebotomist. On May 17, 2012 Claimant suffered an admitted industrial injury to her right knee during the course and scope of her employment with Employer. When she bent over to pick up blood culture bottles her right knee popped.

2. Claimant initially received conservative medical treatment for her right knee condition. While undergoing treatment for her right knee Claimant's left knee buckled and caused her to fall down stairs at home. She suffered a broken left kneecap as a result of the fall.

3. On January 13, 2013 Claimant underwent surgical repair of her right knee with Michael Wertz, M.D. On June 20, 2013 Claimant underwent surgery to repair her left knee.

4. On July 1, 2013 Claimant visited Dr. Wertz for an evaluation. He noted that Claimant had well-healed surgical incisions and normal sensation, but was "perhaps a little hypersensitive around the bruises." Dr. Wertz referred Claimant to physical therapy and directed her for follow-up in three to four weeks.

5. On July 3, 2013 Claimant visited Authorized Treating Physician (ATP) James Fox, M.D. for an examination. Dr. Fox remarked that Dr. Wertz did not find anything significant. However, Claimant requested a second opinion because she had pain in both knees.

6. On July 10, 2013 Claimant visited Bryan G. Wernick, M.D. for an examination. Dr. Wernick determined that Claimant was suffering post-operative pain and possible Complex Regional Pain Syndrome (CRPS).

7. Dr. Fox referred Claimant for a second orthopedic opinion with Joseph Hsin, M.D. of Cornerstone Orthopedics. On July 16, 2013 Claimant visited Dr. Hsin for an orthopedic evaluation. Although Dr. Hsin noted bruising and swelling in Claimant's left leg he stated that the complications were not uncommon. Dr. Hsin released Claimant for physical therapy and a follow-up visit with Dr. Wertz.

8. Claimant continued to receive conservative treatment from Dr. Wernick. By October 16, 2013 Dr. Wernick determined that Claimant had symptoms consistent with CRPS. Claimant subsequently underwent x-rays, a synvisc injection and a sympathetic nerve block. Diagnostic testing in the form of x-rays and MRI's yielded normal results. Additional conservative measures did not improve Claimant's pain symptoms.

9. Because conservative measures had failed Dr. Wernick recommended a spinal cord stimulator trial. He stated that there were "no further indicated treatment options to pursue otherwise."

10. Dr. Wernick referred Claimant to John Mark Disorbio, Ed.D. for a psychological examination. On June 16, 2014 Claimant underwent an evaluation and testing with Dr. Disorbio. He concluded that there were no "significant characterological or other major issues that would impede her from being able to move forward with a stimulator trial and potential implant."

11. On July 21, 2014 Dr. Wernick requested authorization for a spinal cord stimulator trial for Claimant. He testified that Claimant exhibited a number of symptoms consistent with CRPS. Dr. Wernick specifically noted that Claimant suffered from disproportionate pain, tenderness, swelling and decreased range of motion in her left knee. He explained that a spinal cord stimulator trial should be conducted after conservative measures fail. If the trial was a success, Claimant would be a candidate for the implantation of a spinal cord stimulator.

12. On August 11, 2014 Floyd O. Ring performed a records review of Claimant's case to assess whether she was a candidate for a spinal cord stimulator trial. Dr. Ring remarked that the medical records yielded a lack of objective evidence to support Claimant's diagnosis of CRPS. Although the records revealed scattered reports of discoloration, there was a lack of evidence of trophic changes and allodynia. Moreover, the records lacked any evidence of distinctive hair, skin or nail changes throughout the 21 months of records that Dr. Ring reviewed.

13. Dr. Ring's August 11, 2014 report detailed a lack of objective diagnostic testing as required under the State of Colorado Workers' Compensation Medical Treatment Guidelines (Guidelines) Rule 17, Ex. 7 to support a diagnosis of CRPS. In accordance with the Guidelines, Dr. Ring recommended Claimant undergo a 3-phase bone scan that would be followed by repeat lumbar injections, thermographic evaluation, or QSART testing if positive. In the absence of objective testing in accordance with the Guidelines Dr. Ring determined that Claimant's diagnosis of CRPS was premature and the recommendation for a spinal cord stimulator trial was not reasonable or necessary. Accordingly, Insurer denied authorization for a spinal cord stimulator trial.

14. On August 28, 2014 Dr. Ring performed an independent medical examination of Claimant. He completed a physical examination that was consisted with

his medical records review. He reiterated that Claimant did not have CRPS pursuant to the Guidelines because the requisite diagnostic testing had not been performed.

15. On September 4, 2014 Dr. Wernick issued a report in response to Dr. Ring's independent medical examination. He concluded that Claimant "has been diagnosed with CRPS type 1 by IASP criteria (and also qualifying for IASP Budapest criteria)." Dr. Wernick explained that the CRPS diagnosis was supported by the following findings: (1) continued pain disproportionate to any inciting event; (2) Claimant's reports of hyperesthesia, allodynia, skin temperature changes, skin color changes and swelling; (3) evidence of allodynia, swelling and skin color changes on previous exams; and (4) and there was no better explanation for Claimant's continuing pain symptoms. Dr. Wernick also addressed Dr. Ring's concerns about a single sympathetic nerve block for Claimant. He commented that sympathetic nerve blocks are not diagnostic for CRPS but may show sympathetically mediated pain. Moreover, Dr. Wernick remarked that a three phase bone scan was not diagnostic for CRPS and the results would not change Claimant's diagnosis. He summarized that "QSART testing, quantitative sensory testing, thermography and a variety of other tests are also non-specific and unproven based on current medical literature." Dr. Wernick maintained that a spinal cord stimulator trial would "typically be considered when a patient has reached this point" but the modality is non-specific for CRPS and there is mixed literature to support spinal cord stimulation. Nevertheless, he determined that a spinal cord stimulator trial "would be reasonable at this point."

16. On October 10, 2014 Dr. Fox drafted a letter in response to Dr. Ring's independent medical examination report. Dr. Fox stated that he referred Claimant to Dr. Wernick due to "symptoms in the left lower extremity of bruising, skin mottling, swelling, and significant pain ever since her June 20, 2014 office visit." He noted, "it was the symptoms that led me to refer the patient to Dr. Wernick for further evaluation." In a separate note dated October 10, 2014 Dr. Fox stated that he had reviewed the independent medical examination performed by Dr. Ring and Dr. Wernick's response. He summarized "I am in agreement with Dr. Wernick's assessment and statement on the IME."

17. Claimant testified at the hearing in this matter. She explained that, while awaiting her right knee surgery, her knee locked at home, she fell down stairs and broke her left knee cap. On June 20, 2013 Claimant underwent left knee surgery. After the procedure Claimant experienced significant pain, swelling and discoloration in her left leg for months. She subsequently received conservative medical treatment in the form of physical therapy, medications, water therapy, injections and a home exercise program. However, conservative measures failed to relieve her pain symptoms. Claimant emphasized that she does not want to increase her drug intake as a way to alleviate her symptoms. She maintained that she would like to undertake a spinal cord stimulator trial in an attempt to decrease her pain levels.

18. Dr. Wernick testified at the hearing in this matter. He explained that Claimant has undergone significant conservative treatment for her CRPS. However, because conservative measures have been unsuccessful, a spinal cord stimulator trial

is warranted. Dr. Wernick explained that Claimant suffers from CRPS based on the Budapest Diagnostic Criteria and a clinical examination. He maintained that there is no objective diagnostic test for CRPS, but the Budapest Criteria provide that CRPS is characterized by the following: (1) continuing pain disproportionate to the inciting event; (2) sensory changes such as hyperalgesia or allodynia; (3) vasomotor changes involving skin color and temperature; (4) sudomotor changes involving swelling or sweating; (5) motortrophic changes including weakness and tremors; and (6) trophic changes of the hair, nails or skin. Dr. Wernick commented that clinical symptoms include: (1) disproportionate pain; (2) irritating sensations; (3) temperature and skin color changes; (4) sweating; (5) decreased range of motion and (6) weakness.

19. Dr. Wernick noted that Claimant exhibited disproportionate pain, non-dermatomal pain, tenderness, swelling and decreased range of motion. Claimant also had undergone significant conservative measures including medications, lumbar sympathetic nerve blocks and physical therapy but the treatment did not improve Her condition. Dr. Wernick also remarked that Claimant had undergone a psychological evaluation with Dr. Disorbio. The evaluation cleared Claimant as a candidate for a spinal cord stimulator trial. Dr. Wernick stated that, because Claimant has exhausted conservative treatment without improvement and has been psychologically evaluated, he sought authorization for a spinal cord stimulator trial. He noted that, absent the authorization for a spinal cord stimulator trial, Claimant's treatment is in a holding pattern.

20. Dr. Ring testified at the hearing in this matter consistent with his records review and independent medical evaluation. He emphasized that Claimant has not undergone testing as required under Rule 17, Ex. 7 of the Guidelines to support a diagnosis of CRPS. In fact, Claimant underwent a bone scan that was negative for CRPS. Dr. Ring explained that Claimant suffers from subjective pain but lacks the objective criteria to warrant a diagnosis of CRPS. He thus maintained that a CRPS diagnosis was premature.

21. Dr. Ring stated that Claimant had not exhausted diagnostic modalities. Initially, Claimant's pain reports could simply be consistent with a nerve injury that occurred during surgery. Furthermore, a sympathetic nerve block showed some benefit but was not repeated. Dr. Ring commented that further injections could be performed in accordance with the Guidelines. Moreover, Claimant had received additional conservative treatment in the form of a topical treatment and a Lyrica prescription after the request for a spinal cord stimulator trial. Dr. Ring also noted that Claimant had not undergone sufficient psychological treatment, including biofeedback, which could provide pain relief through the development of coping mechanisms. He summarized that, even if Claimant has CRPS, a spinal cord stimulator is a last resort after all treatment modalities have been explored. Claimant's authorization request for a spinal cord stimulator trial should be denied because she has not received all available conservative treatment modalities.

22. Claimant has demonstrated that it is more probably true than not that a spinal cord stimulator trial as recommended by Dr. Wernick is reasonable, necessary

and causally related to her May 17, 2012 industrial injury. Claimant credibly explained that on June 20, 2013 she underwent left knee surgery. After the procedure Claimant experienced significant pain, swelling and discoloration in her left leg for months. She subsequently received conservative medical treatment in the form of physical therapy, medications, water therapy, injections and a home exercise program. However, conservative measures failed to relieve her pain symptoms. She maintained that she would like to undertake a spinal cord stimulator trial in an attempt to decrease her pain levels. Dr. Wernick agreed that Claimant has undergone significant conservative treatment for her CRPS. However, because conservative measures have been unsuccessful, a spinal cord stimulator trial is warranted.

23. Dr. Wernick detailed that Claimant suffers from CRPS as a result of her May 17, 2012 industrial injury. He explained that Claimant had a CRPS diagnosis based on the Budapest Diagnostic Criteria and a clinical examination. Dr. Wernick maintained that there is no objective diagnostic test for CRPS, but the Budapest Criteria provide that CRPS is characterized by the following: (1) continuing pain disproportionate to the inciting event; (2) sensory changes such as hyperalgesia or allodynia; (3) vasomotor changes involving skin color and temperature; (4) sudomotor changes involving swelling or sweating; (5) motortrophic changes including weakness and tremors; and (6) trophic changes of the hair, nails or skin. He commented that clinical symptoms include: (1) disproportionate pain; (2) irritating sensations; (3) temperature and skin color changes; (4) sweating; (5) decreased range of motion and (6) weakness. Dr. Wernick explained that Claimant's CRPS diagnosis was supported by the following findings: (1) continued pain disproportionate to any inciting event; (2) reports of hyperesthesia, allodynia, skin temperature changes, skin color changes and swelling; (3) evidence of allodynia, swelling and skin color changes on previous exams; and (4) there was no better explanation for Claimant's continuing pain symptoms. Dr. Wernick also remarked that Claimant has undergone a psychological evaluation with Dr. Disorbio. The evaluation cleared Claimant as a candidate for a spinal cord stimulator trial. Dr. Wernick summarized that, because Claimant has exhausted conservative treatment without improvement and has been psychologically evaluated, he sought authorization for a spinal cord stimulator trial.

24. In contrast, Dr. Ring emphasized that Claimant has not undergone testing as required under Rule 17, Ex. 7 of the Guidelines to support a diagnosis of CRPS. Dr. Ring explained that Claimant suffers from subjective pain but lacks the objective criteria to warrant a diagnosis of CRPS. He thus maintained that a CRPS diagnosis was premature. Dr. Ring also stated that Claimant has not exhausted conservative treatment or diagnostic modalities. He summarized that, even if Claimant has CRPS, a spinal cord stimulator is a last resort after all treatment modalities have been explored. However, Dr. Wernick persuasively addressed Dr. Ring's concerns. He commented that sympathetic nerve blocks are not diagnostic for CRPS but may show sympathetically mediated pain. Moreover, a three phase bone scan is not diagnostic for CRPS and the results would not change Claimant's diagnosis. He summarized that "QSART testing, quantitative sensory testing, thermography and a variety of other tests are also non-specific and unproven based on current medical literature." Finally, ATP Dr. Fox stated that he had reviewed the independent medical examination performed by

Dr. Ring and Dr. Wernick's response. He summarized "I am in agreement with Dr. Wernick's assessment and statement on the IME." Based on the persuasive medical evidence from Drs. Wernick and Fox, as well as the failure of numerous conservative measures to alleviate Claimant's pain, Dr. Wernick's request for a spinal cord stimulator trial is granted.

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 a spinal cord stimulator trial as recommended by Dr. Wernick is reasonable, necessary and causally related to her May 17, 2012 industrial injury. Claimant credibly

explained that on June 20, 2013 she underwent left knee surgery. After the procedure Claimant experienced significant pain, swelling and discoloration in her left leg for months. She subsequently received conservative medical treatment in the form of physical therapy, medications, water therapy, injections and a home exercise program. However, conservative measures failed to relieve her pain symptoms. She maintained that she would like to undertake a spinal cord stimulator trial in an attempt to decrease her pain levels. Dr. Wernick agreed that Claimant has undergone significant conservative treatment for her CRPS. However, because conservative measures have been unsuccessful, a spinal cord stimulator trial is warranted.

6. As found, Dr. Wernick detailed that Claimant suffers from CRPS as a result of her May 17, 2012 industrial injury. He explained that Claimant had a CRPS diagnosis based on the Budapest Diagnostic Criteria and a clinical examination. Dr. Wernick maintained that there is no objective diagnostic test for CRPS, but the Budapest Criteria provide that CRPS is characterized by the following: (1) continuing pain disproportionate to the inciting event; (2) sensory changes such as hyperalgesia or allodynia; (3) vasomotor changes involving skin color and temperature; (4) sudomotor changes involving swelling or sweating; (5) motortrophic changes including weakness and tremors; and (6) trophic changes of the hair, nails or skin. He commented that clinical symptoms include: (1) disproportionate pain; (2) irritating sensations; (3) temperature and skin color changes; (4) sweating; (5) decreased range of motion and (6) weakness. Dr. Wernick explained that Claimant's CRPS diagnosis was supported by the following findings: (1) continued pain disproportionate to any inciting event; (2) reports of hyperesthesia, allodynia, skin temperature changes, skin color changes and swelling; (3) evidence of allodynia, swelling and skin color changes on previous exams; and (4) there was no better explanation for Claimant's continuing pain symptoms. Dr. Wernick also remarked that Claimant has undergone a psychological evaluation with Dr. Disorbio. The evaluation cleared Claimant as a candidate for a spinal cord stimulator trial. Dr. Wernick summarized that, because Claimant has exhausted conservative treatment without improvement and has been psychologically evaluated, he sought authorization for a spinal cord stimulator trial.

7. As found, in contrast, Dr. Ring emphasized that Claimant has not undergone testing as required under Rule 17, Ex. 7 of the Guidelines to support a diagnosis of CRPS. Dr. Ring explained that Claimant suffers from subjective pain but lacks the objective criteria to warrant a diagnosis of CRPS. He thus maintained that a CRPS diagnosis was premature. Dr. Ring also stated that Claimant has not exhausted conservative treatment or diagnostic modalities. He summarized that, even if Claimant has CRPS, a spinal cord stimulator is a last resort after all treatment modalities have been explored. However, Dr. Wernick persuasively addressed Dr. Ring's concerns. He commented that sympathetic nerve blocks are not diagnostic for CRPS but may show sympathetically mediated pain. Moreover, a three phase bone scan is not diagnostic for CRPS and the results would not change Claimant's diagnosis. He summarized that "QSART testing, quantitative sensory testing, thermography and a variety of other tests are also non-specific and unproven based on current medical literature." Finally, ATP Dr. Fox stated that he had reviewed the independent medical examination performed by Dr. Ring and Dr. Wernick's response. He summarized "I am in agreement with Dr.

Wernick's assessment and statement on the IME." Based on the persuasive medical evidence from Drs. Wernick and Fox, as well as the failure of numerous conservative measures to alleviate Claimant's pain, Dr. Wernick's request for a spinal cord stimulator trial is granted.

ORDER

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

Claimant's request for a spinal cord stimulator trial 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: March 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issue presented for determination is whether the Claimant is entitled to a permanent partial disability ("PPD") award and the appropriate amount of the award, if any. The Claimant asserts that the permanent impairment rating assigned by authorized treating physician ("ATP") Dr. Katherine Bird is most appropriate whereas the Respondents assert that the impairment rating provided by the Division Independent Medical Examination ("DIME") physician is most appropriate. Neither party is challenging whether or not Claimant reached maximum medical improvement ("MMI"), and neither party, particularly the Claimant, has alleged that he is entitled to a whole person impairment rating.

Because MMI is not in dispute and because the Claimant's alleged PPD is limited to the schedule of disabilities found in §8-42-107(2), C.R.S., the ALJ confirmed with the parties that the Claimant has the burden of proof, by a preponderance of the evidence, to prove entitlement to a PPD award and the appropriate amount or impairment percentage. Despite the parties' agreement concerning the applicable burden of proof, the position statements submitted by both parties state that Claimant bears the burden of proof by clear and convincing evidence. For the reasons set forth below in the conclusions of law, the DIME opinions are not binding and Claimant must merely prove, by a preponderance of the evidence, that he is entitled to an award of PPD, and in what amount.

FINDINGS OF FACT

1. Claimant worked for the Employer as an auto mechanic. On May 17, 2013, the Claimant suffered an industrial injury to his left knee when Claimant was struck by a vehicle and pinned his left foot.

2. Claimant ultimately had left knee surgery on September 3, 2013. Dr. Failinger performed a meniscectomy and chondroplasties at the patella, medial femoral condyle, lateral tibial plateau and removal of loose bodies.

3. Following surgery Claimant had extensive physical therapy followed by pool therapy and a series of various types of injections into Claimant's left knee.

4. Three months post-surgery, Dr. Failinger noted that Claimant had almost full extension in his left knee and 130 degrees flexion.

5. A physical therapy note dated January 20, 2014 reflects Claimant's left knee range of motion was 0 to 120 degrees with pain.

6. On February 11, 2014, Dr. Bird noted passive range of motion in the left knee of 5 to 130 degrees, and active range of motion at 10 to 90 degrees.

7. On February 27, 2014, Dr. Alfred Lotman performed an independent medical examination at Respondents' request. Dr. Lotman examined the Claimant, reviewed medical records, and authored a report. On exam, Dr. Lotman noted that Claimant was only able to flex his left knee to 70 degrees and will not allow further pressure on his knee. Dr. Lotman noted that Claimant "tends to hold his knee in a 20 to 30 degree flexed posture, but can gently be taken up to -10 degrees." Dr. Lotman measured Claimant's thighs and calves to determine if Claimant had atrophy in the muscles on his left side, but Dr. Lotman did not detect any differences. Dr. Lotman observed Claimant walking with a mild left sided limp.

8. Dr. Lotman also reviewed surveillance video taken of an individual purported to be the Claimant. Dr. Lotman observed that the person in the surveillance video did not walk with an abnormal gait and did not demonstrate pain behaviors. The observations in the surveillance video influenced Dr. Lotman's diagnosis and prognosis. He concluded that Claimant's physical examination showed rather marked symptom magnification which was reinforced by the video surveillance.

9. Dr. Lotman opined that Claimant needed no additional medical treatment, and had reached maximum medical improvement with no permanent restrictions. Dr. Lotman concluded his report by stating that Claimant's verbal reports of function and restrictions were inconsistent with the Claimant's behaviors observed in the surveillance video.

10. There was no evidence presented that the individual in the video surveillance was the Claimant and the video was not offered into evidence.

11. Claimant returned to ATP Dr. Kathryn Bird on March 11, 2014. She determined that Claimant had reached maximum medical improvement ("MMI"). She also assigned permanent restrictions that included no climbing stairs or ladders, and no kneeling or squatting.

12. For permanent impairment, Dr. Bird found that Claimant sustained 40% impairment to the left lower extremity. She noted active flexion to 100 degrees and extension to a 30 degree lag. Dr. Bird noted that under Table 39 of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) ("Guides"), the loss of extension amounted to 17% permanent impairment and the loss of flexion amounted to 18% permanent impairment. Dr. Bird also assigned 8% impairment under Table 40 for the meniscectomy and chondroplasty. She determined that the combination of the ratings total 40% impairment of the left lower extremity.

13. Dr. Bird did not specifically describe what instrumentation she used to measure the Claimant's range of motion.

14. Rather than filing a final admission of liability admitting for the PPD based on the permanent impairment rating assigned by Dr. Bird, or setting the matter for

hearing, pursuant to WCRP 5-5(H) (effective January 1, 2014), the Respondents applied for a DIME.

15. Dr. Kevin Nagamani performed the DIME on June 11, 2014. He concurred with Dr. Bird's MMI determination. Dr. Nagamani also concurred with the permanent restrictions Dr. Bird assigned.

16. Dr. Nagamani also noted that Claimant's quadriceps girth on the right was two centimeters larger than on the left. Dr. Lotman measured no difference between Claimant's right and left quadriceps.

17. Dr. Nagamani measured Claimant's range of motion in his bilateral knees, and found that it ranged from 0 to 140 degrees on the right compared to a -2 to 112 degree range on the left. Dr. Nagamani documented that Claimant's effort on range of motion testing was poor and that Claimant guarded quite a bit.

18. He determined that Claimant sustained 18% permanent impairment in his left lower extremity. He assigned 11% for abnormal motion in flexion, a Table 40 impairment of 5% for the partial meniscectomy and 3% for chondromalacia.

19. Dr. Nagamani did not specifically describe what instrumentation he used to measure Claimant's range of motion.

20. Dr. Lotman testified by deposition. He disagreed with Dr. Bird's impairment rating for a number of reasons none of which were particularly persuasive. His issue with Dr. Bird's failure to document the instrumentation defies logic given that Dr. Nagamani did not document which instrument he used either. Further, Dr. Lotman placed far too much emphasis on a surveillance video which was not offered into evidence making his reliance on it unhelpful to this ALJ.

21. Dr. Lotman also took issue with Dr. Bird using only active range of motion measurements; however, the Division of Workers' Compensation Impairment Rating Tips ("Rating Tips") specifically indicate that only active range of motion measurements may be used but passive range of motion may be measured to assess validity of the active range of motion measurements. Further, Dr. Nagamani also did not specifically document whether he merely used active range of motion measurements or if he also measured passive range of motion in Claimant's left knee.

22. Claimant's documented left knee range of motion has varied significantly, but in some of the medical records, it is difficult to ascertain whether the measurements were taken using a goniometer, and whether they were active or passive. However, it is apparent from the medical records that the 30 degree lag in Claimant's extension measured by Dr. Bird is inaccurate. 30 degrees represents the worst range of motion Claimant has ever demonstrated during his visits with medical providers. During most of his post-operative medical appointments, Claimant's extension was almost full or closer to the -2 degrees measured by Dr. Nagamani. Dr. Nagamani did not document a loss of extension because -2 degrees represents hyperextension which is past full

extension. Consequently, the ALJ finds that Claimant has not lost the ability to fully extend his knee, and no impairment may be assessed for loss of extension.

23. Given that Claimant's flexion measurements have varied so greatly, the ALJ adopts Dr. Nagamani's measurements as most accurate. Given that he is the DIME examiner, it is presumed that his opinions are the most neutral. In addition, several medical providers have documented that Claimant has given poor effort during range of motion testing thus making it difficult to determine Claimant's true loss.

24. Table 39 of the Guides provides that if retained active flexion of 110 degrees is found, the impairment is 14% of the lower extremity. If the retained active flexion is 120 degrees, the impairment is 11% of the lower extremity. In this case, Dr. Nagamani measured Claimant's flexion at 112 degrees and chose to round up to the 120 degree impairment of 11% rather than the 14%. Dr. Nagamani provided little explanation for this decision other than noting Claimant's poor effort.

25. Both the Guides and the Rating Tips specifically indicate that the impairment rating should be rounded up or down to the nearest whole number. In this case, the nearest whole number to 112 degrees under Table 39 is 110 degrees rather than 120 degrees. As such, the Claimant has established that he is entitled to an increase in his impairment rating. Under Table 39, Claimant's impairment rating should be 14% rather than 11%.

26. The parties did not seriously dispute the Table 40 impairment of 8% although Dr. Bird and Dr. Nagamani assigned the 8% based on different conditions.

27. Based on the combined values chart in the Guides, 14% for loss of range of motion combines with the Table 40 rating of 8% to produce an impairment rating for Claimant's left lower extremity of 21%.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

4. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a DIME process for whole person ratings. In this case, neither party asserted that Claimant was entitled to a whole person impairment rating. Consequently, Subsection (8) is not implicated and the clear and convincing evidence burden does not apply. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo.App. 2000). Claimant must prove entitlement to the scheduled PPD benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

5. As found above, the Claimant has proven that he is entitled to an increase in his impairment rating by 3%, for a total impairment rating of 21%. Claimant has failed to prove that he is entitled to the rating Dr. Bird assigned. The credible and persuasive medical evidence reflects that Claimant's post-operative range of motion measurements have varied greatly making it difficult to ascertain the accuracy of any of the measurements taken. Since Claimant has demonstrated full extension during most of his medical visits, Claimant has failed to prove that he has any loss of extension. Accordingly, the 17% impairment rating Dr. Bird assigned for loss of extension is not persuasive.

6. Further, Dr. Bird's range of motion measurement for loss of flexion is not persuasive. As found, Dr. Nagamani's range of motion measurements are the most accurate; however, the ALJ concludes that pursuant to the Guides and the Rating Tips Dr. Nagamani erred when assigning 11% impairment rather than 14% Claimant's final impairment rating is 21% of the left lower extremity, and he is entitled to a PPD award consistent with that rating.

ORDER

It is therefore ordered that:

1. Claimant is entitled to a PPD award consistent with a scheduled impairment rating of 21% of the left lower extremity.

2. 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: March 26, 2015

DIGITAL SIGNATURE:

L. Broniak

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-926-710-01

ISSUES

- Whether Claimant sustained a functional limitation beyond the *situs* of his admitted hip injury warranting a whole person impairment?

- What, if any, entitlement Claimant has to disfigurement benefits?

FINDINGS OF FACT

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

1. 1. On October 29, 2011 Claimant, a police officer with the City and County of Denver, sustained an admitted work related injury to his left hip. Claimant tripped over a retention wall, twisted, and landed on his hip.

2. Claimant's history of left hip and low back pain predates the October 2011 injury. On June 9, 2011, Claimant presented to Dr. David Conway of Littleton Internal Medicine reporting symptoms of left hip and low back pain. Dr. Conway noted complaints of left upper leg pain from the hip and groin radiating down to the left knee since approximately June of 2010. Claimant told Dr. Conway that he had been taking medication for this pain. Dr. Conway ordered x-rays of Claimant's low back and hips which revealed moderately severe degenerative changes in Claimant's low back mainly at L5-S1, as well as in his hips, left greater than right.

3. Approximately two months prior to the industrial accident, Claimant saw his family physician and received an x-ray guided steroid injection for his osteoarthritic hip pain

4. On October 31, 2011 Claimant presented to Dr. David Blair regarding the industrial incident. Dr. Blair had x-rays taken of Claimant's hips, which showed left and right hip osteoarthritis, including bone-on-bone and collapse of the articular cartilage, a large osteophyte formation, as well as a possible nondisplaced left subcapital femoral fracture. No fracture was ever discovered. The x-rays also revealed degenerative changes of Claimant's low back, but with no evidence of acute bone injury. Dr. Blair felt that Claimant would eventually need a hip replacement, but that the need for a hip replacement was not work related.

5. On August 13, 2013, after attempts at conservative care were exhausted, Claimant underwent total left hip replacement surgery performed by Dr. Todd Miner. Claimant sustained a slightly discolored, but well healed scar as a result of the surgery. In a bathing suit, approximately four inches of the scar would be visible to the public.

6. In Claimant's pre-operative consultation, Claimant told Dr. Miner that he had not experienced any left hip issues prior to his trip-and-fall on October 29, 2011. [Respondent's J, bates 70] The medical records in evidence dispute this claim. [See,

e.g., Respondent's F, bates 10; Respondent's M, bates 98-100; Respondent's G, bates 14; and Respondent's I, bates 53]

7. Claimant received post-operative physical therapy, but continued complaining of increased pain. Claimant reported back pain due to constant limping throughout the day, sharp pain when standing up from a sitting position, as well as pain when leaning forward.

8. Surveillance video dated April 8, 2014, shows Claimant walking briskly without any apparent distress or antalgia. Surveillance video from April 25, 2014, shows Claimant by a pool, repeatedly standing up and sitting down on a low chair, bending over such that his head was level with the back of his pants, walking about, packing up picnic gear, carrying a bag with his right arm, diving into a pool, and chasing beach balls, all without any apparent distress or antalgia of gait.

9. Claimant's surgeon, Dr. Miner, opined after watching the surveillance that he saw no objective evidence of Claimant having any difficulties in gait or sitting.

10. On May 14, 2014, Dr. Stephen D. Lindenbaum performed a full medical evaluation of Claimant. Dr. Lindenbaum observed Claimant walking in from the parking lot to the office without any limp. However, when Claimant saw Dr. Lindenbaum, he began to exhibit mild limping, which was more pronounced when Claimant was walking out of the examination. Upon examination, Dr. Lindenbaum noted an absence of any thigh or calf atrophy, which one would expect to see if Claimant truly had a limp.

11. On May 14, 2014, Dr. Stephen D. Lindenbaum performed a full medical evaluation of Claimant. Dr. Lindenbaum concluded that Claimant had already reached maximum medical improvement (MMI). Dr. Lindenbaum stated that this was based on the fact that Claimant's subjective complaints and video surveillance were inconsistent with his past medical records and the physical examination showed no objective findings.

12. On May 23, 2014, Claimant reported to Dr. Blair that bicycling aggravated his pain and that he was unable to do much of it. Claimant testified at hearing that he was unable to bicycle more than three or four miles per week, once or twice a month. However, Claimant admitted on cross examination that he rode 63.6 miles that same week as part of a National Bike Challenge.

13. The ALJ finds it more likely that Claimant's limp is engineered for the purpose of secondary gain.

14. On June 30, 2014, Dr. Robert Kawasaki examined Claimant who complained of continued pain in his left hip and low back. Dr. Kawasaki noted no specific lumbar injury, and Claimant had full range of motion in his low back. Dr. Kawasaki placed Claimant at MMI and rated his impairment at 25% of the lower extremity based on a 20% rating for the total hip arthroplasty plus 6% for range of motion loss.

15. On August 1, 2014, Respondent filed a Final Admission of Liability, admitting for 25% impairment for Claimant's leg at the hip, per Dr. Kawasaki's June 30, 2014 report.

16. On January 5, 2015, Dr. John S. Hughes performed a record review of Claimant's medical records per Respondent's request. Dr. Hughes is a Level-II accredited physician with more than 32 years of experience and has chaired the Colorado Medical Society's Worker's Compensation and Personal Injury Advisory Committee for over fifteen years. Dr. Hughes has taught at the University of Colorado Medical School since 1994. Dr. Hughes was qualified as an expert in occupational medicine and testified live at hearing.

17. In his report and testimony, Dr. Hughes agreed with Drs. Lindenbaum and Kawasaki that Claimant had reached MMI with respect to his left-hip injury. He determined that Claimant's pre-existing lumbar spine degenerative disc disease was symptomatic during the year preceding Claimant's October 29, 2011, trip-and-fall, and that no evidence existed showing any connection between Claimant's alleged current/ongoing back pain and his admitted hip injury.

18. Dr. Hughes testified that, while Claimant's industrial injury likely exacerbated his low back, no medical evidence supported a finding of a substantial and permanent aggravation of the preexisting lumbar spine condition as a result of the industrial injury.

19. Dr. Hughes explained that exacerbation is "where symptoms are provoked by a particular activity, but where there is no measurable acceleration of a pathologic process." He explained that in contrast, an aggravation would be "where there became a measurable, objectively quantifiable change in my pathology that had occurred as a result of a certain process. And that aggravation led to a need for treatment, maybe a need for replacement arthroplasty, a permanent change in the condition, is what a substantial and permanent aggravation is." He further explained that a temporary aggravation "is where there's a change in the pathology, but treatment is successful in returning that pathology back to its pre-aggravation state."

20. In a prehearing evidentiary deposition, Dr. Lindenbaum also testified that Claimant had significant problems with his back and hip predating the industrial injury.

21. Dr. Lindenbaum testified that he believed Claimant's hip injury should be converted to a whole person injury. When asked why, he responded,

> Well, I think first of all, in the Guidelines, it's recommended in most cases that these things convert to a whole person rating. But in this particular case, putting aside the question of the validity of whether this actually should be treated at all as far as this rating is concerned, I think it affects every aspect of his life.

Dr. Lindenbaum did not cite any portion of the *AMA Guides* or a statutory basis for conversion to whole person. Such justification has no basis in either the *AMA Guides* or § 8-42-107, C.R.S. *See American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (Revised)*, Chapter 2.2; § 8-42-107, C.R.S. Because Dr. Lindenbaum did not apply the correct standard for conversion, the ALJ finds his testimony on this point neither credible nor persuasive.

22. By contrast, Dr. Hughes, an expert in occupational medicine, credibly testified that Division rules require physicians to provide both scheduled impairment ratings and whole person ratings. The decision whether an impairment should be converted is a legal one based upon medical evidence and facts, and not a medical determination. Dr. Hughes explained that Claimant had a history of symptomatic lumbar spine pathology for which Claimant received treatment, including, but not limited to, chiropractic care, prior to the industrial injury. The ALJ finds that Claimant's lumbar spine pathology is more likely not related to this claim.

23. Dr. Hughes provided an informed explanation of the legal bases for conversion, and cited relevant and clear evidence for his opinions that Claimant's injury has no medical basis for conversion. Dr. Hughes credibly testified that there was no evidence that Claimant had sustained a loss of function that extended beyond the region of his left hip into the region of his lumbar spine as a result of his hip injury. Dr. Hughes' opinions are therefore given more weight than those of Dr. Lindenbaum.

24. Dr. Hughes also testified there was no medical evidence to support a finding that Claimant's lumbar spine was in any way exacerbated, aggravated, or accelerated by the industrial injury to Claimant's hip. Dr. Hughes concluded that there was no medical basis to convert Claimant's lower extremity impairment rating to whole person. The ALJ finds Dr. Hughes' opinions to be both credible and persuasive.

25. While Claimant established that certain muscles beyond his hip joint are implicated in some of the activities Plaintiff is permanently restricted from doing, he presented no persuasive evidence that any of those implicated muscles are the situs of Claimant's injury.

26. The ALJ concludes that the situs of Claimant's injury is the lower extremity at the hip joint. Thus, converting Claimant's scheduled injury into a whole person injury is not warranted.

27. THE ALJ FINDS AND CONCLUDES that as a result of this work injury, Claimant has sustained disfigurement consisting of a slightly discolored, but well healed approximately four inch long scar as a result of his surgery, which entitles Claimant to additional compensation. Section 8-42-108 (2), C.R.S.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" 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., 2009. 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).

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 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).

4. Colorado Revised Statute § 8-42-107(1) limits a claimant to a scheduled disability award if the injury resulted in a permanent medical impairment that is enumerated on the schedule of disabilities. *Strauch v. PSL Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The schedule of disabilities is a chart that lists how a claimant should be compensated when there is an injury to that claimant's extremities. This differs on how a claimant is compensated for a whole person injury to the trunk of his body, which is a different statutory formula.

5. In the context of § 8-42-107(1), the term "injury" refers to the part or parts of the body, which have been functionally impaired or disabled as a result of the work related accident. The court will examine the parts of the body that sustained the ultimate loss, and not necessarily the location on the body where the injury initially occurred. The issue of conversion is a question of fact for the ALJ. *Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000). Therefore, it is the *situs* of the functional impairment that is the relevant inquiry, not the *situs* of the initial harm. Here, because Claimant's hip is enumerated on the schedule of disabilities, he must demonstrate that he sustained a functional impairment beyond his hip and into his torso in order to receive compensation for a whole person injury. Based on the totality of the evidence, the ALJ has found that Claimant did not meet his burden of proving by a preponderance of the evidence that any part of his body above his hip is functionally impaired, and therefore the situs of Claimant's functional impairment is at his hip.

6. Furthermore, the mere presence of pain does not compel the finding of whole person impairment. *Langton v. Rocky Mountain Health Care*, 937 P. 2d 883, 885 (Colo. App. 1996). This pain would have to limit Claimant's ability to use a portion of his body before there is a consideration of a functional impairment for purposes of determining whether an injury is on or off the schedule. *Velasquez v. UPS*, W. C. No. 4-573-459 (April 13, 2006). Here, Claimant presented no persuasive evidence that pain limited his use of any portion of his body other than his hip. While he presented evidence that he was restricted from a few activities that implicated the use of other muscle groups, no credible evidence that those other muscle groups caused or experienced pain.

7. Medical records show that Dr. Lindenbaum observed Claimant walking through Dr. Lindenbaum's parking lot, showing no signs of an antalgic gait until meeting with Dr. Lindenbaum, at which point, Claimant began limping. Furthermore, video-surveillance evidence of Claimant walking about briskly on April 8 and 25, 2014, without any sign of an antalgic gait, is inconsistent with Claimant's claims. Similarly, he is clearly seen sitting down and standing up from a low chair, poolside, again, despite testimony to the contrary. Dr. Lindenbaum observed that Claimant did not display any calf or thigh atrophy, which further reinforces that Claimant did not regularly favor one leg over the other. Finally, Claimant advised Dr. Blair that he was unable to ride his bicycle very much as a result of his alleged pain, but then admitted on the stand that he rode in excess of 60 miles the following week.

8. Claimant has not presented any credible evidence of a functional limitation beyond his lower extremity.

9. Claimant's complaints of pain beyond the *situs* of his injury are not found to be genuine, and cannot form a causal link between Claimant's scheduled hip injury and any back pain from which he may or may not be suffering.

10. In this case, Respondent has provided credible and expert evidence that Claimant's low back and torso complaints predate the industrial injury. Moreover, they have presented credible evidence that Claimant's testimony and subjective reports cannot be trusted at face value.

11. Section 8-42-108(1), C.R.S., provides that an ALJ may grant a disfigurement award for serious, permanent disfigurements "about the head, face, or parts of the body normally exposed to public view." § 8-42-108(1), C.R.S. An award for disfigurement is based on "an observable impairment of the natural appearance of a person." *Arkin v. Industrial Commission of Colorado*, 358 P.2d 879 (1961). Those parts of the body "normally exposed to public view" have been understood to extend as far as all parts of the body visible when in swimming attire. *See Twilight Jones Lounge v. Showers*, 732 P.2d 1230, 1232 (Colo.App.1986).

ORDER

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

1. Claimant did not sustain a functional limitation beyond the *situs* of his industrial hip injury. Accordingly, his request for a whole person conversion of his injury is denied.
2. Insurer shall pay Claimant $1,000 for this disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.
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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2015

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant sustained an injury arising out of and in the course and scope of his employment, and if so;

2. Whether Claimant is entitled to a change of physician based on Respondents' failure to provide a designated provider list.

3. Whether Claimant is entitled to temporary total disability benefits from April 25, 2014 and ongoing.

4. What is Claimant's average weekly wage?

FINDINGS OF FACT

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

1. Claimant's date of birth is January 1, 1969. He commenced employment as a delivery driver for Employer on June 12, 2005. Claimant worked as manager of delivery and delivery drivers. His job duties included taking delivery assignment sheets, coordinating deliveries with the other driver and delivering stairs. Claimant's duties included, as necessary, dealing with and communicating with customers.

2. Claimant requested and took two weeks off from work for periods covering March 22, 2013, through April 5, 2013.

3. On the morning of July 1, 2013, Claimant approached John Sellars requesting two weeks of vacation off, immediately, so that he could travel to Mexico. Mr. Sellars, the president of the company, explained to Claimant that he could not have two weeks off at that time because they were in the middle of the busy season and Claimant was the supervisor of the trucks. This discussion escalated into an argument and Claimant became very upset. Claimant used profanity and stormed out of Mr. Sellars' office. Claimant was angry because he could not get the time off. Mr. Sellars credibly testified that he would have terminated the employment of any other employee who acted like Claimant, but he did not terminate Claimant because of their long and amicable relationship. Claimant had not previously argued with Mr. Sellars about taking time off work.

4. After leaving Sellars' office, Claimant began his day delivering stairs. The next time Claimant saw Mr. Sellars was following Claimant's first delivery of July 1, 2013. Claimant reported that he injured himself removing stairs from a truck. Claimant advised that he wanted to see a doctor and was sent to see Nancy Sanders, the office manager. Ms. Sanders completed an Employer's First Report of Injury and Claimant was seen at Concentra Aurora, one of Employers' authorized providers.

5. Claimant was seen by Dr. Draper at Concentra Aurora, an authorized provider, on July 1, 2013. Dr. Draper diagnosed a left-sided lumbrosacral strain with radiculopathy and left upper extremity strain. Claimant was taken off work on July 1, 2013, and returned to work the following day with restrictions of no lifting, pushing or pulling greater than five pounds, no standing or walking greater than 15 minutes, and no bending squatting or kneeling. Claimant was expected to sit 90% of the time. Employer accommodated Claimant's restrictions upon Claimant's return to work on July 2, 2013. Claimant's duties continued to require that he operate a commercial vehicle.

6. At Claimant's next medical appointment, July 16, 2013, Claimant's left upper extremity pain had resolved, but Claimant reported that the commercial driving was causing back pain. Between July 1 and 16, 2013, Claimant never complained to Employer that operating a commercial vehicle caused him pain. Claimant was restricted from operating a commercial vehicle. Claimant relayed his work restrictions to Employer. Since commercial driving was an important part of Claimant's job duties, though Employer could have accommodated the restriction, instead Mr. Sellars permitted Claimant to take the two weeks off that he requested on July 1, 2013.

7. Claimant drove to Durango, Mexico by himself, driving 12 hours per day for two days, both coming and going. Claimant returned to work on August 8, 2013. According to Claimant, driving to Mexico in July did not change his condition. It has always been the same.

8. On August 8, 2013, Claimant was seen by Dr. Draper reporting that his "Symptoms are the same. No new symptoms, improvement or worsening of symptoms." Dr. Draper reported that Claimant was to continue with physical therapy and a home exercise program.

9. The Insurer filed a Notice of Contest on August 30, 2013. Notwithstanding the denial of this claim, Insurer continued to authorize medical care. Claimant continued to receive treatment at Concentra, which included multiple evaluations by Drs. Draper and Miller and other Concentra physicians. In addition, Claimant received medications, physical therapy, and a MRI. Claimant was referred to Dr. Kawasaki, who provided injection therapy and referred Claimant out for chiropractic and acupuncture treatment.

10. On October 7, 2013, Dr. Kawasaki recommended continued strengthening and conditioning exercises. Based on his review of physical therapy notes, he reported that Claimant was functionally able to carry 50 pounds and lift up to 50 pounds with good quality. Dr. Kawasaki recommended increasing Claimant to a medium work duty

category, including 50 pounds maximum lifting, pushing and pulling occasionally, 25 pounds frequently and 10 pounds constantly.

11. On October 17, 2013, Dr. Kawasaki reported that Claimant's EMG/nerve conduction study was negative. He scheduled Claimant for an October 22, 2013, left L4-5 transforaminal ESI, and Claimant did undergo this injection. Dr. Kawasaki reported that he wanted to see Claimant in follow up to this ESI in one to two weeks. Claimant did not follow up and has never returned to see Dr. Kawasaki.

12. Claimant was seen by Dr. Miller on December 19, 2013. He reports that Claimant was still working within his restrictions and tolerating the job well. Claimant reported no change in his pain. Claimant had not followed up with Dr. Kawasaki. Dr. Miller reported, "In fact, he has not been seen for about two months." Claimant unilaterally discontinued all treatment at Concentra and its referrals.

13. Claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment. The testimony offered by Mr. Sellars was more credible and persuasive than the testimony offered by Claimant. It is found that there was a July 1, 2013, argument between Claimant and Mr. Sellars occurring in the early morning hours before Claimant left the office for a delivery. The weight of the credible and persuasive evidence presented at hearing established that Claimant failed to prove by a preponderance of the evidence that a work injury occurred and instead Claimant's report of an injury was due to Claimant's anger with his employer who denied his request for time off on July 1, 2013. Claimant's post-injury actions, including withdrawal from medical care, further persuade the ALJ regarding the legitimacy of this claim. Also, Claimant's ability to sit for long periods of time and drive long distances weighs in favor of finding that Claimant failed to establish a work related low back injury.

CONCLUSIONS OF LAW

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

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

2. 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. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Clam Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009).

4. A compensable injury is one that arises out of and in the course and scope of employment. Section 8-41-301(1)(b), C.R.S. An injury occurs "in the course of" employment where a claimant demonstrates that the injury occurred within the time and place limits of his employment during an activity that has some connection with his work related functions. *See Triad Painting Company v. Blair*, 812 P.2d 638 (Colo. 1991).

5. Claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of or in the course and scope of his employment. It is concluded that Claimant's testimony is unpersuasive and lacks credibility. The testimony offered by Mr. Sellars was more credible and persuasive than the testimony offered by the Claimant. The totality of the evidence compells the conclusion that it is more likely than not that Claimant failed to prove the claim. Factors supporting this conclusion are: Claimant's anger toward the employer on July 1, 2013, because he denied Claimant's request for time off from work; Claimant's post-injury actions, including withdrawal from medical care; and Claimant's ability to sit for long periods of time and drive long distances during his time off from work traveling to Mexico by car.

ORDER

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

1. Claimant's claim for benefits are denied and dismissed.

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

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

DATED: March 12, 2015_

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment.

2. If the Claimant's claim is compensable, whether he proved, by a preponderance of the evidence, that he is entitled to medical benefits for his right shoulder condition.

FINDINGS OF FACT

1. The Claimant was 23 years old when he worked for the Employer.

2. The Claimant suffered an admitted work injury to his left shoulder while throwing a large truck tire from a truck (Claimant's Exhibit 5, p. 175).

3. The Claimant first saw Dr. Ogrodnick on February 27, 2012 for the left shoulder injury. After examining the Claimant, Dr. Ogrodnick assessed the Claimant with a left shoulder strain and referred the Claimant for a left shoulder MRI (Claimants' Exhibit 1, p. 2; Respondents' Exhibit B, p. 28). On March 5, 2012, Dr. Ogrodnick noted that the MRI revealed multiple labral tears (Claimant's Exhibit 1, p. 8; Respondents' Exhibit B, p. 35).

4. When the Claimant saw Dr. Ogrodnick again on March 9, 2012, the Claimant reported that he was having significant left-sided neck pain and that his "modified duty at work involves moving tires with only his right arm and this eventually causes burning on the left side of his neck." Dr. Ogrodnick returned the Claimant to work with continued work restrictions of no use of the left arm, but provided no restrictions with right arm use (Claimant's Exhibit 1, p. 12; Respondents' Exhibit B; p. 37).

5. On March 13, 2012, the Claimant was evaluated by Dr. David Walden, who noted the MRI confirmed "some serious significant pathology including multiple labral tears, including the anterior superior, posterior superior, and inferior labrum" along with "a longitudinal split in the intraarticular portion of the long head of the biceps with some tendinopathy present." Dr. Walden diagnosed a left shoulder complex SLAP lesion with an extending longitudinal tear into the biceps. Dr. Walden did not feel that conservative treatment would be of benefit due to the heavy labor the Claimant performs and recommended an arthroscopic labral repair with possible biceps tenodesis (Claimant's Exhibit 3, pp. 150-151). Dr. Walden performed the left shoulder surgery on April 6, 2012 (Claimant's Exhibit 3, pp. 158-159).

6. The Claimant continued to follow up with Dr. Walden and Dr. Ogrodnick after the left shoulder surgery and the Claimant underwent physical therapy. Although the shoulder improved, the Claimant continued to report left shoulder pain (Claimant's Exhibits 1, 2 and 3; Respondents' Exhibits B and D).

7. On June 14, 2012, the Claimant saw PA-C Vicki Dihle at Dr. Ogrodnick's clinic for follow up of his left shoulder strain. He was also complaining of right shoulder pain that the Claimant reported started when he was at work. Ms. Dihle noted that the Claimant thought it may be associated with overuse, but that the Claimant denied a specific injury. The Claimant reported that he told his boss about the right shoulder pain and when he was seen by Dr. Walden for a follow-up visit, Dr. Walden stated the Claimant needed to follow up with this clinic. Ms. Dihle noted that "the patient was encouraged to talk with his employer about opening a new claim for his right shoulder, although it does not sound work-related to me" (Claimant's Exhibit 1, pp. 38-39; Respondents' Exhibit B, pp. 51-52).

8. When the Claimant saw Dr. Ogrodnick on June 21, 2012, he reported to Dr. Ogrodnick that he thought his right shoulder strain was related to overusing his right arm while he is recovering from a left arm injury. Dr. Ogrodnick noted that the Claimant was not sure when the symptoms started but felt that around June 8, 2012 the activity that irritated his right arm was when he was lifting tires to gage them using only his right arm. The Claimant had not worked for the previous 4-5 days since the Employer wanted the Claimant's right shoulder evaluated before returning to the jobsite, but the rest time from work did not provide the Claimant with any relief from constant pain. After examination, Dr. Ogrodnick noted that "it is uncertain whether this is a work-related injury." However, Dr. Ogrodnick provided a right UE work restriction of no weight above 15 lbs. (Claimant's Exhibit 1, pp. 43-44; Respondents' Exhibit B, pp. 54-55).

9. On June 27, 2012, the Claimant continued to report right shoulder pain starting around June 8, 2012. The Claimant reported that "he is performing light duty, in which he continues handling tires, but he tries to avoid the largest tires." Dr. Ogrodnick noted full right shoulder range of motion and a negative impingement maneuver with full rotator cuff strength. Dr. Ogrodnick recommended therapy for the right shoulder (Claimant's Exhibit 1, p. 50; Respondents' Exhibit B, p. 61). On June 29, 2012, Dr. Ogrodnick noted that the Claimant reported that "he was 'put off work' because the insurance company decided the right shoulder was not work related and he was told to get a release from his PMD"(Claimant's Exhibit 1, p. 54; Respondents' Exhibit B, p. 65).

10. On July 26, 2012, the Claimant was seen at Memorial Health Urgent Care for right shoulder pain that the Claimant reported had been hurting for a month. The office note indicated that the Claimant "states his physical therapist says he is overcompensating due to surgery on left shoulder 3 months ago" (Respondents' Exhibit C, pp. 77-78).

11. On August 8, 2012, the Claimant reported that he still had right shoulder pain but there were no aggravating activities that he was aware of, because he was not

working. With respect to the left shoulder condition, Dr. Ogrodnick opined that the Claimant has reached MMI and is released to return to work with no limitations. Dr. Ogrodnick provided a 16% left upper extremity impairment rating which would convert to a 10% whole person impairment rating (Claimant's Exhibit 1, p. 60; Respondents' Exhibit B, p. 68).

12. On September 28, 2012, the Claimant saw Dr. Ogrodnick for a one-time visit reporting that his left shoulder pain is getting worse since he was put at MMI. The Claimant reported he was not working and at rest had a 7/10 pain with an intermittent left-sided neck pain. Dr. Ogrodnick prescribed Motrin and Vicodin and recommended a follow up with Dr. Walden to consider a subacromial injection (Claimant's Exhibit 1, p. 65; Respondents' Exhibit B, p. 73).

13. The Claimant was evaluated by Dr. Jeffrey Raschbacher on November 14, 2012 for an IME. Dr. Raschbacher noted that the Claimant put his left shoulder pain on the pain diagram as part of the intake questionnaire, but that he did not put the right shoulder pain since he that was not accepted as part of the claim. Dr. Raschbacher noted that he had the Claimant do the pain diagram over to include all symptoms and body parts (Respondents' Exhibit A, p. 19). The Claimant reported to Dr. Raschbacher that his left shoulder feels worse and he has limited motion and after he was put at MMI he has one additional physical therapy visit but then that stopped and he had no injections, repeat surgery or repeat MRIs. As for the right shoulder, the Claimant reported to Dr. Raschbacher that he first noticed the right shoulder symptoms after about 1 ½ days of light duty work when he was pulling tires off a pile and grading them and then rolling or kicking the tires to the correct pile. The Claimant reported his right shoulder pain was actually getting worse (Respondents' Exhibit A, p. 20). After physical examination and a review of the medical records, Dr. Raschbacher opined that "it is not clear whether [the right shoulder pain complaints] are work-related or not." Dr. Raschbacher recommended an MRI of both shoulders before further comment (Respondents' Exhibit A, p. 23).

14. On January 7, 2013, Dr. Raschbacher prepared an Addendum to the 11-14-12 IME report after review of the Claimant's left and right shoulder MRIs performed on December 11, 2012. As for the right shoulder, Dr. Raschbacher opined that "the right shoulder MRI shows a torn labrum. More likely than not this is degenerative in nature and if it needs treatment, should be treated on a nonwork-related basis" (Respondents' Exhibit A, p. 25).

15. On July 31, 2013, the Claimant filed a Worker's Claim for Compensation stating that he suffered a right arm/shoulder injury on March 10, 2012 when he was throwing tires. He stated that he notified his employer of the injury on March 10, 2012 by reporting it to Dave Kenney (Respondents' Exhibit F). An Application for Hearing filed by the Claimant also lists the date of injury as March 10, 2012 (Respondents' Exhibit J).

16. Dr. Raschbacher performed a second IME on September 23, 2014. The Claimant reported to Dr. Raschbacher that his left shoulder feels worse now than it did

before he had his left shoulder surgery. Nevertheless, the Claimant still wanted to pursue right shoulder surgery (Respondents' Exhibit A, pp. 1-2). The Claimant advised Dr. Raschbacher that after he returned to work following his left shoulder surgery, he did different types of work, he might pick up trash for 30 minutes and he used the wheel crusher for an hour. Then the owner of the company came by and said that he wanted the Claimant to grade tires. The Claimant reported that his occurred his first day back to work after the left tire surgery. The Claimant stated that this was the same work he did before the surgery with the only difference being that they did not have the Claimant load the trucks. He would roll tires to coworkers who would then load them. The Claimant told Dr. Raschbacher that he did this for about 2 months and then he was fired for insubordination although the Claimant stated that he was not insubordinate (Respondents' Exhibit A, p. 4). For this IME report, Dr. Raschbacher reviewed medical records dating back to 1996, including the treatment records of Dr. Walden from 03/13/12 – 08/02/12 and the treatment records of Dr. Ogrodnick from 03/05/12 – 09/28/12, as well as physical therapy notes, and the December 11, 2012 left and right shoulder MRIs (Respondents' Exhibit A, pp. 6-11). Ultimately, Dr. Raschbacher concludes that "it is not clear when exactly [the Claimant] worked in the postoperative period and what work he was doing exactly." Dr. Raschbacher further opines that if the Claimant was, in fact, throwing tires with his right upper extremity, then he likely injured the right shoulder labrum when he was doing this activity. However, if the Claimant was not throwing tires with the right upper extremity, then Dr. Raschbacher found it medically unlikely that any work-related activity would have caused the right shoulder labral tears. Dr. Raschbacher also opined that in an individual as young as the Claimant who has bilateral labral disease and degeneration and tears at the shoulders, "it is fairly clear that he has a disposition to this problem. No specific trauma would be necessary to produce a labral tear as these can occur in the setting of a predisposition without acute trauma." Yet, Dr. Raschbacher still opines that the causation determination for the Claimant's right shoulder condition rests on the type of activity the Claimant was performing with his right upper extremity.

17. Dr. Ogrodnick testified by deposition on October 8, 2014 as an expert in occupational medicine. Dr. Ogrodnick was and authorized treating physician ("ATP") for the Claimant. He testified that he initially saw the Claimant on February 27, 2012 (Depo. Tr. Dr. Ogrodnick, p. 5). Dr. Ogrodnick testified that at the initial visit the Claimant's chief complaint was left shoulder pain. The history that the Claimant provided was that the injury occurred when he was throwing tires into a pile and he felt a painful pop in the left shoulder. A physical examination revealed an impingement of the left shoulder and Dr. Ogrodnick requested a left shoulder MRI, prescribed Motrin and placed work restrictions on the Claimant of no use of the left arm (Depo. Tr. Dr. Ogrodnick, pp. 6-7). Dr. Ogrodnick testified that when he next saw the Claimant on March 5, 2012, the Claimant had the same 7/10 level of pain and, in reviewing the MRI images, Dr. Ogrodnick observed multiple labral tears in his shoulder. Based on this Dr. Ogrodnick referred the Claimant to Dr. David Walden, an orthopedic surgeon and he continued the left arm restrictions. (Depo. Tr. Dr. Ogrodnick, pp. 7-8). Dr. Ogrodnick testified that the Claimant had left shoulder surgery and continued to follow up with Dr. Ogrodnick post-surgery. On June 14, 2012, the Claimant started to complain about problems with his right

shoulder (Depo. Tr. Dr. Ogrodnick, p. 8). The Claimant told Dr. Ogrodnick's PA that he thought the right shoulder pain started at work but was not sure of any specific injury. The PA opined that the right shoulder pain was associated with overuse. When the Claimant saw the PA again on June 21, 2012, the Claimant stated that he was overusing his right arm during his recovery from the left-sided surgery. The Claimant told the PA that he thought the right-sided symptoms started around June 8, 2012 when he was lifting tires (Depo. Tr. Dr. Ogrodnick, pp. 9-10). A physical examination on that day showed full active and passive range of motion of the right upper extremity without tenderness and normal grip strength, reflexes and circulation. The PA sent the Claimant to therapy for the right shoulder although at this time it was uncertain that this was a work-related injury (Depo. Tr. Dr. Ogrodnick, p. 11). Dr. Ogrodnick testified that he next saw the Claimant on June 27, 2012 and the Claimant reported that the right shoulder felt fine at rest, but it was painful during therapy exercises. The Claimant reported difficulty sleeping due to pain in both shoulders but he still had full range of motion of the right shoulder (Depo. Tr. Dr. Ogrodnick, pp. 11-12). Dr. Ogrodnick continued to see the Claimant for his left shoulder until he was placed at maximum medical improvement on August 8, 2012 (Depo. Tr. Dr. Ogrodnick, pp. 15-16). Dr. Ogrodnick testified that throwing heavy tires was a causative factor in the Claimant's left shoulder injury (Depo. Tr. Dr. Ogrodnick, p. 17). Dr. Ogrodnick further testified that if the Claimant was throwing tires with his right arm, then he believed that the cause of the Claimant's right shoulder issues would be the work-related activities of throwing those tires (Depo. Tr. Dr. Ogrodnick, p. 18). On cross-examination, Dr. Ogrodnick agreed that in determining if there is a causal link between the right shoulder symptoms and the job duties that it would be important to have specific information about the modified job duties the Claimant was performing just prior to June 14, 2012 (Depo. Tr. Dr. Ogrodnick, p. 21). Dr. Ogrodnick conceded that he did not have information about the weight, size and circumference of the tires he was working with during modified duties. Nor did Dr. Ogrodnick have specific information about the motions used or how the Claimant was handling the tires, nor did he have information about how frequently the Claimant was performing tasks with his right arm and shoulder (Depo. Tr. Dr. Ogrodnick, pp. 21-22). Dr. Ogrodnick also confirmed that neither he, nor anyone from his office, discussed with the Claimant what activities he was doing outside of work (Depo. Tr. Dr. Ogrodnick, p. 25). Dr. Ogrodnick later testified that he believes that this information is required in order to make a causation determination with respect to the Claimant's right shoulder condition (Depo. Tr. Dr. Ogrodnick, p. 32).Dr. Ogrodnick also testified that initially he had concluded that the Claimant's right shoulder symptoms were not work-related (Depo. Tr. Dr. Ogrodnick, pp. 25-26). Dr. Ogrodnick opined that some of the pathology on the Claimant's December 11, 2012 right shoulder MRI scan was degenerative, however the SLAP tear that was present was more likely an acute situation as opposed to a chronic degenerative condition. Dr. Ogrodnick further testified that there are many potential causes for a SLAP tear (Depo. Tr. Dr. Ogrodnick, pp. 27-28). On redirect examination, Dr. Ogrodnick was asked if the Claimant was lifting, moving and rolling tires that weighed more than 15 pounds repetitively, it is possible that he would have injured his right shoulder and this could lead to labral tears and a SLAP tear (Depo. Tr. Dr. Ogrodnick, pp. 33-37). Dr. Ogrodnick further testified that it is uncommon for a man younger than age 35 to have a degenerative labrum to the extent where it requires

surgery (Depo. Tr. Dr. Ogrodnick, p. 37). Dr. Ogrodnick later testified that the causation determination really hinged on whether or not the Claimant was throwing tires on modified duty and if he was it was more likely work-related, but that if he did not throw tires on modified duty, it was more likely not work-related (Depo. Tr. Dr. Ogrodnick, p. 42).

18. The Claimant testified at the hearing on November 5, 2014. He testified that he believes that he injured his right shoulder around May or June of 2012. The Claimant testified that he was grading tires for the employer. He testified that this task involved picking a tire up to about Claimant's chest height and spinning it around to examine it. The Claimant testified that then he would push on the sidewalls to check for wear and he would push with his right arm. Then after he determined which pile was correct for the tire, he would use a part throwing, part rolling motion down his body and when the tire went by his foot, he would kick it into one of the piles. On redirect testimony, the Claimant further clarified that about 30-40% of the time the tire does not make it to the right pile and you have to go over and pick up the tire and throw it up on the pile which can be up to 15 feet high. The Claimant testified that he had previously injured his left shoulder back in January of 2012 working in the Employer's other yard throwing truck tires high on a pile and he felt a pop in his shoulder. After treatment and surgery on that left shoulder, the Claimant was not to pick up tires with his left arm at all. He testified that he went right back to work after the initial injury, and although it was called modified duty, the Claimant testified that, other than 1 day of picking up trash, it was the same work grading tires as he did before. Then he was off work for a while after surgery. When he returned to work after surgery, on the first day, he was given a job using a machine to crush rusted rims out of tires and then to toss those rims into a waste container. However, the Claimant testified that owner of his Employer said he didn't want the Claimant doing that work and that he needed to be grading tires, so he went right back to that. The Claimant testified that he did not recall ever telling Dr. Ogrodnick that he was working a super-light duty job because his job never actually changed.

19. In May 2012, the Claimant testified that he worked 60-70 hours that month which was about ½ of his normal hours and in June 2012, he testified he worked about 60-70 hours as well. The Claimant testified that he did the same work until his employment was terminated for insubordination, which he said they claimed when he was just joking around like everyone used to do. On cross-examination, the Claimant disputed what Dave Kearney stated was the reason for his termination. When asked if he compared working at modified duty was like paid slavery, the Claimant disputed this. When asked if he was told to stop complaining and he responded, "you can't stop me from complaining," the Claimant disputed this and also testified that he never challenged Mr. Kearney to fire him.

20. After his employment was terminated, the Claimant worked at Premier, a construction clean up company and he swept for them for about 2-3 weeks in December 2012. Then, the Claimant testified that he worked for a construction company called Structures as a laborer and assistant to the carpenters starting in November 2013 for

about 2-3 months. Then, the Claimant testified that he worked as a packer for a moving company starting in July 2014 for about 2 weeks but he couldn't pick things up and so he had to stop working there.

21. When questioned about why he did not report a right shoulder injury sooner, the Claimant testified that he did tell his supervisor and he was waiting for his supervisor to tell him that it was okay to see a doctor since he did not have private insurance and could not afford to see a doctor on his own.

22. The Claimant testified that his current symptoms are an inability to do repetitive work or lift his arm above his head, a burning, aching, stabbing pain, inability to sleep, and when he moves his arm in certain motions, it pops.

23. The Claimant testified that in November 2012, his symptoms affected his activities outside of work. The Claimant has 5 children. In November 2012, his youngest was 6 months and his oldest was 5 years old. He testified that was frustrated because he could not do things with his kids and he had trouble picking them up and it got worse. The Claimant also stopped playing basketball and was frustrated because of this.

24. Mr. Benjamin Estes testified at the hearing. He has worked for the Employer as a tire grader on and off for 40 years. He worked with the Claimant and was aware of the Claimant's left shoulder injury. He testified that he also recalled the Claimant returned to work after he had left shoulder surgery. After he returned to work, Mr. Estes testified that the Claimant had work restrictions and worked modified duty, picking up trash mainly. Mr. Estes testified that the Claimant also worked at sorting and inspecting tires. Mr. Estes testified that the Claimant rolled tires around on the ground and inspected them and then he would roll the tire to a stacker. Mr. Estes testified that if Claimant did pick the tire up, he would not hold it at a 90 degree angle like the Claimant testified, but rather at more of a 45 degree angle since it is too hard to lift it the way the Claimant described. Mr. Estes testified that that is how everyone did it and the Claimant did not perform the work differently. Mr. Estes stated that after returning from surgery, sometimes the Claimant rolled the tires and sometimes he kicked them, but he doesn't recall seeing the Claimant drop-kick a tire in the way that the Claimant described.

25. Mr. David Kenney testified at the hearing. He has been a manager at Employer for 8 years and supervises 2 yards. He also works with the other employees. He is familiar with the Claimant from when the Claimant worked for the Employer. He testified that he was aware of the Claimant's January 2012 left shoulder injury and was aware of the Claimant's work restrictions. After his left shoulder surgery, the Claimant returned to a modified duty job with his left arm immobilized in a sling. Mr. Kenney testified that the Claimant never complained to him that the modified duty was too hard. Mr. Kenney testified that the Claimant mostly picked up trash after his return to work. He only worked for a few hours a day after his return from surgery. It was not until the last day that he worked in June that the Claimant returned to sorting tires. Mr. Kenney testified that the Claimant told him that he hurt his right shoulder towards the end of his employment with Employer. Mr. Kenney testified that the Claimant went to the doctor a

couple of days later. Mr. Kenney does not recall the exact date that the Claimant's employment was terminated because he testified that it was a long time ago.

26. Dr. Jeffrey Raschbacher testified at the hearing as an expert in the areas of occupational medicine, family medicine and Level II Accreditation matters. Dr. Raschbacher saw the Claimant twice for evaluations in this case. He generally testified in accordance with his written reports. At the first evaluation, the Claimant gave a history and explained his symptoms and filled out a questionnaire, possibly with the help of his wife. Dr. Raschbacher testified that there was an issue with the date of the injury because in the paperwork provided to him, it says 3/10/12 for the onset which is different from the Claimant's testimony at hearing. Dr. Raschbacher testified that the Claimant told him he was throwing tires because when a pile got too high, the workers couldn't just roll the tires to the pile and they would have to throw them. Based on the questionnaire and his interview with the Claimant, Dr. Raschbacher testified that he was not aware of any acute event leading to a right shoulder injury. Referring to his prior IME report, Dr. Raschbacher testified in accordance that he opined that the Claimant's labrum is predisposed to injury and tearing and because of that, it is important to understand what the Claimant was doing at work and outside of work. Dr. Raschbacher opined that if the Claimant was actually "throwing" tires, then his right shoulder condition is relate to work activities, but if he was not "throwing" tires, then his right shoulder condition is not work related. By "throwing" tires, Dr. Raschbacher testified that he is specifically referring to the action of "ballistically flinging tires forward" and by "ballistically," Dr. Raschbacher meant a rapid acceleration/deceleration movement, not a steady motion. Dr. Raschbacher testified that he did not find the movement of holding a tire in front of his body with his arm flexed and then "drop kicking" the tire, to be a ballistic motion that would be an unfavorable mechanical position for the Claimant's right shoulder. So, Dr. Raschbacher opined that if that was the motion the Claimant was making, then this is not a mechanism of injury likely to produce a labrum tear. Referring to the Claimant's 12/11/12 MRI, Dr. Raschbacher testified that the Claimant's degenerative changes were progressing and his diagnosis is osteoarthritis and labral tear. Dr. Raschbacher then testified that the labral tear pathology could be insidious and the result of a degenerative condition without a discreet injury having occurred at work. On cross-examination, Dr. Raschbacher conceded that it does not matter how many hours the Claimant was working, but rather the issue came down to the activity the Claimant was performing, whether he was throwing tires or not. Referencing his November 14, 2012 IME report, Dr. Raschbacher testified that even back on that date, there were conflicting reports of right shoulder symptoms in late April. Dr. Raschbacher recalled that the Claimant didn't want to list right shoulder issues because at that point he understood that this was not an accepted part of his claim. However, because he was complaining of right shoulder pain, Dr. Raschbacher had the Claimant go back to his pain chart and add in the right shoulder pain complaints. Dr. Raschbacher also testified that he had trouble understanding why the Claimant wanted the right shoulder surgery since the left shoulder surgery didn't turn out that well.

27. The medical records, employment records and testimony create some controversy as to when the Claimant's alleged work injury occurred, anywhere from

March through June of 2012. While there was some testimony and documentation that characterized the Claimant's injury as an "overuse" injury, the Claimant did not allege that he suffered an occupational disease with respect to his right upper extremity, but rather a work injury.

28. While there was also conflicting testimony as to the nature of the Claimant's job duties when he returned to work following his left shoulder injury, the weight of the evidence does not support that the Claimant was throwing tires during this time period. In considering the testimony of the Claimant, Mr. Estes and Mr. Kenney, the ALJ finds that the Claimant only briefly performed jobs such as picking up trash and crushing tire rims. The rest of the work that the Claimant performed was related to grading tires. However, it is found that the while performing the job of grading tires after returning to work after his left shoulder injury, the Claimant was not a loader anymore and was not required to throw tires onto a pile or into a truck. Rather, the weight of the evidence, including some of the Claimant's own testimony and statements in medical reports, is that the Claimant was rolling or dropkicking tires into piles. Other co-workers would load the tires after the Claimant graded the tire or, if needed, after the Claimant directed a tire to the correct pile of tires for that condition of tire, a coworker would get it to the top of the tire pile. For his part, the Claimant would pick up a tire, spin it, check the sidewalls and then roll or dropkick the tire in a particular direction. He would not throw tires as the term "throw" was described by Dr. Raschbacher.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

In resolving whether the Claimant has met his burden of proof to establish that he suffered a compensable injury, the ALJ must examine the totality of the evidence and consider credibility. An initial issue relates to when the alleged injury occurred. Dr.

Raschbacher noted in his IME reports and testified that due to reporting inconsistencies, he attempted to question the Claimant about the timing of an injury to his right shoulder, but the Claimant was unable to provide him with specific information. In a number of medical reports and during testimony at the hearing, the Claimant has stated that his right shoulder symptoms started in May to June of 2012, and on more than one occasion, the Claimant's medical records list a date of June 8, 2012. This is not in accord with his filing of his claim and his Application for Hearing which lists his injury date as March 10, 2012.

In addition to issues related to the timing of the reporting of the alleged right shoulder work injury, there are some inconsistencies in the Claimant's statements to medical providers, supervisors and in his testimony, and as compared to the testimony of coworkers, regarding the Claimant's actual work duties in the time period when he returned from his left shoulder surgery. However, even the Claimant testified and has previously represented that, unlike his left shoulder injury, he does not relate his right shoulder injuries to any one specific event. Rather, he testified and stated in medical records that his right shoulder pain symptoms seem to have come on more gradually.

On November 14, 2012, the Claimant reported to Dr. Raschbacher that he first noticed the right shoulder symptoms after about 1 ½ days of light duty work when he was pulling tires off a pile and grading them and then rolling or kicking the tires to the correct pile. On September 23, 2014, the Claimant reported essentially the same to Dr. Raschbacher.

On June 27, 2012, the Claimant reported to Dr. Ogrodnick that "he is performing light duty, in which he continues handling tires, but he tries to avoid the largest tires." Then, on July 26, 2012, the Claimant was seen at Memorial Health Urgent Care for right shoulder pain that the Claimant reported had been hurting for a month. The office note indicated that the Claimant "states his physical therapist says he is overcompensating due to surgery on left shoulder 3 months ago."

The Claimant testified at the hearing on November 5, 2014 that he was grading tires for the employer. He testified that this task involved picking a tire up to about Claimant's chest height and spinning it around to examine it. The Claimant testified that then he would push on the sidewalls to check for wear and he would push with his right arm. Then after he determined which pile was correct for the tire, he would use a part throwing, part rolling motion down his body and when the tire went by his foot, he would kick it into one of the piles.

A coworker, Mr. Estes, testified that the Claimant had work restrictions and worked modified duty after returning from left shoulder surgery, picking up trash mainly. Mr. Estes testified that the Claimant also worked at sorting and inspecting tires. Mr. Estes testified that the Claimant rolled tires around on the ground and inspected them and then he would roll the tire to a stacker. Mr. Estes testified that if Claimant did pick the tire up, he would not hold it at a 90 degree angle like the Claimant testified, but rather at more of a 45 degree angle since it is too hard to lift it the way the Claimant

described. Mr. Estes testified that that is how everyone did it and the Claimant did not perform the work differently. Mr. Estes stated that after returning from surgery, sometimes the Claimant rolled the tires and sometimes he kicked them, but he doesn't recall seeing the Claimant drop-kick a tire in the way that the Claimant described.

Dr. Ogrodnick initially during treatment for the right shoulder questioned whether the Claimant's right shoulder condition was work related. Then, Dr. Ogrodnick recommended right shoulder treatment basing this, in part, on an understanding that the Claimant was throwing tires with his right arm. Dr. Ogrodnick further testified that if the Claimant was throwing tires with his right arm, then he believed that the cause of the Claimant's right shoulder issues would be the work-related activities of throwing those tires. However, on cross-examination during deposition testimony, Dr. Ogrodnick agreed that in determining if there is a causal link between the right shoulder symptoms and the job duties that it would be important to have specific information about the modified job duties the Claimant was performing just prior to June 14, 2012. Dr. Ogrodnick conceded that he did not have information about the weight, size and circumference of the tires he was working with during modified duties. Nor did Dr. Ogrodnick have specific information about the motions used or how the Claimant was handling the tires, nor did he have information about how frequently the Claimant was performing tasks with his right arm and shoulder. Dr. Ogrodnick also confirmed that neither he, nor anyone from his office, discussed with the Claimant what activities he was doing outside of work. Dr. Ogrodnick later testified that he believes that this information is required in order to make a causation determination with respect to the Claimant's right shoulder condition. Ultimately, Dr. Ogrodnick opined that the causation determination really hinged on whether or not the Claimant was throwing tires on modified duty and, if he was, it was more likely work-related, but that if he did not throw tires on modified duty, it was more likely not work-related.

Dr. Raschbacher agreed that if the Claimant was actually "throwing" tires, then his right shoulder condition is relate to work activities, but if he was not "throwing" tires, then his right shoulder condition is not work related. By "throwing" tires, Dr. Raschbacher testified that he is specifically referring to the action of "ballistically flinging tires forward" and by "ballistically," Dr. Raschbacher meant a rapid acceleration/deceleration movement, not a steady motion. Dr. Raschbacher testified that he did not find the movement of holding a tire in front of his body with his arm flexed and then "drop kicking" the tire, to be a ballistic motion that would be an unfavorable mechanical position for the Claimant's right shoulder. So, Dr. Raschbacher opined that if that was the motion the Claimant was making, then this is not a mechanism of injury likely to produce a labrum tear. Referring to the Claimant's 12/11/12 MRI, Dr. Raschbacher testified that the Claimant's degenerative changes were progressing and his diagnosis is osteoarthritis and labral tear. Dr. Raschbacher then testified that the labral tear pathology could be insidious and the result of a degenerative condition without a discreet injury having occurred at work.

In considering the testimony of the Claimant, Mr. Estes and statements in the medical records, it was found that while performing the job of grading tires after

returning to work after his left shoulder injury, the Claimant was not a loader anymore and was not required to throw tires onto a pile or into a truck. Rather, the weight of the evidence is that the Claimant was rolling or drop-kicking tires into piles. Other co-workers would load the tires after the Claimant graded the tire or, if needed, after the Claimant directed a tire to the correct pile of tires for that condition of tire, a coworker would get it to the top of the tire pile. For his part, the Claimant would pick up a tire, spin it, check the sidewalls and then roll or dropkick the tire in a particular direction. He would not throw tires as the term "throw" was described by Dr. Raschbacher. Relying on the testimony of both Dr. Ogrodnick and Dr. Raschbacher, since the Claimant was not engaged in a throwing mechanism, his right shoulder condition is not related to his work activities. As such, the Claimant's claims for compensation for WC 4-928-129-01 for his right shoulder condition is denied and dismissed.

Remaining Issues

The Claimant failed to prove that his modified work duties during the period of time after he returned from left shoulder surgery resulted in a compensable right shoulder injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issue regarding medical benefits is moot. In weighing the conflicting medical opinions, it was found that the Claimant failed to prove that his right shoulder condition was caused, permanently aggravated, or accelerated by either or both his return to work after his left shoulder surgery and/or overuse of his right upper extremity at his work duties. Therefore, the Claimant has not proven that his left shoulder condition is related to a work injury and he has not established that medical benefits, including right shoulder surgery, are reasonably necessary to cure and relieve the effects of a work injury.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The Claimant's current right shoulder condition was not caused, aggravated or accelerated by a work injury while performing his modified job duties after returning to work from a left shoulder surgery.

2. The Claimant has not proven that he is entitled to medical benefits reasonably necessary to cure and relieve the Claimant from the effects of a work injury to his right shoulder, including, but not limited to, right shoulder surgery.

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

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

DATED: March 4, 2015

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

STIPULATIONS

1. If the Claimant timely filed a claim for workers' compensation in Claim No. WC 4-951-736, the parties agree that the Claimant sustained a compensable injury.

2. If the surgery performed by Dr. Stephen Shogan on April 16, 2014 is found authorized, reasonable, necessary and related, then the parties agree that the Claimant is entitled to receive temporary total disability (TTD) benefits for WC 4-928-690 from April 16, 2014 ongoing based upon an average weekly wage (AWW) of $900.00

ISSUES

Based on the foregoing stipulations, the following issues remained for consideration at hearing:

1. Whether the Claimant proved that the surgery and medical treatment provided to the Claimant by Dr. Stephen Shogan was authorized, causally related and reasonably necessary to cure and relieve the effects of the October 26, 2013 and/or July 25, 2013 industrial injury.

2. Whether the Respondent has proven that the Claimant's claim for benefits in Claim No. WC 4-951-736 is barred by the applicable statute of limitations.

FINDINGS OF FACT

1. The Claimant is the head custodian at a public school operated by her Employer. She was initially hired on January 10, 2004 (or possibly January 10, 2005). She was employed and performing her job duties on October 26, 2011 and on July 25, 2013 (Respondent's Exhibits A and CC). The Claimant testified at the hearing on August 27, 2014 that she has had 3 work injuries in her 10-year work history with the Employer. She suffered a wrist injury in 2009 breaking ice outside of the school where she works. On cross-examination, the Claimant testified that for the 2009 injury, she did not do anything except for seeing a doctor until she felt better. The Claimant subsequently had two additional injuries which are the subject of the consolidated claims in this case.

October 26, 2011 Injury

2. The Claimant testified that she had a second work injury on October 26, 2011 when she had to put away a canopy the day after the night crew didn't clean it after a football game. The canopy was heavy and covered with snow so the Claimant was using a push broom to get the snow off when the canopy fell and hit the Claimant in the back of the head. The Claimant testified that she felt a big headache and ringing in her ears. The Claimant testified that she went into the office and filled out forms with the secretary and the assistant principal, Mr. Roper. The Claimant's testimony regarding the mechanism of injury for the October 26, 2011 injury is consistent with the medical records and was credible and is found as fact.

3. Dr. Bruce Cazden initially saw the Claimant and examined her on October 28, 2011. He assessed the Claimant with a C/T strain and a mild skull contusion (Respondent's Exhibit E). As of November 28, 2011, Dr. Cazden noted that the Claimant was feeling better with respect to her cervicothoracic strain and that she had no muscle spasm. He discharged her from care at MMI with 0% impairment (Respondent's Exhibit G).

4. On December 28, 2011, the Claimant returned to Arbor Occupational Medicine and saw Dr. Sander Orent due to ongoing pain in the thoracolumbar area. Dr. Orent noted that the Claimant was getting better but aggravated her back pain because of an ice chopping incident. Dr. Orent contacted the Claimant's Employer to opine that it is unrealistic to expect the Claimant to shovel the entire high school grounds herself with a snow shovel. He recommended the Claimant have assistance with shoveling in the short term and possibly a snow blower. The Claimant was referred for additional physical therapy (Respondent's Exhibit I).

5. On January 9, 2012, the Claimant saw Dr. Cazden for follow up on the cervical and thoracic strain. The Claimant also reported the onset of some right upper extremity pain over the last few days. Dr. Cazden recommended continued chiropractic and physical therapy and if the right upper extremity pain continued, evaluation for a facet joint injection (Respondent's Exhibit M).

6. On January 23, 2012, Dr. Cazden noted the Claimant was improving and that the chiropractic was helping and the Claimant "has also gotten quite a bit of benefit from Physical Therapy." Dr. Cazden noted some mild neck and mid-back stiffness, but opined that otherwise she was improving and she was nearing MMI (Respondent's Exhibit S).

7. On February 6, 2012, Dr. Cazden saw the Claimant for follow-up on her ongoing neck pain. He noted that she has tried conventional treatments including physical therapy, needling and chiropractic, but continues to have neck pain. A review of the Claimant's x-ray showed underlying arthropathy at the facet joints from C2-C3 to C6-C7 with the worst at C3-4 and C4-5. Dr. Cazden recommended a one-time trial of facet injections with Dr. Sorenson. The Claimant remained on modified duty requiring assistance with snow removal (Respondent's Exhibit V).

8. On February 13, 2012, the Claimant saw Dr. Lief Sorenson for right-sided neck pain into her shoulder. The Claimant reported a pain that was "tight and aching" with some "needle-like pain" between her shoulder blades and back. The Claimant reported that chiropractic helped her to some degree but physical therapy produced very little results without long-term relief. Dr. Sorenson diagnosed the Claimant with "chronic pain syndrome, cervical spondylosis and myalgia myositis." He noted that he spent extensive time reviewing the Claimant's pain history and discussing options for treatment modalities. He scheduled her for an injection on that visit with follow-up to occur with Dr. Cazden. Dr. Sorenson also noted that the Claimant was a candidate for radiofrequency ablation if the injections were helpful diagnostically and possibly a candidate for diagnostic radial branch blocks followed by radiofrequency ablation. Dr. Sorenson also recommended continuation of the Claimant's ongoing conservative modalities. Dr. Sorenson performed a right-sided cervical C3-4 and C4-5 facet injection and noted that the Claimant's post-procedure neurologic exam was unchanged from pre-procedure (Respondent's Exhibit X).

9. On February 17, 2013 Dr. Cazden noted that the Claimant reported partial relief of her neck pain and the radiculopathy was mildly improved. However, the pain was still present and so Dr. Cazden recommended an MRI and continued observation over the next two weeks for improvement with the injections (Respondent's Exhibit Y).

10. The Claimant saw Dr. Sorensen again on March 21, 2012 for right-sided cervical C4-5 and C5-6 facet injections. No complications were noted and the Claimant's post-procedure neurologic exam was unchanged from pre-procedure (Respondent's Exhibit Z).

11. On March 23, 2012, Dr. Cazden responded to questions regarding the Claimant's status and noted she was not at MMI but she was making progress, recently underwent follow-up facet injections and Dr. Cazden opined that she was approaching MMI. He did expect that there may be "some permanent residuals from her injury, although they are not severe." MMI was anticipated within the next six weeks (Respondent's Exhibit AA).

12. On April 9, 2012, Dr. Cazden placed the Claimant at MMI for her cervical strain and noted improved facet arthropathy. She was returned to full duty on April 9, 2012 and Dr. Cazden found no permanent impairment. He recommended one doctor visit as maintenance care as needed over the next 4 months (Claimant's Exhibit 4; Respondent's Exhibit BB).

13. The Claimant testified that she was sent to Arbor Occupational Medicine and saw Dr. Cazden for treatment for the October 2011 injury. The Claimant testified that Dr. Cazden sent her to physical therapy but every time she had physical therapy the pain got worse. The Claimant testified that Dr. Cazden sent her to Dr. Sorenson for injections and it helped a little bit. Then, that was it for treatment. The Claimant testified that she spoke to Dr. Cazden and wanted more treatment because she felt she was still in pain and that Dr. Cazden was not treating her right. She also testified that she felt

that her case for the October 26, 2011 injury was still open and if the pain was worse, she could go back anytime. She testified that she didn't receive anything stating the case was closed. She testified that she just kept working and got used to being in pain. On cross-examination, the Claimant testified that she did not file a claim for worker's compensation because she thought the Employer would file this. For the 2011 injury, the Claimant testified on cross-examination that if she had to leave work for doctor or physical therapy appointments, she would just tell the secretary when she left and when she returned and then the Claimant would stay late to make up the time so she did not miss any work. The Claimant testified that in 2012 she still had moderate neck pain, not all the time, but with heavy lifting. The Claimant testified that after her medical treatment stopped in 2012, she had no work restrictions after that. The Claimant's testimony regarding her treatment for the October 2011 injury and her understanding of the status of this claim was credible and is found as fact.

14. The Claimant completed a Worker's Claim for Compensation for the October 26, 2011 work injury on May 23, 2014 alleging a cervical strain injury due to the canopy tent and snow falling on her head (Respondent's Exhibit A).

15. On June 10, 2014, Respondent filed a Notice of Contest for the October 26, 2011 claim on the grounds that the claim was not filed within the applicable statute of limitations (Respondent's Exhibit B).

16. The Claimant filed an Application for Hearing on June 27, 2014 for the October 26, 2011 injury (Respondent's Exhibit C). Respondent filed its Response to Application for Hearing on July 7, 2014 (Respondent's Exhibit D).

July 25, 2013 Injury

17. The Claimant testified that on July 25, 2013, she was stripping wax in the main hallway with three others and the floor was slippery. The Claimant was holding the "doodlebug" which she described as a pad on a long stick, while another person was using the stripper machine. The Claimant tried to keep from falling but the stick broke and she fell and her head hit the floor. She testified that her hair was wet with chemicals from the wax stripping process. While the Claimant went to take a shower to clean off the stripping chemicals, the secretary got and filled out the forms. The Claimant's testimony regarding the mechanism of injury for the July 25, 2013 accident was credible and is found as fact.

18. The Claimant handwrote an Employee Report of Injury/Incident on July 25, 2013 that was substantially consistent with her testimony regarding the mechanism of injury. The Claimant also noted the names of the three co-workers who witnessed the incident (Claimant's Exhibit 2). On July 30, 2013, the office personnel at the school completed the Supervisor's Accident/Incident Investigation Report also noting the Claimant slipped and fell while stripping the floors of wax when she slipped on the stripping solution. The report notes the Claimant "fell on her back and arm was twisted back" (Claimant's Exhibit 3).

19. An Employer's First Report of Injury was completed on July 31, 2013 that states that the Claimant reported an injury occurring on 07/25/2013 and that the injury occurred when the Claimant slipped on a wet floor and fell. The report lists a witness and notes that the Claimant treated with Arbor Occupational (Respondent's Exhibit CC).

20. The Claimant testified that she asked that she not be required to treat with Dr. Cazden, so she was sent to Dr. Kistler. Then, he retired, so the Claimant started treating with Dr. Koval. The Claimant testified that Dr. Koval sent the Claimant to physical therapy and 1 session of chiropractic. She felt that her condition kept getting worse and her arm became numb. The Claimant testified that after the July 25, 2013 injury, her pain got much worse and headaches started which went down her neck into the arm. She testified that she became depressed and really sick.

21. On July 31, 2013, the Claimant was initially evaluated by Dr. David Kistler at Arbor Occupational Medicine for a chief complaint of neck and right shoulder injury occurring on July 25, 2013. The Claimant reported slipping on a floor that was wet with floor stripper and she fell on her right shoulder and back. The Claimant reported an initial numbness and tingling that had since abated. She did not recall losing consciousness but she did have to be helped up. The Claimant did not recall hitting her head but she reported headaches which seem to originate from her neck. After physical examination, Dr. Kistler assessed the Claimant with "cervical strain, which is a flare of pre-existing due to this injury" and "right shoulder strain." The Claimant was provided with lifting restrictions of no more that 5 lbs. with the right arm and avoiding overhead. He ordered x-rays and indicated that if the shoulder wasn't improving consideration of an MRI (Claimant's Exhibit 5; Respondent's Exhibit II).

22. On July 31, 2013, the Claimant had x-rays of her cervical spine. Dr. Nicholas Wickersham interpreted the images and reported findings. He noted "minimal variation in positioning of C5 on C6 with flexion, suspicious for instability" and "mild bilateral neural foraminal stenosis and multilevel degenerative change" (Claimant's Exhibit 6).

23. On August 21, 2013, the Claimant saw Dr. Kistler reporting a "50% overall subjective improvement" with respect to her cervical and right shoulder sprains. She reported that physical therapy and dry needling was helpful but was not sure about traction. The Claimant reported that she has been asked to do things outside of her restrictions such as move desks. At this point the Claimant was showing improved range of motion in physical therapy with limitations still due to pain and she had 2 facet injections on the right C4-5 and right C5-6 which were noted to be "quite helpful." Dr. Kistler referred the Claimant back to Dr. Sorenson for repeat facet injections (Respondent's Exhibit MM).

24. On September 9, 2013, the Claimant reported that she saw Dr. Bryan Wernick on 08-28-2013 and then on 09-06-13, she had repeat injections with some improvement. Dr. Kistler noted moderate tenderness around C4-C5 on the right

paraspinal with tightness with her cervical range of motion but full range of motion of her right shoulder (Respondent's
Exhibit SS).

25. On September 23, 2013, the Claimant saw Dr. Kistler again reporting continued improvement on her cervical and right shoulder strains, perhaps a 60% overall subjective improvement. Dr. Kistler noted full range of motion of the cervical spine with some tenderness in the bilateral paraspinals in the lower cervical area (Respondents Exhibit VV).

26. On October 7, 2013, the Claimant saw Richard Shouse, PA-C at Arbor Occupational Medicine. Mr. Shouse noted that the Claimant had a problem with her right shoulder and neck three years ago, but it had gotten "somewhat better" until her 07-25-13 slip and fall. On examination, Mr. Shouse noted that the Claimant was tender primarily at the paraspinal region and in the upper thoracic back particularly along the right scapular region. The Claimant's physical therapy was continued and PA-C Shouse noted that since the Claimant was doing well, her physical therapy should get a bit more aggressive to help resolve her symptoms and get case closure (Respondent's Exhibit XX).

27. On October 23, 2013, the Claimant returned to Arbor Occupational Medicine and saw Dr. Alisa Koval. She noted that the Claimant had a pre-existing neck condition that was aggravated by a slip and fall on July 25, 2013. Dr. Koval noted that the Claimant reported that her neck extension is the most difficult motion for her and that she did not have full range of motion of her right shoulder. On examination, Dr. Koval noted full range of motion with the neck but with discomfort on extension. Dr. Koval also noted that the Claimant was not able to fully abduct her right shoulder. Physical therapy was continued and therapeutic dry needling was recommended. The Claimant's work restrictions were limited to lifting no more than 23 pounds.

28. The Claimant testified that she didn't recall missing 10 physical therapy appointments in September and October of 2013, but she agrees that she missed some appointments because she was depressed.

29. On November 19, 2013, the Claimant saw Dr. Koval again and Dr. Koval made a request for the Claimant to be evaluated by Dr. Carbaugh for pain management and mental health. On examination, Dr. Koval found the Claimant to be tender in the cervical and paraspinal regions as well as the right and left trapezius, right worse than left. Dr. Koval assessed the Claimant with cervical and thoracic strains with right sided trapezius involvement and new left-sided trapezius pain that has waxed and waned since the last visit along with possible reactive depression. Dr. Koval also recommended an MRI of the cervical spine "after watching her symptoms wax and wane, and not truly improve very much over the last several visits (Respondent's Exhibit EEE).

30. On November 26, 2013, the Claimant underwent a cervical MRI without contrast. The images were interpreted and reported by Dr. Wayne A. Miller. Dr. Miller noted that "no fractures or dislocations are evident and the cord appeared normal

throughout the cervical region. Dr. Miller's impression was that the MRI showed "C3 through C6 degenerative disc disease" including posterior bulging of the discs at C3 through C6 and mild right foraminal stenosis at C4-C5 and mild bilateral foraminal stenosis at C5-C6 (Claimant's Exhibit 7).

31. On December 3, 2013, the Claimant saw Dr. Koval again and the Claimant reported that overall her condition was stable although improvements lately have been modest and infrequent. Reviewing the MRI, Dr. Koval noted that the results showed manifestations of mild to moderate degenerative disc disease at C3-C6 with posterior bulging of each of those discs and mild stenosis at C4-5 on the right side and at C5-6 bilaterally. Physical therapy and work restrictions were continued (Claimant's Exhibit 8, pp, 9-10; Respondent's Exhibit III).

32. On December 6, 2013, the Claimant saw Ron Carbaugh, Psy.D. for a pain psychology evaluation per the referral of Dr. Koval. Dr. Carbaugh opined that the Claimant is caught between significant psychosocial and family stressors as well as an effort on her part to continue working and provide for herself and her children. He found this stress is likely impacting her pain perception as well as her response to treatment. He ultimately opined that the Claimant would be a fair candidate for surgery, at best (Respondent's Exhibit JJJ).

33. On December 11, 2013, Dr. Bryan Castro evaluated the Claimant for a surgical consultation for a neck injury. Dr. Castro reported that the Claimant describe a primary injury occurring in October 2011 with a re-injury in July 2013. With respect to the re-injury, the Claimant advised Dr. Castro that she was stripping wax on a floor when she had a slip-and-fall injury where she injured her head, and her right arm twisted behind her back. The Claimant reported her pain is predominantly neck pain, headaches and right greater than left shoulder pain with significant thoracic pain. Dr. Castro noted that the Claimant has tried physical therapy, a home traction unit, Flexeril and an epidural injection. He also reviewed the Claimant's MRI, noting mild-to-moderate degenerative changes, some disc bulging centrally at C3-4, C4-5 and C5-6 and disc desiccation without significant foraminal narrowing and without central canal encroachment. Dr. Castro noted that the Claimant was "quite adamant that 'something needs to be done' from a treatment standpoint." However, Dr. Castro opined that it is not clear that there is any surgery that is going to fix her condition and he recommended a continued conservative approach. He informed the Claimant that the majority of symptoms resolve on their own eventually. Dr. Castro noted no instability, no coronal or sagittal plane deformities, and no neural encroachment. Therefore, Dr. Castro opined that surgical intervention in this case is unpredictable and the Claimant could have a poor outcome (Claimant's Exhibit 9; Respondent's Exhibit LLL).

34. The Claimant testified that she saw Dr. Castro who left her with the impression that she was going to get worse and there was nothing he could do to help her. She testified that she was in pain and just wanted to get better. When she left Dr. Castro's office, she testified that she thought she really needed help.

35. On December 13, 2013, Dr. Koval noted that the Claimant reported experiencing increased pain. However, based on his surgical consultation, Dr. Castro "feels strongly that surgery is not the answer at this time. He feels that her changes are degenerative and do not warrant fusion at this point." Dr. Koval noted that this was very upsetting to the Claimant as she is really struggling with her chronic pain. Dr. Koval recommended referral back to Dr. Wernick for a second round of injections (Claimant's Exhibit 8, pp. 11-12; Respondent's Exhibit NNN).

36. On January 9, 2014, the Claimant reported to Dr. Koval that she was overall experiencing decreased pain due to a translaminar epidural cortisone shot that she received on January 6, 2014. Dr. Koval put the Claimant's physical therapy on hold until after she followed up with Dr. Wernick to allow the full effect of the injection to take place (Respondent's Exhibit QQQ).

37. On January 20, 2014, the Claimant saw Dr. Sorensen for follow-up after injections performed on January 6, 2014. The Claimant was reporting over 90% relief for about 10 days with the relief gradually subsiding and leveling off at greater than 50% relieve as of the date of this visit. Based on the results, Dr. Sorenson noted the Claimant would be a candidate for repeat C7-T1 interlaminar ESI in the future should her functionally beneficial pain relief lessen over time (Claimant's Exhibit 10).

38. On January 22, 2014, the Claimant saw Dr. Koval again for follow up and reported significant relief and decreased pain from the translaminar epidural cortisone shot. The Claimant reported an initial 90% relieve which has since decreased to about 50% but the Claimant reported that she was still extremely functional. The Claimant reported that she was sleeping reasonably well and Dr. Koval noted that the Claimant told her that the reasons she occasionally does not sleep well have less to do with her neck and more to do with her life. It was also noted that the Claimant started pain and adjustment counseling with Dr. Carbaugh and his associate Jane Cameron at this point (Respondent's Exhibit SSS).

39. On February 6, 2014, the Claimant saw Dr. Koval again reporting overall decreased pain due to the translaminar epidural cortisone shot. However, with an increased work load recently and more work out in the cold plowing and shoveling snow, she has been having more flare ups. Work restrictions were continued as were ongoing pain and adjustment sessions (Respondent's Exhibit WWW).

40. On February 13, 2014, the Claimant saw Dr. Stephen Shogan for the chief complaint of neck pain present for 2 years after a snow drift fell on her head. The Claimant reported "chronic neck pain that is not as severe as prior to her injection," neck stiffness, headaches and bilateral arm pain right greater than left. As of this visit, Dr. Shogan noted the Claimant had participated in 6 months of PT with short temporary relief and 3 sessions of ESI injections at Avista Hospital with Dr. Sorenson with the last injection on 01/08/2014 with some relief. Dr. Shogan performed a general neurological examination and he reviewed a November 26, 2013 cervical MRI. Dr. Shogan assessed spinal stenosis in the cervical region, cervical spondylosis without myelopathy, cervicalgia and brachial neuritis or radiculitis. Dr. Shogan discussed treatment options

with the Claimant including further conservative care vs. surgical intervention (Claimant's Exhibit 11, pp. 25-26; Respondent's Exhibit YYY).

41. On February 21, 2014, the Claimant followed up again with Dr. Koval reporting that the relief from the translaminar epidural cortisone shot has since diminished. The Claimant advised that she wanted to obtain a second opinion regarding cervical fusion surgery rather than proceed with a second round of injections at this point. The Claimant reported that her pain continues to worsen and be aggravated by work activities. The Claimant reported that she was seeking a longer term solution than injections. The Claimant also reported that the tramadol for pain was less effective over time so Dr. Koval prescribed Percocet for use at night and tramadol for use at work during the day. Dr. Koval referred the Claimant to Dr. Shogan for a second surgical evaluation (although the ALJ notes that the Claimant saw Dr. Shogan on February 13, 2014 prior to this referral) (Claimant's Exhibit 8, pp. 15-16; Respondent's Exhibit AAAA).

42. The Claimant testified that a friend told her about Dr. Shogan and she saw him on February 13, 2014. She testified that she went on her own to see Dr. Shogan for a second opinion. She stated that she did not bring any prior medical records to this appointment on purpose because she wanted his honest opinion. The Claimant agreed that Dr. Shogan gave her two treatment options, surgery or continued conservative treatment. During testimony at the hearing, the Claimant clarified that she decided to get a second opinion, she told Dr. Koval and then she told Dr. Koval that she went to see Dr. Shogan.

43. On March 13, 2014, the Claimant saw Dr. Sander Orent at Arbor Occupational Medicine to talk more about her neck. Dr. Orent noted, "we have two very contrasting opinions regarding whether she should undergo surgery, leave alone the fact that she went on her own to see Dr. Shogun." Dr. Orent further noted that Dr. Shogan opined that the Claimant would benefit from a 3-level fusion while Dr. Castro opined that this would be a mistake because the Claimant does not have the surgical indications. In reviewing the Claimant's two cervical MRIs, Dr. Orent noted that "there has been some significant change between the first and the last one; however, I do not find any physical examination consistent with a cervical radiculopathy." Dr. Orent discussed the nature of cervical degenerative disease and the consequences of a fusion including the long term consequences. Dr. Orent stated that the Claimant is very uncomfortable and desperate to be fixed. However, Dr. Orent cautioned that his concern is that surgery could make her worse and not better and he recommended a SAMMS conference to obtain an independent opinion from another physician. Dr. Orent also advised the Claimant that, "should she choose to undergo the surgery with Dr. Shogan at this point, the surgery would not be authorized by us" (Claimant's Exhibit 12; Respondent's Exhibit CCCC).

44. On March 24, 2014, the Respondent sent a Prior Authorization Denial Letter denying the request for surgery submitted on March 20, 2014. Respondent challenged the reasonableness, necessity and relatedness of the requested procedures (Claimant's Exhibit 13). Also on March 24, 2014, the Respondent filed an Application for Hearing regarding the July 25, 2013 work injury (Respondent's Exhibit DD).

45. On March 27, 2014, Dr. Orent responded to interrogatories from the claims consultant on this case about the surgery request for a C4-C-6 fusion with mosaic plating by Dr. Shogan. Dr. Orent opined that the surgical procedure was not related to an injury date of 07-25-13. Dr. Orent further opined that he shared Dr. Castro's opinion that the Claimant's current cervical complaints are outside of the Workers' Compensation system and he further opines that he does not believe the Claimant has good indications for the surgery and he had concerns about her condition worsening as a result of the surgery and did not believe the cervical fusion should be performed (Respondent's Exhibit EEEE).

46. The Claimant testified that she was referred by Dr. Koval for the surgery. While the Claimant was referred for a second opinion regarding treatment options to Dr. Shogan, the medical records do not reflect that Dr. Koval or any of the physicians at Arbor Occupational Medicine referred the Claimant for surgery or approved or agreed with the surgical treatment option. After obtaining Dr. Shogan's recommendation, the clear indication from the Claimant's authorized treating physicians is that the surgery proposed by Dr. Shogan was not authorized and that the Claimant's treating physicians relied on the opinion of Dr. Castro over Dr. Shogan. While Dr. Koval did make a referral to Dr. Shogan for a consultation, albeit with the misunderstanding that the Claimant had not already previously seen Dr. Shogan, this is very different from making a referral for a surgical procedure. The actions taken by the Claimant's authorized treating physicians subsequent to obtaining the recommendation of Dr. Shogan for surgical intervention very clearly indicate that the proposed treatment was not authorized and that there was no referral to Dr. Shogan for surgery. In considering all of the evidence on the issue of whether Dr. Shogan was an authorized medical provider in this case, the ALJ finds that Dr. Koval only made a referral for an orthopedic consultation. Any orthopedic consultation provided by Dr. Shogan after the referral was made in the ordinary course of treatment was authorized. However, there was no referral for a surgical procedure. Upon obtaining two conflicting orthopedic surgical consultations, the Claimant's authorized treating physicians at Arbor Occupational Medicine recommended further conservative care at that time and specifically stated that the surgical option was not an authorized and valid referral in the event that the Claimant elected to pursue surgery.

47. On April 8, 2014, the Claimant filed a Response to Application for Hearing regarding the July 25, 2013 work injury (Respondent's Exhibit EE).

48. On April 9, 2014, the Claimant interacted with PA-C Adam Baker at Dr. Shogan's office to advise that she has "elected to proceed with C3-6 ACDF instead of C4-6 with mosaic plating (Claimant's Exhibit 11, pp. 27-28; Respondent's Exhibit FFFF).

49. On April 16, 2014, Dr. Shogan performed an anterior cervical disk and spur removal with fusion and mosaic plating at C3-4, C4-5 and C5-6 at HealthOne Rose Medical Center. There were no apparent complications during or immediately after the procedure (Respondent's Exhibit GGGG).

50. The Claimant testified that right after waking up from surgery she felt better and the headaches and the burning in her back and arms was gone. After the

surgery the Claimant testified that she did not have to take any narcotics even though before the surgery she took so many narcotics that it made her sick and she had to see a gastroenterologist. The Claimant testified that before the surgery, she was miserable and had no life and now she has a life again. She testified that for her the surgery was necessary.

51. On May 21, 2014, Dr. Stephen Shogan testified by deposition as an expert witness in the area of neurosurgery (Tr. Depo. Dr. Stephen Shogan, p. 3). Dr. Shogan testified that as of his first examination of the Claimant on February 13, 2014, he was not independently aware that the Claimant's injury was work-related, nor did he recall anything in his notes that reflected a work injury (Tr. Depo. Dr. Stephen Shogan, p. 6). As of the deposition date, Dr. Shogan testified that he did not have enough information to provide a causation determination and he deferred that opinion (Tr. Depo. Dr. Stephen Shogan, pp. 9-10). Dr. Shogan testified that the operative procedure that he performed on the Claimant was reasonable and necessary given the Claimant's underlying pathology and symptoms (Tr. Depo. Dr. Stephen Shogan, p. 10). Dr. Shogun described the procedure as removal of the three discs from in between four bones in her neck and then placing devices that encourage fusion and structural support in the area where the discs used to be and then fusing the four bones together (Tr. Depo. Dr. Stephen Shogan, p. 11). Dr. Shogan testified that he has only seen the Claimant one time post-operatively but at that time, the Claimant told him that her symptoms were better (Tr. Depo. Dr. Stephen Shogan, p. 11). On cross-examination, Dr. Shogan testified that based on his review of intake information, the Claimant was referred to his office from a friend and not a physician (Tr. Depo. Dr. Stephen Shogan, p. 13). Based on the Claimant's November 26, 2013 MRI scan that Dr. Shogan reviewed, he opined that the findings indicated there was nerve root impingement at C4-5 and C5-6 (Tr. Depo. Dr. Stephen Shogan, pp. 14-15). After reviewing a report of a February 27, 2012 cervical MRI, Dr. Shogan testified that, depending on differences in how the radiologist read that MRI, the February 27, 2012 MRI was "pretty similar to the MRI scan that was – that I reviewed from November of 2013" (Tr. Depo. Dr. Stephen Shogan, p. 16). Dr. Shogun conceded that there was not anything in the MRI that he reviewed that led him to believe that the pathology present was trauma-induced versus degenerative, but noted that "frequently it is really impossible to sort that out" (Tr. Depo. Dr. Stephen Shogan, p. 24). When questioned about whether or not the surgery he performed on the Claimant was necessary, Dr. Shogan testified that whether or not surgery is necessary is up to the patient in terms of how much pain they are willing to live with and whether or not they believe the surgical option is appropriate (Tr. Depo. Dr. Stephen Shogan, p. 31).

52. On June 19, 2014, the Claimant saw Dr. Koval for follow-up eight weeks post-cervical fusion. Dr. Koval noted the Claimant reported she was doing very well and her pain levels diminished to where the Claimant no longer used medications and was out of her neck brace. Dr. Koval noted the Claimant was to continue physical therapy and massage therapy and remain on modified duty (Claimant's Exhibit 8, pp. 17-18).

53. On June 29, 2014, Dr. Shogan responded to a June 5, 2014 letter from Claimant's counsel regarding a request for a causation opinion. After evaluation of medical records related to a July 25, 2013 accident and an October 26, 2011 accident,

Dr. Shogan opined that the Claimant's need for continuing treatment and surgery he recommends is related to the incident on July 25, 2013. Dr. Shogan further opined that no apportionment is needed as between the July 25, 2013 accident and the October 26, 2011 accident (Claimant's Exhibit 11, pp. 30-31; Respondent's Exhibit KKKK).

54. On July 1, 2014, Dr. Sander Orent testified by deposition as an expert witness in occupational medicine (Tr. Depo. Dr. Sander Orent, pp. 3-4). Dr. Orent testified that Drs. Kistler and Koval from the same clinic where he practices have treated the Claimant since July 31, 2013. He testified that he has participated in her care as well, primarily with a case review and participation in a SAMMS conference (Tr. Depo. Dr Sander Orent, pp. 4-5). Dr. Orent testified that the Claimant presented with an injury to her cervical spine and shoulder (Tr. Depo. Dr. Sander Orent, p. 5) and that a pre-existing neck condition was aggravated by the July 2013 accident (Tr. Depo. Dr. Sander Orent, p. 6). During the course of her treatment, the Claimant has had physical therapy, modified duty, medications, consultations with pain management specialists and a psychological evaluation (Tr. Depo. Dr. Sander Orent, p. 6). The Claimant also received a C7-T1 epidural steroid injection (Tr. Depo. Dr. Sander Orent, p. 7). Dr. Orent found that an MRI showed mild to moderate degenerative changes in the Claimant's cervical spine with some posterior bulging of the discs but no disc herniations. Dr. Orent characterized this as "age appropriate degenerative change" and found the MRI to be "unremarkable" (Tr. Depo. Dr. Sander Orent, p. 8). The Claimant has also had repeated EMG studies which were negative (Tr. Depo. Dr. Sander Orent, p. 9). The Claimant had reported cervical radiculopathy. However, Dr. Orent was not able to reproduce the symptoms with certain maneuvers used to determine if a nerve is compressing in the neck to cause symptoms into the arm as the Claimant had a negative Spurling's maneuver (Tr. Depo. Dr. Sander Orent, pp. 10-11). With respect to the Colorado Medical Treatment Guidelines (the "Guidelines"), Dr. Orent testified that it is his opinion that while the Guidelines are evidence-based, they are merely guidelines and they do not apply in all cases. He testified that about 80 percent of cases fall within the Guidelines, but they don't have the force of the law, rather they are recommendations for what is reasonable (Tr. Depo. Dr. Sander Orent, pp. 12-14). While Dr. Orent clearly testified that he does not feel that the Guidelines apply in every case and he was critical of the Guidelines in some respects, he ultimately opined that the Claimant was not a surgical candidate because conservative treatment had not been exhausted and she did not meet the criteria of the Guidelines (Tr. Depo. Dr. Sander Orent, pp. 15-18 and p. 21). Dr. Orent opined that there were therapy options that the clinic would have preferred to have explored with the Claimant, including dry-needling, and there were concerns about the Claimant from a psychological perspective (Tr. Depo. Dr. Sander Orent, pp. 22-25). Dr. Orent conceded that post-surgery, the Claimant had been doing well, with her pain levels down and she was off medication and out of her neck brace (Tr. Depo. Dr. Sander Orent, p. 26). However, Dr. Orent testified that while he is happy the Claimant now feels better, he opined that he thinks it is likely that her physicians could have gotten the Claimant there without the surgery (Tr. Depo. Dr. Sander Orent, p. 33). Additionally, Dr. Orent testified that there are still issues down the road because a spinal fusion takes three out of seven levels of the cervical spine in terms of allowing movement. Therefore the levels above and below the fused segments now take the force of the stress that would have been absorbed by the other three levels. Dr. Orent

also testified that commonly with fusions, there is a need to perform revisions due to the wear and tear that occurs on the levels above and below the fusion site (Tr. Depo. Dr. Sander Orent, pp. 26-27). Dr. Orent also reviewed medical records from the prior cervical injury that occurred in 2011 when a heavy canopy with about six inches of snow fall on the Claimant's head. The Claimant had two injections which helped temporarily for about three months, muscle relaxers which did not help and six months of physical therapy which the Claimant quit since it was not helping. Dr. Orent testified that the records indicated that the Claimant just got used to the pain and was still symptomatic from the prior 2011 injury at the time of the July 2013 injury (Tr. Depo. Dr. Sander Orent, pp. 28-29). On cross-examination, Dr. Orent conceded that it seems like the surgery was a good idea because today the Claimant is getting better, but Dr. Orent still holds back from endorsing the surgery as reasonably and necessary because the surgery altered the mechanics of the spine and people with fusions are at significant risk for complications down the road (Tr. Depo. Dr. Sander Orent, pp. 36-37). In any event, when Dr. Orent saw the Claimant about a month after the surgery on May 15, 2014, he found the Claimant was doing well and she had a good outcome from the surgery (Tr. Depo. Dr. Sander Orent, pp. 38-39). Dr. Orent saw the Claimant again on June 5, 2014 and Dr. Koval saw her on June 19, 2014 and on both visits, the Claimant's pain levels were down and she was out of the neck brace and no longer on narcotics (Tr. Depo. Dr. Sander Orent, pp. 39-40). Dr. Orent testified that he respected both Dr. Castro and Dr. Shogan, but he maintained that he still agreed with Dr. Castro and aligns his own ideas about how to approach whether or not someone is a surgical candidate more with Dr. Castro (Tr. Depo. Dr. Sander Orent, pp. 44-45). As for parsing out the 2011 claim with the 2013 injury, because the Claimant was still symptomatic from the 2011 injury at the time of the 2013 injury, Dr. Orent testified that he would not be able to state at this time what percentage of the Claimant's symptoms/condition was related to the earlier claim versus the later claim (Tr. Depo. Dr. Sander Orent, pp. 49-50).

55. On July 3, 2014, the Claimant's Motion was granted to consolidate the two hearings for the October 26, 2011 injury and the July 25, 2013 injury (Respondent's Exhibit GG).

56. On August 29, 2014, Dr. Bryan Castro testified as an expert witness in orthopedic surgery (Tr. Depo. Dr. Bryan Castro, pp. 3-4). Dr. Castro testified that he saw the Claimant one time for an evaluation for a cervical injury. At the time of his evaluation, Dr. Castro's impression was that "she had a cervical injury referred to me for neck and arm symptoms. I didn't think she'd be a good surgical candidate (Tr. Depo. Dr. Bryan Castro, p. 5). Dr. Castro opined that he didn't think the bulging in her neck was causing significant neuro-encroachment and he felt that the surgery for neck pain in the setting of mild to moderate degenerative changes has an unpredictable outcome (Tr. Depo. Dr. Bryan Castro, pp. 5-6). Dr. Castro also testified that he saw no objective findings of significant nerve impingement and did not note any spinal instability (Tr. Depo. Dr. Bryan Castro, pp. 6-7). In reviewing the Guidelines, Dr. Castro found that a number of indications were not met under the criteria of the Guidelines with respect to whether the Claimant was a surgical candidate (Tr. Depo. Dr. Bryan Castro, pp. 8-12). Dr. Castro was advised that the Claimant proceeded with the surgery regardless and that her pain was decreased, she was no longer on narcotics and that she feels better.

Nevertheless, Dr. Castro testified that this information did not change his opinion about the Claimant as a candidate for cervical surgery. Dr. Castro opined that a cervical fusion carries a significantly high risk of possible untoward outcomes and will put significant increased load on the disk below and above which may require further surgeries in the future. He testified that even though the Claimant may be doing better than the 50/50 chance of a good outcome, this is not a predictable result when you are back at the point where you are considering the surgery (Tr. Depo. Dr. Bryan Castro, p. 13). Moreover, a three-level fusion versus a two-level fusion increases the likelihood of additional issued down the road as the fusion permanently alters the structure of the spine. He testified that given that the Claimant is in her 40's she will see the next level below break down in her lifetime. Dr. Castro ultimately confirmed his initial opinion that the cervical fusion surgery in this case was not reasonable and necessary (Tr. Depo. Dr. Bryan Castro, pp. 13-14). On cross-examination, Dr. Castro testified that if a surgical procedure could predictably relieve pain and improve functionality, then it would be reasonable and necessary (Tr. Depo. Dr. Bryan Castro, p. 16). However, regardless of the outcome in this case, Dr. Castro maintains that surgery is not an indicated procedure for neck pain (Tr. Depo. Dr. Bryan Castro, p. 18) and that the Claimant did not need surgery as a result of her injury (Tr. Depo. Dr. Bryan Castro, p. 24). Later on redirect testimony, Dr. Castro testified that it is his opinion that the Claimant's symptoms could have improved without the surgery (Tr. Depo. Dr. Bryan Castro, p. 26).

57. The Claimant testified that she does not understand how the worker's compensation system works and she received no instruction from her Employer. She testified that she thought the Employer would do all the necessary filings for her.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Medical Benefits - Authorized

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment even if the treatment is reasonable, necessary and related. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Johnston v. Hunter Douglas,* W.C. 4-879-066-01 (ICAO April 29, 2014). However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990); *Rogers v. Industrial Claims Appeals Office*, 746, 565 (Colo. App. 1987); *Cabela v. ICAO*, 198 P. 3d 1277 (Colo. pp. 2008); *Roybal v. University of Colorado Health Sciences Center*, 768 P .2d 1249 (Colo. App. 1988).

A physician who commences treatment upon a referral made in the "normal progression of authorized treatment" becomes an authorized treating physician. *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d. 680 (Colo. App. 1999); *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985). The determination of whether there has been a referral in the "normal progression of authorized treatment"

is a question of fact for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995). When a referral is limited in scope and the care provided exceeds the scope of the referral, then such treatment is not authorized. *Kilwein*, supra.

The Claimant suffered a head and cervical injury on October 26, 2011 when a snow covered canopy fell and struck her in the back of the head. The Claimant received conservative treatment for this injury from October 28, 2011 until April 9, 2012 when she was placed at MMI by her ATP Dr. Cazden. The Claimant testified credibly that she wanted more treatment and spoke to Dr. Cazden about this because she was still in pain. However, the Claimant did not file a Worker's Claim for Compensation related to this injury until May 23, 2014. Prior to filing a claim, the Claimant never missed work for this injury or for doctor or physical therapy appointments related to this injury. Rather, she would make up any missed time from work due to any appointments.

On July 25, 2013, the Claimant suffered an admitted work injury when she slipped and fell while stripping a wax floor. The Claimant fell on her right shoulder and back with her arm twisted back. After this injury, the Claimant requested that she not be required to treat with Dr. Cazden who had treated her for her October 26, 2011 injury. Instead, the Claimant treated with Dr. Kistler who retired, so then the Claimant treated with Dr. Koval. From July 31, 2013 through February 6, 2014, the Claimant received conservative treatment, including physical therapy, a home traction unit, injections and pain management counseling.

The Claimant was referred to Dr. Bryan Castro who evaluated her on December 11, 2013 to determine if she was a surgical candidate for her cervical condition. Dr. Castro recommended a continued conservative approach and did not recommend surgical intervention at that time. The Claimant testified that when she left Dr. Castro's office after this visit, she was under the impression that she was going to get worse and there was nothing Dr. Castro could do to help her and she was in pain and just wanted to get better. On December 13, 2013, the Claimant saw her ATP Dr. Koval again and Dr. Koval noted that Dr. Castro's strong opinion that surgery was not the answer at this time was very upsetting to the Claimant because she was struggling with her chronic pain. Dr. Koval recommended referral back to Dr. Wernick for a second round of injections which were done on January 6, 2014. In follow up with Dr. Sorenson on January 20, 2014, the Claimant was noted to be a candidate for repeat injections based on the results from the January 6, 2014 injections. In this time frame, the Claimant was also seeing Dr. Ron Carbaugh and his associate for pain and adjustment counseling.

On February 13, 2014, the Claimant went to see Dr. Stephen Shogan based on the referral from a friend. She did not bring any prior medical records with her to the appointment because she wanted his honest opinion about whether she needed surgery. Dr. Shogan provided the Claimant with two treatment options: (1) continued conservative care, or (2) surgery. Per the medical records and the testimony of the Claimant and Dr. Shogan, the Claimant was not initially referred to Dr. Shogan by a

worker's compensation ATP, nor was Dr. Shogan made aware at the time of the initial visit that the Claimant's injury was work-related.

Only after seeing Dr. Shogan and obtaining recommended treatment options from him did the Claimant request a second surgical consult regarding cervical fusion surgery rather than proceeding with the second round of injections. There is no indication that Dr. Koval already knew that the Claimant had seen Dr. Shogan on February 13, 2014 when Dr. Koval recommended a referral for a surgical evaluation on February 21, 2014. In fact, based on reasonable inferences drawn from the medical records, it is more likely that Dr. Koval did not know that the Claimant had already seen Dr. Shogan at this point.

Subsequently, the Claimant followed up with Dr. Sander Orent on March 13, 2014 to talk about options with respect to treatment for her neck. He noted that the Claimant had two very contrasting opinions about whether or not she was a surgical candidate and also noted that the Claimant "went on her own to see Dr. Shogan." Dr. Orent noted that he made it quite clear to the Claimant at this appointment that if the Claimant chose to undergo the surgery with Dr. Shogan at this point, it would not be authorized by her ATPs at Arbor Occupational Medicine. On March 24, 2014, Respondents denied the prior authorization request for surgery that was submitted on March 20, 2014.

Therefore, after obtaining Dr. Shogan's recommendations, there is a clear indication that the Claimant's ATPs relied on the opinion of Dr. Castro rather than Dr. Shogan regarding the Claimant's surgical candidacy at this point.

In spite of this, the Claimant contacted Dr. Shogan's office on April 9, 2014 to advise that she elected to proceed with Dr. Shogan's surgical recommendation. The surgery was performed by Dr. Shogan on April 16, 2014. Since the surgery, the Claimant's symptoms have been alleviated and she believes that her condition has improved.

At his deposition, Dr. Shogan was rather ambivalent about whether or not the surgery performed on the Claimant was reasonably necessary to cure and relieve the Claimant of her work related injury or injuries. He testified that "frequently it is really impossible to sort that out." In his opinion, whether or not surgery is necessary is up to the patient in terms of how much pain they are willing to live with. In contrast, Dr. Castro testified that regardless of the immediate outcome of the Claimant's surgery in this case, he confirmed his original opinion that surgery was not indicated for the Claimant in this case and that although she has had a good initial outcome, she is now at risk for possible untoward outcomes as the cervical fusion alters her anatomy and places significant increased load on the disks above and below the fusion area. Dr. Orent agreed with Dr. Castro and continued to opine that the surgery was not reasonable and necessary in this case due to the risk for complications down the road as the surgery altered the mechanics of the Claimant's spine. Dr. Orent also felt strongly that

conservative treatment had not been exhausted in this case and he believes her physicians could have brought her to an improved condition without the surgery.

Based on the conduct of the Claimant and her physicians in this case, there was no valid referral to Dr. Shogan in the "normal progression of authorized treatment." While the Claimant managed to secure an after the fact referral to Dr. Shogan for a surgical consultation, this was a limited referral for a second opinion. In light of the prior surgical consultation with Dr. Castro that did not recommend surgery, the consultation referral to Dr. Shogan was clearly not an unconditional referral for treatment. After receiving recommendations from Dr. Shogan, the physicians at Arbor Occupational Medicine specifically advised the Claimant that the surgical option recommended by Dr. Shogan would not be authorized in light of the opinion of Dr. Castro that they found more persuasive. Additionally, Dr. Shogan also provided an option for continued conservative care. However, even with all of this information, the Claimant elected to proceed with surgery. It is the Claimant's right to make this election and proceed with the surgery and it does appear that initially the surgery has a good outcome.

Nevertheless, that does not make the surgery or the treatment provided by Dr. Shogan authorized pursuant to the Act. If the treatment is not authorized and is not provided by an authorized treating physician, then the Respondent is not liable for payment. Based on the facts in this case, to the extent that Dr. Shogan could be considered an authorized treating physician, the referral for consultation was limited in scope to providing a second opinion as to whether or not the Claimant was a surgical candidate. The Claimant's ATPs did not make a referral to Dr. Shogan to commence treatment, up to and including surgery. Rather, upon obtaining the second opinion from Dr. Shogan and considering it in connection with the surgical consultation opinion from Dr. Castro, the Claimant's ATPs recommended a treatment plan in line with Dr. Castro's opinion.

Because Dr. Shogan is not an authorized treating physican in this case and the treatment he provided was not authorized, it is not necessary to consider whether the medical treatment provided by Dr. Shogan was reasonably necessary to cure and relieve the Claimant of either her October 26, 2011 injury or her July 25, 2013 injury.

Remaining Issues

The Claimant failed to prove that the medical treatment that she received from Dr. Stephen Shogan was authorized, except for a limited referral for a second orthopedic surgical consultation. As such, the remaining issues regarding whether or not the medical benefits were reasonably necessary, whether or not the Claimant's claim under WC 4-951-736 is barred by the applicable statute of limitations, and TTD and AWW are moot.

ORDER

It is therefore ordered that:

1. The Claimant failed to prove, by a preponderance of the evidence, that the medical treatment provided by Dr. Shogan was authorized. The surgery performed on the Claimant by Dr. Shogan on April 16, 2014 was outside the scope of any referral from the Claimant's authorized treating physicians and Dr. Shogan was not an authorized treating physician under the Act.

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

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

DATED: March 19, 2015

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

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stephen Lindenbaum, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) because her lower back and hip require further evaluation.

FINDINGS OF FACT

1. Employer is a restaurant. Claimant worked for Employer as a Busser and Hostess. Her job duties involved greeting customers, seating customers and cleaning tables. On October 15, 2013 Claimant slipped on a lemon peel and twisted her ankle while working for Employer.

2. After initially receiving authorized medical treatment Claimant was referred to Arbor Occupational Medicine. On December 19, 2014 Claimant visited Authorized Treating Physician (ATP) John Raschbacher, M.D. at Arbor Occupational medicine for an evaluation. Dr. Raschbacher determined that Claimant suffered a left ankle sprain, a left foot sprain and a lumbar contusion. He ordered an MRI of her foot and ankle and restricted her to working most of the time in a seated position.

3. The MRI revealed the degenerative condition of os trigonum syndrome. The MRI did not reflect a ligament tear or bone contusion. X-rays of Claimant's lumbar spine revealed degenerative changes.

4. Dr. Raschbacher referred Claimant to Scott G. Resig, M.D. at Denver Vail Orthopedics for an evaluation. Dr. Resig initially examined Claimant and administered a left ankle cortisone injection. Dr. Resig subsequently recommended trigonum excision surgery.

5. On April 8, 2014 ALJ Felter conducted a hearing in the matter. He considered whether Claimant suffered injuries to her left foot/ankle, right knee and lower back as a result of the October 15, 2013 incident. On April 21, 2014 ALJ Felter issued Findings of Fact, Conclusions and Law and Order. He concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. Claimant did not appeal the determination and the Order became final on May 11, 2014.

6. On May 9, 2014 Claimant returned to Dr. Raschbacher for an examination. Dr. Raschbacher reviewed ALJ Felter's Findings of Fact, Conclusions of Law and Order and noted Claimant's left ankle injury was compensable but her lower back and right hip were not components of her Workers' Compensation claim. He

noted that Claimant wished to proceed with treatment but, because she was pregnant, further treatment could not be rendered until she came to term. If Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Dr. Raschbacher remarked that Claimant had limitations to her left ankle range of motion but no other impairment. He placed Claimant at MMI and assigned a 6% lower extremity impairment rating. Insurer then filed a Final Admission of Liability (FAL) consistent with Dr. Raschbacher's MMI and impairment determinations.

7. On August 29, 2014 Claimant underwent a Division Independent Medical Examination with Stephen D. Lindenbaum, M.D. Claimant reported that she was still experiencing lower back pain. After reviewing Claimant's medical records he concluded that she had not reached MMI. Dr. Lindenbaum noted that Claimant required additional evaluation but the treatment could not be provided because she was eight months pregnant. He explained that after delivering the baby she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. Dr. Lindenbaum also recommended an MRI of Claimant's lower back. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

8. On October 21, 2014 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Claimant was still pregnant. She reported that while she was performing her job duties for Employer she was walking down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. After considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. He stated that there was "no evidence that [Claimant] sustained any type of injurious event to her back or hip region as a result of the 10/15/2013 incident." He explained that there were no clinical findings to suggest Claimant suffered any "symptomatic pathology" to her body besides the left ankle that was related to the October 15, 2013 incident. Dr. Lesnak determined that it was reasonable for Claimant to consider excision of the os trigonom in her left ankle/foot as recommended by Dr. Resig. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. However, Dr. Lesnak noted that, because Dr. Raschbacher's range of motion measurements for Claimant's left ankle were "submaximal," he questioned their validity.

9. On October 28, 2014 Dr. Lesnak issued an addendum report after reviewing Dr. Lindenbaum's DIME determination. He maintained that Claimant did not suffer any injuries to her back or hip as a result of the October 15, 2013 work incident. Dr. Lesnak thus explained that Dr. Lindenbaum's suggestion that Claimant required additional evaluation for her back and hip was incorrect. The symptoms were "completely unrelated" to the October 15, 2013 accident. Dr. Lesnak noted that Claimant remained at MMI for her left ankle but should undergo a surgical evaluation of the ankle after her pregnancy. He remarked that "there is absolutely no medical evidence to suggest that any of [Claimant's] reported pathology involving her lumbar spine or pelvis is in any way related to the occupational injury of 10/15/13 and clearly Dr. Lindenbaum was in error when he recommended additional medical evaluations

pertaining to these subjective complaints." Dr. Lesnak also commented that Dr. Lindenbaum's recommendation failed to consider ALJ Felter's ruling that Claimant's hip and back were unrelated to the October 15, 2013 work accident.

10. On January 14, 2014 Dr. Lesnak testified through an evidentiary deposition in the present matter. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum thus failed to comply with Table 53 of the of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). He summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. Range of motion abnormalities do not constitute a diagnosis pursuant to Table 53. The diagnosis must be "very specific" that is "related to the injurious event and correlate[ed] with the symptoms and objective findings." Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy. However, he noted that she was "temporarily at MMI, but not completely at MMI." Dr. Lesnak maintained that Claimant did not require additional treatment or testing for her lumbar spine or hip because there were no clinical findings to suggest there were any symptoms related to the areas.

11. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI because her lower back and hip require further evaluation. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On April 8, 2014 ALJ Felter concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

12. After considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. However, he stated that there was no clinical evidence that Claimant sustained any injury to her back or hip region as a result of the incident. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. Dr. Lesnak also determined that it was reasonable for Claimant to consider excision of the os trigonom in her left ankle/foot as recommended by Dr. Resig.

13. Dr. Lesnak specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lesnak summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. Range of motion abnormalities do not constitute a diagnosis pursuant to Table 53. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury. Based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Lesnak, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's determination was incorrect. The persuasive opinion of ATP Dr. Raschbacher reflects that Claimant reached MMI on May 9, 2014 with a 6% lower extremity impairment rating for her left ankle as a result of the October 15, 2013 incident.

CONCLUSIONS OF LAW

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

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

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

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial*

Claim Appeals Office, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

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

. 7. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI because her lower back and hip require further evaluation. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On April 8, 2014 ALJ Felter concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

8. As found, after considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. However, he stated that there was no clinical evidence that Claimant sustained any injury to her back or hip region as a result of the incident. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. Dr. Lesnak also determined that it was reasonable for Claimant to consider excision of the os trigonom in her left ankle/foot as recommended by Dr. Resig.

9. As found, Dr. Lesnak specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lesnak summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. Range of motion abnormalities do not constitute a diagnosis pursuant to Table 53. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury. Based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Lesnak, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's determination was incorrect. The persuasive opinion of ATP Dr. Raschbacher reflects that Claimant reached MMI on May 9, 2014 with a 6% lower extremity impairment rating for her left ankle as a result of the October 15, 2013 incident.

ORDER

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

1. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI because her lower back and hip require further evaluation. Based on Dr. Raschbacher's determination, Claimant reached MMI on May 9, 2014 with a 6% lower extremity impairment rating for her left ankle as a result of the October 15, 2013 incident.

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

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

you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 27, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether the claimant is barred from litigating the issues of average weekly wage and temporary benefits for concurrent employment that was previously explicitly reserved;

2. If the claimant is not barred, whether the claimant is entitled to temporary total disability (TTD) benefits for her concurrent employment with Service Master; and,

3. If so entitled to TTD, whether the claimant has established an average weekly wage for the concurrent employment.

FINDINGS OF FACT

1. The claimant sustained an injury on November 13, 2013.

2. At the time of the injury, the claimant worked for the respondent-employer as a Special Education Assistant.

3. The claimant also held concurrent employment with Service Master at the time of injury.

4. The respondent initially denied liability for the claimant's injury.

5. On January 22, 2014, the claimant filed an application for hearing on compensability, temporary benefits, medical benefits, and average weekly wage.

6. Hearing on the claimant's January 22, 2014 application went forward on May 6, 2014. The claimant proceeded on AWW and "temporary partial and/or temporary total disability benefits from November 13, 2013 and ongoing" but reserved "concurrent employment" for future determination.

7. On May 28, 2014, the undersigned ALJ issued Findings of Fact, Conclusions of Law, and Order finding claimant's injury compensable, ordering the respondent to pay medical benefits, and fixing claimant's AWW at $342.19. Neither party appealed the order.

8. The ALJ denied claimant's claim for temporary benefits. It was specifically found that claimant failed to show by a preponderance of the evidence that she suffered a wage loss as the result of her injury.

9. Respondent subsequently filed a General Admission of Liability on July 18, 2014 admitting for medical benefits and AWW.

10. On November 12, 2014 the claimant filed an Application for Hearing on the issues of AWW, TPD and TTD.

11. The claimant alleges that she is entitled to an increased AWW based on concurrent employment at the time of injury. She further alleges she is entitled to temporary benefits due to her inability to work at her concurrent employment as a result of her injury.

12. The ALJ finds that the claimant was unable to continue her concurrent employment with Service Master as a result of her injury beginning with the date of injury, November 13, 2013 and ongoing. The claimant claims entitlement based on lost wages from Service Master from the date of injury and ongoing.

13. At the current hearing the claimant established that as of May 6, 2014 (the date of the first hearing) she was aware she earned eligible wages from concurrent employment with Service Master. The claimant further testified that as of May 6, 2014 she was aware that she lost wages from Service Master as a result of her November 13, 2014 injury beginning November 13, 2013 and ongoing.

14. The ALJ finds that the AWW and temporary benefits at issue in the current dispute are not identical to the AWW and temporary benefits at issue in the May 6, 2014 hearing.

15. The ALJ finds that the temporary benefits sought as a result of claimant's lost wages from Service Master were specifically reserved at the time of the initial hearing as stated in the order on May 28, 2014.

16. The ALJ finds that claimant is not collaterally estopped from litigating the issues of AWW and entitlement to temporary benefits.

17. The claimant obtained wage records from Service Master after the May 6, 2014 hearing, as indicated by the date of faxing on those records of May 30, 2104.

18. In November of 2013, the claimant was employed by both the respondent-employer and Service Master. She began working for Service Master in the beginning

of August of 2013. She worked Monday through Friday from 7pm until 10pm. Her rate of pay was $7.78 per hour. She worked 3 hours per day, five days per week for a total of 15 hours per week. This equates to an AWW of $116.70.

19. The claimant last worked for Service Master on November 12, 2013, the date before her compensable injury occurred. On November 13, 2013 and up to her recovery from surgery on January 21, 2015 the claimant did not work due to her injury. She has not yet returned to work for Service Master since the surgery.

20. The claimant's typical duties for Service Master included taking out trash, vacuuming, and cleaning. The vacuum was the type that was required to be carried on her back. Her job required her to be on her feet the entire three hour shift, except for her 10 minute break.

21. The claimant was having difficulty walking after her injury. She was on crutches for almost two months and had been wearing a brace since then. She could not go up and down stairs without significant pain, nor could she squat or kneel. This prevented her from performing her job duties at Service Master.

22. The claimant had surgery on her right knee on January 21, 2015 and her knee has been doing well since that date. The claimant's knee remained essentially unchanged between the date of the injury, November 13, 2013, and the date of her surgery, January 21, 2015.

23. The claimant first sought treatment from Dr. Miguel Castrejon on November 13, 2013, the day of the injury. Dr. Castrejon made a determination that the injury was not work related and referred the claimant to Memorial Hospital for x-rays. He did not address any work restrictions.

24. Claimant sought treatment from Memorial Hospital after her visit with Dr. Castrejon. She then followed up with Dr. Charles Waldron on November 22, 2013 per instructions given at Memorial.

25. Dr. Waldron instructed the claimant to not work for three weeks or until further evaluation.

26. The claimant was unable to receive any further treatment in the following months due to the fact that the respondent had contested compensability that was set for determination on May 6, 2014.

27. The claimant's next examination was with Dr. Timothy Hall on July 28, 2014, after a finding of compensability had been made.

28. Dr. Hall determined that the claimant has had restrictions that precluded her from performing her work with Service Master, including no kneeling, no squatting, limited bending, no prolonged standing or walking, and limited lifting from floor to waist of no more than 15 pounds.

29. Dr. Hall explained that her job with Service Master is outside these restrictions, as opposed to her day job with the School District where she is sitting most of the day. Her condition had not improved over time.

30. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to TTD benefits for her concurrent employment only beginning November 13, 2013 and continuing until terminated by operation of law.

31. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to an AWW of $116.70.

32. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to indemnity benefits for periods of time that she was unable to work with Service Master at the AWW of $116.70.

33. The ALJ finds that the claimant has established that it is more likely than not, that she is entitled to an AWW of $342.19 + $116.70 equaling $458.89 for periods of time when the claimant was unable to work for both the respondent and Service Master.

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

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

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

4. The respondent cites various equitable defenses in opposing the claimant's pursuit of the benefits requested herein. As found above, the issue of concurrent employment was specifically reserved at the previous hearing and subsequent Order. Reserving such issue would be meaningless unless all attendant corollary issues are reserved as well. By finding and concluding that the claimant has established concurrent employment, all benefits flowing from that decision are necessarily included within the reservation of the concurrent employment issue.

5. To receive temporary disability benefits, the claimant must prove the injury caused a disability. 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). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

6. The claimant was fully able to perform her duties with Service Master from her date of hire through November 12, 2013. It was not until she sustained an injury to her right knee while working for the respondent-employer that she became unable to perform her work with Service Master. Dr. Castrejon was the workers' compensation physician that first examined the claimant on the date of injury. Dr. Castrejon made an erroneous legal determination that the claimant's injury was not compensable. He did not address her work restrictions at that time for this reason. The claimant's work

restrictions were not addressed until November 22, 2013 when she was examined by Dr. Waldron. He took her off of work for a few weeks, but with the assumption that she would receive further evaluation to better determine her ability to work. She did not see another doctor until July 20, 2014 as a result of litigation.

7. The claimant's knee condition remained virtually unchanged between the date of injury until her surgery more than a year later. Dr. Hall, the claimant's ATP, was clear in his assessment of the claimant's work restrictions. He opined that she has been completely unable to perform her job with Service Master because of its physical demands being outside of the restrictions she has had since the injury occurred. It is evident that the claimant is entitled to TTD benefits for her job with Service Master.

8. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), *See Also* § 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p. 1457. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

9. The claimant earned $7.78 per hour with Service Master. She worked three hours per day, from 7pm to 10pm, Monday through Friday. Her wage records support her testimony. $7.78 per hour, multiplied by 15 hours per week, equals an AWW of $116.70 for her concurrent employer and a TTD rate of $77.80. The claimant's AWW for the respondent-employer is $342.19. Therefore, the claimant's combined AWW is $458.89.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent's defenses are denied and dismissed.

2. The claimant's AWW from concurrent employment is $116.70.

3. The respondent shall pay the claimant temporary total disability benefits based upon her concurrent employment beginning on and including November 13, 2013 and continuing until terminated by operation of law at the AWW of $116.70.

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

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

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

DATE: March 30, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

Whether the claimant has proven, by a preponderance of the evidence, that he sustained an occupational disease, or injury, arising out of and in the course of his employment with the respondent-employer.

FINDINGS OF FACT

1. The claimant has worked for the respondent-employer as a Machinist since approximately June of 1997.

2. The claimant changed positions in September of 2013 to a Finisher I, in the Finishing Department. There were approximately four to five different jobs that he would rotate through in this department. These included a weighing station, painting of chemicals on disc break, and automatic machine that did the same job as the manual painting of the chemical on the disc break, and the finishing, or adding of the metal parts to the breaks. The claimant could not remember all of the specific jobs in detail. The claimant testified that the only job duty that caused him any issues was the flipping of the disc from one side to the other. Each disc weighed between 13 and 17 lbs.

3. The claimant indicated that he felt "pain" in his thumbs but that the pain that he felt in the Finishing Department was different than that which he previously experienced in the Machinist Department.

4. The claimant indicated that he had seen his family physician, Dr. Steven Milligan for bilateral wrist pain on October 2, 2013.

5. The History in Dr. Milligan's October 2, 2013 Medical Report notes a "52 year old male patient who presents to the office for bilateral wrist and elbow pain for many months."

6. A July 1, 2014 job demands analysis report from Vocational Rehabilitation Expert, Katie Montoya, included job descriptions for the various positions that the claimant performed.

7. Ms. Montoya's Job Demands Analysis Report noted that "awkward posture and repetition/duration: four hours of: wrist flexion > 45°, extension > 30° or

ulnar deviation > 20° was not present." She further went on to state that in the finishing position, "one responsibly was coating. There was a small paintbrush which is utilized for one of the processes. There were also small rollers which are utilized to apply chemicals. This position also required taking weight and rotating and flipping the parts. In the video clips provided you can see the worker spinning the disc with his hands almost in a flip and grab type movement."

8. The Productions Summary information specific to the claimant during his time in question while working in the Finishing Department presented the "average parts process based on actual parts scans." These records show the volume and non-repetitive nature of the job in the Finishing Department. For the "manual oxi" position, the average parts per shift were 35 and parts per hour were four. For the "bake-out" position, the parts per shift assigned were 96 and the parts per hour were ten. For the "auto oxi" position, the parts per shift were 69, the parts per robot load were 30 and the robot loads per shift were two. On the "riveting pre-build" position, the parts per shift were 61 and the parts per hour were six.

9. A videotape that was taken by Vocational Rehabilitation Expert, Katie Montoya, shows the customary procedure for "flipping" or "spinning" the disc break from one side to the other. The claimant, however, disavows the shown procedure and asserts that he used a more thumb specific procedure.

10. Ben Smith is the Machine Shop and Finishing Manager at the respondent-employer's Pueblo facility. Mr. Smith has been with the respondent-employer for six years. He was originally a machine shop engineer when he first began with the company, and was the finishing team lead at the time of the claimant's complaint of injury/occupational disease on or about October 31, 2013. Mr. Smith indicated that he has been familiar with the claimant during the entire time Mr. Smith has been with the company.

11. As the Finishing Team Lead, Mr. Smith is more than familiar with the claimant's job assignments at the respondent-employer both in the Finishing Department and in his prior position in the Machine Shop Department.

12. Mr. Smith was aware of the claimant's prior 1997 workers' compensation claim concerning the claimant's elbows.

13. The claimant was changed to a different crew in 2012 in the Machine Shop Department. The claimant was held out of the grinding station at that time due to his restrictions from the 1997 claim.

14. In September 2013 the claimant was transferred to the Finishing Department where the claimant would be able to complete all of the necessary job duties with his work restrictions from the 1997 claim. Mr. Smith observed that the claimant was not happy about this change.

15. Mr. Smith detailed all the different job duties in the Finishing Department and specifically, the manual coating job where the claimant alleges that his occupational disease/injury occurred. Mr. Smith had seen the videotape that was completed by Vocational Rehabilitation Expert, Katie Montoya, concerning the flipping or spinning of the disc break. Mr. Smith admitted that he does not remember seeing the claimant specifically do this specific task however; he did indicate how it was taught and performed at the respondent-employer. Mr. Smith specifically indicated that the discs are flipped or spun from one side to the other. He has never seen anyone perform the changing of the sides of the disc in the awkward manner as described by the claimant.

16. Mr. Smith has reviewed the July 1, 2014 Jobs Demand Analysis that was completed by Vocational Rehabilitation Expert, Katie Montoya. He noted that he was present when it was performed and that he helped provide the information and data to Ms. Montoya for the completion of the Job Demands Analysis Report. Mr. Smith indicated that he thoroughly reviewed the reports itself and he that he believes it to be quite accurate.

17. Ms. Paula Perea is the Human Resource Manager for the respondent-employer in their Pueblo location. She is familiar with the claimant switching jobs to the Finishing Department in September of 2013. She indicated that the claimant came to her with right wrist complaints initially sometime in the beginning to middle of October of 2013. This was after he had only completed a few shifts in his new Finishing Department position with the respondent-employer.

18. Ms. Perea believed that the claimant told her that his complaints concerning his right wrist started when he was using a spatula at home over the weekend.

19. Dr. Carlos Cebrian testified by evidentiary deposition on January 23, 2015. Dr. Cebrian obtained a thorough occupational history from the claimant. Dr. Cebrian noted that the October 2, 2013 Medical Report from Dr. Milligan noted that the claimant had wrist symptoms for many months before the claimant was seen on October 2, 2013. However, the claimant informed Dr. Cebrian that he did not have any symptoms before he switched positions from the Machinist to the Finisher Department on September 18, 2013.

20. Dr. Cebrian noted that the claimant was seen by Orthopedic Surgeon, Dr. Timothy Hart. Dr. Hart never performed a causation analysis or according to his reports, reviewed any job site analysis concerning the claimant's jobs at the respondent-employer.

21. Dr. Cebrian noted that the claimant had informed Dr. Hart that he had been a Machinist for 16 ½ years with the same company and that was the reason for his symptoms being work-related. He noted that the Division of Workers' Compensation Medical Treatment Guidelines under cumulative trauma lay out the process for determining whether or not something is likely causally related to one's job duties. According to Dr. Cebrian's review of Dr. Hart's medical report, Dr. Cebrian did not believe that Dr. Hart was privy to this specific information in order to complete the detailed causation analysis as outlined in the Medical Treatment Guidelines.

22. Dr. Cebrian diagnosed the claimant with bilateral CMC osteoarthritis of the thumbs which, based upon a reasonable degree of medical probability, he did not find to be causally related to the claimant's work at the respondent-employer.

23. Dr. Cebrian noted that he reviewed the Job Demands Analysis completed by Vocational Rehabilitation Expert, Katie Montoya, the two separate job descriptions of two different Machinists, and the respondent-employer production summary and completed a detailed causation analysis concerning the claimant's bilateral CMC osteoarthritis of

24. Dr. Cebrian noted that "[The claimant] is moving a fair amount during his job. And he wasn't in these awkward postures for long periods of time if he happened to pass through it, which—all of us at some point during our day, when we move, we may move through an awkward posture, but it doesn't have the combination of time factor involved in that period and so going through all of the primary risk factors, [the claimant] did not have any." Dr. Cebrian went through the secondary risk factors and indicated that he did not find any of them present to relate the claimant's bilateral CMC osteoarthritis of the thumbs to his work duties at the respondent-employer.

25. Dr. Cebrian further testified that "it's my medically probable opinion that [the claimant's] bilateral CMC osteoarthritis is not causally related to his work at [the respondent-employer]."

26. As far as an acute injury is concerned, Dr. Cebrian indicated that the claimant's job duties "would not be a mechanism that would cause an injury to the CMC joint or aggravate the CMC joint if there was a preexisting problem." Dr. Cebrian went

on to note that the claimant had been having problems with his thumbs/wrists for several months prior to the October 31, 2013 date of injury/occupation disease.

27. Dr. Cebrian opined that since the claimant's complaints didn't change and there was "no acute swelling or anything like that," he could not confirm that an acute injury took place on or about October 31, 2013 from his review of the medical records.

28. Dr. Cebrian's opinion concerning the acute injury is bolstered by the November 4, 2013 report from Dr. Scott, who made no mention of an acute injury on or about October 31, 2013.

29. Dr. Cebrian also noted that somebody who "has bilateral CMC arthritis—if you're going to do certain activities, that you're going to feel your symptoms, that doesn't make that condition related. It's just there are certain things you do that cause symptoms. It doesn't mean that that's causally related to that (work)."

30. Physician's Assistant Katherine Fitzgerald examined the claimant upon referral from the claimant's primary care physician, Dr. Steven Milligan. PA Fitzgerald did not perform a thorough causation analysis nor was she privy to any Job Demands Analysis, job descriptions, or production summary/information with respect to the claimant's job duties at the respondent-employer. Without this specific detailed information, PA Fitzgerald was not able to complete a through causation analysis in accordance with the Colorado Workers' Compensation Medical Treatment Guidelines.

31. The testimony of Ben Smith, the Machine Shop & Finishing Manager, is more persuasive than the claimant has to how the discs should be turned or flipped. The ALJ finds the testimony of the claimant specifically with respect to how the discs are turned to be less than persuasive.

32. The claimant also alleges that he experienced a "pop" in his left thumb/wrist when turning over a disc on October 31, 2013. However, the November 4, 2014 medical report from authorized treating physician, Dr. Douglas Scott, does not contain any history whatsoever of an event or incident that took place on October 31, 2013. To the contrary, Dr. Scott's history states that "he (claimant) told me that this problem has been ongoing for a long time, but started noticing a worsening in his wrist after he began a new job in the finishing on 09/20/2013."

33. The ALJ finds the deposition testimony of Dr. Cebrian to be credible and his opinions to be thoroughly detailed in accordance with the causation analysis for cumulative trauma conditions outlined in the Colorado Workers' Compensation Medical Treatment Guidelines.

34. The ALJ finds the testimony of both Ben Smith and Paula Perea to be credible and persuasive.

35. The claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease of bilateral CMC osteoarthritis of the thumbs, or any other occupational disease, resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work. Dr. Cebrian's expert opinions are persuasive.

36. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury or occupational disease to his bilateral wrists or thumbs that arose out of and occurred in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; see, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

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

3. The claimant must prove that an injury directly and approximately 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.

4. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a worker's compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-42-201, 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).

5. In this claim, the claimant alleges an occupational disease of bilateral wrist and thumbs. Section 8-40-201(14), C.R.S. defines "occupation 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.

6. This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P2.d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An accidently injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1992). In contrast, an occupational disease arises not from an accident, but from prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

7. Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. 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. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. As found, the ALJ concludes that the claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease to his bilateral wrists or thumbs resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work.

9. The claimant has also failed to prove that he sustained an "accidental injury" on or about October 31, 2013. The November 4, 2013 Medical Report from authorized treating physician, Dr. Douglas Scott, does not mention any specific incident or injury that occurred on this date. To the contrary, Dr. Scott indicated that "he told me that the onset was that this problem has been ongoing for a long time, but started noticing a worsening in his wrist after he began a new job in finishing on 09/20/2013." This information is directly contrary to any assertion that the claimant sustained an industrial injury on October 31, 2013.

10. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: March 13, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

On October 24, 2013 (hereinafter "first injury" or "claim number WC 4-947-316"), Claimant sustained an admitted injury to his left shoulder while in the course and scope of his employment with Employer A. The Claimant was receiving medical treatment for that injury when he suffered a second injury on November 22, 2013 (hereinafter "second injury" or "claim number WC 4-935-813) while working for Employer B. Respondents B admitted liability for the foot and ankle injuries Claimant sustained, but denied liability for any alleged worsening or aggravation of Claimant's left shoulder condition. Respondents A allege that any additional medical treatment Claimant may need for his left shoulder is not related to the October 24, 2013 admitted claim. Claimant believes the November 2013 injury aggravated his left shoulder, and seeks a determination that he sustained a second left shoulder injury while working for Employer B. Alternatively, Claimant seeks an order finding and concluding that Respondents A are responsible for additional medical treatment for his left shoulder. The Claimant also endorsed temporary total disability benefits, but stated that Claimant continued to receive temporary total disability under claim number WC 4-935-813.

Respondents B endorsed the issue of medical benefits–reasonable and necessary. Based on the position statement Respondents B submitted, Respondents B seek an order determining that Claimant no longer needs any medical care related to the second injury.

FINDINGS OF FACT

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

1. Claimant was born on November 25, 1950 and was 63 years of age at the time of the hearing.

2. Claimant worked as stagehand through Union Local 7. Claimant works through Local Union 7 as a union stage hand. He is sent out to work for various employers. His job duties generally consist of heavy physical labor.

3. On October 24, 2014, Claimant worked for Employer A unloading crates at the Colorado Convention Center. As he grabbed a crate and spun it around, he injured his left shoulder.

4. After this incident, Claimant's shoulder was stiff and sore but it was "operational". Respondents A admitted liability for the injury.

5. Claimant testified that he had no shoulder problems before October 24, 2013.

6. Employer referred the Claimant to Concentra for medical treatment. Claimant saw physician's assistant Ron Rasis at Concentra on October 25, 2014. Mr. Rasis prescribed pain and anti-inflammatory medications, physical therapy and imposed work restrictions.

7. Claimant next worked for Employer B after completing the job for Employer A. On November 22, 2014 while working for Employer B, he was 'spotting' a pallet containing approximately 450 lbs. of boxed literature. These boxes were stacked five by about four feet high on the pallet which a forklift was moving. The Claimant was standing next to a guardrail as the forklift moved the pallet out to the loading dock. As it passed by the Claimant, the pallet collapsed, the boxes of literature fell off and onto him. He was knocked to the floor and pinned to the guardrail. He did not remember if he put his left arm out to break the fall or many details of the fall.

8. Claimant injured his ankles, knees, ribs and he testified that that this incident also injured/aggravated/worsened his prior left shoulder injury.

9. Claimant was still undergoing treatment at Concentra for his left shoulder at the time he sustained the second injury.

10. During the second injury, Claimant's most severe injuries were to his bilateral ankles. He suffered fractures, had surgery and was wheelchair bound for some time following the second injury. At that time, Claimant focused on his ankle problems rather than on his shoulder, which was reasonable under the circumstances. Claimant believes the second injury aggravated or worsened his left shoulder condition.

11. Claimant continued to receive treatment for his left shoulder at Concentra under WC 4-947-316-01 following the second injury. The treatment essentially consisted of physical therapy. As of February 25, 2014, the Claimant had reported no improvement in his left shoulder with physical therapy.

12. Claimant was referred to orthopedic surgeon Dr. Joshua Metzl at Steadman Hawkins for evaluation of his ankle injuries.

13. Dr. Metzl performed surgery on Claimant's left ankle on December 4, 2013. Dr. Metzl continued to provide conservative treatment for Claimant's right ankle.

14. On December 12, 2013, Claimant asked Dr. Metzl about his left shoulder. Dr. Metzl examined Claimant's left shoulder and noted that radiographs showed glenohumeral arthritis. Dr. Metzl recommended conservative treatment and follow up with one of Dr. Metzl's practice partners for definitive management once fixation of the ankle fracture was completed.

15. A MRI of Claimant's left shoulder done on March 3, 2014 revealed advanced glenohumeral degenerative changes, some tearing including a SLAP type II tear was suspected in conjunction with mild to moderate distal articular bicipital tendinopathy, and mildly acute inflamed moderate to advanced acromioclavicular degeneration is noted.

16. Claimant followed up with Dr. David Jones at Concentra on March 6, 2014 regarding his left shoulder. Dr. Jones' assessment was left shoulder AC joint osteoarthritis with acute flare. Dr. referred the Claimant to Dr. Michael Hewitt for a consultation.

17. On March 13, 2014, Claimant saw either Gary Sakryd who is Dr. Thomas Noonan's physician's assistant or Dr. Noonan for evaluation of his left shoulder. Dr. Noonan is Dr. Metzl's practice partner at Steadman Hawkins. The March 13, 2014 report noted that a lengthy discussion was had with Claimant regarding the natural history and progression of Claimant's shoulder condition. The provider noted that Claimant was ultimately a candidate for arthroplasty, but could undergo injections for temporary relief.

18. On April 7, 2014, Claimant saw Dr. Hewitt for the orthopedic consultation recommended by Dr. Jones. Dr. Hewitt examined Claimant's left shoulder and documented Claimant's history. He also reviewed Claimant's MRI and x-rays of Claimant's left shoulder. Dr. Hewitt noted that Claimant "understands he has advanced glenohumeral arthritis which would be chronic in nature." Dr. Hewitt also explained to the Claimant that the only surgery that would provide any long term benefit would be a partial or total shoulder replacement. Claimant elected to receive a subacromial injection during that visit.

19. Dr. Steven Horan examined the Claimant and performed a review of Claimant's medical records on behalf of Respondents B. In his September 9, 2014 report, Dr. Horan opined that the first injury exacerbated Claimant's left shoulder issues. Dr. Horan recommended one or two steroid injections over the next couple of years.

20. Dr. Hewitt requested authorization for a second injection, which prompted a WCRP Rule 16 review by Dr. Steven Horan. Dr. Horan issued a second report dated September 25, 2014 in which he stated the shoulder pain Claimant is experiencing was the "expected progression of the severe degenerative joint disease with which he has been previously diagnosed." Furthermore, "what he is experiencing now is the likely degenerative process of his diagnosis. I do not feel that the October or November injuries are causing the patient's symptoms at this time."

21. The credible medical evidence demonstrates that Claimant's left shoulder has advanced degenerative arthritis which was not caused by either work injury.

22. Dr. Kathleen D'Angelo testified as an expert on behalf of Respondents B. Dr. D'Angelo testified that the second injury did not cause, aggravate, accelerate or

exacerbate the pathology in Claimant's left shoulder. Although exacerbation, aggravation or acceleration of the *pathology* is not the applicable legal standard in this case, the ALJ agrees that the second injury did not produce the need for treatment of Claimant's left shoulder.

23. Based on the credible medical evidence the ALJ finds that Claimant's ongoing symptoms in his left shoulder are due to the degenerative disease process. Even if the second injury caused an acute flare of his left shoulder condition as Concentra records and Dr. Horan initially indicated, Claimant's symptoms have improved through the treatment he has received under WC 4-947-316. Claimant has admitted to his treatment providers that he is better than he was in the fall of 2013, but has not returned to his pre-injury status. However, as opined by many treatment providers, Claimant has severe degenerative arthritis in his left shoulder and his symptoms are to be expected regardless of any trauma.

24. Claimant may need additional treatment for his left shoulder problems, but the ALJ could find no credible or persuasive medical opinion that the need for additional treatment is due to either work injury. As such, Claimant has failed to meet his burden of proof that continued medical treatment for his left shoulder should be provided by Respondents A. In addition, the Claimant has failed to prove that he suffered an aggravation, acceleration or exacerbation of his left shoulder condition due to the second injury.

25. Dr. D'Angelo testified and her report states that Claimant is at maximum medical improvement for his second injury. She also testified that Claimant has had an impairment rating for his second injury, specifically for his ankle injuries. There is nothing in the medical records to corroborate Dr. D'Angelo's testimony and opinions in that regard. In addition, no final admission was offered into evidence. The status of Claimant's claim number WC 4-935-813 regarding medical benefits, maximum medical improvement or permanent impairment is entirely unknown to this ALJ. As such, the ALJ is not persuaded by Dr. D'Angelo's opinion that Claimant needs no further medical treatment for any component of his second injury. The ALJ declines to enter an order denying additional medical benefits under claim number WC 4-935-813 at this time.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

Medical Benefits Related to Injuries Sustained Under Claim No. WC 4-947-316

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

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

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

6. As found, no persuasive or credible medical evidence suggests that Claimant's ongoing symptoms in his left shoulder are due to anything other than the degenerative disease process. As such, Claimant has failed to meet his burden of proof that Respondents A should be liable for continued medical treatment for his left shoulder.

Compensability of Left Shoulder Condition or Relatedness of Left Shoulder Condition to Injuries Sustained Under Claim No. WC 4-935-813

7. 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.

8. 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 a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792 (1979). A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

9. The credible medical evidence demonstrates that Claimant's left shoulder has advanced degenerative arthritis which was not caused by either work injury. Assuming the second injury caused an acute flare of his left shoulder condition as Concentra records and Dr. Horan indicated, Claimant's symptoms have improved through the treatment he has received under WC 4-947-316. Claimant has admitted to his treatment providers that he is better than he was in the fall of 2013, but that he has not returned to his pre-injury status. However, as opined by many treatment providers, Claimant has severe degenerative arthritis in his left shoulder and his symptoms are to be expected regardless of any trauma. Claimant has failed to prove that the second injury aggravated, accelerated or exacerbated his pre-existing left shoulder condition to produce the need for medical treatment.

Denial of Additional Medical Benefits Under Claim No. WC 4-935-913

10. Respondents B endorsed the issue of medical benefits, but did not provide any explanation at the commencement of hearing regarding what was meant by that endorsement. Respondents B, in their position statement, requested an order denying all future medical benefits under Claim No. WC 4-935-913. Respondents B contend that Claimant failed to meet his burden to prove that he is entitled to ongoing medical benefits. The ALJ disagrees. Dr. D'Angelo testified and her report states that Claimant is at maximum medical improvement for his second injury. She also testified that Claimant has had an impairment rating for his second injury, specifically for his ankle injuries. There is nothing in the medical records to corroborate Dr. D'Angelo's testimony and opinions in that regard. In addition, no final admission was offered into evidence. The status of Claimant's claim number WC 4-935-813 regarding medical benefits, maximum medical improvement or permanent impairment is entirely unknown to this ALJ. As such, the ALJ is not persuaded by Dr. D'Angelo's opinion that Claimant needs no further medical treatment for any component of his second injury. The ALJ declines to enter an order denying medical benefits under claim number WC 4-935-813 at this time.

ORDER

It is therefore ordered that:

1. Claimant's claim for additional medical benefits for his left shoulder under claim number WC 4-947-316 is denied and dismissed.

2. Claimant's claim for workers' compensation benefits for his left shoulder under claim number WC 4-935-813 is denied and dismissed.

3. The request by Respondents' B for an order discontinuing all medical benefits under WC 4-935-813 is denied.

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

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

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

DATED: March 4, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Whether Dr. Swarsen and Dr. Stull are authorized treating providers.
- Whether Claimant has made a proper showing for a change of physician

FINDINGS OF FACT

1. Claimant suffered an admitted work related injury to her left shoulder on February 20, 2014 while working for Employer.

2. Claimant reported the injury to Employer and was sent to Braden Reiter, D.O. for treatment.

3. On March 6, 2014, Claimant saw Dr. Reiter. Claimant reported that while throwing a garbage bag into a trash bin she felt a pop in her left shoulder. Claimant did not mention to Dr. Reiter any knee pain or injury to her knee. Claimant filled out a pain diagram that only circled her left shoulder area. *See* Exhibit 7.

4. Dr. Reiter filled out an initial Physician's Report of Worker's Compensation Injury indicating the work related medical diagnosis was left shoulder strain. He placed Claimant on temporary restrictions, recommended physical therapy 2-3 times per week for 2-3 weeks, and prescribed 800 mg ibuprofen. *See* Exhibit 7.

5. On March 13, 2014 Claimant again saw Dr. Reiter. He continued her temporary restrictions, physical therapy, and ibuprofen. He noted that she would be rechecked in two weeks and if there was no improvement he would consider further diagnostic testing. Again, at this appointment, Claimant did not mention any knee pain or knee injury. *See* Exhibit 7.

6. On March 18, 2014 Claimant had a physical therapy appointment with physical therapist (PT) Patricia Dockter. Claimant reported to PT Dockter that her left shoulder/arm symptoms were better. PT Dockter noted that Claimant had had left lower extremity pain/radiating symptoms with an antalgic gait pattern that Claimant reported had started two days prior. Claimant reported to PT Dockter that this new pain must be from her injury. *See* Exhibit 7.

7. On March 27, 2014 Claimant again saw Dr. Reiter. Claimant reported that her shoulder was doing better, but that she still had some pain. Claimant reported she had a lot of pain in her left knee. Dr. Reiter noted that her left shoulder had full range of motion with slight pain over the lateral aspect, a negative drop-arm test, negative impingement test, intact distal sensation, and grip strength of +5/5. *See* Exhibit 7.

8. Dr. Reiter released Claimant to full duty work. Dr. Reiter advised Claimant that he could not treat Claimant's left knee as it was not part of the work injury. Dr. Reiter recommended Claimant follow up with her private physician for evaluation and further treatment of her left knee. Dr. Reiter released Claimant at maximum medical improvement (MMI) with no impairment. *See* Exhibit 7.

9. Dr. Reiter filled out a closing Physician's Report of Worker's Compensation Injury. Dr. Reiter noted that Claimant reached MMI for her work related sprain/strain of the shoulder and upper arm on March 27, 2014, was able to return to full duty work, and had no permanent impairment. Dr. Reiter did not make any referral for treatment or evaluation or check any boxes indicating Claimant needed follow up care or would be referred for any treatment for her work related left shoulder injury. *See* Exhibit 7.

10. Claimant contacted an attorney's office and was referred by the office to Ronald Swarsen, M.D. for treatment.

11. On April 7, 2014 Claimant saw Dr. Swarsen. Claimant reported to Dr. Swarsen that on February 20, 2014 she was throwing a trash bag over the edge of a large trash container when she felt a pop in the left shoulder and slipped. She reported that she hit her left shoulder against the container and then fell forward striking her left knee on debris that was around the base of the container. Claimant reported continued pain in her left shoulder and neck region and in her left knee. *See* Exhibit 8.

12. Claimant's April 7, 2014 report to Dr. Swarsen was the first time she mentioned to any provider that she had struck her left knee.

13. Claimant reported to Dr. Swarsen that she had been seen twice by the physician she was sent to, had 4 physical therapy sessions, and reported that she had no significant benefit from treatment. *See* Exhibit 8.

14. The report to Dr. Swarsen that she had no significant benefit from treatment of her left shoulder is contrary to Claimant's earlier reports to both Dr. Reiter and PT Dockter that her left shoulder symptoms were better.

15. Dr. Swarsen referred Claimant for an MRI of her left knee and left shoulder and also referred Claimant to Phillip Stull, M.D. an orthopedic surgeon. *See* Exhibit 8.

16. On April 11, 2014, Claimant underwent an MRI of her left shoulder and left knee. The MRI was interpreted by Radiologist James Piko. Dr. Piko provided the impression that Claimant had a small non displaced tear at the critical zone of her supraspinatus tendon, subdeltoid bursitis, small joint effusion, no labral tear, and subacromial arch moderate stenosis in her left shoulder. The results of her left knee MRI were not included in evidence. *See* Exhibit 10.

17. On April 17, 2014 Claimant saw Dr. Swarsen for a follow up appointment. Claimant reported that her left knee and left shoulder continued to hurt. Dr. Swarsen reviewed her April 11, 2014 left knee MRI and noted it showed positive results. Dr. Swarsen did not yet have the MRI report for Claimant's left shoulder. *See* Exhibit 8.

18. On April 22, 2014 Respondents issued a letter to Claimant's counsel denying Claimant's request for change of physician to Dr. Swarsen. The letter stated that Respondents would be filing a final admission of liability as Claimant had been placed at MMI. *See* Exhibit D.

19. On April 24, 2014, Respondents filed a final admission of liability, consistent with Dr. Reiter's March 27, 2014 report closing the matter and placing Claimant at MMI. *See* Exhibit 1.

20. On April 24, 2014 Claimant saw Dr. Stull on referral from Dr. Swarsen. Dr. Stull opined that Claimant had a torn medial meniscus and mild chondromalacia of her left knee. Dr. Stull recommended a left knee arthroscopy, partial meniscectomy, and related procedures. Dr. Stull also noted that Claimant had a symptomatic small left rotator cuff tear in her left shoulder that would likely require surgical care. Dr. Stull planned to address the shoulder issue after Claimant recovered from knee surgery. *See* Exhibit 9.

21. Claimant objected to Respondents April 24, 2014 final admission of liability and requested a Division Independent Medical Examination (DIME).

22. On July 15, 2014 Claimant underwent a DIME with Gary Zuehlsdorff, D.O. Dr. Zuehlsdorff opined that Claimant's left shoulder injury was work related. Dr. Zuehlsdorff noted that there were positive findings on an MRI for the left shoulder and that an orthopedist had recommended surgery. Thus, after his review, he opined that Claimant was not at MMI and recommended reopening the claim. Dr. Zuehlsdorff opined that the left knee was not work related and recommended no further evaluation, diagnostics, and/or treatment of the left knee. *See* Exhibit 2, Exhibit 3.

23. On August 8, 2014 Respondents filed a general admission of liability consistent with Dr. Zuehlsdorff's DIME opinion. *See* Exhibit 5.

24. Claimant is not found credible or persuasive. Her reports to medical providers and her hearing testimony are found to be inconsistent and do not persuade the ALJ.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Authorized Treating Provider

Authorization refers to the physician's legal status to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to provide a list of physicians from which the injured employee may select the physician who attends her. However, § 8-43-404(5)(a), C.R.S. implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Therefore, if the physician selected by the respondents refuses to treat the claimant for non-medical reasons, and the respondents fail to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *Id.*

Whether or not the physician has refused to treat the claimant for non-medical reasons is a question of fact for resolution by the ALJ. *Lutz v. Industrial Claim Appeals*

Office, 24 P.3d 29 (Colo. App. 2000). Here, the evidence establishes that Dr. Reiter discharged the claimant from further treatment for her work related left shoulder injury because he placed her at maximum medical improvement and did not believe that any additional treatment was necessary. Determining when an injured worker has reached maximum medical improvement is a medical determination and Dr. Reiter's discharge was for medical reasons. Therefore, in this case, the right of selection for treatment of Claimant's work related left shoulder injury did not pass to Claimant based on a refusal to treat for non-medical reasons.

Claimant argues that the right to select a physician passed to her when both Dr. Reiter and Employer refused to tender care to her for her work related injury. This is not found persuasive. As found above, Dr. Reiter did not refuse to tender care for Claimant's work related left shoulder injury. Rather, Dr. Reiter refused to provide care for the non work related left knee injury. For the left shoulder injury, Dr. Reiter did provide care. He saw Claimant multiple times, referred her for physical therapy, and ultimately placed her at MMI. Similarly, at no time did Employer refuse Claimant care for her work related left shoulder injury. Employer responded to Claimant's report of left shoulder injury, referred her to Dr. Reiter, and she received treatment from Dr. Reiter. Although both Dr. Reiter and Employer indicated Claimant would have to contact her personal physician for treatment of her left knee injury, there was never a refusal to tender care for Claimant's work related left shoulder injury and thus the right to select a physician to treat her left shoulder never passed to Claimant.

Claimant next argues that Dr. Swarsen and Dr. Stull were within the chain of referral from Dr. Reiter since Dr. Reiter referred her to her personal physician. It is well established that employers are liable for the expenses incurred when, as part of the normal progression of authorized treatment for a compensable injury suffered by a claimant, an authorized treating physician refers a claimant to one or more other physicians. Thus, the designation "authorized treating physician" includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an authorized treating physician" *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

Claimant's testimony that Dr. Reiter referred her to her personal physician for treatment of her work related left shoulder injury is not found credible or persuasive. Rather, the medical records and notes are very clear that he only referred her for treatment of her left knee and that there was no further treatment necessary for her work-related left shoulder condition. His March 27, 2014 closing Physician's Report of Worker's Compensation Injury is consistent with his narrative of the appointment. The form indicates Claimant reached MMI with no permanent impairment, that Claimant was able to return to full duty work with no restrictions, and does not indicate that any follow up care or referral is appropriate. It would be entirely inconsistent for Dr. Reiter to have filled out the form indicating he was making no referral for Claimant's left shoulder injury and note the same in his narrative, but at the same time for him to have told Claimant to treat her left shoulder with her personal physician. Rather, Dr. Reiter's reports are clear

that he referred her to her personal physician for her non work related left knee injury only.

This case is thus distinguishable from the case cited by Claimant. In *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), an authorized treating physician (ATP) had been treating the Claimant's knee. The ATP then referred the Claimant to her personal physician for treatment of the knee as he did not believe it to be work related. The knee in that case was later found to be work related and so the referral for treatment of that same body part was found to be in the ordinary course of treatment and the Claimant's personal physician was found to be authorized. Additionally, the surgeon that Claimant's personal physician referred her to was also was found to be in the chain of referral. The court held that the risk of mistake by an ATP in concluding that an injury is non-compensable lies with the employer. *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

In this case, Dr. Reiter did not refer Claimant to her personal physician for treatment of her left shoulder. In fact, he treated her left shoulder until a point where Claimant reported improvement and he believed her to be at MMI. He only referred Claimant to her personal physician for treatment of her left knee, which is not a compensable work related condition. Had Claimant's left knee condition been found work related subsequent to Dr. Reiter's referral to claimant's personal physician for treatment of the left knee condition then this case would be more analogous to the *Cabela* case. However, the facts of this case show that the referral to Claimant's personal physician was for a non work related condition and does not result in the personal physician becoming an ATP for the work related left shoulder condition. Therefore, Dr. Swarsen and Dr. Stull are not in the chain of referral for the work related injury and neither doctor qualifies as an ATP in this claim.

Change of Physician

Section 8-43-404(5)(a), C.R.S. states:

> Upon the proper showing to the Division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee, and in any non-surgical case the employee, with such permission, in lieu of medical aid, may procure any non-medical treatment recognized by the laws of this state as legal, the practitioner administering such treatment to receive such fee therefore under the medical provisions of articles 40 to 47 as this titled as may be fixed by the Division.

While ordering a change of physician is within the discretion of the ALJ, a change may not be based upon arbitrary considerations. *Consolidated Landscape v. Industrial Claim Appeals Office*, 883 P.2d 571 (Colo. App. 1994). Here, although claimant testified that she had confidence in Dr. Stull, she presented no evidence whatsoever to support a change of physician from Dr. Reiter. Claimant did not testify that she lacked

confidence in Dr. Reiter or that there was any type of breakdown in the doctor-patient relationship between herself and Dr. Reiter. The only evidence presented was that Dr. Reiter had placed her at MMI and that she disagreed with this assessment. The proper way to challenge this opinion was not through a change of physician but to pursue a DIME. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). It is not uncommon for ATPs to be mistaken about initial MMI determinations. Indeed, this is the purpose of the DIME process, of which claimant took advantage. Dr. Reiter did not have the benefit of the MRI at the time of his MMI determination and at the time of his MMI determination claimant demonstrated +5/5 of grip strength, full range of motion in her shoulder, and subjectively reported improvement in her shoulder condition to both him and to PT Dockter. Claimant has not returned to Dr. Reiter since the Division IME to obtain any follow up evaluations and has failed to make a proper showing as to why she failed to return to Dr. Reiter and that a change of physician to Dr. Swarsen and Dr. Stull is warranted.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show that Respondents refused to tender care and that the right to select a physician for her work related left shoulder injury passed to her.

2. Claimant has failed to meet her burden to show that Dr. Swarsen and Dr. Stull are within the chain of referral for her work related left shoulder injury. The treatment provided by Dr. Swarsen and Dr. Stull is unauthorized.

3. Claimant has failed to make a proper showing for a request of change of physician to Dr. Swarsen and Dr. Stull. Her request for change of physician is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 27, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable lower back injury on March 8, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) and Temporary Total Disability (TTD) benefits for the period March 9, 2014 until terminated by statute.

FINDINGS OF FACT

1. Claimant works as a Bartender for Employer. Her job duties involve serving food, bussing tables, making drinks, washing dishes, cleaning tables, changing kegs, stocking alcohol and closing the bar.

2. On Saturday, March 8, 2014 Claimant was changing out an empty beer keg. Claimant noted that an empty beer keg weighs approximately 40 pounds. While in Employer's walk-in cooler Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward and lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." The incident occurred shortly after 5:00 p.m. Claimant's back pain continued to increase throughout the rest of her work shift. She explained that towards the end of her shift she sat down and processed credit card receipts in an effort to reduce her lower back pain.

3. Surveillance videos from two angles in Employer's bar area reflect that Claimant did not appear to be in significant pain from approximately 5:00 p.m. until the conclusion of her shift several hours later at 1:00 a.m. on March 9, 2014. Claimant appears to move fluidly while performing her job duties. She serves drinks and bends as necessary.

4. Claimant testified that she did not explicitly tell any of her co-workers that she had injured her back while lifting a keg on March 8, 2014. She noted that the bar was busy and there was not much time to talk to anyone. Nevertheless she told co-worker Donivan Cano "numerous times that [her] back was hurting worse and worse

and worse . . . ." Claimant acknowledged that she did not tell Mr. Cano that she injured her back while moving a keg.

5. Mr. Cano testified that he also works as a Bartender for Employer. He confirmed that March 8, 2014 was a busy night and he did not recall whether a Budweiser keg had been changed. He remarked that Claimant likely worked her complete shift until 1:00 a.m. and she never told him that she had injured her back while changing a keg. Claimant told him that she was experiencing back pain and needed to sit down. She then sat down and processed credit card receipts.

6. Claimant testified that she was scheduled to open Employer's bar at 11:00 a.m. on March 9, 2014. However, Claimant explained that her "walking and mobility wasn't great" and her breathing was "awful." She thus contacted new employee Noel Martin, told her that she was unable to report for work because she was in pain after injuring her back on the previous night and asked Ms. Martin to cover the shift.

7. Ms. Martin testified at the hearing in this matter. She commented that Claimant never advised her that she had injured her back while changing a keg at work on March 8, 2014. Ms. Martin explained that she had received a text message from Claimant on the morning of March 9, 2014 requesting work coverage. When Ms. Marin arrived at Employer's bar she had a conversation with Claimant in which Claimant stated that she felt poorly but did not elaborate.

8. On Monday, March 10, 2014 Claimant went into work to perform inventory. General Manager Christina Fahey was at the bar because she oversees inventory. Claimant reported that she thought she had hurt her ribs or "popped some ribs out of place changing the Budweiser keg on Saturday night." She commented that she was unable to continue inventory duties because she was having difficulties sitting, breathing and talking. Claimant remarked that Ms. Fahey arranged for another employee to cover the shift and provided her with a list of two designated Workers' Compensation medical providers. Claimant chose HealthOne.

9. Claimant drove to HealthOne Occupational Medicine and Rehabilitation and was evaluated by Deana Halat, FNP. FNP Halat reported that Claimant had attempted to pick up an empty keg at work on March 8, 2014 but experienced pain throughout her back. Claimant mentioned that on the day after the incident

> she was much worse, with increasing shortness of breath, her ribs and back hurt, she has a hard time breathing, her whole back has now started to hurt. She had nausea and terrible vomiting yesterday. She has hardly eaten anything today, just a little bit of yogurt because she is so nauseated…She denies neck pain, chest pain, but she does have shortness of breath. She is clearly in significant pain and is grunting at all times because trying to take a deep breath is so painful for her… She has had diarrhea, last was today… She did not fall at work. The keg did not fall on her…

10. In completing a physical examination of Claimant, FNP Halat explained that there was "no palpable tenderness along the paraspinous muscles in [Claimant's] lower back." She determined that Claimant suffered from "shortness of breath, pain [and] left upper quadrant abdominal pain." FNP Halat remarked that she contacted 9-1-1 to transport Claimant to Swedish Medical Center because Claimant required more extensive evaluation than could be provided at the clinic. She concluded that she could not "with all certainty determine that this is a work-related injury. Additional diagnostics are indicated."

11. Claimant was admitted to Swedish Medical Center because of abdominal pain, flank pain, vomiting and nausea. Claimant reported that her symptoms began three days earlier while lifting a heavy keg at work. A chest x-ray and an abdominal CT scan did not reveal any acute findings. A subsequent CT scan of the lumbar spine was also normal. Doctors thus suspected that Claimant's pain was secondary to a musculoskeletal strain. On March 14, 2014 Claimant was discharged from Swedish Medical Center with a diagnosis of "low back pain, secondary to muscle spasm."

12. On March 17, 2014 Claimant returned to HealthOne for an examination. David Williams, M.D. noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed a lumbar strain and muscle spasms. He also took Claimant off of work. She subsequently attended several other appointments at HealthOne during March and April 2014. She was diagnosed with a lumbar strain and possible torn paraspinous muscles in her lower back. Claimant underwent conservative treatment that included medications and physical therapy.

13. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Finally, Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014. The record thus reveals that Claimant returned to work for Employer in a modified capacity on April 7, 2014.

14. On April 21, 2014 Insurer filed a Notice of Contest challenging Claimant's claim. Claimant explained that she was unable to receive medical treatment through her Workers' compensation physicians and was "left to her own devices" to obtain treatment.

15. On June 9, 2014 Claimant visited personal physician Christopher D'Ambrosio at Advanced Orthopedic & Sports Medicine Specialists for an examination. Dr. D'Ambrosio noted that Claimant suffers from fibromyalgia and chronic pain syndrome. Claimant reported severe pain in her lower back and posterior pelvis. She also had numbness and tingling that radiated down the back of both legs. Dr. D'Ambrosio recorded range of motion measurements that were identical to the deficits he had recorded on February 10, 2014. He commented that Claimant had a normal

lumbar spine MRI earlier in the year but sought a new MRI to "further evaluate her complaints."

16. Claimant's medical records prior to her March 8, 2014 date of injury reflect that she suffers from chronic pain symptoms. On January 6, 2014 Claimant underwent a lumbar spine MRI. The MRI did not reveal any structural abnormalities, protrusions or stenosis. On February 10, 2014 Claimant visited Dr. D'Ambrosio for an examination. Claimant reported pain of "unknown etiology with radicular symptoms out of proportion." She specifically suffered severe lower back pain and pain that radiated down her back. Her range of motion was 10 degrees lateral flexion on the right, 10 degrees extension on the right and 30 degrees flexion on the right. Range of motion testing on the left was 10 degrees lateral flexion. Dr. D'Ambrosio noted that Claimant had severe restrictions on flexion, extension and bending. Claimant reported a lower back pain level of 7/10. At a February 26, 2014 examination with Dr. D'Ambrosio he noted that Claimant suffers from chronic pain syndrome. He specifically commented that Claimant suffers from "fibromyalgia, Sjogren's and other rheumatologic chronic pain symptoms."

17. On June 20, 2014 Claimant underwent a repeat lumbar MRI. The radiology report did not reflect any structural changes in comparison to the January 6, 2014 lumbar MRI.

18. On July 28, 2014 Claimant returned to Dr. D'Ambrosio for an examination. Dr. D'Ambrosio recorded lumbar range of motion measurements that were better than the measurements prior to the workplace incident on March 8, 2014. He recommended physical therapy and a home exercise program.

19. On June 23, 2014 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall issued addendum reports on July 9, 2014, August 8, 2014 and September 8, 2014. Claimant reported that on Saturday, March 8, 2014 she was working for Employer as a bartender and was changing out an empty beer keg. She leaned forward, lifted an empty keg and twisted. Claimant experienced a pain in her lower back that felt "weird." Dr. Fall also reviewed Claimant's medical records and conducted a physical examination. She concluded that Claimant's presentation was consistent with her prior history of worsening back pain and stiffness. Claimant did not suffer a new, specific work-related injury. Dr. Fall noted that during Claimant's initial visit at HealthOne she reported nausea, vomiting, abdominal pain and shortness of breath. Claimant's symptoms were not typical for a lumbar strain. Instead, Dr. Fall maintained that Claimant's symptoms were more consistent with her pre-existing condition.

20. Dr. Fall subsequently determined that additional medical records supported her position that Claimant did not suffer a new lumbar spine injury or the aggravation of a pre-existing condition on March 8, 2014. She remarked that Claimant's symptoms pre-dated the industrial incident because she had been experiencing progressive worsening of her symptoms. In fact, Claimant was suffering leg pain and 7/10 pain levels prior to March 8, 2014.

21. On July 25, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Fall. Dr. Fall maintained that Claimant's presentation was consistent with her prior history of worsening lower back pain and stiffness instead of a new, work-related injury. She noted that Claimant's radicular symptoms upon returning to light duty work were consistent with her pre-existing condition as detailed in the medical records. Dr. Fall remarked that Claimant had normal EMG and MRI studies that suggested her severe pain complaints were inconsistent with the objective findings. She summarized that Claimant had a pre-existing rheumatological condition with progressive worsening and not a new industrial injury. Dr. Fall noted that Claimant did not have any work restrictions that were attributable to the March 8, 2014 incident.

22. Dr. Fall also testified at the hearing in this matter. She maintained that Claimant's symptoms constitute the natural progression of her pre-existing, chronic lower back pain. Dr. Fall noted that there is no objective evidence to suggest that Claimant suffered a new lower back injury on March 8, 2014. She commented that Claimant's lumbar MRI findings did not change between January 6, 2014 and June 20, 2014. After reviewing Dr. D'Ambrosio's medical records, Dr. Fall detailed that Claimant's physical examination findings and medications also did not change before and after the industrial incident on March 8, 2014. Notably, Claimant's lumbar range of motion was identical on February 10, 2014 and June 9, 2014. Moreover, Dr. Fall explained that there are no objective findings to support Claimant's ongoing lower back symptoms. Furthermore, she explained that, although Claimant attributed her continuing pain to undergoing a hysterectomy, hysterectomies typically do not cause lower back symptoms. Accordingly, Dr. Fall concluded that Claimant's lower back symptoms constitute the natural progression of a pre-existing condition.

23. Claimant worked an average of 30 hours per week for Employer. She earned $4.98 each hour plus tips. Claimant had gross earnings of $4,511.24 for the period December 28, 2013 through March 8, 2014. Dividing $4,511.24 by 12 weeks yields an AWW of $375.94.

24. Claimant has established that it is more probably true than not that she sustained a compensable lower back injury on March 8, 2014 during the course and scope of her employment with Employer. However, the March 8, 2014 incident constituted a temporary aggravation of her chronic, pre-existing condition that returned to baseline by March 18, 2014. On March 8, 2014 Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward and lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." Claimant's co-worker Mr. Cano confirmed that Claimant stated that she was experiencing pain and needed to sit down. She then sat down and processed credit card receipts. Claimant subsequently obtained medical treatment through HealthOne. She consistently maintained that she injured her lower back while lifting an empty keg at work. Physicians diagnosed Claimant with a lumbar strain and possible torn paraspinous muscles in her lower back. She underwent conservative treatment that included medications and physical therapy.

25. Dr. Fall maintained that Claimant has suffered a natural progression of her pre-existing, chronic lower back condition. She noted that there is no objective evidence to suggest that Claimant suffered a new, lower back injury on March 8, 2014. Dr. Fall commented that Claimant's lumbar MRI findings did not change between January 6, 2014 and June 20, 2014. After reviewing Dr. D'Ambrosio's medical records Dr. Fall detailed that Claimant's physical examination findings and medications also did not change before and after the industrial incident on March 8, 2014. Notably, Claimant's lumbar range of motion was identical on February 10, 2014 and June 9, 2014. Moreover, Dr. Fall explained that there are no objective findings to support Claimant's ongoing lower back symptoms. She summarized that Claimant had a pre-existing rheumatological condition with progressive worsening. Claimant did not suffer a new industrial injury.

26. Although Dr. Fall maintained that Claimant's symptoms constituted the natural progression of her pre-existing condition, the record reflects that an incident occurred on March 8, 2014 while Claimant was lifting a keg at work. The incident caused a temporary aggravation of her pre-existing condition and prompted her need for medical treatment. However, Claimant's temporary aggravation resolved by March 9, 2014 when her pain symptoms decreased to the levels she had reported prior to her March 8, 2014 industrial injury. Accordingly, Claimant's work activities on March 8, 2014 aggravated, accelerated, or combined with her pre-existing condition to produce a need for medical treatment.

27. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. However, her entitlement to medical benefits ceased by March 18, 2014 when her pain symptoms returned to baseline levels. The lumbar MRI's performed both prior to and after the March 8, 2014 incident showed no disc pathology or neural encroachment. Claimant simply continued to report lower back pain and radicular symptoms that had existed prior to March 8, 2014. The treatment recommendations for Claimant's chronic, lower back pain and radicular symptoms also did not change subsequent to the work incident. Claimant continued to take the same medications. Dr. D'Ambrosia had recommended physical therapy and a home exercise program to Claimant prior to March 8, 2014 and reiterated those recommendations subsequent to the work incident. Moreover, Claimant's lumbar range of motion was the same on February 10, 2014 and June 9, 2014. Claimant's March 8, 2014 work incident thus caused a temporary aggravation of her pre-existing, chronic lower back pain and radicular symptoms. Specifically, on February 10, 2014 Claimant had reported a lower back pain level of 7/10 to Dr. D'Ambrosio. Based upon the medical evidence, any temporary aggravation to Claimant's chronic, preexisting condition thus returned to baseline by March 19, 2014 when Claimant reported a pain level of 7/10 to Dr. Williams at HealthOne. On a pain diagram on March 21, 2014 Claimant again rated her pain level as 6-7/10. Accordingly, Claimant's temporary aggravation resolved by March 19, 2014.

28. **Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period March 9, 2014 through April 6, 2014.**

On March 8, 2014 Claimant suffered a lower back injury at work and was subsequently admitted to Swedish Medical Center until she was discharged on March 14, 2014. On March 17, 2014 Claimant returned to HealthOne for an examination. Dr. Williams noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed her with a lumbar strain and muscle spasms. He also took Claimant off of work. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Finally, Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014. The record thus reveals that Claimant returned to work for Employer in a modified capacity on April 7, 2014. Pursuant to §8-42-105(3)(b), C.R.S. Claimant's TTD benefits ceased by operation of law when she returned to modified employment. Accordingly, Claimant is entitled to TTD benefits for the period March 9, 2014 through April 6, 2014.

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 she suffered a disability that was proximately caused by an injury arising

out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable lower back injury on March 8, 2014 during the course and scope of her employment with Employer. However, the March 8, 2014 incident constituted a temporary aggravation of her chronic, pre-existing condition that returned to baseline by March 18, 2014. On March 8, 2014 Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward and lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." Claimant's co-worker Mr. Cano confirmed that Claimant stated that she was experiencing pain and needed to sit down. She then sat down and processed credit card receipts. Claimant subsequently obtained medical treatment through HealthOne. She consistently maintained that she injured her lower back while lifting an empty keg at work. Physicians diagnosed Claimant with a lumbar strain and possible torn paraspinous muscles in her lower back. She underwent conservative treatment that included medications and physical therapy.

7. As found, Dr. Fall maintained that Claimant has suffered a natural progression of her pre-existing, chronic lower back condition. She noted that there is no objective evidence to suggest that Claimant suffered a new, lower back injury on March 8, 2014. Dr. Fall commented that Claimant's lumbar MRI findings did not change between January 6, 2014 and June 20, 2014. After reviewing Dr. D'Ambrosio's medical records Dr. Fall detailed that Claimant's physical examination findings and medications also did not change before and after the industrial incident on March 8, 2014. Notably, Claimant's lumbar range of motion was identical on February 10, 2014 and June 9, 2014. Moreover, Dr. Fall explained that there are no objective findings to support Claimant's ongoing lower back symptoms. She summarized that Claimant had a pre-existing rheumatological condition with progressive worsening. Claimant did not suffer a new industrial injury.

8. As found, although Dr. Fall maintained that Claimant's symptoms constituted the natural progression of her pre-existing condition, the record reflects that

an incident occurred on March 8, 2014 while Claimant was lifting a keg at work. The incident caused a temporary aggravation of her pre-existing condition and prompted her need for medical treatment. However, Claimant's temporary aggravation resolved by March 9, 2014 when her pain symptoms decreased to the levels she had reported prior to her March 8, 2014 industrial injury. Accordingly, Claimant's work activities on March 8, 2014 aggravated, accelerated, or combined with her pre-existing condition to produce a need for medical treatment.

Medical Benefits

9. 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).

10. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. However, her entitlement to medical benefits ceased by March 18, 2014 when her pain symptoms returned to baseline levels. The lumbar MRI's performed both prior to and after the March 8, 2014 incident showed no disc pathology or neural encroachment. Claimant simply continued to report lower back pain and radicular symptoms that had existed prior to March 8, 2014. The treatment recommendations for Claimant's chronic, lower back pain and radicular symptoms also did not change subsequent to the work incident. Claimant continued to take the same medications. Dr. D'Ambrosia had recommended physical therapy and a home exercise program to Claimant prior to March 8, 2014 and reiterated those recommendations subsequent to the work incident. Moreover, Claimant's lumbar range of motion was the same on February 10, 2014 and June 9, 2014. Claimant's March 8, 2014 work incident thus caused a temporary aggravation of her pre-existing, chronic lower back pain and radicular symptoms. Specifically, on February 10, 2014 Claimant had reported a lower back pain level of 7/10 to Dr. D'Ambrosio. Based upon the medical evidence, any temporary aggravation to Claimant's chronic, preexisting condition thus returned to baseline by March 19, 2014 when Claimant reported a pain level of 7/10 to Dr. Williams at HealthOne. On a pain diagram on March 21, 2014 Claimant again rated her pain level as 6-7/10. Accordingly, Claimant's temporary aggravation resolved by March 19, 2014.

Average Weekly Wage

11. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on her earnings at the time of injury. The Judge must calculate the money

rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). As found, an AWW of $375.94 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

TTD and TPD 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). **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.**

13. **As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period March 9, 2014 through April 6, 2014. On March 8, 2014 Claimant suffered a lower back injury at work and was subsequently admitted to Swedish Medical Center until she was discharged on March 14, 2014. On March 17, 2014 Claimant returned to HealthOne for an examination. Dr. Williams noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed her with a lumbar strain and muscle spasms. He also took Claimant off of work. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Finally, Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014. The record thus reveals that**

Claimant returned to work for Employer in a modified capacity on April 7, 2014. Pursuant to §8-42-105(3)(b), C.R.S. Claimant's TTD benefits ceased by operation of law when she returned to modified employment. Accordingly, Claimant is entitled to TTD benefits for the period March 9, 2014 through April 6, 2014.

ORDER

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

1. Claimant suffered a compensable temporary aggravation of her lower back condition while working for Employer on March 8, 2014.

2. Claimant is entitled to medical treatment through March 19, 2014.

3. Claimant earned an AWW of $375.94.

4. **Claimant shall receive TTD benefits for the period March 9, 2014 through April 6, 2014.**

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

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

DATED: March 11, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issues to be determined by this decision are the following:

1. Whether the respondents have overcome the opinion of the Division IME by clear and convincing evidence regarding whether claimant is at maximum medical improvement (MMI)?

2. Whether the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 28, 2014 and ongoing when he was released in writing by his treating physician to regular employment on May 21, 2014?

3. Whether the claimant has proven by a preponderance of the evidence that further medical benefits are reasonably necessary and related to the work injury?

4. What is claimant's proper average weekly wage?

FINDINGS OF FACT

1. The claimant sustained an industrial injury to his left knee on February 24, 2014 while working for the respondent-employer. At that time the claimant injured his left knee while securing equipment. There was bad weather that day and the claimant's supervisor asked him to secure the materials from the wind. He picked up a piece of plywood and was blown into a steel beam injuring his left knee. The claimant believes that he blacked out for a few seconds. He suffered a laceration to his left knee.

2. Immediately after sliding into the steel beam, the superintendent came and helped him into his truck and took him to the emergency department.

3. The claimant went to Penrose St. Francis emergency department on February 24, 2014. His left knee was sutured and he was given a knee immobilizer.

4. On February 25, 2014, Dr. Steve DeCoud, at Premier Urgent Care, examined the claimant. He was given temporary work restrictions from February 25,

2014 through February 27, 2014 of no lifting, no pushing or pulling, walking less than two hours per day, no crawling, no squatting, and no climbing.

5. On February 27, 2014, Dr. Robert Magnuson gave the claimant temporary work restrictions from February 27, 2014 through March 6, 2014 of no lifting over ten pounds, no carrying over 10 pounds, no pushing or pulling over ten pounds, walking less than two hours per day, no crawling, no squatting, and no climbing.

6. On March 5, 2014, Dr. Sharma placed the claimant at MMI and released him back to full duty without any restrictions. However, Dr. Sharma evaluated the claimant again on March 28, 2014. On that date, he indicated that he anticipated the claimant would reach MMI on April 11, 2014.

7. On March 28, 2014, the claimant underwent an x-ray on his left knee, which revealed "mild degenerative changes of the medial and patellofemoral compartments."

8. On April 11, 2014, Dr. Sharma evaluated the claimant. He was given a hinged knee brace for his left knee. He was diagnosed with left knee medial meniscus tear. Dr. Sharma referred him to physical therapy and referred for an MRI on his left knee.

9. On April 21, 2014, Dr. Sharma evaluated the claimant again. His diagnosis was changed to Left knee Pre-patellar bursitis with chondromalacia patella. The claimant was referred to orthopedic surgeon, Dr. David Walden.

10. On May 21, 2014, Dr. Sharma placed the claimant at MMI and he did not give him a permanent impairment. Dr. Sharma recommended three injections with Dr. Walden as maintenance care.

11. The respondent-insurer filed a Final Admission of Liability (FAL) on June 5, 2014.

12. The claimant filed a timely objection to the FAL and a notice and proposal for a Division Independent Medical Examination ("Division IME").

13. The claimant underwent a Division IME with Dr. Stephen Scheper on September 9, 2014. In his report, Dr. Scheper opined that the claimant was not at MMI for his left knee injury.

14. Dr. Scheper opined that "[i]n consideration of his long professional career without difficulty, the inciting event on 2/24/2014 resulted in a dramatic change to his functional capacity for gainful employment and deserves further management."

15. The ALJ finds that Dr. Scheper's opinion was that the industrial injury substantially aggravated the claimant's pre-existing knee condition and that the claimant is not yet back to baseline.

16. Dr. Scheper recommended "he be referred back to orthopedic surgery for continued treatment with Dr. Walden, or an additional provider at the claimant's discretion. The specific treatment options should be left to the expertise of his orthopedist at this point."

17. Dr. Scheper noted that "[p]ermanent impairment rating is not applicable at this time. This should be reassessed when he indeed reaches MMI status."

18. The respondents filed an application for hearing on October 17, 2014 to overcome the DIME of Dr. Stephen Scheper.

19. The claimant filed a response to the application for hearing on October 24, 2014 endorsing average weekly wage (AWW), temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, medical benefits, and reasonable and necessary as additional issues.

20. The respondents' retained independent medical record reviewer, Dr. Wallace Larson to review the claimant's medical records. Without examining the claimant, Dr. Larson opined that the claimant is at MMI and does not require any additional treatment.

21. The claimant was able to perform his job duties as a rigger and carpenter before February 27, 2014 without any difficulty. Since his injury the claimant has not been able to perform his full job duties as a result of his industrial injury. Although he did not have work restrictions, the respondent-employer was accommodating the claimant's work by only having him perform light duty work.

22. The claimant was laid off by the respondent-employer on May 28, 2014, shortly after being placed at MMI. It was the claimant's understanding that he was laid

off because his employer didn't have any light duty and he was unable to perform full duty work. The respondent- employer had the claimant on light duty until he was laid off.

23. On April 21, 2014, Dr. Sharma reviewed and signed off on the claimant's "demonstrated physical capabilities." Dr. Sharma agreed that the claimant's work demands lifting from floor to knuckle, knuckle to shoulder, shoulder to overhead all required a capability of lifting over seventy-five pounds. The claimant's work demands an overall carrying capability of over seventy-five pounds. The claimant's actual capability to lift from floor to knuckle was sixty pounds. The claimant's actual capability to lift from knuckle to shoulder was "NT" [not tested]. The claimant's actual capability to lift from shoulder to overhead was "NT" [not tested]. The claimant's actual capability to carry is only fifteen pounds. Only being able to carry fifteen pounds places the claimant in the light category of work.

24. The Claimant began working for the respondent-employer on October 31, 2013. He was paid $20.00 an hour. The wage records indicate that the claimant worked 15 weeks between his start date and the February 28, 2014 pay date. There are two weeks where it appears the claimant did not work or the time was negligible. During the 15 weeks the claimant earned $10,250.00. This equates to an average weekly wage of $683.33.

25. The ALJ finds that there is insufficient medical evidence to establish anything more than a difference of opinion between the DIME physician, Dr. Scheper, and the other physicians who have opined upon the claimant's condition, as such the respondents have failed to establish that Dr. Scheper's findings are clearly erroneous.

26. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to temporary total disability benefits from and including May 28, 2014 and ongoing because the claimant's wage loss is due directly to his industrial injury; that is, but for the consequences of his industrial injury the respondent-employer would not have laid off the claimant.

27. The ALJ finds that the claimant has established that it is more likely than not that he requires additional treatment as determined by Dr. Scheper in order to cure or relieve him from the effects of the industrial injury.

28. The ALJ finds that the claimant has established that it is more likely than not that his average weekly wage is $683.33.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, (W.C. No. 4-

874-745-01, ICAO February 14, 2014); *See also Javalera v. Monte Vista Head Start, Inc.,* (W.C. No. 4-532-166, ICAO July 19, 2004); *Gonzales v. Browning Industries of Colorado*, (W.C. No. 4-350-356, ICAO March 22, 2000).

8. As found above, the ALJ concludes that the medical opinions of the DIME physician, Dr. Scheper, have not been overcome by clear and convincing evidence, as the other physicians opinions only amount to a difference of opinion.

9. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

10. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that his wage loss is directly attributable to his industrial injury; therefore, the claimant is entitled to TTD benefits commencing May 28, 2014 and continuing until terminated by operation of law.

11. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

12. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

13. The ALJ concludes, as found above, that the claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical care to cure or relieve him from the effects of his industrial injury as recommended by Dr. Scheper.

14. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), See Also Section 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p. 1457. The objective of wage calculation is to reach a fair approximation of the claimant's

actual wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

15. The ALJ concludes, as found above, that the claimant began working for the respondent-employer on October 31, 2013. The claimant was paid $20.00 an hour. The wage records indicate that the claimant worked 15 weeks between his start date and the February 28, 2014 pay date. There are two weeks where it appears the claimant did not work or the time was negligible. During the 15 weeks the claimant earned $10,250.00. This equates to an average weekly wage of $683.33.

16. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that his AWW is $683.33.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents attempt to overcome the DIME opinion of Dr. Scheper is denied and dismissed.

2. The respondent-insurer shall pay the claimant TTD benefits beginning May 28, 2014 and continuing until terminated by operation of law.

3. The respondent-insurer shall pay for all reasonable and necessary medical care to cure or relieve the claimant from the effects of his industrial injury; and specifically as recommended by Dr. Scheper.

4. The claimant's average weekly wage is $683.33.

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: March 9, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

Whether Claimant's average weekly wage (AWW) should be increased by $124.58 per week to include Employer's cost of health insurance.

STIPULATIONS

Claimant's AWW without the increase for health insurance cost is $827.01. If the health insurance cost is found by the ALJ to be included in Claimant's AWW, then the new AWW rate would be $951.59.

FINDINGS OF FACT

1. Claimant was hired by Employer on April 4, 2014 as a general handyman at one of Employer's residential apartment complexes. Claimant's first day of work for Employer was April 7, 2014. *See* Exhibit A.

2. In his letter of hire, Claimant was advised that Employer imposed a 90-day period for all new employees during which they were not entitled to benefits afforded more tenured employees including, but not limited to, group insurance and sick leave. The letter of hire also informed Claimant that during the 90-day period his work productivity and ability to work with co-employees and subcontractors would be examined closely. The letter further advised Claimant that it would be within the sole discretion of Employer to terminate at any time during the 90-day probation period, or at any time thereafter, the employment of any employee for any reason or no reason, with or without notice. Claimant received this letter and signed it. *See* Exhibit A.

3. On June 14, 2014 Claimant suffered an admitted work related injury when he fell down stairs at Employer's property while responding to an on-call emergency at 3:00 a.m. to change the smoke detector battery at one of Employer's residential units. *See* Exhibit 2.

4. On the date of his injury, Claimant was still a probationary employee and had not yet worked 90 days for Employer.

5. Claimant has not worked for Employer since June 14, 2014.

6. Claimant remains an employee of Employer. Employer placed Claimant on a leave of absence, due to the injury, with an effective leave of absence date of June 18, 2014.

7. When Claimant was hired, he elected benefits, which would have become effective after 90 days of active employment, or on July 6, 2014.

8. Employer's 2014 Employee Benefits Handbook states that coverage for benefit elections that an employee makes become effective after the employee has been actively employed by Employer for 90 days. *See* Exhibit G.

9. Employer's Employee Handbook, revised August 1, 2013, states that all full-time employees are eligible for the medical insurance plan on the first day following their initial 90 days of employment. *See* Exhibit F.

10. At the time of his injury, Claimant was not yet eligible for health insurance benefits. Employer had not yet paid for any benefits for Claimant and similarly Claimant had not contributed any amount toward the costs of health insurance benefits.

11. As Claimant did not work for Employer following his June 14, 2014 injury, per company policy, he was not eligible for health insurance benefits on July 6, 2014 when his probationary period would have ended had he remained actively employed.

12. Despite not being eligible for health insurance benefits per company policy, sometime shortly after July 6, 2014 Claimant was issued a health insurance card. Claimant used the health insurance for non-work related medical issues shortly after he received it.

13. The cost to Employer of providing health insurance benefits to Claimant was $124.58 per week. Claimant did not incur any costs for the health insurance benefits.

14. Sometime in October of 2014, Claimant attempted to fill a prescription at Walgreens and was advised by Walgreens that his insurance had been cancelled.

15. Claimant's health insurance benefits were cancelled by Employer on October 10, 2014. Employer did not enter Claimant's leave of absence into their computer system in June of 2014 when Claimant stopped working and went out on a leave of absence due to an internal error.

16. Employer realized the error in October of 2014 and submitted the leave of absence into their computer system. Employer then terminated Claimant's health insurance benefits.

17. On October 21, 2014 Claimant spoke with Employer and was explained that since he had not worked for 90 days, he was not eligible for benefits and that his insurance card had been issued in error.

18. Claimant was the beneficiary of approximately three months of health insurance benefits for which he was not eligible under the contract of hire.

19. Although Claimant was expected to continue actively working for Employer from June 14, 2014 until he reached his 90th day of employment, his employment status was not guaranteed by Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.,*

supra. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

Here, it is clear that at the time of Claimant's injury he was not yet eligible for any health insurance benefits or additional compensation from Employer beyond his wages as he had not yet worked for Employer for 90 days. Claimant's average weekly wage at the time of his injury was $827.01. At the time of his injury, Claimant had not made any contributions for health insurance benefits. Employer was also not providing any health insurance benefits to Claimant nor had Employer made any payments or contributions for health insurance benefits. There was no evidence to support a cost to Claimant to continue a health insurance plan or to convert to a similar or lesser plan after his injury.

The statute requires that Claimant's AWW be based on the earnings at the time of the injury unless for any reason using his actual earnings at the time of the injury would not fairly determine Claimant's AWW. *See* § 8-42-102(2), C.R.S. (2014). The ALJ is not persuaded that using Claimant's actual earnings on the date of his injury would not fairly determine his AWW. Departing from the requirements of § 8-42-102(2), and using the discretionary authority under § 8-42-102(3), to include prospective benefits and a prospective cost to Employer of health insurance benefits is not found appropriate in this case.

The prospective benefits were not in force at the time of the injury and there were no guarantees by Employer that Claimant would remain employed through the probationary period and receive health insurance benefits. Rather, the contract of hire makes it clear that Claimant could be terminated at any time during his probationary period and that only after successful completion would Claimant be eligible for benefits. Claimant did not work for Employer long enough to be eligible for benefits. Claimant also has not worked since the date of his injury. Although he remains an employee, the ALJ finds it persuasive that Claimant did not and has not actively worked for Employer for 90 days. Under the contract of hire, Claimant has never been entitled to health insurance benefits. Therefore, the ALJ does not find it appropriate and does not find that fairness requires adding to Claimant's average weekly wage the prospective cost to Employer of health insurance benefits.

Claimant argues that manifest injustice occurred as a result of Employer issuing him health insurance benefits and then revoking the same. However, as found above, the health insurance benefits were issued in error as Employer failed to note in their computer system that Claimant was no longer working and out on a leave of absence. Rather than suffering a manifest injustice, Claimant was the beneficiary of health insurance for a period of approximately three months that he was not due or owed under the contract of hire.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $827.01. The calculation of AWW shall not be increased to include Employer's cost of health insurance.

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: March 24, 2015

/s/Michelle E. Jones_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on May 23, 2014.

2 Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 24, 2014 until terminated by statute.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $513.00.

2. The medical treatment Claimant received for the May 23, 2014 incident from University of Colorado Hospital, Michael Ladwig, M.D., Nicholas K. Olsen, D.O., Brian Reiss, M.D., Physiotherapy Associates, Health Images, Touchstone Imaging and Rehabilitation Associates was authorized.

3. Respondents have paid Claimant's medical bills from the authorized providers with the possible exception of the University of Colorado Hospital Emergency Room from May 26, 2014. Respondents agree to pay the May 26, 2014 Emergency Room bill.

FINDINGS OF FACT

1. Employer is a janitorial supply and distribution company. Claimant began working for Employer on January 6, 2011 as a Warehouseman. His job duties involved pulling orders, stocking freight, delivering orders and installing dispensers. Claimant's normal work hours were Monday through Friday from 9:00 a.m. until 5:30 p.m.

2. Claimant testified that on Friday morning May 23, 2014 he was loading items into his delivery van at Employer's warehouse. He began experiencing left lower back pain while lifting five gallon buckets of degreaser that each weighed approximately 50 pounds. When he arrived at his destination for delivery of the degreaser Claimant carried the buckets into the customer's facility. Claimant explained that, because of his worsening pain, he carried two buckets at a time in an attempt to balance his load. Claimant described sharp pain that pushed through his back.

3. Claimant completed his delivery duties for the day and returned to Employer's warehouse. At approximately 2:20 p.m. General Manager of Employer

Penny Schreter left early for the Memorial Day weekend. Ms. Schreter instructed Claimant that he could close up and leave early once his co-worker Mark Gurule returned from Colorado Springs. Claimant commented that he thus continued to perform work around the warehouse until he left for the day at 4:15 p.m. Claimant remarked that he moved a couple of 55 gallon drums using a drum lift. He explained that he first maneuvered or "manhandled" the drum to get it to the corner of the pallet. Claimant stood on the pallet, hugged the drum and twisted it around. Claimant noted that by the end of his work day he was suffering significant lower back pain and could hardly bend over.

4. At approximately 4:15 p.m. Mr. Gurule returned to Employer's warehouse from Colorado Springs. Claimant locked up the warehouse and then went home. He explained that his lower back pain started becoming more severe and he developed aching pain down his left leg. Claimant noted that he remained in significant pain throughout the weekend.

5. On Sunday, May 25, 2014 Claimant contacted Ms. Schreter and told her that he was suffering excruciating pain. He believed that he needed to go to an emergency room by ambulance. Claimant stated that he discussed with Ms. Schreter that his pain had started on Friday May 23, 2014 while he was lifting five gallon buckets of degreaser. Ms. Schreter advised Claimant to visit an emergency room if it was necessary.

6. On Monday, May 26, 2014 Claimant was still suffering excruciating pain and went to University Hospital for medical treatment. On admission to the University of Colorado Hospital Emergency Room Claimant informed the nurse that he had been experiencing intermittent lower back pain since December. Claimant denied trauma but reported heavy lifting at work that involved moving five gallon buckets and 55 gallon drums during the preceding week. The physician notes reveal that Claimant had a history of lower back injuries at work that began in December 2013 while pulling 2,500 pound pallets with a pallet jack. Claimant specifically commented that he had been experiencing very severe lower back pain over the last three days after an acute exacerbation. He noted that he was recently moving some five gallon pails at work and climbing ladders at home to move a swamp cooler. Claimant had been using hot packs and trying a back brace but his pain intensified over the weekend.

7. Claimant testified that he mentioned climbing his ladder at home because the physician asked him to describe all the different things he had done with his back. He had experienced some pain or a "tweak" to his lower back days before the May 23, 2014 incident while stretching his leg around and twisting to get on a ladder to descend from his roof at home. Claimant had been cleaning and sealing the swamp cooler on his roof to prepare it for operation. He described removing the cover of the swamp cooler on his roof, sweeping out debris and spraying the interior with sealant. Claimant did not take any parts of the swamp cooler down off his roof. He denied slipping or falling. Claimant did not move the swamp cooler as reflected in the Emergency Room records. In fact, Claimant's neighbor Don Wiles testified that he was able to observe Claimant's roof and remembers when the previous owner of the home installed the

swamp cooler. The same swamp cooler is still there and to his knowledge has never been moved. Claimant noted that the lower back pain was temporary and resolved by the following day. He performed his regular job duties on the day following the swamp cooler incident.

8. Claimant acknowledged that it had not been unusual for him to "tweak" his lower back since the previous winter when he hurt his back moving 2,500 pound pallets of ice melt for Employer. He explained that he could do little things that would cause mild pain or a cramp in his lower back. Claimant would typically have pain for a day or two before improving. He also described another recent incident of back pain in which his foot slipped in a restroom stall when he was installing a toilet tissue dispenser as part of his job duties. Claimant noted that he had never missed work, obtained medical care or sought Workers' Compensation benefits for his lower back symptoms.

9. Ms. Schreter testified to the chronology of events surrounding Claimant's May 23, 2014 incident. She explained that on Wednesday May 21, 2014 at approximately 10:00 a.m. Claimant sought to leave work because it was a light day. He stated that there was something he needed to do at home. Ms. Schreter permitted Claimant to leave Employer's warehouse and go home.

10. Claimant returned to work on Thursday May 22, 2014. He reported to Ms. Schreter that he injured his lower back on the previous day when descending a ladder while repairing the swamp cooler on his roof. Ms. Schreter remarked that Claimant appeared to be experiencing discomfort and was limping. She asked Claimant if he wanted to go home but he replied that he would wear his back brace and be fine. Claimant subsequently wore his back brace throughout his shift.

11. Claimant returned to work on Friday May 23, 2014. He continued to wear his back brace. Because of the upcoming Memorial Day Holiday Claimant had a light delivery schedule and returned to Employer's warehouse facility by approximately 2:00 p.m. Ms. Schreter remarked that when Claimant returned from his deliveries he was still wearing his back brace, did not seem any worse and did not mention any additional back injuries.

12. In contrast to Claimant's testimony, Ms. Schreter maintained that Claimant was not required to move 55 gallon drums when he returned from completing his deliveries on May 23, 2014. She explained that Midwest Motor Freight delivered four pallets of 55 gallon drums at approximately 10:00 a.m. Ms. Schreter received the delivery and rearranged the drums on the pallets so that they were ready for delivery. In fact, they were not scheduled for delivering until the following Tuesday. Ms. Schreter also explained that Claimant had access to a forklift, a pallet jack and a "walkie stacker" lift that could be used to move and lift heavy items. Moreover, Claimant resisted moving large items, including the 55 gallon drums, and Ms. Schreter was the one who generally worked with them. Ms. Schreter noted that Claimant had previously been involved in a spill with the drums and thus did not like to move them.

13. Jo Ann Bertram was a previous employee for Employer. She provided a written statement explaining that on May 22, 2014, Claimant reported to work and appeared in pain and limping. She stated that he had taken off the day before, or Wednesday May 21, 2014, to "get his water cooler ready for summer." Claimant told her that he was climbing down a ladder with a part of a water cooler in his hand when he slipped and twisted his back. Ms. Bertram specifically noted that Claimant was "limping and said his back hurt."

14. Mr. Gurule testified that he worked in the same capacity and performed identical job duties to Claimant. He explained that on Tuesday May 20, 2014 Claimant did not appear to be injured and they made deliveries together. On Wednesday May 21, 2014 Claimant was not at work. On Thursday May 22, 2014 Claimant returned to work wearing a back brace. Claimant told Mr. Gurule that he injured his back on the prior day at home while installing a swamp cooler and climbing up and down a ladder. Mr. Gurule noted that Claimant had previously, occasionally complained of back stiffness and pain. On May 23, 2014 Claimant was still in pain and limping. Mr. Gurule stated that he made deliveries and returned to Employer's facility at about 3:00 p.m. Claimant did not ask for any assistance in moving any drums and commented that they could leave for the weekend.

15. On May 28, 2014 Claimant visited Authorized Treating Physician (ATP) Michael Ladwig, M.D. for an evaluation. Claimant reported that while he was lifting five gallon pails of degreaser at work he felt a sharp pain in his lower back. He also experienced sharp, shooting pains down his left leg. Claimant had difficulty standing and walking for extended periods. Based on Claimant's history, mechanism of injury, and objective findings on examination Dr. Ladwig concluded that Claimant suffered a work-related injury. He took Claimant off work and referred him for an MRI.

16. On June 3, 2014 Claimant underwent an MRI of his lower back. The MRI reflected an apparent disc extrusion causing severe left lateral recess stenosis and left entry zone foraminal compromise at the L3-4 level.

17. On June 9, 2014 Claimant underwent a consultation with Nicholas K. Olsen, D.O. Claimant reported that he initially sprained his back during the previous winter pulling 2,500 pound pallets of ice melt. The symptoms were never great enough that he consulted a physician and he did not report a work injury. On May 23, 2014 Claimant was lifting five gallon pails of degreaser. When he returned to Employer's warehouse he was repackaging 55 gallon drums. Toward the end of the day, Claimant noticed a significant increase in lower back pain. Over the Memorial Day weekend the pain became so great he went to University Hospital. Claimant reported that he was still suffering significant pain and was unable to get any real relief even with oral medications and hot packs. Dr. Olsen determined that Claimant suffered a work-related injury on May 23, 2014 and had acute signs of left L3, L4 radiculitis as noted on both physical examination and supported by MRI findings. Dr. Olsen prescribed pool therapy and subsequently performed transforaminal epidural steroid injections at two levels. However, because Claimant continued to have a high level of pain, Dr. Olsen referred him to Brian Reiss, M.D. on July 2, 2014 for a surgical consultation.

18. On July 17, 2014 Claimant visited Orthopedic Surgeon Dr. Reiss for a consultation. Claimant reported that he was making deliveries and lifting five gallon pails at work when he developed lower back pain. He was later moving 55 gallon barrels and his symptoms worsened. Claimant mentioned that he had irritated his lower back previously moving pallets at work. Dr. Reiss reviewed the MRI films and suspected that the density that had been read as a herniated disc may actually be a hematoma. Dr. Reiss therefore ordered a repeat MRI. The second MRI performed on July 30, 2014 revealed a reduction of the density at the L3-4 level.

19. On December 4, 2014 Dr. Reiss testified through an evidentiary deposition in this matter. Dr. Reiss noted that the change between Claimant's two MRI's confirmed that Claimant had sustained a hematoma at the L3-4 level and not an extruded disc. Dr. Reiss explained that hematomas tend to resolve fairly quickly compared to herniated discs. He also remarked that the hematoma suggested a fairly acute injury. Dr. Reiss explained that a hematoma involves blood and that it likely came from inside Claimant's spinal canal. Dr. Reiss noted that hematomas usually involve acute pain that is more severe than usual if the individual has had a history of back pain associated with lower extremity symptoms. Dr. Reiss concluded that Claimant developed the hematoma at work on Friday, May 23, 2014. He maintained that, even if Claimant came into work on Friday morning and had already tweaked his back, something else happened during the day that significantly worsened Claimant's condition. Based on Claimant's reports Dr. Reiss determined that something severe occurred on Friday May 23, 2014 that led to the worsening of Claimant's condition and new leg pain. Dr. Reiss noted that evidence from coworkers that Claimant was limping prior to his lower back injury did not change his opinion. He concluded that Claimant's lower extremity pain and dysfunction is secondary to the hematoma. Dr. Reiss partially attributed Claimant's back pain to the hematoma and partially attributed it to his pre-existing condition.

20. On November 13, 2014 Dr. Olsen determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned Claimant lifting, carrying, pushing and pulling restrictions not to exceed 10 pounds. Dr. Olsen also stated that Claimant should alternate sitting and standing every 30 minutes. Claimant had previously been restricted from performing any work by Dr. Ladwig. He has not been provided any work from Employer since receiving work restrictions. Dr. Olsen summarized that Claimant sustained a work-related lumbar sprain/strain on May 23, 2014 and serial MRI's demonstrated a resolving hematoma of the lumbar spine. Dr. Olsen also stated that Claimant not only had a hematoma but likely injured the multifidi and smaller muscles that control his vertebral movement.

21. Claimant has demonstrated that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on May 23, 2014. Claimant testified that on Friday morning May 23, 2014 he was loading items into his delivery van at Employer's warehouse. He began experiencing left lower back pain while lifting five gallon buckets of degreaser that each weighed approximately 50 pounds. When he arrived at his destination for delivery of the degreaser Claimant carried the buckets into the customer's facility. Claimant completed his delivery duties for the day and returned to Employer's

warehouse. Claimant remarked that he then moved a couple of 55 gallon drums using a drum lift. He explained that he first maneuvered or "manhandled" the drum to get it to the corner of the pallet. Claimant stood on the pallet, hugged the drum and twisted it around. Claimant noted that by the end of his work day he was suffering significant lower back pain and could hardly bend over. Claimant's lower back pain worsened throughout the weekend and he sought medical treatment. Throughout his medical treatment he consistently maintained that he injured his back at work while lifting five gallon buckets of degreaser and moving 55 gallon drums. Claimant also noted that he "tweaked" his back on May 21, 2014 while cleaning and sealing the swamp cooler on his roof to prepare it for operation. He described removing the cover of the swamp cooler on his roof, sweeping out debris and spraying the interior with sealant. Claimant did not take any parts of the swamp cooler down off his roof. He denied slipping or falling. He specifically noted that he "tweaked" his lower back while stretching his leg around and twisting to get on a ladder to descend from his roof at home.

22. Ms. Schreter testified that when Claimant returned to work on Thursday May 22, 2014 he stated that he injured his lower back on the previous day when descending a ladder while repairing the swamp cooler on his roof. Ms. Schreter remarked that Claimant appeared to be experiencing discomfort and was limping. She asked Claimant if he wanted to go home but he replied that he would wear his back brace and be fine. Moreover, Mr. Gurule testified that while talking to Claimant on May 22, 2014 Claimant stated he injured his back on the prior day at home while installing a swamp cooler and climbing up and down a ladder. Mr. Gurule noted that Claimant was still in pain and limping. Finally, Ms. Bertram remarked that Claimant told her he injured his back climbing down a ladder with a part of a water cooler in his hand when he slipped and twisted his back. Ms. Bertram specifically noted that Claimant was "limping and said his back hurt."

23. The record is replete with evidence that Claimant "tweaked" his back while working on a swamp cooler and descending a ladder at home on May 21, 2014. However, he worked a full shift and completed his job duties on the following day. The persuasive medical records and testimony demonstrate that Claimant aggravated his lower back condition while performing his job duties on May 23, 2014. On May 28, 2014, after considering Claimant's history, mechanism of injury, and objective findings on examination, Dr. Ladwig concluded that Claimant suffered a work-related injury. On June 9, 2014 Dr. Olsen determined that Claimant suffered a work-related injury on May 23, 2014 and had acute signs of left L3, L4 radiculitis as noted on both physical examination and supported by MRI findings. He subsequently summarized that Claimant sustained a work-related lumbar sprain/strain on May 23, 2014 and serial MRI's revealed a resolving hematoma of the lumbar spine. Dr. Olsen also stated that Claimant not only had a hematoma but likely injured the multifidi and smaller muscles that control his vertebral movement. Finally, Dr. Reiss persuasively testified that the change between Claimant's two MRI's confirmed that Claimant had sustained a hematoma at the L3-4 level and not an extruded disc. He explained that a hematoma involves blood and that it likely came from inside Claimant's spinal canal. Dr. Reiss noted that hematomas usually involve acute pain that is more severe than usual if the individual has had a history of back pain associated with lower extremity symptoms. Dr.

Reiss concluded that Claimant developed the hematoma at work on Friday, May 23, 2014. He maintained that, even if Claimant came into work on Friday morning and had already tweaked his back, something else happened during the day that significantly worsened Claimant's condition. Dr. Reiss specifically determined that something severe occurred on Friday May 23, 2014 that led to the worsening of Claimant's condition and new leg pain. He noted that evidence from coworkers that Claimant was limping prior to his May 23, 2014 lower back injury did not change his opinion. Accordingly, based on the persuasive medical records and testimony, Claimant's work activities for Employer on May 23, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

24. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period May 24, 2014 through November 13, 2014. On May 23, 2014 Claimant suffered a lower back injury while working for Employer. On May 28, 2014 Dr. Ladwig took Claimant off of work. On November 13, 2014 Dr. Olsen determined that Claimant had reached MMI. He assigned Claimant lifting, carrying, pushing and pulling restrictions not to exceed 10 pounds. Dr. Olsen also stated that Claimant should alternate sitting and standing every 30 minutes. Pursuant to §8-42-105(3)(a), C.R.S. Claimant's TTD benefits ceased by operation of law when Dr. Olsen determined that he had reached MMI. Accordingly, Claimant is entitled to TTD benefits for the period May 24, 2014 through November 13, 2014.

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. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on May 23, 2014. Claimant testified that on Friday morning May 23, 2014 he was loading items into his delivery van at Employer's warehouse. He began experiencing left lower back pain while lifting five gallon buckets of degreaser that each weighed approximately 50 pounds. When he arrived at his destination for delivery of the degreaser Claimant carried the buckets into the customer's facility. Claimant completed his delivery duties for the day and returned to Employer's warehouse. Claimant remarked that he then moved a couple of 55 gallon drums using a drum lift. He explained that he first maneuvered or "manhandled" the drum to get it to the corner of the pallet. Claimant stood on the pallet, hugged the drum and twisted it around. Claimant noted that by the end of his work day he was suffering significant lower back pain and could hardly bend over. Claimant's lower back pain worsened throughout the weekend and he sought medical treatment. Throughout his medical treatment he consistently maintained that he injured his back at work while lifting five gallon buckets of degreaser and moving 55 gallon drums. Claimant also noted that he "tweaked" his back on May 21, 2014 while cleaning and sealing the swamp cooler on his roof to prepare it for operation. He described removing the cover of the swamp cooler on his roof, sweeping out debris and spraying the interior with sealant. Claimant did not take any parts of the swamp cooler down off his roof. He denied slipping or falling. He specifically noted that he "tweaked" his lower back while stretching his leg around and twisting to get on a ladder to descend from his roof at home.

7. As found, Ms. Schreter testified that when Claimant returned to work on Thursday May 22, 2014 he stated that he injured his lower back on the previous day when descending a ladder while repairing the swamp cooler on his roof. Ms. Schreter remarked that Claimant appeared to be experiencing discomfort and was limping. She asked Claimant if he wanted to go home but he replied that he would wear his back brace and be fine. Moreover, Mr. Gurule testified that while talking to Claimant on May 22, 2014 Claimant stated he injured his back on the prior day at home while installing a swamp cooler and climbing up and down a ladder. Mr. Gurule noted that Claimant was still in pain and limping. Finally, Ms. Bertram remarked that Claimant told her he injured his back climbing down a ladder with a part of a water cooler in his hand when he slipped and twisted his back. Ms. Bertram specifically noted that Claimant was "limping and said his back hurt."

8. As found, The record is replete with evidence that Claimant "tweaked" his back while working on a swamp cooler and descending a ladder at home on May 21, 2014. However, he worked a full shift and completed his job duties on the following day. The persuasive medical records and testimony demonstrate that Claimant aggravated his lower back condition while performing his job duties on May 23, 2014. On May 28, 2014, after considering Claimant's history, mechanism of injury, and objective findings on examination, Dr. Ladwig concluded that Claimant suffered a work-related injury. On June 9, 2014 Dr. Olsen determined that Claimant suffered a work-related injury on May 23, 2014 and had acute signs of left L3, L4 radiculitis as noted on both physical examination and supported by MRI findings. He subsequently summarized that Claimant sustained a work-related lumbar sprain/strain on May 23, 2014 and serial MRI's revealed a resolving hematoma of the lumbar spine. Dr. Olsen also stated that Claimant not only had a hematoma but likely injured the multifidi and smaller muscles that control his vertebral movement. Finally, Dr. Reiss persuasively testified that the change between Claimant's two MRI's confirmed that Claimant had sustained a hematoma at the L3-4 level and not an extruded disc. He explained that a hematoma involves blood and that it likely came from inside Claimant's spinal canal. Dr. Reiss noted that hematomas usually involve acute pain that is more severe than usual if the individual has had a history of back pain associated with lower extremity symptoms. Dr. Reiss concluded that Claimant developed the hematoma at work on Friday, May 23, 2014. He maintained that, even if Claimant came into work on Friday morning and had already tweaked his back, something else happened during the day that significantly worsened Claimant's condition. Dr. Reiss specifically determined that something severe occurred on Friday May 23, 2014 that led to the worsening of Claimant's condition and new leg pain. He noted that evidence from coworkers that Claimant was limping prior to his May 23, 2014 lower back injury did not change his opinion. Accordingly, based on the persuasive medical records and testimony, Claimant's work activities for Employer on May 23, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Temporary Total Disability Benefits

9. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and

subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 24, 2014 through November 13, 2014. On May 23, 2014 Claimant suffered a lower back injury while working for Employer. On May 28, 2014 Dr. Ladwig took Claimant off of work. On November 13, 2014 Dr. Olsen determined that Claimant had reached MMI. He assigned Claimant lifting, carrying, pushing and pulling restrictions not to exceed 10 pounds. Dr. Olsen also stated that Claimant should alternate sitting and standing every 30 minutes. Pursuant to §8-42-105(3)(a), C.R.S. Claimant's TTD benefits ceased by operation of law when Dr. Olsen determined that he had reached MMI. Accordingly, Claimant is entitled to TTD benefits for the period May 24, 2014 through November 13, 2014.

ORDER

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

1. Claimant suffered a lower back injury during the course and scope of his employment with Employer on May 23, 2014.

2. Claimant earned an AWW of $513.00.

3. The medical treatment Claimant received for the May 23, 2014 incident from University of Colorado Hospital, Michael Ladwig, M.D., Nicholas K. Olsen, D.O., Brian Reiss, M.D., Physiotherapy Associates, Health Images, Touchstone Imaging and Rehabilitation Associates was authorized.

4. Respondents have paid Claimant's medical bills from the authorized providers with the possible exception of the University Hospital Emergency Room from May 26, 2014. Respondents agree to pay the May 26, 2014 Emergency Room bill.

5. Claimant shall receive TTD benefits for the period May 24, 2014 through November 13, 2014.

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: March 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury in the course and scope of his employment with Respondent-Employer on July 8, 2014;

2. If the claim is determined to be compensable, whether Claimant has established by a preponderance of the evidence that he received authorized medical treatment that was reasonable and necessary to cure or relieve the effects of his industrial injury;

3. If the claim is determined to be compensable, whether the surgery performed by Dr. David Beard was reasonable, necessary and related to Claimant's work injury of July 8, 2014; and

4. If the claim is found to be compensable, what is Claimant's average weekly wage.

STIPULATIONS

The parties stipulate and agree that if the claim is found compensable, Claimant is entitled to temporary total disability benefits from July 10, 2014, and continuing until terminated pursuant to statute or rule.

FINDINGS OF FACT

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

1. Claimant is a 60 year old male who worked as a Ready-Mix driver for Respondent-Employer starting on March 2, 2007. Claimant worked for Respondent-Employer at their Longmont/Firestone area plant.

2. Respondent-Employer is a concrete company. Byron Maine is the plant manager for Employer's Longmont/Firestone plant, and he has been in that position for twelve years and 18 years total with Respondent-Employer. Jim Hansen is the "Batchman"

for that plant, where he has worked for seven to eight years. Richard "Dick" Feldman is a Ready-Mix driver at that plant, where he has worked for more than five years. Mr. Maine, Mr. Hansen and Mr. Feldman have known Claimant for many years, and Mr. Hansen and Mr. Feldman knew Claimant even before working with him at Respondent-Employer. Mr. Maine, Mr. Hansen and Mr. Feldman all have had cordial, friendly relationships with Claimant over the years.

3. Claimant had a prior left knee workers' compensation claim with Respondent-Employer with a date of injury of July 15, 2013. Under his prior claim, Claimant had left knee surgery. Claimant was off work and receiving TTD benefits under that claim from July 16, 2013, through October 31, 2013. Mr. Maine, Mr. Hansen and Mr. Feldman were aware of Claimant's prior left knee claim, his prior left knee surgery, and that he missed time from work under that claim.

4. Following his left knee surgery, Claimant returned to work for Respondent-Employer on November 1, 2013, and he continued to work his regular position as a Ready-Mix driver until July 3, 2014. As of the date of his alleged injury, Claimant was earning $1,100.51 per week.

5. Claimant did not work between Friday, July 4, 2014, and Sunday, July 6, 2014. During that weekend, Claimant had an accident at home. Claimant was coming down a flight of stairs when he fell, and twisted his right knee.

6. On Monday morning, July 7, 2014, Claimant returned to work limping. That morning, Claimant had separate conversations with Mr. Feldman and Mr. Hansen in a common area where employees clock in, get coffee, take breaks, and where drivers wait for their trucks to be loaded.

7. Mr. Feldman has known Claimant for twenty years, has never had a problem with Claimant, and has maintained a cordial, friendly relationship with Claimant. Mr. Feldman spoke to Claimant on the morning of July 7, 2014, and he remembered the specific details of that conversation. Mr. Feldman and Claimant were in the common area, and Mr. Feldman was sitting down, tying his shoes, while Claimant was in the same common area waiting for his truck to be loaded. Mr. Feldman specifically recalled Claimant was noticeably limping that morning, and that Claimant appeared to be in pain and hurt. Claimant told Mr. Feldman he "screwed" up his knee when he fell down three stairs at home over the weekend. When Mr. Feldman asked Claimant if it was the knee that was fixed, Claimant told him that it was not the knee that was fixed. It was his good knee. Mr. Feldman's testimony regarding this conversation was credible.

8. Mr. Hansen is responsible for getting trucks loaded, coordinating truck movement, coordinating between drivers and dispatch, and handling small problems in conjunction with the plant manager. Mr. Hansen has known Claimant for ten years, and they worked together at a different company prior to working together at Respondent-Employer. Claimant and Mr. Hansen never had problems with each other.

9. Mr. Hansen spoke to Claimant the morning of July 7, 2014, by the coffee pot in the common area. Mr. Hansen had just come back from a week of vacation. Claimant asked him how his vacation went, and Mr. Hansen told Claimant it was not very good, as he got so sick during his vacation that he had to go to the emergency room. Claimant told Mr. Hansen that his weekend wasn't much better, as he had been running down the stairs at his house and missed the bottom two stairs and twisted the "F" out of his other knee. Mr. Hansen's testimony that Claimant told him he twisted his knee at home was credible.

10. Although Claimant recalled talking to co-employees that morning, he could not recall who he spoke to. Claimant admitted that he was limping on the morning of July 7, 2014. Although he could not recall who he spoke to, Claimant testified that he told co-workers that he had a bad weekend, which included falling down stairs at home, and developing gout. Claimant denied that he told anyone that he injured his right knee over the weekend. Claimant indicated the only reason he was limping, was because of the gout. Claimant's testimony that he was limping on July 7, 2014, because of gout, and that he did not tell co-employees that he twisted his knee over the weekend, in light of the testimony of Mr. Feldman and Mr. Hansen, is not credible.

11. On July 8, 2014, Claimant was at work cleaning his assigned truck, when he climbed up a ladder attached to the back of his truck to chip away a piece of concrete. The ladder is a straight, metal ladder, with grips on the rungs of the ladder for better traction. As Claimant reached the fourth or fifth rung of the ladder, he felt a tearing and squishing sensation in his right knee. Claimant admitted he was simply climbing the ladder when he experienced this pain, and that he did not twist or pivot.

12. Claimant worked the rest of July 8, 2014, but he did not report an injury. Claimant returned to work on July 9, 2014. After delivering his first load, Claimant contacted Mr. Hansen, and told him his knee was hurting, and to "chalk him up" as being out for the rest of the day. Mr. Hansen told Claimant to talk to Mr. Maine, the plant manager, when he got back to the plant.

13. When Claimant returned to the plant, he went to Mr. Maine's office, and reported his claim. Claimant indicated he injured his knee climbing a ladder while cleaning his truck. Claimant could not explain exactly how he injured his knee. Mr. Maine gave Claimant paperwork, which included a designated provider sheet, and sent Claimant to ErgoMed.

14. On July 9, 2014, Claimant was seen at ErgoMed, where he was examined by a therapist, who noted that Claimant provided a history of injuring his knee while climbing, and cleaning his truck. Claimant failed to report that he fell down the stairs the prior weekend.

15. On July 10, 2014, Claimant was examined by Dr. Chima Nwizu at Family Physicians of Greeley, the designated provider. Claimant provided a history of injury to his right knee from climbing a ladder at work. Claimant did not reveal that he fell at home that weekend. Dr. Nwizu's recommendations included medications, crutches, a right knee x-ray and a right knee MRI.

16. On July 15, 2014, a right knee MRI was interpreted as showing a flap tear of the body and posterior horn segments of the medial meniscus with mild medial meniscal extrusion. There was also a meniscal flap displaced partially from the undersurface near the junction between the body and posterior horn segments. There was also a cyst associated with the tear, chondromalacia, effusion, and synovitis.

17. On July 17, 2014, Dr. Nwizu reviewed the MRI report, and then referred Claimant to an orthopedics specialist.

18. On July 23, 2014, Claimant was seen by Dr. David Beard, who obtained a history that Claimant was trying to climb up a ladder at work when he had a tearing sensation in the medial aspect of his knee. Again, Claimant made no mention of the at-home accident. Dr. Beard examined Claimant, reviewed his records, reviewed the MRI report, and recommended a right knee arthroscopy for partial medial meniscectomy.

19. At the same time that Claimant started missing work because of the alleged work injury, Mr. Feldman, Mr. Hansen, and third employee learned that Claimant was claiming his right knee injury was work related. Claimant's co-workers notified Mr. Maine that Claimant had told each of them that he injured his right knee at home when he fell down the stairs.

20. On July 28, 2014, Dr. Jon Erickson, an orthopedic surgeon, performed a physician advisor record review. Dr. Erickson was provided a history that Claimant was climbing up a ladder when he felt a squish in his right knee. He noted the right knee MRI showed a fairly substantial tear. Dr. Erickson further noted that he was aware of the July 4, 2014, at-home accident, which he described as Claimant going down some stairs when he slipped on the last two stairs, suffering a twisting injury to his right knee. Dr. Erickson explained that causality was at issue, and he did not believe someone with a normal knee would suffer the injury claimed from climbing a ladder.

21. On July 29, 2014, Respondent-Insurer denied the surgery based upon the condition for which surgery was recommended was not compensable, and the claim being denied. On August 4, 2014, Respondent-Insurer filed a notice of contest.

22. On August 22, 2014, Claimant's right knee was arthroscopically repaired. Dr. Beard's surgery report reflects that the surgery revealed that Claimant had a complex tear of the posterior horn and body of the medial meniscus.

23. Dr. Allison Fall conducted an independent medical evaluation regarding the cause of Claimant's injury. Dr. Fall credibly testified that she paid particular attention to Claimant's alleged mechanism of injury. Claimant reported to Dr. Fall that on July 8,

2014, he started climbing a ladder, which was straight up, on the side of the truck. As he started climbing the ladder, and was on the fourth or fifth rung, he felt a tear or ripping sensation or a squishing in his knee. Dr. Fall also reviewed information regarding Claimant's at-home fall described in Dr. Erickson's physician advisor report and Claimant's answers to interrogatories. Dr. Fall reviewed all available medical records and the right knee MRI report. Finally, Dr. Fall examined Claimant's right knee. Dr. Fall concluded:

> I would agree with the assessment of Dr. Erickson that climbing a ladder straight up would not cause the changes seen on the knee MRI. The slip-and-fall, which occurred over the weekend on the stairs at home, would be much more probable to cause an acute knee injury. Certainly, if one had an acute meniscus injury and were climbing stairs, they may be symptomatic. However, the climbing of the stairs did not alter the underlying physiology. Therefore, in my opinion, this would be considered a non-work-related condition.

24. At hearing, Dr. Fall testified credibly that the mechanism of injury which Claimant provided at hearing was consistent with the mechanism of injury he reported to her during the IME, and that Claimant did not indicate he twisted his knee or pivoted while climbing the ladder. Dr. Fall confirmed that Claimant's pre-operative diagnoses included a complex medial meniscus tear, thinning of the cartilage, and scarring of the medial collateral ligament. Dr. Fall explained that the most common causes of such medial meniscus tears are compression and a rotational type forces, and deep, deep squats below 90 degrees where the hips are lower than the knee on a repetitive basis. Dr. Fall credibly opined that the most likely causes for tears are not consistent with simply climbing a ladder.

25. Dr. Fall credibly opined that Claimant's right knee medial meniscus tear is the sort of tear caused by a forceful torqueing or twisting injury, and that climbing a straight ladder would not cause, aggravate or accelerate a right knee medial meniscus tear, or the complex tear such as what was found on Claimant's surgery. Dr. Fall also credibly testified that it was more likely Claimant would sustain a complex tear while falling down stairs, as opposed to climbing a ladder, and while Claimant may have experienced increased pain while climbing a ladder at work on July 8, 2014, he did not aggravate or accelerate his right knee injury from climbing the ladder.

CONCLUSIONS OF LAW

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

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of*

Boulder v. Streeb, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

2. The term "accident" refers to an "unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. The term "injury" refers to the effect of an accident. Section 8-40-201(2), C.R.S. A "compensable" injury is one that requires medical treatment or causes disability. For a claim to be compensable, a claimant must establish the existence of both an "accident" and an "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967).

3. The fact that a work-related incident may elicit an increase in pain is not enough to establish a compensable aggravation or injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo.App.1985); *Barba v. REIJ School District*, W.C. No. 3-038-941 (June 28, 1991); *See also Becher v. City Market*, W.C. Nos. 3-059-095 and 3-108-379 (ICAO September 16, 1994); *Cindy Lou Carlson v. Joslins Dry Goods,* W.C. No. 4-177-843 (ICAO March 31, 2000). The mere experience of symptoms at work does not require a finding that employment proximately caused the underlying condition. *Harris v. Golden Peaks Nursing,* W.C. No. 4-680-878 (June 4, 2008); *Cotts v. Exempla,* W.C. No 4-606-563 (August 18, 2005).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonable 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, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. Based on the credible and persuasive evidence presented at hearing, it is concluded that Claimant twisted and injured his right knee in his fall at home over the July 4, 2014 weekend. The testimony of Claimant's two co-employees, Mr. Feldman and Mr. Hansen, was more credible and persuasive than Claimant's testimony.

6. Furthermore, it is concluded that Claimant's right knee complex medial meniscus tear and need for medical treatment for that tear was not caused, aggravated or accelerated on July 8, 2014, when Claimant climbed a ladder on his truck at work. Claimant failed to sustain his burden of proof to establish that climbing the ladder of his truck on July 8, 2014, caused his medial meniscus tear, or aggravated or accelerated the need for care. Dr. Fall credibly opined that Claimant's right knee medial meniscus tear is the sort of

tear caused by a forceful torqueing or twisting injury, and that climbing a straight ladder would not cause, aggravate or accelerate a right knee medial meniscus tear, yet alone a complex tear such as was found on surgery.

7. Claimant seeks an order awarding medical benefits in the form of surgery by Dr. Beard. In order to receive medical benefits for an injury, a claimant must establish, to a reasonable degree of medical probability that the need for medical treatment is proximately caused by a work-related trauma. *Merriman v. I.C.A.O.*, 210 P.2d 448 (Colo. 1949); *Rockwell Intn'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). Claimant failed to sustain his burden of proof on the medical benefits issue as it was not established that Claimant's need for surgery was proximately caused by a work-related trauma.

ORDER

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

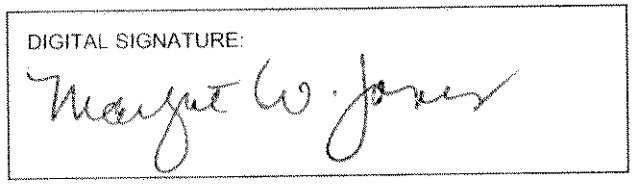
1. Claimant's claim is denied and dismissed with prejudice.

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

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

DATED: March 13, 2015_____

DIGITAL SIGNATURE:



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-957-738-01

ISSUES

- Whether Claimant sustained a compensable injury on June 8, 2014?
- Whether Claimant's need for total knee replacement surgery on his right knee is reasonable, necessary, and related to the alleged June 8, 2014 incident?

FINDINGS OF FACT

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

1. Claimant was employed as a firefighter for Respondent on June 8, 2014 and had been so employed for approximately 20 years.

2. Claimant denies any accidents or injuries to his right knee joint other than two incidents while performing his job duties for the Employer on March 20, 2012 and June 8, 2014.

March 20, 2012 Injury

3. On March 20, 2012, Claimant sustained a compensable injury to his right knee in the course and scope of his employment. Dr. Jonathan **Bloch**, D.O., evaluated Claimant a day after the accident and diagnosed a sprained knee. His evaluation is notable for the following findings: No decreased active or passive range of motion; no focal tenderness, deformity, swelling, no bruises. Dr. Bloch did not order any diagnostic testing either in the form of x-ray or MRI, and anticipated Claimant's symptoms would resolve over the next few weeks. Dr. Bloch prescribed physical therapy and a follow up exam, but Claimant did not comply and did not seek any further medical attention for his injury. Claimant testified that he did not follow up with medical treatment because he thought that his knee sprain would heal on its own. Claimant was released to full duty without restrictions, but due to his schedule, he did not return to work for six or seven days. Claimant felt capable of performing his job duties as a firefighter at that time.

4. Dr. Bloch also noted mild consistent patellar crepitation. Dr. McBride testified that the presence of such patellar crepitus in the knee evinces a knee that is already degeneratively arthritic. Therefore, while no doctor performed radiographs or MRIs of Claimant's knee in 2012, Dr. Bloch's report of patellar crepitus supports a finding that Claimant's right knee was already arthritic by early 2012.

5. On May 10, 2012 Claimant's case was closed due to his non-compliance with follow-up care and physical therapy.

6. Claimant's testimony and reports to providers about his post 2012 injury status varied. For example, he testified at hearing that his symptoms never improved, but rather worsened between 2012 and 2014. This testimony is supported by Claimant's inability to complete physical evaluations offered by his department in both 2012 and 2013, secondary to complaints of right knee pain. However, his testimony is contradicted by Claimant's reports to Dr. McBride on November 11, 2014 that he returned to work quickly following his 2012 injury because his knee had started to feel better; he also reported to Dr. McBride that he did not pursue physical therapy or follow up medical appointments because his knee was feeling better. These reports are supported by Claimant's immediate return to work without restrictions, his failure to follow up with medical and physical appointments, and his inability to explain why he did not return for treatment when his symptoms increased over time inconsistently with a sprain and his expectations.

June 8, 2014 Injury

7. On June 8, 2014, Claimant accidentally placed his right foot on another firefighter's bunking boots causing his right knee to twist. He experienced severe pain in his right knee. Claimant was taken to the emergency department of Denver Health Medical Center. Claimant reported he heard a "pop" prior to the onset of and complained of associated right lower extremity weakness and an inability to straighten the right knee without pain. X-rays of Claimant's right knee were taken.

8. On June 9, 2014, Claimant followed up with Dr. James Moses and Dr. James Blair, his primary treating providers at The Center for Occupational Safety and Health. Claimant's work activities were restricted and an MRI of his right knee joint without contrast was performed.

9. The MRI report obtained from Advanced Medical Imaging reflected:

> Severe medial femoral tibial degenerative joint disease with denudation of the majority of the cartilage with subchondral, marrow edema and large marginal osteophytes. There is a large degenerative tear of the posterior horn and body of the medial meniscus with a large horizontal cleavage tear of the posterior horn, with an associated parameniscal cyst. A severely macerated body is present with grade 2 extrusion and the majority of the body is absent. There is a small full-thickness cartilage defect within the posterior weight bearing portion of the lateral femoral condyle. There is chondromalacia patella with moderate generalized cartilage attenuation with superimposed 8 x 5 mm full-thickness defect within the lower medial patellar facet. There is no denudation of the trochlea area also noted. Additionally, there is a moderate size complex joint effusion with synovitis.

10. On June 10, 2014, ATP Dr. Moses reviewed these findings with Claimant and noted the following as Recommendations and Plan of Care:

> The severity of the damage to his right knee and associated degenerative joint disease may indicate that he will require a partial or total arthroplasty. It is likely that some of the damage visualized on the MRI is secondary to the previous work related knee injury that occurred approximately 2 years ago. However, the current injury caused a permanent aggravation of the underlying knee pathology.

11. On June 18, 2014, because the MRI showed significant, advanced osteoarthritis, Claimant was referred to a total joint specialist, Dr. Michael Hewitt**,** who noted the MRI was consistent with significant advanced arthritis of the knee and recommended Claimant proceed with a total knee arthroplasty.

12. On June 30, 2014 Claimant saw Dr. Todd Miner of Colorado Joint Replacement for a second opinion. Dr. Miner agreed a total knee replacement was warranted to restore Claimant's mobility and alleviate his pain symptoms.

13. On July 8, 2014, Dr. Miner re-evaluated Claimant, and agreed that Claimant needed a total knee replacement due to his severe degenerative osteoarthritis. Dr. Miner assessed that Claimant's predominant problem was post traumatic arthritis which had become symptomatic as of the March 20, 2012 injury and had worsened. "He has substantial arthritic change on his MRI." The ALJ finds that because Dr. Miner did not have an earlier MRI to compare with, that his intended meaning was that as of his March 2012 injury, Claimant already suffered from substantial osteoarthritis of his right knee.

14. The ALJ finds that Dr. Hewitt and Dr. Miner recommended right knee replacement because of the MRI findings showing significant advanced osteoarthritis of the right knee.

15. On July 18, 2014, Dr. Stephen Lindenbaum, an orthopedic surgeon, performed a Respondent's independent medical examination (IME) of Claimant. Dr. Lindenbaum opined the June 8, 2014 injury did not cause the present problem of degenerative arthritic changes but also conceded that the twisting incident could have temporarily aggravated the arthritic changes. Moreover, regarding the 2012 incident, Dr. Lindenbaum suggested Claimant most likely aggravated his right knee condition in the 2012 work injury. Dr. Lindenbaum stated that Claimant had been suffering "severe degenerative changes" in the right knee for quite some time, and observed that these changes had been occurring over a "long period of time," "certainly prior to 2012," when Claimant twisted his knee at work in 2012. Dr. Lindenbaum concluded that Claimant had suffered some sort of meniscal damage well in the past. He further reasoned that the fact that Claimant returned to work without restrictions in 2012, one week after the injury, also demonstrated that the 2012 slip and fall did not cause any meniscal damage. Dr. Lindenbaum further elaborated that he did not believe the 2014 slip and fall caused the "significant degenerative changes" in Claimant's knee. Therefore, any injury Claimant may have sustained in 2012 or 2014 was merely a temporary exacerbation of the underlying arthritic condition. Dr. Lindenbaum opined that

Claimant's extreme arthritic condition occurred over a long time, that a knee replacement was indicated, but it was not related to the work injuries.

16. Dr. Miner took issue with IME Dr. Lindenbaum's findings and on July 24, 2014 commented as follows:

> I reviewed Dr. Lindenbaum's report today. I disagree with this report in several aspects. Dr. Lindenbaum opined that prior to the 2012 workers' compensation injury that James sustained to the right while working as a firefighter, that he had been developing degenerative changes. However, the evidence is that [Claimant] was working full duty and in fact able to do the skills evaluation testing, a very strenuous physical drill, better than many other firefighters. He was inadequately and inappropriately treated in 2012 in the sense that no MRI scan was obtained, which undoubtedly would have revealed a significant medial meniscus tear. Being a stoic individual, [Claimant] was disgruntled with the fact that they were not doing much for him and just proceeded to press on with his life in working as a firefighter. He was able, however, to perform full duty, albeit with some symptoms. He performed full duty for two years. After his injury of June 8, 2014, he was unable to perform full duty. Therefore, this current situation is a permanent aggravation of a pre-existing condition. In fact, the preexisting condition is due to another work related injury that was inappropriately treated. Nevertheless, prior to June 8, 2014, [Claimant] was working full duty and now he is not. Therefore, I feel that this is a compensable situation and should have his knee replaced under this claim.

17. The ALJ is not persuaded by Dr. Blair's comments. First, what a 2012 MRI would have revealed, had one been taken, is speculative. Second, Dr. Blair's opinion that Claimant returned to work in 2012 with symptoms is controverted by Claimant's reports to Dr. McBride, his benign 2012 examination, his immediate return to work without restrictions, Claimant's non compliance with medical and physical therapy appointments, and Claimant's failure to seek medical care for over two years. Third, Dr. Blair's comment that Claimant was inadequately and inappropriately treated in 2012 because no MRI was ordered is conclusury and not supported by the record which shows a benign exam not necessarily requiring an MRI. Fourth, the inability to work full duty is not determinative of causation or relatedness. And fifth, Dr. Miner's attributing character traits to Claimant, such as stoicism, renders his comments less than objective.

18. Thus the ALJ finds unpersuasive Dr. Miner's conclusion that Claimant suffers a permanent aggravation of a pre-existing condition, the pre-existing injury being the inappropriately treated 2012 injury.

19. On August 11, 2014 Respondents issued a Notice of Contest, contesting the June 8, 2014 incident was an industrial accident and alleging Claimant's condition/diagnosis was not consistent with the mechanism of injury.

20. On November 11, 2014 Claimant was examined by Dr. John T. McBride, another Respondent's IME, who issued medical findings that same date. At that time Dr. McBride did not have the actual radiographs and MRI to review, but did have the radiology reports. Dr. McBride opined Claimant had arthritis in his right knee joint and that the arthritis had become more progressive and now required a total knee replacement, but it was not related to his occupational injuries of 2012 and 2014.

21. Dr. McBride is an orthopedic surgeon with American Board of Orthopedic Surgery qualifications. He is level II accredited by the Division of Workers' Compensation, and was qualified as an expert in orthopedics and sports medicine. Dr. McBride testified that he reviewed radiographs and the MRI before testifying at the hearing and confirmed his opinion that Claimant's arthritis had progressed and was the only reason for a total knee replacement. He opined Claimant's need for the total knee replacement was not related to the occupational injuries of 2012 and 2014.

22. Dr. McBride opined that any injury Claimant may have sustained in June 2014 at most only aggravated Claimant's preexisting arthritis. At hearing, Dr. McBride explained that this was "based on [Claimant's] obvious effusion on his MRI," emphasizing that the MRI showed "no evidence of an acute fracture" and "no evidence of an acute meniscus tear." Based on his review of Claimant's MRI and radiographs, Dr. McBride opined that Claimant's osteoarthritis "has been going on for quite some time," and that due to the lack of any focal tenderness or laxity, his medial collateral ligament injury predated the injury in March of 2012, and certainly the 2014 incident.

23. Dr. McBride noted Claimant suffers from Pelligrini-Stieda, or ossification of the medial collateral ligament. He explained in order to develop Pelligrini-Stieda, there would have to be evidence of a "fairly significant medial collateral ligament injury." Such indicia would include "swelling, tenderness, and bruising." Dr. McBride noted that none of these indicia were present during Claimant's March 2012 evaluation, meaning Claimant's medial collateral ligament injury must necessarily have predated Claimant's 2012 injury, and is therefore not related to his employment.

24. Dr. McBride also testified Claimant had non-work-related comorbidities which made him more susceptible to a medial meniscal injury. Specifically, Claimant's bilateral knees, but especially his right side, indicated a varus deformity [bowleggedness], which caused added stress pressure on the medial meniscus. And Claimant's height and weight correspond to a BMI which would classify him in the "heavy" range.

25. Also, Dr. McBride explained the Medical Treatment Guidelines' Rule 17. Notably, Dr. McBride demonstrated that under Rule 17, Claimant did not qualify for a finding of an aggravation of preexisting osteoarthritis. Dr. McBride elaborated:

> During the training of a Level II physician, there are the Colorado state workman's [sic] compensation guidelines. Rule 17, lower extremity injury medical treatment guidelines

> is actually very elegant in the way it describes aggravation of arthritis. In order to have an aggravation of arthritis, you have to have an injury that's well documented, the injury has to be related to the work that the injured worker is performing, and with regards to aggravated arthritis, there should be either a meniscectomy, a hemarthrosis at the time of the original injury, MRI or arthroscopic evidence of a ligament tear, and it should be at least two years prior to the complaints of the new complaints of knee pain. So for example, if somebody tears their anterior cruciate ligament, the ACL, or has a major articular cartilage injury or has a meniscus tear, that gets treated, two years or greater and as it says in the guidelines, at least two years, usually more like 10-20 years, they develop arthritis then it can be related to that injury. But without the evidence of a change in the radiographs going from normal to significant abnormal, it is very difficult to prove that the injury caused the arthritis. Clearly from the 2014, and that's like I said, the beauty of having the radiographs 24 hours later, there is no way that those arthritic changes occurred from the accident that happened 24 hours earlier.

26. Dr. McBride added that, even though there is evidence of a meniscal injury in this claim, its mere existence does not qualify for Rule 17 purposes, as at the time of his evaluation with Dr. Bloch in March 2012, Claimant had full range of motion, no point tenderness, and no effusion. "If he'd had significant meniscus tear at that time . . . when he saw Dr. Bloch 24 hours after his injury in 2012, if he had a significant meniscus injury, one would have anticipated a significant effusion, significant point tenderness, possibly some bruising, and a limitation of motion. None of those were found." Dr. Lindenbaum's report is consistent on this issue.

27. Dr. McBride explained that the terminology used by Dr. Lindenbaum essentially meant that it would take more than two years to develop the type of arthritis seen in Claimant's knee, and that Claimant's need for a total knee replacement would have occurred without any workplace incidents in 2014, or even 2012.

28. Moreover, Dr. McBride testified that treatment for a meniscal injury does not generally include a total knee replacement, which is the treatment Claimant is seeking in this matter. Instead, Dr. McBride explained that Claimant's need of total knee replacement in this matter was due to his unrelated and preexisting osteoarthritis.

29. Orthopedic surgeons Drs. Lindenbaum and McBride each independently opined Claimant's degenerative osteoarthritis was inconsistent with twisting incidents that date back approximately two years. Rather, it is a preexisting condition that required years of wear and tear to develop to its current state.

30. While meniscal trauma may, in some instances, temporarily irritate preexisting osteoarthritis, credible and persuasive evidence was presented indicating

the knee would quickly return to pre-meniscal injury status without any permanent complication or aggravation.

31. The ALJ credits Dr. McBride's testimony that while Claimant's 2014 MRI shows an effusion, which may be proof of an aggravation, it was a temporary aggravation because the 2014 MRI showed no evidence of an acute fracture and no evidence of an acute meniscus tear.

32. Based on the totality of the evidence, the ALJ finds Claimant suffers from preexisting osteoarthritis, and his alleged workplace injury in 2014 did not cause and did not permanently aggravate his underlying degenerative condition.

33. While there are no MRI or radiograph records that predate the alleged 2014 incident, Drs. Lindenbaum and McBride both independently emphasized the fact that Claimant returned to work 6 days after his 2012 knee sprain without restrictions. This supports a finding that the 2012 injury caused no meniscal damage.

34. Dr. McBride concluded that Claimant's osteoarthritic condition had been ongoing for at least five to ten years.

35. Dr. McBride further explained that "in order to entertain previous trauma as a cause" of degenerative osteoarthritis, there must be medical documentation of a "meniscectomy," "hemarthrosis," or arthroscopic evidence of meniscus or ACL damage. Dr. McBride stressed that the prior injury must be "at least two years from presentation for the new complaints," and a "significant increase in pathology on the affected side in comparison to the original imaging" must be present. In the present case, Claimant does not have medically documented evidence of a previous hemarthrosis, ligament, or meniscus injury at least two years prior to the June 8, 2014 incident.

36. Dr. McBride testified at hearing that had Claimant suffered from such an aforementioned knee injury in 2012, a physical examination would reveal "significant effusion, significant point tenderness, possibly some bruising, and a limitation of motion." However, Dr. Bloch's 2012 examination revealed none of these symptoms.

37. Nonetheless, even Dr. Blair acknowledges that Claimant's meniscal injury predates the alleged 2014 incident. There is no dispute that the meniscal injury predates the June 8, 2014, accident.

38. Only Dr. Blair, an occupational medicine specialist, supports Claimant's claim that a knee replacement is causally related to Claimant's employment and the incident of June 8, 2014. But even Dr. Blair acknowledges that the arthritis and meniscal tear predate the alleged June 8, 2014, incident.

39. By contrast, two orthopedic surgeons independently concluded based upon accepted medical knowledge and supported by clear and uncontroverted evidence that Claimant's degenerative osteoarthritis and meniscal injury not only preexisted the 2012 and 2014 workplace incidents, but are the reason Claimant requires a total knee replacement.

40. Dr. McBride testified that Claimant suffered some minor aggravation of his right knee on June 8, 2014. However, he made clear that any such aggravation was small, as outlined by the worker's compensation Treatment Guidelines. Dr. McBride

later clarified that there was only evidence of a temporary aggravation of Claimant's arthritic knee as a result of the June 8, 2014, incident. Dr. McBride acknowledged that Claimant *may* require some conservative treatment as a result of the June 8, 2014, incident. However, he limited such treatment to corticosteroid injections, removing the fluid in his knee, and physical therapy, with anticipated resolution in about four weeks.

41. Dr. Lindenbaum, however, stated that no conservative treatment was likely to help Claimant in any way, as the damage to his knee was too severe. To that end, Dr. Lindenbaum opined Claimant was at maximum medical improvement as it related to the June 8, 2014, incident. While a total knee replacement would be appropriate to alleviate Claimant's right knee complaints, such a procedure would not be compensable under worker's compensation.

42. Dr. McBride opined there was no permanent aggravation that could be related to the June 8, 2014, accident, nor was the need for a total knee replacement accelerated or related in any way to the events of that date.

43. Both Drs. Lindenbaum and McBride credibly opine the total knee replacement is not compensable under the Colorado Workers' Compensation Act for an injury occurring on June 8, 2014. The current degenerative condition of Claimant's knee is undisputedly the result of wear and tear over a long period of time, and not the result of an acute and minor twist of the knee that occurred as recently as June 2014.

44. Claimant has the burden to prove entitlement to any benefits he seeks. This includes showing that an incident occurred in the course and scope of his employment on June 8, 2014, and that the incident caused an actual injury requiring medical treatment. Claimant further has the burden of proving that any medical treatment or benefits which he seeks are reasonable, necessary, and related to that same June 8, 2014, injury.

45. The uncontroverted facts of this case, combined with the independent medical diagnoses of two orthopedic experts, demonstrate that Claimant suffers from severe degenerative osteoarthritis, a condition that clearly predates the June 8, 2014 twisting incident to Claimant's right knee. The advanced condition of Claimant's knee degeneration and meniscal injury are simply not consistent with a less than one year old knee sprain.

46. Moreover, even if Claimant did sustain an actual injury to his right knee on June 8, 2014, at best it was only a temporary aggravation of preexisting knee complaints, requiring conservative care at best.

47. The opinions of Drs. Lindenbaum and McBride are found to be more credible and persuasive than that of Dr. Blair. Drs. Lindenbaum and McBride are both orthopedic surgeons. By contrast, Dr. Blair is an occupational medicine physician. It is reasonable that Drs. Lindenbaum and McBride are more qualified to opine on causes of damage in the knee than is Dr. Blair.

48. Based on the totality of the evidence, the ALJ finds Claimant has not met his burden of proof that he suffered an injury as the result of the June 8, 2014, incident.

49. Based on the totality of the evidence, the ALJ finds Claimant has not met his burden of showing that a total knee replacement surgery is reasonable, necessary, or related to the June 8, 2014, accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ makes the following conclusions of Law:

Under the Colorado Workers' Compensation Act, an injury is compensable if the injury arises out of and in the course of the employee's employment. C.R.S. § 8-41-301(1)(c). Stated conversely, an injury that does not arise out of and in the course of employment is not compensable. *See id*.

The Workers' Compensation Act distinguishes between the terms "accident" and "injury". Specifically, "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. "Injury" refers to the physical trauma caused by the accident. Or put another way, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). There are no benefits owed to a victim of an industrial accident unless the accident results in a compensable "injury." *Wherry v. City and County of Denver*, W.C. 4-475-818, (ICAO March 7, 2002). A "compensable" injury is one which results in an injury requiring medical treatment or causing disability. As found above, the ALJ concludes that Claimant's injury, if any, is not the result of the events of June 8, 2014, but rather is the manifestation of his underlying arthritic condition.

Where a claimant's injury is due entirely to a pre-existing condition not traceable to the employment, the injury is not compensable under the Act. The existence of a pre-existing medical condition does not preclude a claimant from proving a compensable injury where an industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, the claimant must prove there was an injury caused by the work activities, and not merely a manifestation of a pre-existing condition. *Robert Gomez v. SMG Denver Convention Complex*, W.C. 4-237-047 and 4-423-132 (ICAO October 23, 2001). For example, in *Brown v. Industrial Commission*, a claimant experienced an on-the-job injury that he alleged to have aggravated his pre-existing degenerative lower back condition. 447 P.2d 694 (Colo. 1968). Though the claimant in *Brown* presented evidence that the on-the-job injury "could have" aggravated the degenerative changes, proving that a possibility existed allowed only for mere speculation, which was insufficient to satisfy the claimant's burden. *Id.* at 695.

Here, Dr. McBride acknowledged that Claimant *may* require some conservative treatment as a result of the June 8, 2014 incident. However, he limited such treatment, if any, to corticosteroid injections, removing the fluid in his knee, and physical therapy, with anticipated resolution in about four weeks. Further, Dr. Lindenbaum stated that no conservative treatment was likely to help Claimant in any way, as the damage to his knee was too severe. To that end, Dr. Lindenbaum opined Claimant was at maximum medical improvement as it related to the June 8, 2014, incident. As the court concluded in *Brown*, here Claimant presented evidence only that the on-the-job injury "could have"

aggravated his degenerative changes; and proving that a possibility existed allowed only for mere speculation, which was insufficient to satisfy the claimant's burden

Where a claimant experiences an accident at work, and subsequently develops a condition that is inconsistent with the mechanism of the accident, but consistent with a pre-existing degenerative condition, ALJs have found the subsequent condition to be unrelated to the accident. *Baca v. Helm*, 682 P.2d 474 (Colo. 1984) (septic arthritis of the shoulder); *Robert Gomez v. SMG Denver Convention Complex*, W.C. 4-237-047 and 4-423-132 (2001) (neck strain superimposed on a pre-existing degenerative neck condition); *Darrel McManigal v. Adolph Coors Company*, W.C. 3-843-696 and 3-868-629 (ICAO July 13, 1990) (osteoarthritis of the knee. *Cf. F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985) (pain during subsequent employment was recurrent consequence of pre-existing condition rather than result of aggravation of injury.). Here, while both doctors McBride and Lindenbaum agreed a total knee replacement would be appropriate to alleviate Claimant's pre-existing right knee condition and pain complaints, both opined such a procedure would not be compensable under worker's compensation.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, the ALJ concludes that Claimant's testimony, actions, and reports to Dr. McBride were inconsistent, diminishing his credibility. Also as found, the opinions of Dr. McBride and Dr. Lindenbaum were most persuasive based on their training and fields of expertise. In addition, their opinions were the most well-supported and well-reasoned.

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bondensleck v. Indus, Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008). The ALJ determines witnesses' credibility. *Arenas v. Indus. Claim Appeals Office*. 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Young v. Indus. Claim Appeals Office,* 297 P.3d 964*,* 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App.2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. See *Prudential Ins. Co. V. Cline*, 98 Colo. 275, 57 P.2d 1205 (1930); CJI, Civil, 3:16 (2005).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is "that quantum of probative evidence which a rational

fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. V. Gussert,* 914 P.2d 411 (Colo. App.1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. V. Collett,* 33 P. 3d 1230 (Colo. App. 2001.)

An employer must provide an injured worker with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." §8-42-101 (1)(a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by the employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Constriction v. Rinta,* 717 P.2d 965(Colo. App. 1985). A respondent is liable for the "direct and natural consequences" of a work-related injury. The chain of causation, however, can be broken by the occurrence of an independent intervening injury. See 1 A. *Larson, Workers' Compensation Law*, section 13.00 (1997). As found, the Claimant has failed to establish the causal relatedness of his right knee condition to the accident of June 8, 2014.

The ALJ concludes that Claimant has not established by a preponderance of the evidence that he suffered a compensable injury; that is one which results in an injury requiring medical treatment or causing disability.

The ALJ concludes that Claimant has not established by a preponderance of the evidence that the requested total right knee arthroplasty is caused by an industrial injury, if any, occurring on June 8, 2014.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge 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. 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: March 3, 2015

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

ISSUES

The following issue was raised for consideration at hearing:

> Whether Respondents established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability benefits (TTD) because she was responsible for termination from employment under Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S.

STIPULATION OF FACT

The Parties stipulated Claimant's average weekly wage at the time of the injury was $642.27.

FINDINGS OF FACT

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

1. Employer is an assisted living facility that takes care of residents with memory issues, such as dementia and Alzheimer's. Claimant was employed as a caregiver. Claimant worked as a lead caregiver for a period of time prior to her injury, but she stepped down from the lead position and resumed her duties as a caregiver.

2. While working as a caregiver on July 13, 2014, Claimant sustained an admitted injury while lifting a patient.

3. After the July 13, 2014 injury, Claimant worked for the Employer under the restrictions provided by authorized treaters at Concentra. Claimant was treated by several providers at Concentra, including Darla Draper, M.D., Nickolas Curcija, PA-C, and Terrell Webb, M.D. Claimant's restrictions from July 17, 2014 to September 3, 2014 included: no climbing, no lifting over 10 lbs., no bending greater than four times per hour, no pushing or pulling over 10 lbs. of force, no reaching above shoulders, no squatting, and no kneeling. Claimant continued working for the Employer with the restrictions through August 7, 2014, when her employment was terminated.

4. Claimant's providers at Concentra released Claimant to full duty work, without restrictions, on September 4, 2014. Claimant was terminated on August 7, 2014, and was released to full duty work less than a month later.

5. The full duty release on September 4, 2014, came after Claimant underwent an MRI. The MRI revealed no significant work-related pathology. Claimant reported to her provider on September 4, 2014, that she had been performing activities beyond the restrictions provided to her earlier and "tolerating" that increased level of activity. Claimant followed up with Concentra on October 17, 2014. Dr. Webb noted Claimant had "progressed to almost back to baseline." Claimant was advised to follow up with Denver Health for non-work related findings on MRI. Dr. Webb continued Claimant's release to full duty work without restrictions.

6. The Employer, as an assisted living facility, and Claimant, as a qualified medication administration staff member, are regulated by the State of Colorado's Department of Public Health and Environment. Medications are required by law to be administered by qualified medication administration staff members (QMAP) and only upon written order of a licensed physician. Claimant is a QMAP. Claimant, as a QMAP, passed the Colorado State Department of Health's competency evaluation for administration of medication. Claimant completed the QMAP training and was permitted to dispense and process medications for the Employer.

7. Employer hired Claimant to work in one of their Assisted Living residences. The Employer has three residences in Lakewood, Golden and Arvada. Claimant worked in the Arvada residence, where she and other employees took care of eight to ten residents. The residents have memory issues. Claimant cared for the residents with care and devotion. State law and the families of residents in Assisted Living require accountability by those caring for residents.

8. Employer meets all of the requirements of the State. State law requires the tracking of medications and supplements to ensure safe medication administration practices. At any time, a resident can face a life threatening need for medical treatment. Accurate recordkeeping by QMAP can assist in the proper care and treatment for a patient.

9. The Medical Administration Record (MAR) is the official medical record for the patient. This record travels with the patient and informs physicians and family members about the medications administered to a resident.

10. The State of Colorado requires a residential care facility, like Employer, and the QMAP to track every medication, every supplement, every vitamin, every mineral, everything orally administered, and everything that goes in a feeding tube. Food is more generally tracked. The State requires the Employer and QMAP, with precision, to name the "medications" a resident receives. There should be no mistakes with medication administration for residents.

11. QMAP's follow specific rules when writing on a MAR. QMAP's are trained on what can be placed on a MAR. Claimant understood the MAR is part of a resident's

permanent record and it must be accurate. For instance, if a medication cannot be administered because it is not available or it is refused, the QMAP is trained to place a circle in the box for the date and document the exact reason on the reverse side of the MAR. If the MAR does not have marking showing the medication was dispensed, it is considered not administered. If a mistake is made when writing on the MAR, Claimant was trained to circle and initial a mistake.

12. Claimant drew arrows on the MAR of residents to indicate another employee's mistake. Claimant pointed out another employee's mistake because that employee failed to initial a date box for a medication that was to be given. Claimant admitted she drew the arrows on the MAR. Claimant knew from her training that drawing an arrow on a MAR was not the correct procedure for indicating a patient was not given a medication. The correct procedure was to circle the date box and then document the reasons for missing the medication.

13. Claimant drew arrows on three MAR in four locations when she should not have made any markings. Claimant made incorrect markings on the following dates: July 24, 2014, for docusate sodium; July 24, 2014, for lorazepam and Risperdal; and July 21, 2014, for Colace. Claimant admits she did not follow proper procedure by writing on the MAR.

14. Claimant's testimony about Brent Bartlett's role was conflicting, confusing and therefore was not relied upon. Though Claimant admits her markings on the MAR were inappropriate, Claimant testified Brent Bartlett was her supervisor and he told her to make the marks on the MAR.

15. Sheryl Kysar is the Administrator for Employer. As the Administrator, Ms. Kysar oversees operations at the Employer's facilities. Ms. Kysar testified Claimant was employed as a caregiver/QMAP for the Employer; Claimant worked shortly as a lead caregiver, but stepped down in the fall of 2013. Claimant resumed her position as a caregiver in 2013 and 2014. As a lead, Claimant had difficulty coordinating the ordering medications of the residents and keeping the medication cart properly stocked.

16. Ms. Kysar credibly testified Mr. Bartlett was not a lead on July 24, 2014, when Claimant inappropriately drew arrows on four MAR entries. Mr. Bartlett was not in a position where he had the authority to tell Claimant to draw arrows inappropriately on the MAR on July 24, 2014. Mr. Barlett was a caregiver at the time.

17. Ms. Kysar learned about Claimant marking on the MAR inappropriately when Sherrie Bonham, the house manager, brought the marks to her attention. Ms. Bonham supervised Claimant.

18. Ms. Bowman and Kysar investigated the marks on the MAR. Claimant advised the two managers that she did not make the marks. Employer learned Claimant made the marks on the MAR in order to point out other employees who had missed signing the MAR. Claimant had been recently reprimanded for missed signatures and was

asked to be more careful. Claimant made the marks on the MAR highlighting others' missed signatures shortly after she was reprimanded for missing signatures.

19. Around the same time as the MAR being inappropriately marked upon by Claimant, two other problems surfaced. Claimant signed reflecting that she provided a medication to a patient and then miscounted the medication at the end of her shift. Claimant reported there were 14 anti-anxiety tablets left, when the next person on duty and the Employer confirmed there were 15 tablets left. Because there were 15 tablets left and there were 15 left before Claimant started her shift, managers concluded that Claimant's notation that she gave the pill to the resident must have been inaccurate. Claimant miscounted the medication and improperly signed that she had provided the controlled substance to the resident when in fact she did not.

20. Additionally, the Employer documented Claimant had inappropriate contact with a resident's family. Rules regarding contact with residents' family are based on the State's regulations that provides for equal treatment of residents. A personal relationship with a family member can lead to charges of favoritism. If there are problems with care, a personal relationship might keep a family member from reporting problems to protect the friend who is part of the care team for the resident.

21. Staff reported to Employer that Claimant had an off-duty meeting with a family member in which other staff was told to leave the two alone. On another occasion, Claimant was asked by a family member to ride along with that family member and a resident rather than ride on the bus with the rest of the residents. Claimant was asked to ride with the resident's family member because that family member did not know her way around town on a facility outing. Employer rules required Claimant to obtain permission to divert staff to a personal car on this type of outing. Claimant did not receive permission and the bus was without one staff member during the ride to the outing. Claimant came into work on a day off to speak with the family member in the facility. Claimant was aware of the need to avoid personal relationship with family members.

22. Claimant went on vacation shortly after July 25, 2014, when she returned, she met with Ms. Kysar and Ms. Bowman to discuss the problems discovered with the medications and the family member relationship. Ms. Kysar and Bowman discussed their investigation and decided to terminate Claimant's employment because of the seriousness of the problems. On August 7, 2014, when Claimant returned from vacation, the Employer informed Claimant her employment with the Employer was terminated for three grounds: improper recordkeeping; inappropriate contact with resident family members; and inappropriate writing on a resident's MAR.

23. Respondents proved it is more probably true than not that that Claimant engaged in volitional conduct that caused the termination from employment. Therefore, Claimant is responsible for the termination from employment. The ALJ finds the testimony of Ms. Kysar and Ms. Bowman more persuasive and credible than Claimant's testimony.

CONCLUSIONS OF LAW

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

1. The purpose of the 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. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Respondents contend that they sustained their burden of proof to establish that Claimant was responsible for her termination from employment and denying Claimant's request for TTD from August 8, 2014 until September 4, 2014, when Claimant was released to full duty work without restriction. Sections 8-42-103(1)(g), C.R.S., and 8-42-105(4)(a), C.R.S., (termination statutes) provide that if a temporarily disabled employee "is responsible for termination for employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003).

4. When a Claimant is responsible for the termination of her employment, the subsequent wage loss is the result of the Claimant's act leading to the termination, not the injury. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002). As a result, Claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994). A Claimant will be considered responsible if she engaged in a volitional act or exercised control over the circumstances that led to the termination. *Id.*

5. A volitional act does not mean moral or ethical culpability. It simply means that Claimant performed the act that led to her termination. *Gleason v. Southland Corp.*, W.C. No. 4-149-631 (ICAO, June 13, 1994). As the Panel stated, "we decline the Claimant's invitation to narrowly define the 'volitional act' test so as to exclude all conduct which is inadvertent or negligent." *Gleason* at 2. Negligent or inadvertent conduct may constitute a volitional act and culpability is not required. *Id*.

6. The ALJ concludes Respondents proved it is more probably true than not that Claimant was responsible for the post-injury termination from employment within the meaning of the termination statutes. The Judge concludes that Claimant committed a volitional act that caused her termination when Claimant marked on a MAR improperly, mismarked a controlled medication administration record, miscounted a controlled medication, and engaged in an improper personal relationship with a family member. The ALJ credits the testimony of Ms. Kysar and Ms. Bonham concerning the events surrounding Claimant's termination on August 7, 2014, and discredits the Claimant's testimony insofar as it conflicts with the testimony of Ms. Kysar and Ms. Bonham.

ORDER

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

1. Claimant's claim for temporary total disability benefits from August 7, 2014 until properly terminated by law is DENIED and DISMISSED. Claimant is not entitled to temporary total disability benefits beginning August 7, 2014, as she was responsible for her termination from employment.

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

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

DATED: March 9, 2015___

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant established by a preponderance of the evidence that she is entitled to an order awarding a closed period of Temporary Total Disability (TTD) benefits; and

2. Whether Claimant established by a preponderance of the evidence that she is entitled to an order awarding reasonably necessary and related medical benefits.

As a preliminary matter at hearing, Claimant withdrew her claim for medical benefits.

FINDINGS OF FACT

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

1. Claimant suffered an admitted work related ankle injury on September 2, 2014.

2. Respondents filed a General Admission of Liability (GAL) on November 7, 2014. Based on the admission contained in the GAL, Respondents paid Claimant weekly TTD benefits of $881.65 starting September 8, 2014.

3. Respondents filed another GAL on January 28, 2015, whereby weekly TTD benefits of $881.65 starting September 3, 2014, were admitted by Respondents.

4. Claimant asserts that she is owed TTD benefits for the period of October 29, 2014, through November 15, 2014.

5. Claimant's weekly TTD rate is $881.65 and Claimant's daily TTD rate is $125.95.

6. As of the date of the hearing, Claimant had been paid $18,514.65 in TTD benefits. Those benefits covered the period of September 3, 2014, through January 27, 2015.

7. Marchelle Robinson is a claims adjuster for Insurer. Ms. Robinson has worked as a claims adjuster for 16 years. She was assigned as the claims adjuster for Claimant's claim. She credibly testified that she used an online calculator provided by the Division of Workers' Compensation, State of Colorado to

calculate Claimant's benefits during the period September 3, 2014 through January 27, 2015. This is a period of 147 days or 21 weeks.

8. Ms. Robinson calculated the benefits owed Claimant in TTD for a period of 147 days or 21 weeks, which totaled $18,514.65. Ms Robinson testified that this is the amount paid to Claimant.

9. Claimant failed to establish that Respondents improperly calculated her TTD benefits for the period October 29, 2014, through November 15, 2014.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). As of the date of hearing, Claimant had been paid $18,514.65 in TTD benefits.

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

4. Claimant contends that Respondents failed to properly pay Claimant TTD during the period from September 3, 2014, through January 27, 2015. Claimant contends that during the period October 29, 2014, through November 15, 2014,

she was not properly paid TTD. Claimant contends that the period September 3, 2014, through January 27, 2015, covers a 23 week period and Respondents argues that it covers a 21 week period.

5. It is found and concluded that the credible and persuasive evidence presented at hearing established that the period from September 3, 2014, through January 27, 2015, covers a 21 week period.

6. Respondents are liable for 21 weeks of TTD from September 3, 2014, through January 27, 2015, at the TTD rate of $881.65 per week, which totals $18,514.65.

7. It is further found and concluded that Claimant has been paid $18,514.65 for the time period from September 3, 2014 through January 27, 2015.

8. Claimant failed to establish by a preponderance of the evidence that Respondents incorrectly paid benefits to her.

ORDER

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

1. Claimant's claim for TTD benefits for the time period October 29, 2014, through November 15, 2014, is denied and dismissed.

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

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

DATED: March 24, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014.

2. A determination of Claimant's Average Weekly Wage (AWW).

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 1, 2014 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's TTD benefits should be reduced pursuant to §8-43-102(1)(a), C.R.S. for failing to timely report his injury in writing.

FINDINGS OF FACT

1. Claimant worked for Employer as a Rigger on a pipeline project. His job duties involved manipulating and securing loads of heavy materials to be lowered by a crane into a mineshaft. The materials routinely weighed in excess of several hundred pounds.

2. During the first week of May 2014 Claimant received a pay raise from Employer. Claimant earned aggregate gross wages of $10,452.75 from the pay period ending May 11, 2014 through the pay period ending June 29, 2014. Dividing the gross wages by eight weeks yields an AWW of $1,306.59. An AWW of $1,306.59 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant testified that while driving into work with coworker Michael Croak on June 30, 2014 he developed discomfort in his lower back and left leg. Upon arriving at work at approximately 5:30 AM Claimant performed several preliminary duties. He also attended a meeting with other members of the crew prior to commencing the tunneling operation for the day.

4. Claimant explained that at approximately 7:00 AM he was tugging on railroad track that weighed approximately 350 pounds to lower it into a mineshaft. Each piece of railroad track was approximately 35 feet in length. Claimant pushed the pieces of track together and aligned them so they would be flat when they reached the ground inside the mineshaft. He forcefully pulled on straps to secure the pieces of track. Claimant testified that he "injured himself right then and there" when pain shot through his left lower back and down his left leg. He remarked that he continued to work until he could no longer walk.

5. James Wiley testified that he worked for Employer as a Crane Operator. He was operating a crane while Claimant was preparing the rigging to lower the railroad tracks into the mineshaft. He explained that Claimant began to limp after strapping materials but could not recall whether the items were railroad tracks. Mr. Wiley noted that Claimant's symptoms worsened over time.

6. Michael Croak testified that he worked for Employer as a Bottom Lander. He unhooked materials from the crane at the bottom of the mineshaft. Mr. Croak stated that Claimant did not inform him of any lower back discomfort on the way to work and he did not witness Claimant develop any symptoms from the bottom of the mineshaft.

7. Employer's General Superintendent at the job site Cal Negley testified that another superintendent told him Claimant was in pain on June 30, 2014 and wanted to visit a doctor. Mr. Negley initially spoke to the other supervisor and then talked to Claimant about his condition. Claimant stated that he awoke in significant pain on that morning and wanted to see a doctor. Mr. Negley noticed that Claimant was limping but he had noticed Claimant limping on prior occasions. He remarked that Claimant did not mention that he injured his back after lifting anything at work.

8. Safety Coordinator James Bennett, who worked for World Wide Safety Consulting, testified that he was informed on June 30, 2014 that Claimant required a ride home because he was injured. He testified that he spoke to Claimant and asked him if the injury was work-related. Claimant responded that the injury was not work-related and his leg was bothering him on the way to work. Mr. Bennett then stated that he gave Claimant a ride home. He commented that Claimant never mentioned a work-lifting incident that caused back or leg pain.

9. Claimant testified that he told his supervisors about being uncomfortable on the drive into work on June 30, 2014 because he wanted to "thoroughly" communicate and be "candid" with Employer. Although Claimant told Employer about experiencing pain in his back and leg on the way into work, he did not tell Employer about a lifting or tugging incident that caused an injury.

10. Claimant explained that after the June 30, 2014 incident he visited the Emergency Room at Memorial Hospital in Colorado Springs because of his back and leg pain. The medical record reveals that Claimant did not mention any lifting or tugging incident that caused his symptoms. Claimant only reported he "works as a hand signal operator for a large crane, and subsequently goes nonstop in the morning until 10 a.m." He "denie[d] any recent trauma."

11. On July 2, 2014 Claimant visited Jeffrey R. Kent, M.D. for an examination. Claimant reported severe left leg pain that had developed on the preceding Monday or June 30, 2014 with no known injury. Dr. Kent restricted Claimant from working between June 30, and July 8, 2014. He also prescribed pain medication and referred Claimant for an MRI. Dr. Kent subsequently remarked that Claimant would require work restrictions.

12. On July 8, 2014 Claimant underwent a lumbar spine MRI. The most prominent finding on the MRI was a left-sided disc extrusion at L3-L4 causing left lateral recess narrowing with L4 nerve root contact. Claimant also exhibited moderate to severe left foraminal narrowing and L3 nerve root impingement. The MRI also revealed degenerative changes at L2-3, L4-5 and L5-S1.

13. On July 11, 2014 Claimant visited Jeffrey P. Jenks, M.D. for an evaluation. Dr. Jenks noted that Claimant's back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." Dr. Jenks' commented that Claimant's MRI from July 8, 2014 showed a left foraminal disc extrusion at L3-4 causing lateral recess narrowing and L4 nerve root contact, moderately severe left foraminal narrowing, L3 nerve root impingement, multilevel degenerative disc disease, canal stenosis at L4-5, moderate L5-S1 foraminal narrowing and L5 nerve root contact. He diagnosed Claimant with lumbar discogenic pain and radicular symptoms.

14. On July 30, 2014 Claimant returned to Dr. Kent for an examination and noted he was dissatisfied with Dr. Jenks. He reported continuing sciatic pain down the left leg that caused him to fall on two occasions. Claimant returned to Dr. Kent on August 2, 2014. Dr. Kent referred him to John H. Bissell, M.D. "to assume care of his physiatry and pain management."

15. On September 11, 2014 Claimant visited Dr. Bissell for an examination. Claimant reported that on the day prior to the June 30, 2014 incident he had performed significant heavy lifting at work but there was no specific event that injured his back. He remarked that on the night of June 29, 2014 he had "his usual back stiffness and baseline soreness" but he did not do anything unusual to cause his back pain to flare up. Claimant stated that on June 30, 2014 he experienced increased soreness in his back on the drive into work. He explained that after he lifted three railroad ties one at a time he suddenly developed left lower back and left leg pain that incapacitated him. Claimant remarked that he did not report the incident as a work injury because he "recall[ed] having some increased soreness in his back that morning and he could not relate that to anything specifically occurring from the day before or that night." After reviewing Claimant's MRI and conducting a physical examination Dr. Bissell concluded that Claimant's condition "represent[ed] a work-related aggravation of a pre-existing condition."

16. On September 16, 2014 Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation. Employer received the formal claim on September 17, 2014 and filed a First Report of Injury with the Division of Workers' Compensation on September 18, 2014.

17. On January 6, 2015 Claimant underwent a Rule 8 independent medical examination with Lloyd J. Thurston, D.O. Claimant reported that on June 30, 2014 he was lifting straps onto pieces of railroad track at work. He explained that while he was separating the tracks to get the straps around them he "pulled on the railroad track and was immediately injured." Claimant described the initial pain as "feeling like he had been 'shot' in the left low back with sudden pain in the left side like the thigh bone was

broken and sticking out." Dr. Thurston performed a physical examination that revealed numerous findings consistent with left lower extremity radiculopathy. He diagnosed Claimant with a left L3-L4 disc extrusion causing left L4 nerve root contact and left L3 nerve root impingement as well as clinical findings of left quadriceps muscle atrophy and left L4 sensory neuropathy consistent with left L4 nerve root compression/compromise. In assessing causation Dr. Thurston concluded:

> [b]ased on [Claimant's] description of his job, his description to me of the sudden dramatic onset of his symptoms while performing his job, and his description of the interaction with his coworkers immediately after the onset of symptoms, the left L4 radiculopathy is more likely than not a result of an acute left L3-L4 disc extrusion compressing the left L4 nerve root.

18. On January 27, 2015 Dr. Bissell testified through an evidentiary deposition in this matter. Dr. Bissell explained that the multilevel degenerative changes on Claimant's MRI likely predated the industrial injury. However, Dr. Bissell further determined that the L3-4 disc extrusion probably did not predate the work incident. Rather, Dr. Bissell stated that "[w]ithin a reasonable degree of medical probability, I'd say that [the L3-4 extrusion] was the reason why he developed left leg pain, and so that was probably work-related due to that lifting episode of the 500-pound metal or railroad ties, whatever it was." Nevertheless, Dr. Bissell acknowledged that it was difficult to determine if the extrusion was preexisting or caused by the lifting incident on June 30, 2014.

19. Claimant has demonstrated that it is more probably true than not that he suffered compensable lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014. Claimant explained that he developed discomfort in his lower back and left leg while driving to work on June 30, 2014. He testified that he pushed pieces of track together and aligned them so they would be flat when they reached the ground inside the mineshaft. While he was pulling on straps to secure the pieces of track he experienced the sudden onset of pain through his left lower back and down his left leg. Crane Operator Mr. Wiley was operating a crane while Claimant was preparing the rigging to lower the railroad tracks into the mineshaft. He explained that Claimant began to limp after strapping materials but could not recall whether the items were railroad tracks. Mr. Wiley noted that Claimant's symptoms worsened over time. Claimant did not immediately report a work-related incident to Employer. Instead, he reported that the injury was not work-related and his left leg had been bothering him on the way to work. When Claimant subsequently obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." The record thus reveals that an incident occurred while Claimant was working for Employer on June 30, 2014 but he did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014.

20. Subsequent medical records reveal that Claimant suffered an aggravation of a pre-existing condition while working for Employer on June 30, 2014. On September 11, 2014 Claimant reported to Dr. Bissell that, after he lifted three railroad ties one at a time, he suddenly developed left lower back and left leg pain that incapacitated him. Claimant remarked that he did not report the incident as a work injury because he "recall[ed] having some increased soreness in his back that morning and he could not relate that to anything specifically occurring from the day before or that night." After reviewing Claimant's MRI and conducting a physical examination Dr. Bissell concluded that Claimant's condition "represent[ed] a work-related aggravation of a pre-existing condition." Dr. Bissell subsequently testified that the multilevel degenerative changes on Claimant's MRI likely predated the industrial injury. However, Dr. Bissell further determined that the L3-4 disc extrusion probably did not predate the work incident. Rather, Dr. Bissell stated that "[w]ithin a reasonable degree of medical probability, I'd say that [the L3-4 extrusion] was the reason why he developed left leg pain, and so that was probably work-related due to that lifting episode of the 500-pound metal or railroad ties, whatever it was." Similarly, Dr. Thurston explained that, based on Claimant's description of the sudden onset of symptoms while performing his job and interaction with his coworkers immediately after the onset of symptoms, Claimant suffered an acute L3-L4 disc extrusion that compressed the L4 nerve root. The persuasive medical reports and testimony of Drs. Bissell and Thurston thus reveal that Claimant's work activities for Employer on June 30, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

21. Claimant has proven that it is more probably true than not he is entitled to receive TTD benefits until terminated by statute. Claimant ceased working on June 30, 2014 because his back and leg pain prevented him from performing his regular job duties. Claimant's work activities involved manipulating and securing loads of heavy materials to be lowered by a crane into a mineshaft. The materials routinely weighed in excess of several hundred pounds. Dr. Kent initially took Claimant off work from June 30 through July 8, 2014 and subsequently remarked that Claimant would require work restrictions. Employer informed Claimant that he could not return to work until he was released by a physician "to come back to work at 100 percent." Moreover, the medical records and Claimant's testimony reveal that he was unable to perform his job duties for Employer after June 30, 2014. Claimant is entitled to an award of TTD benefits because his June 30, 2014 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.

22. Respondents have demonstrated that it is more probably true than not that Claimant's TTD benefits should be reduced pursuant to statute for failing to timely report his injury in writing. Claimant did not report his June 30, 2014 industrial injury to Employer until September 17, 2014. The record is replete with evidence that Claimant did not initially report to Employer or medical providers that he suffered a work injury on June 30, 2014. Claimant told Employer's General Superintendent at the job site Mr. Negley that he awoke in significant pain on the morning of June 30, 2014 and wanted to see a doctor. Mr. Bennett testified that he spoke to Claimant and asked him if the injury was work-related. Claimant responded that the injury was not work-related and his leg

was bothering him on the way to work. Mr. Bennett remarked that Claimant never mentioned a work-lifting incident that caused back or leg pain. When Claimant initially obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." Claimant thus did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014. Claimant waited approximately two and one-half months to specifically report that he had suffered an industrial injury while working for Employer. A review of the pertinent factors in considering whether to reduce Claimant's compensation reveals that the long delay in reporting the industrial injury warrants the loss of one day's compensation for each day's failure to report. Accordingly, Respondents are not liable for TTD benefits prior to September 17, 2014. However, Claimant shall receive TTD benefits for the period September 18, 2014 until terminated by statute.

CONCLUSIONS OF LAW

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

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

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

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 there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014. Claimant explained that he developed discomfort in his lower back and left leg while driving to work on June 30, 2014. He testified that he pushed pieces of track together and aligned them so they would be flat when they reached the ground inside the mineshaft. While he was pulling on straps to secure the pieces of track he experienced the sudden onset of pain through his left lower back and down his left leg. Crane Operator Mr. Wiley was operating a crane while Claimant was preparing the rigging to lower the railroad tracks into the mineshaft. He explained that Claimant began to limp after strapping materials but could not recall whether the items were railroad tracks. Mr. Wiley noted that Claimant's symptoms worsened over time. Claimant did not immediately report a work-related incident to Employer. Instead, he reported that the injury was not work-related and his left leg had been bothering him on the way to work. When Claimant subsequently obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on

June 30, 2014 with "no apparent precipitating injury or event." The record thus reveals that an incident occurred while Claimant was working for Employer on June 30, 2014 but he did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014.

8. As found, subsequent medical records reveal that Claimant suffered an aggravation of a pre-existing condition while working for Employer on June 30, 2014. On September 11, 2014 Claimant reported to Dr. Bissell that, after he lifted three railroad ties one at a time, he suddenly developed left lower back and left leg pain that incapacitated him. Claimant remarked that he did not report the incident as a work injury because he "recall[ed] having some increased soreness in his back that morning and he could not relate that to anything specifically occurring from the day before or that night." After reviewing Claimant's MRI and conducting a physical examination Dr. Bissell concluded that Claimant's condition "represent[ed] a work-related aggravation of a pre-existing condition." Dr. Bissell subsequently testified that the multilevel degenerative changes on Claimant's MRI likely predated the industrial injury. However, Dr. Bissell further determined that the L3-4 disc extrusion probably did not predate the work incident. Rather, Dr. Bissell stated that "[w]ithin a reasonable degree of medical probability, I'd say that [the L3-4 extrusion] was the reason why he developed left leg pain, and so that was probably work-related due to that lifting episode of the 500-pound metal or railroad ties, whatever it was." Similarly, Dr. Thurston explained that, based on Claimant's description of the sudden onset of symptoms while performing his job and interaction with his coworkers immediately after the onset of symptoms, Claimant suffered an acute L3-L4 disc extrusion that compressed the L4 nerve root. The persuasive medical reports and testimony of Drs. Bissell and Thurston thus reveal that Claimant's work activities for Employer on June 30, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Average Weekly Wage

9. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

10. As found, during the first week of May 2014 Claimant received a pay raise from Employer. Claimant earned aggregate gross wages of $10,452.75 from the pay period ending May 11, 2014 through the pay period ending June 29, 2014. Dividing the gross wages by eight weeks yields an AWW of $1,306.59. An AWW of $1,306.59 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

11. 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).

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits until terminated by statute. Claimant ceased working on June 30, 2014 because his back and leg pain prevented him from performing his regular job duties. Claimant's work activities involved manipulating and securing loads of heavy materials to be lowered by a crane into a mineshaft. The materials routinely weighed in excess of several hundred pounds. Dr. Kent initially took Claimant off work from June 30 through July 8, 2014 and subsequently remarked that Claimant would require work restrictions. Employer informed Claimant that he could not return to work until he was released by a physician "to come back to work at 100 percent." Moreover, the medical records and Claimant's testimony reveal that he was unable to perform his job duties for Employer after June 30, 2014. Claimant is entitled to an award of TTD benefits because his June 30, 2014 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.

Failure to Timely Report

13. Section 8-43-102(a), C.R.S. provides that "every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence…if said employee fails to report said injury in writing, said employee may lose up to one day's compensation for each day's failure to so report." Imposition of a penalty for late reporting is discretionary, rather than mandatory, because the statute provides that the claimant "may" lose compensation for failing to timely report the injury in writing. *Tellez v. Wal-Mart Stores*, W.C. No. 4-413-780 (ICAP, Nov. 29, 2001). Pertinent factors to consider when deciding whether to reduce a claimant's compensation include whether the claimant was physically capable

of reporting the injury, whether the claimant orally notified the employer or the employer otherwise had actual notice of the injury, whether the employer had an opportunity to refer the claimant to its physician before the claimant engaged substantial medical treatment or experienced a significant period of disability and whether the lack of a written report prejudiced the employer's ability to defend the claim. *See e.g., Lefou v. Waste Management*, W.C. Nos. 4-519-354 & 4-536-799 (ICAP, Mar. 6, 2003); *Doughty v. Poudre Valley Hospita*l, W.C. No. 4-488-749 (ICAP, Mar. 14, 2002).

14. As found, Respondents have demonstrated by a preponderance of the evidence that Claimant's TTD benefits should be reduced pursuant to statute for failing to timely report his injury in writing. Claimant did not report his June 30, 2014 industrial injury to Employer until September 17, 2014. The record is replete with evidence that Claimant did not initially report to Employer or medical providers that he suffered a work injury on June 30, 2014. Claimant told Employer's General Superintendent at the job site Mr. Negley that he awoke in significant pain on the morning of June 30, 2014 and wanted to see a doctor. Mr. Bennett testified that he spoke to Claimant and asked him if the injury was work-related. Claimant responded that the injury was not work-related and his leg was bothering him on the way to work. Mr. Bennett remarked that Claimant never mentioned a work-lifting incident that caused back or leg pain. When Claimant initially obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." Claimant thus did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014. Claimant waited approximately two and one-half months to specifically report that he had suffered an industrial injury while working for Employer. A review of the pertinent factors in considering whether to reduce Claimant's compensation reveals that the long delay in reporting the industrial injury warrants the loss of one day's compensation for each day's failure to report. Accordingly, Respondents are not liable for TTD benefits prior to September 17, 2014. However, Claimant shall receive TTD benefits for the period September 18, 2014 until terminated by statute.

ORDER

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

1. Claimant suffered lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014.

2. Claimant earned an AWW of $1,306.59.

3. Claimant shall receive TTD benefits for the period September 18, 2014 until terminated by statute.

4. 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: March 9, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Respondent has proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on May 17, 2014 during the course and scope of his employment with Employer.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

4. . Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondent failed to designate a medical provider after receiving notice of his injury.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute.

6. Whether Employer is subject to penalties pursuant to §8-44-101, C.R.S. for failing to carry Workers' Compensation insurance.

7. Whether Claimant's compensation should be increased by 50% pursuant to §8-43-408(1), C.R.S. for Employer's failure to carry Workers' Compensation insurance on May 17, 2014.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $550.00.

FINDINGS OF FACT

1. On March 28, 2014 Claimant came to Colorado from Puerto Rico. He responded to a job advertisement placed by Employer and was hired on March 31, 2014. Claimant had approximately 16 years' experience in the field of automotive body repair and painting. His job initially entailed automotive body paint preparation and light body work. Employer furnished tools for Claimant's use.

2. Claimant testified that he worked for Employer on Monday through Friday from 8:00 a.m. until 5:30 p.m. He also frequently worked on Saturdays from 8:00 a.m. until 2:00 p.m. Employer initially paid Claimant a salary in cash. However, on May 7, 2014 and May 14, 2014 Employer paid Claimant in checks made payable to him personally.

3. After approximately 1.5 months, Employer assigned Claimant to perform primarily automotive body painting. Employer also gave Claimant a raise. Claimant purchased a paint gun and used his own sander and air blower. He painted approximately 10 different cars per week. Employer did not train Claimant and did not supervise his work performance.

4. Claimant was not employed anywhere else during the time he worked for Employer. He was also not self-employed or customarily engaged in an independent trade related to the services he performed for Employer. There was no written agreement between the parties that established Claimant was an independent contractor.

5. Employer had two separate buildings on its premises known by the addresses "315" and "319." Location 315 consisted of the body shop, paint booth and office. Location 319 was the place where Employer built race cars and made signs. Claimant remarked that he performed work for Employer in both locations.

6. Owner of Employer James J. Keeney testified at the hearing in this matter. He explained that he initially engaged Claimant to specifically perform work on two vehicles. Claimant responded that he could complete the work in four to five weeks. Mr. James Keeney agreed to pay Claimant a flat contact rate of $2,500.00 for his services. He noted that Claimant accepted the arrangement. He maintained that he did not establish a specific schedule in which Claimant was required to perform the work. Mr. James Keeney denied that Claimant was required to work an assigned schedule. In fact, Mr. James Keeney remarked that when Claimant took his paint gun and other tools home, Claimant acknowledged that he was performing auto body work for others. Mr. James Keeney commented that he did not oversee, instruct or train Claimant about performing auto body repair or painting. He agreed that he paid Claimant by cash or personal check for his services.

7. Mr. Jimmy Kenney is the son of Mr. James Keeney. Mr. Jimmy Keeney corroborated that his father hired Claimant to perform specific work on only a Buick and a Corvette. Claimant provided his own tools for auto body repair and painting. He did not require supervision or training in completing his tasks.

8. On May 17, 2014 Claimant arrived for work and asked Mr. James Keeney about the work that should be performed on that day. Mr. James Keeney told Claimant to help his son work on a Subaru. Claimant stated that he had previously worked on the Subaru for Employer. Employer was preparing the Subaru for an upcoming car show. Claimant went to the 319 location and assisted Mr. Jimmy Keeney with work on the

vehicle. He injured his left hand when he grabbed the wheel of the Subaru as it started moving down a small incline.

9. Mr. James Keeney explained that when Claimant arrived at the 315 location on May 17, 2014, he inquired whether any work was available. He responded that the shop was closed Mr. James Keeney maintained that he never directed Claimant to work on the Subaru. In fact, location 319 was a separate facility that was unrelated to the Employer. Mr. James Kenney explained that his son used the 319 location as a workshop for his private vehicles.

10. Mr. Jimmy Kenney explained that 319 is a location where he works on racing cars and vinyl graphics. He maintained that no Employer work is performed at the 319 location. Mr. Jimmy Keeney remarked that on May 17, 2014 he was preparing a Subaru to go to a detailing shop. Claimant entered the 319 location and they discussed Claimant's new car. Mr. Jimmy Keeney maintained that at no time did he ask Claimant to assist him in performing any work on the Subaru. Claimant injured his left hand when he grabbed the front driver's side wheel of the Subaru.

11. Immediately after the injury, Mr. James Keeney drove Claimant to Colorado Springs Health Partners for emergency medical treatment. Employer did not provide Claimant with a list of at least medical providers to treat his injury.

12. On May 17, 2014 Employer did not possess Workers' Compensation insurance. In fact, Employer was uninsured from July 1, 2005 through October 15, 2014.

13. Because of his injury Claimant was unable to earn wages from May 18, 2014 until June 9, 2014. Claimant underwent surgery on June 2, 2014 at Memorial Hospital. He returned to work for Employer on June 9, 2014. Claimant continued to work for Employer until he was terminated on September 10, 2014. He subsequently worked for a different employer from September 19, 2014 until he was laid off on January 1, 2015. Claimant has been unable to return to regular work due to the effects of his May 17, 2014 industrial injury. He has not reached Maximum Medical Improvement (MMI).

14. Respondent has failed to prove that it is more probably true than not that Claimant was an independent contractor pursuant to statute. Employer established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer established that it did not provide more than minimal training or supply all of the necessary tools. However, Claimant did not operate a trade or business and Employer paid him personally by cash or check. In fact, Claimant earned a salary based on a regular work schedule. The record reveals that there was no fixed or contract rate of pay based on the completion of a specific project. Finally, Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the service performed" during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Claimant's income was wholly dependent on his earnings from Employer.

15. Claimant has established that it is more probably true than not that he suffered compensable injuries on May 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that on May 17, 2014 he arrived for work and asked Mr. James Keeney about the work that should be performed on that day. Mr. James Keeney told Claimant to help his son, Jimmy Keeney, work on a Subaru. Claimant went to the 319 location and assisted Mr. Jimmy Keeney with work on the Subaru. He injured his left hand when he grabbed the wheel of the vehicle as it started moving down a small incline. In contrast, owner of Employer Mr. James Keeney and his son Mr. Jimmy Keeney testified that Claimant was not performing services for Employer when he injured his left hand. However, Claimant's credible testimony and the circumstances surrounding the injury reveal that Claimant injured his left hand on the Subaru while performing his job duties for Employer.

16. 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. After the injury, Claimant sought emergency treatment at Colorado Springs Health Partners and underwent surgery at Memorial Hospital on June 2, 2014. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his May 17, 2014 left hand injury. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injury.

17. Claimant has established that it is more probably true than not that the right of medical selection passed to him because Respondent failed to designate a medical provider after receiving notice of his injury. Claimant informed Employer of the accident, reported his injuries and sought medical treatment. However, Employer failed to provide Claimant with a list of at least two authorized treating physicians. Because Respondent never designated any medical providers, the right to select a physician passed to Claimant.

18. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute. Claimant was unable to earn wages during the period May 18, 2014 through June 9, 2014 because he was experiencing the effects of his left hand injury. Claimant continued to work for Employer until he was terminated on September 10, 2014. He subsequently worked for a different employer from September 19, 2014 until he was laid-off on January 1, 2015. Claimant has been unable to return to regular work due to the effects of his May 17, 2014 industrial injury. He has not reached MMI for his May 17, 2014 left hand injury.

19. Employer is not subject to additional penalties pursuant to §8-44-101, C.R.S. for failing to carry Workers' Compensation insurance. Respondent was fined by the Director of the Division of Workers' Compensation for failing to carry Workers' Compensation insurance. Respondent was fined a total of $16,970.00 based on $5.00 per day for each of the 3,394 days from July 1, 2005 through October 15, 2014. The fine was issued pursuant to W.C.R.P. 3-6.

20. Claimant has established that Employer was not insured on May 17, 2014. His disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act.

CONCLUSIONS OF LAW

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

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

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

Independent Contractor

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The second prong of §8-40-202(2)(a), C.R.S. as to whether an claimant should be deemed an employee is whether the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011). Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is

paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant was an independent contractor pursuant to statute. Employer established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer established that it did not provide more than minimal training or supply all of the necessary tools. However, Claimant did not operate a trade or business and Employer paid him personally by cash or check. In fact, Claimant earned a salary based on a regular work schedule. The record reveals that there was no fixed or contract rate of pay based on the completion of a specific project. Finally, Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the service performed" during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Claimant's income was wholly dependent on his earnings from Employer.

Compensability

7. 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.

8. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries on May 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that on May 17, 2014 he arrived for work and asked Mr. James Keeney about the work that should be performed on that day. Mr. James Keeney told Claimant to help his son, Jimmy Keeney, work on a Subaru. Claimant went to the 319 location and assisted Mr. Jimmy Keeney with work on the Subaru. He injured his left hand when he grabbed the wheel of the vehicle as it started moving down a small incline. In contrast, owner of Employer Mr. James Keeney and his son Mr. Jimmy Keeney testified that Claimant was not performing services for Employer when he injured his left hand. However, Claimant's credible testimony and the circumstances surrounding the injury reveal that Claimant injured his left hand on the Subaru while performing his job duties for Employer.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

10. 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. After the injury, Claimant sought emergency treatment at Colorado Springs Health Partners and underwent surgery at Memorial Hospital on June 2, 2014. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his May 17, 2014 left hand injury. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injury.

Right of Selection

11. 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).

12. As found, Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondent failed to designate a medical provider after receiving notice of his injury. Claimant informed Employer of the accident, reported his injuries and sought medical treatment. However, Employer failed to provide Claimant with a list of at least two authorized treating physicians. Because Respondent never designated any medical providers, the right to select a physician passed to Claimant.

TTD Benefits

13. 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).

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute. Claimant was unable to earn wages during the period May 18, 2014 through June 9, 2014 because he was experiencing the effects of his left hand injury. Claimant continued to work for Employer until he was terminated on September 10, 2014. He subsequently worked for a different employer from September 19, 2014 until he was laid-off on January 1, 2015. Claimant has been unable to return to regular work due to the effects of his May 17, 2014 industrial injury. He has not reached MMI for his May 17, 2014 left hand injury.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

15. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. However, Employer is not subject to additional penalties pursuant to §8-44-101, C.R.S. for failing to carry Workers' Compensation insurance. Respondent was fined by the Director of the Division of Workers' Compensation for failing to carry Workers' Compensation insurance. Respondent was fined a total of $16,970.00 based on $5.00 per day for each of the 3,394 days from July 1, 2005 through October 15, 2014. The fine was issued pursuant to W.C.R.P. 3-6.

50% Increase in Benefits

16. Claimant seeks penalties against Employer for failing to carry Workers' Compensation insurance pursuant to §8-43-408, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

17. As found, Claimant has established that Employer was not insured on May 17, 2014. His disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act.

ORDER

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

1. Claimant worked for Employer as an employee not an independent contractor.

2. Claimant suffered a compensable left hand injury during the course and scope of his employment with Employer on May 17, 2014.

3. Employer is financially liable for Claimant's reasonable and necessary medical treatment that is designed to cure or relieve the effects of his May 17, 2014 industrial injuries.

4. The right of selection passed to Claimant.

5. Claimant earned an AWW of $550.00.

6. Employer shall pay Claimant TTD benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute. There is a 22 day period from May 18, 2014 through June 9, 2014 and a 10 day period from September 10, 2014 through September 19, 2014. Claimant is entitled to a TTD rate of $368.50, increased by 50% for a lack of insurance, to a TTD rate of $550.00 each week. Multiplying $550.00 each week for a total period of 32 days yields a total TTD amount of $2,514.27.

7. Employer shall also pay Claimant TTD benefits for the period January 1, 2015 until terminated by statute. The period consists of 72 days as of the date of this Order. Claimant is entitled to a TTD rate of $368.50, increased by 50% for a lack of

insurance, to a TTD rate of $550.00 each week. Multiplying $550.00 each week for a total period of 72 days yields a total TTD amount of $5,657.14 plus any TTD benefits that accrue until benefits are terminated pursuant to statute. Accordingly, total TTD benefits due as of the date of this Order equal $8,171.41.

In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $8,171.41with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $8,171.41 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation <u>or</u>

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

8. 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: March 13, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Claimant testified that he worked for Employer at a Popeye's restaurant in Northglenn, Colorado. On April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead.

2. Claimant explained that, at the recommendation of Employer's Store Manager, he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14.

3. Mr. Nick Amirian submitted documents on Respondent's behalf purportedly reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold.

4. Claimant has established that it is more probably true than not that he sustained compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer. The credible testimony of Claimant reflects that on April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead. Respondent has submitted documents purportedly reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold. However, absent more information about corporate structure and relationships the information does not nullify Claimant's credible testimony that he suffered head injuries while working at a Popeye's restaurant in Northglenn, Colorado.

5. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to

cure or relieve the effects of his industrial injuries. Claimant credibly explained that at the recommendation of Employer's Store Manager he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14. Accordingly, Claimant is entitled to reasonable and necessary medical treatment for his head injuries.

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. As found, Claimant has established by a preponderance of the evidence that he sustained compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer. The credible testimony of Claimant reflects that on April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead. Respondent has submitted documents purportedly reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold. However, absent more information about corporate structure and relationships the information does not nullify Claimant's credible testimony that he suffered head injuries while working at a Popeye's restaurant in Northglenn, Colorado.

Medical Benefits

7. 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).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Claimant credibly explained that at the recommendation of Employer's Store Manager he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14. Accordingly, Claimant is entitled to reasonable and necessary medical treatment for his head injuries.

ORDER

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

1. Claimant suffered compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer.

2. Respondent is financially responsible for payment of the April 15, 2014 HealthOne medical bill as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's April 15, 2014 industrial injuries.

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

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

DATED: March 13, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on June 18, 2014.

STIPULATIONS

The parties stipulated on record that if the claim is found compensable, the treatment provided by Dr. Nwizu and any referrals by Dr. Nwizu would be authorized as would the emergent treatment at Mountain View Regional Hospital.

FINDINGS OF FACT

1. Claimant worked for Employer as a "floorer" with duties including assisting the head driller, maintaining Employer's rig, and performing other duties as assigned. Claimant was hired by Employer in November of 2010 in Fruita, Colorado.

2. After being hired Claimant worked on a rig in Platteville, Colorado close to his home in Greeley, Colorado and went home in the evenings. Claimant also went through safety training in Fruita, Colorado. Claimant's home rig was listed as rig number 326 with a location of Fruita, Colorado. *See* Exhibit F

3. In January of 2014, Claimant was assigned by Employer to a new rig in Wyoming and began working on rig number 304, as his permanent or "home rig."

4. Shortly after Claimant began working in Wyoming, Employer completed an Hourly Personnel Action Form noting that Claimant was being transferred from rig 326 with a location noted of Fruita, Colorado to rig number 304 with a location noted of Casper, Wyoming. The effective date of transfer listed on the form was February 6, 2014. *See* Exhibit F.

5. When Claimant was transferred to Wyoming as his home rig, Claimant asked Jerry Stolz, drilling superintendent for Employer, whether he would be provided a per diem for working out of town. Mr. Stolz advised Claimant that he would not be provided a per diem because he would be provided a "man camp" to sleep at. Claimant understood that instead of a per diem, he would be provided sleeping arrangements paid for by Employer.

6. The rig Claimant began working on in January of 2014 was not actually located in Casper, Wyoming. The rig itself was in the middle of land in Wyoming, with Casper being the nearest town. Casper was located approximately two hours driving time from the rig.

7. Claimant's schedule in Wyoming required him to work 14 straight days and 12 ½ hour shifts per day. Claimant then would have 14 days off of work. This cycle repeated with 14 days on and 14 days off.

8. During the entire time Claimant was employed by Employer, he resided in Greeley, Colorado. After being assigned to the Wyoming rig, Claimant would leave Greeley, Colorado at the beginning of his 14 days on and would travel to the rig location. Claimant stayed at the rig location for the entire 14 days on and slept at the Employer provided "man camp" located approximately 100 feet from the actual rig during his 14 days on. At the end of the 14 days on, Claimant then would leave the rig site and return to Greeley, Colorado.

9. Claimant was not paid mileage to travel to/from the rig location from Greeley, Colorado at the start of his 14 day assignment or at the end of his 14 day assignment.

10. At the rig location, two "man camps" existed approximately 100 feet from the actual rig. The men working at the rig location, including Claimant, were assigned to one of the two camps for sleeping during their 14 days on.

11. When Claimant arrived to begin working at the Wyoming rig in January of 2014, he was assigned to one of the camps by Lee Hawkins, the rig manager. Mr. Hawkins designated that Claimant was to spend his evenings after the 12 ½ hour shift in the camp Claimant was assigned to during his 14 days on.

12. Claimant was assigned to a top bunk, approximately eight feet off the ground. The bunk beds did not have ladders, and employees assigned to top bunks had to pull themselves up. The bunk beds were makeshift, narrow, and the top bunk was too close to the ceiling to allow Claimant to fully sit up while in bed.

13. Claimant testified credibly that there was no viable option to sleep elsewhere during his 14 days on as there would not be sufficient time to go home or to the nearest town/hotel, eat, sleep, and get back in time for his next 12 ½ hour shift.

14. Claimant also testified credibly that he was not required to sleep at the man camp and could leave or sleep elsewhere if he wished. Claimant was not charged to sleep at the camp nor was any amount taken out of his paycheck for the use of the camp.

15. Claimant worked a 14 days on 14 days off schedule always sleeping and staying at the camp from January of 2014 until June 19, 2014.

16. On June 18, 2014 Claimant worked his regular 12 ½ hour shift. Claimant then went to the man camp, ate dinner, and went to bed.

17. While asleep, and at an unknown time estimated between 8:00 p.m. and 10:00 p.m. on June 18, 2014, Claimant fell off the top bunk and hit a night stand table that sat beside the bed with his lower back. Claimant does not recall the exact details surrounding his fall and was disoriented afterwards for a period of time.

18. After the fall, Claimant could barely walk and couldn't get back into the top bunk. Claimant spent the remainder of the night sleeping on the couch in the living room of the camp.

19. Claimant showed his direct supervisor, driller Jaime Lechuga, his back. Mr. Lechuga indicated Claimant should go back to sleep and that they would look at his back in the morning.

20. On June 19, 2014 Claimant was supposed to be at the rig at 5:30 a.m. for a safety meeting. Claimant could not walk or get up to attend the meeting and told his coworkers to have Mr. Hawkins to come speak with him.

21. Mr. Hawkins arrived to talk to Claimant and to see if Claimant could work if Claimant took it easy. Claimant advised he could not. Mr. Hawkins advised Claimant that Claimant would need to get a doctor's note to return to work.

22. Claimant spoke with his wife during this period of time. Claimant's wife called Employer's corporate office to complain and several hours later Employer sent an Employee to the rig location to pick up Claimant and to drive Claimant to the nearest hospital.

23. Claimant arrived at Mountain View Regional Hospital in Casper, Wyoming at approximately 12:15 p.m. on June 19, 2014. *See* Exhibit 2.

24. Claimant was treated by Khawaja Waseem, M.D. Dr. Waseem noted Claimant had tenderness, swelling, and a large hematoma on his lower left lumbar region. Dr. Waseem noted a clinical impression of left flank hematoma. Dr. Waseem noted Claimant's history of falling off a bunk bed, hitting a coffee table. Claimant was prescribed voltarin and flexeril and was released from the hospital. *See* Exhibit 2

25. Although Claimant has a history of drinking, Claimant was not drinking on the evening that he fell out of the bunk bed.

26. Claimant's testimony is found credible and persuasive in relating the fall out of the bunk bed, his lack of alcohol use the night of the fall, and the employment relationship with Employer including the conversations surrounding the camps that were provided by Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

In order to recover benefits the claimant must prove by a preponderance of the evidence that his injury was proximately caused by an incident arising out of and in the course of his employment. Section 8-41-301(1)(b) & (c), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related

functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "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. *Id.*

Generally, injuries that occur while a claimant is going to or coming from the place of employment are not considered to have arisen out of and in the course of the employment. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). However, the Madden court noted exceptions to that general rule. The Madden court held that "the determination of whether a traveling employee's injury warrants an exception to the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances." *Id at 864*. Accordingly, the Madden court ruled that the proper approach was to consider a number of factors to determine whether special circumstances warrant recovery under the Act. According to the Madden court, those factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. If only one variable is present, "recovery depends on whether the evidence supporting the variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment." *Id. at 864-865*. An injury sustained during travel initiated at the direct or implied request of the employer, or during travel that confers a benefit on the employer beyond the employee's mere arrival at work is, barring some deviation, sufficient to satisfy the arising out of and in the course of tests because the travel is contemplated by the employment contract. *Id. at 865*.

The Madden court recognized that travel may be part of the service to the employer if it is at the express or implied request of the employer. In such cases the claimant is said to be in "travel status." *Id. at 865*. When an employee is in travel status the employee is under continuous workers' compensation coverage unless engaged in a distinct departure on a personal errand. *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001); *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). Evidence that an employer paid for transportation or provided lodging and meals is indicative of travel status. *Id at 12*. Additionally, if an employee's travel is at the express or implied request of the employer, or if the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, the travel is within the scope of employment. *Varsity Contractors and Home Ins. Co. v. Baca* 709 P.2d 55 (Colo. App. 1985); *Loffland Brothers v. Baca*, 651 P.2d 431 (Colo. App. 1982).

Under workers' compensation law, it is generally not necessary for an employee to be actually engaged in work duties at the time of an accident for an injury to be compensable. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994); *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1992); *Northwest Conejos Fire Protection District v. Industrial Commission*, 566 P.2d 717 (Colo. App. 1977). It is sufficient if the injury arises out of a risk which is reasonably

incidental to the conditions and circumstances of the particular employment. *City of Boulder v. Streeb*, *supra.* This rule, applied to traveling employees, means that the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are considered incidental to and within the scope of the traveling employee's employment. *Alexander Film Co. v. Industrial Commission*, 319 P.2d 1074 (Colo. 1957); *Archer Freight Lines, Inc. v. Horn Transportation, Inc.*, 514 P.2d 330 (Colo. App. 1973).

In this case, Claimant has met his burden to show that the injury was caused by an incident arising out of and in the course of his employment. After review of the Madden factors and the above cases, the ALJ is persuaded by Claimant's argument that there was a causal connection between Claimant's injury and his employment such that the injury is compensable. When Claimant arrived at the rig to begin his 14 days on, his employment began. Claimant never left the rig location during his entire 14 days on shift and was during this time in continuous "travel status" from which he made no departures. In reviewing the Madden factors, the ALJ is persuaded that although Claimant was off the clock when sleeping and eating at the camp, Claimant nonetheless was on the work premises approximately 100 feet from the rig. Additionally, the travel status while at the rig location for 14 straight days was contemplated by the employment contract and employment agreement between Claimant and Employer. Specifically, Claimant was advised by Employer that in lieu of a per diem, he would be provided sleeping arrangements. Claimant was assigned to a man camp by his drilling supervisor upon his arrival to the rig location. Further, there was no viable option for the workers to sleep in another location during their 14 day shift given the location of the rig in the middle of land with the closest town approximately 2 hours away and given the long work days with 12 ½ hour shifts. The "travel" of the employees who left the rig, walked approximately 100 feet and slept in an Employer provided camp while working for 14 straight days places them in a continuous "travel" status during their entire 14 days on. The travel and sleeping arrangements were initiated at the direct request by the Employer, and the Employer designated the camps for the workers to sleep at. Although the Employer did not force Claimant to sleep at the camp and Claimant could have left if he had chosen to do so, there was no true option to sleep elsewhere and perform the job duties or remain employed.

The travel to the camp and sleeping and eating at the camp also provided a benefit to Employer. Without providing the camp and sleeping arrangements, Employer would be hard pressed to find qualified workers to work the rig, which was located essentially in the middle of nowhere. The employees who were in travel status during their 14 days on were located at the rig site and in travel status at the request of Employer. After reviewing the evidence as a whole, Claimant has met his burden to show he was in travel status from the time he arrived at the rig to begin his 14 day shift and until he left the rig at the end of the 14 days. It is clear from the facts of this case that Claimant was not actually engaged in work duties and was not on the clock at the time of his accident when he was sleeping and fell out of the top bunk bed. However, the injury in this matter arose out of the risk of sleeping at the camp which was a necessity of the job, paid for by Employer, and at the request of Employer. Therefore,

Claimant was in travel status and the injury of falling out of the bunk bed was incidental to his employment and is compensable.

Respondents argue both that Claimant was drinking alcohol the night of the fall out of the bunk bed as well as that there was no evidence the camps were owned or maintained by Employer. Both arguments are not persuasive. First, although the evidence established that Claimant had prior alcohol related offenses and that while off work Claimant drank alcohol, Claimant is found credible that on the evening/early morning in question he was not drinking. Claimant was credible that it would not be safe to do so and that he did not drink while working or while at the rig for his 14 days on. Claimant readily admitted he drinks during his days off. The medical reports cited by Respondent to support the fact that Claimant was a drinker indicate that Claimant reported drinking when not working, consistent with his testimony. Additionally, although Claimant was unable to testify as to who ran, owned, or maintained the camps, Claimant credibly testified as to the fact that the camps were provided by Employer. Claimant was credible when he testified that when he was transferred to Wyoming he was advised by Employer's drilling superintendant Jerry Stolz that he would be given a camp to sleep at. This is consistent with his additional testimony that when he arrived in Wyoming, he was directed to a camp by Employer's rig manager Lee Hawkins. The camp was located approximately 100 yards from the rig. The evidence, when weighed as a whole, overwhelmingly supports that the camp was provided by Employer.

ORDER

It is therefore ordered that:

1. Claimant has met his burden by a preponderance of the evidence to show that he suffered a compensable injury on June 18, 2014 and that his injury occurred while he was in "travel status."

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

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondent. The proposed decision was filed, electronically, on March 5, 2015. Claimant was given 2 working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the medical treatment prescribed by Claimant's authorized treating physician (ATP), Jennifer A. Kempers, M.D., in the form of the provision of narcotic pain medications for the Claimant's low back injury, remains reasonably necessary and/or causally related to the Claimant's work-related injury. The hearing is on the Respondent's Application wherein the Respondent challenges the continued reasonable necessity for ongoing narcotic pain medications. Nonetheless, it is the Claimant's burden, by preponderant evidence to prove that the present level of narcotic pain medications is reasonably necessary and causally related in the workers compensation context.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant sustained a compensable injury to his low back on or about February 4, 2004.

2. The Claimant was originally found to be at maximum medical improvement (MMI) on May 17, 2007 by Cliff Gronseth, M.D. Elizabeth Bisgard, M.D., performed an independent medical examination (IME) of the Claimant at the behest of the Respondent. Dr. Bisgard testified that the only physician that has been following the Claimant for his work injury over the last several years has been Dr. Kempers.

3. Based on Dr. Bisgard's review of Dr. Kempers' medical records, Dr. Bisgard identified the following medications as medications that Dr. Kempers has been prescribing for the Claimant's reports of ongoing low back pain:

- Oxycontin – a slow acting but powerful narcotic
- Oxycodone – a fast acting narcotic for break through pain

- Flexeril – a muscle relaxer

Dr. Kempers also treats the Claimant for other non-work related medical conditions.

4. Dr. Bisgard saw the Claimant for the first time on December 3, 2011. Following her initial evaluation, Dr. Bisgard stated the following in her February 3, 2011 report:

> I also strongly recommend that Dr. Kempers wean [Claimant] from his narcotic medications. His pain levels still range from 6/10 to 10/10. He is doing minimal activity, and per the *Guidelines*, the purpose of narcotics is to increase function. Clearly, he has not had any change in his function, so by the *Guidelines* outlined, he should be tapered off these medications as they are showing no functional benefit. I would refer Dr. Kempers to Rule 17, Exhibit 9, which deals with chronic pain disorder.

5. At hearing, Dr. Bisgard testified that, at the time of her initial evaluation of the Claimant, it was her opinion that the Claimant's continued use of narcotic pain medications was not having any impact on either his level of functioning, or his level of reported pain. Consequently, pursuant to the Medical Treatment Guidelines of the Division of Workers Compensation, continuing the Claimant on narcotic pain medications would no longer be considered reasonably necessary.

6. Also, according to Dr. Bisgard, at the time of her February 3, 2011 evaluation, the Claimant was not suffering from any kind of depression.

7. The Claimant saw Dr. Kempers on May 29, 2013. He presented as very tearful inasmuch as he had lost his wife one month earlier.

Dr. Bisgard's Most Recent Evaluation

8. When Dr. Bisgard saw the Claimant again on June 30, 2014, the Claimant reported to her the fact that his wife had died, and that had been a very difficult loss for him. The Claimant believed that the stress and aggravation caused by his work injury expedited his wife's death. After her evaluation, Dr. Bisgard stated that the Claimant clearly had the diagnosis of significant depression at that time. Unfortunately, according to her review of the medical records, it was Dr. Bisgard's opinion that Dr. Kempers had not been adequately treating the Claimant for his ongoing depression. Specifically, Dr. Bisgard noted that the Claimant was not taking an anti-depressant, nor was he in any kind of ongoing therapy to address his ongoing depression. Dr. Bisgard stated that anti-depressants are completely different from narcotics.

9. Dr. Bisgard is of the opinion that the Claimant's depression is a significant contributor to his ongoing complaints of low back pain at this time. In that regard, Dr. Bisgard stated that the Claimant's depression has resulted in a psychological and emotional cause of his ongoing pain complaints. The narcotic pain medications that Dr. Kempers is prescribing for the Claimant's complaints of low back pain are to address a physiological cause of low back pain. As a result, Dr. Kempers choice of using narcotic pain medications to address the Claimant's pain complaints is not in any way addressing what Dr. Bisgard believes to be a primary reason of the Claimant's ongoing reports of pain, and that is his depression.

10. Dr. Bisgard also is of the opinion that the Claimant has a somatoform disorder, and has had a somatoform disorder for some time. In Dr. Bisgard's opinion the Claimant's somatoform disorder dates back to at least April 2009 when Scott Primack, D.O., as part of his evaluation, expressed concerns about the results of the Distress Risk Assessment Method which indicated a strong psychological component to the Claimant's pain complaints.

11. According to Dr. Bisgard, a somatoform disorder is a psychological condition in which stressors in an individual's life manifest themselves as pain complaints as well as other subjective physical symptomatology. In a somatoform disorder, pain complaints do not have a physiological basis; rather, pain complaints have a psychological basis that is not at the conscious level.

12. According to Dr. Bisgard, it is counter indicated to treat an individual with a somatoform disorder with narcotic pain medications. Again, narcotic pain medications are designed to treat individuals with a physiological basis for pain. Individuals with a somatoform disorder do not necessarily have a physiological basis for pain; rather, the primary cause of their pain is psychological in nature, but not at the conscious level. As a result, no amount of narcotic pain medication will significantly change that individual's pain complaints because those pain complaints are based on a psychological component, not a physical component.

13. Dr. Bisgard was of the opinion that because of the Claimant's depression and somatoform disorder, it was no longer reasonable for Dr. Kempers to continue to treat the Claimant with narcotic pain medications because the primary cause of the Claimant's pain complaints at this time is psychological and emotional in nature. In Dr. Bisgard's opinion, the continued provision of narcotic pain medication to treat the Claimant's pain complaints is not only unreasonable and unnecessary, but counter indicated.

14. Dr. Bisgard also identified other factors in the Claimant's health profile that support her conclusion that Dr. Kempers' ongoing provision of narcotic pain medications to address the Claimant's pain complaints are counter-indicated. Dr. Bisgard noted, based on her review of Dr. Kempers' medical records, that the Claimant has a history of being non-compliant with his medication. The medical records reflect that the Claimant,

on his own and on several occasions, upped his pain medication, which resulted in him filling the prescriptions for his pain medications earlier than scheduled. Dr. Bisgard also noted that the Claimant lacks insight into his medical condition. For example, Dr. Bisgard noted that the Claimant believed that his work injury accelerated his wife's death. Lacking insight into his medical condition, according to Dr. Bisgard, is concerning inasmuch as it is unlikely that the Claimant understands that his complaints of ongoing low back pain are more attributable to his emotional and psychological condition as opposed to a physical cause.

15. Dr. Bisgard further testified as to the potential adverse consequences of the Claimant's ongoing consumption of narcotic pain medications to address his subjective complaints of pain. According to Dr. Bisgard, the Claimant is somewhat in a perfect storm to abuse his pain medications. The Claimant is isolated in his home at this point, with a fundamental lack of medical insight into his condition, which substantially increases the likelihood of an overdose, either intentional or accidental.

16. Ultimately, Dr. Bisgard is of the opinion that the Claimant's ongoing use of narcotic pain medications is no longer reasonably necessary. Dr. Bisgard states that the Claimant needs to be weaned off these medications. Because the Claimant is not on an extremely high dose of narcotic medication, Dr. Bisgard is of the opinion that such weaning can be done on an outpatient basis, without the necessity of inpatient detoxification. Hand in hand with weaning the Claimant off of his pain medication is the need for the Claimant to begin the consumption of anti-depressants to control his depression. Dr. Bisgard also is of the opinion that the Claimant should be encouraged to attend some form of therapy in order to help him cope with his ongoing grief over the loss of his wife. Finally, Dr. Bisgard is of the opinion that the Claimant needs to increase his level of activity.

17. Dr. Bisgard acknowledged that the Claimant does have degenerative disk disease, which could be considered a physiological cause of low back pain. Dr. Bisgard is of the opinion, however, that because of the significant overlay resulting from the Claimant's depression and somatoform disorder, as well as the minimal findings of degenerative changes in the Claimant's lumbar spine, over-the-counter medications such as Ibuprofen or Acetaminophen would be more than adequate to address any pain resulting from any actual physiological cause.

18. Dr. Bisgard is of the opinion that the Claimant can effectively be weaned off his narcotic medications on an outpatient basis in 3-4 weeks.

Ultimate Findings

19. The ALJ finds that Dr. Bisgard's testimony is highly persuasive, compelling and credible. The ALJ further finds that it is no longer reasonably necessary for the ongoing provision of narcotic pain medications to address the Claimant's complaints of low back pain within the context of his work-related injury. The ALJ finds that the

Claimant needs to undergo a weaning process of his narcotic medications which, according to Dr. Bisgard, should take no more than 3-4 weeks to be fully weaned off his narcotic medication. Consequently, the ALJ finds that the only pain medications that the Respondent should be responsible to provide should be the reducing doses of pain medication that the Claimant would need in order to complete his weaning process.

20. The Claimant has failed to prove, by a preponderance of the evidence that the Claimant's ongoing narcotic pain medications are reasonably necessary to cure and relieve the effects of his work-related injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found,

the opinions of Dr. Bisgard are highly persuasive and credible because of her in-depth understanding of the Claimant's medical/psychological condition.

Reasonable Necessity of Ongoing Pain Medications

b. The Respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. The right to workers' compensation benefits, including medical benefits, however, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment is proximately caused by an injury arising out of and in the course of the employment. § 8-41-301 (1) (c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). As found, the ongoing prescription of narcotic pain medications is no longer reasonably necessary to cure and relieve the effects of the Claimant's work-related injury.

c. Although the Respondent is liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, the Respondent 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. Indus. Claim Appeals Office*, 53 P.3d 192 (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. Indus. Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). The Claimant bears the continuing burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). As found, Dr. Kempers' ongoing provision of narcotic pain medications to address the Claimant's complaints of low back pain is no longer reasonably necessary. As further found, the Claimant needs to be weaned off of his pain medication. The length of time to undergo this weaning process should be no more than 30-45 days. The Respondent should only be required to pay for pain medications in order to effectuate this weaning process.

d. To facilitate this weaning process, the ALJ concludes that counsel for the Respondent should contact Dr. Kempers and provide her with a copy of this decision. Dr. Kempers should then have 30 days from the date of receipt of this decision to formulate a treatment plan which should provide for the weaning of the Claimant's narcotic pain medications such that the Claimant should be fully weaned off of the narcotic pain medications within 45 days. The Claimant's depression is not related to his work injury. As a result, the ALJ lacks jurisdiction and authority to dictate to Dr. Kempers how she should be treating the Claimant's depression. Nonetheless, it would be important in Dr. Kempers' treatment plan as to how she will attempt to treat the Claimant's depression. Regardless of how Dr. Kempers chooses to treat the Claimant's underlying depression, her provision of pain medication at this time is only reasonably

necessary in the context of prescribing the Claimant reducing doses of these pain medications during the 45-day weaning process.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

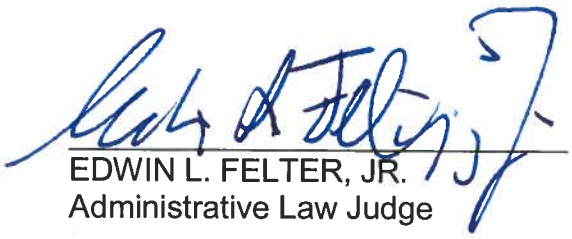
A. Within five days of the date of the issuance of this decision, counsel for the Respondent shall provide a copy of this decision to Dr. Kempers in the context of a request for her to provide a treatment plan consistent with this decision.

B. Dr. Kempers shall, within 30 days of the date of receiving this decision, provide a treatment plan consistent with this decision to wean the Claimant off of his narcotic pain medications within 45 days thereafter.

C. The ALJ shall retain continuing jurisdiction to provide additional Orders should Dr. Kempers be unable or unwilling to provide a treatment plan consistent with the contents of this decision.

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

DATED this 12 day of March 2015.



EDWIN L. FELTER, JR.
Administrative Law Judge

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

objections, electronically. The proposed decision was filed, electronically, on March 3, 2015. On March 4, 2015, counsel for the Respondent filed objections concerning calculations and dates in the proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Respondent's request to overcome the Division Independent Medical Evaluation (DIME) of Richard L. Stieg, M.D., which determined that the Claimant was not at maximum medical improvement (MMI). The Respondent's burden on this issue is "clear and convincing evidence."

If Dr. Stieg's DIME is not overcome, the additional issues concern average weekly wage (AWW) from multiple employments; whether the Claimant is entitled to temporary partial disability (TPD) benefits and/ or temporary total disability (TTD) benefits commencing on June 10, 2013. Also, if the DIME is not overcome, ancillary issues include a COBRA increase to AWW, effective June 6, 2014. The Claimant's burden on these issues is by a "preponderance of the evidence." There is an additional issue concerning whether the Respondent is entitled to a Federal Social Security Disability (SSDI) benefit offset. It is the respondent's burden by "preponderant evidence" on this issue.

FINDINGS OF FACT

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

Preliminary Findings

1. This is an admitted right shoulder injury of June 9, 2013, which occurred when the Claimant felt a sharp pain in his right shoulder girdle while he was lifting meat at the Employer's store.

2. The Respondent filed a General Admission of Liability (GAL), dated December 20, 2013, admitting for medical benefits and an AWW of $433.36, based on the Claimant's earnings with the Employer herein.

3. At the time of his injury, the Claimant had two jobs, one as a meat cutter for the Employer herein, and the other as a meat cutter for Albertsons.

4. As a result of the admitted injury, the Claimant was unable to continue his job at Albertsons where he established that he had an AWW of $484.15 (*See*

Claimant's Exhibit 15). The Claimant continued to work for the Employer herein, without wage loss until October 2, 2013.

5. The Claimant was referred to Concentra for treatment. He was given restrictions of no use of his right upper extremity (RUE).

6. The Claimant was subsequently referred to John Schwappach, M.D; Armodios Hatzidakis, M.D; and, Scott Falci, M.D. Dr. Hatzidakis documented the Claimant's cervical problems on August 20, 2013, and referred the Claimant for further diagnostic testing (*See* Claimant's Exhibit 13, bate stamp108). This diagnostic testing was performed by William H. Bentley, M.D., at Exempla and it established that the Claimant had a radial plexopathy with most involvement above the upper plexus. (*See* Claimant's Exhibit 11, bate stamp 93).

7. The Claimant was also referred to Dr. Falci who had treated him previously for a thoracic spine cyst removal. Dr. Falci evaluated the Claimant on October 2, 2013, and was of the opinion that the Claimant should undergo cervical surgery as described by his office in a note dated October 3, 2013 (*See* Claimant's Exhibit 14, bate stamp 112). In his report of October 2, 2013, Dr. Falci noted that the Claimant had complained of radicular symptoms following his injury. *Id.*, 114. Dr. Falci took the Claimant off work on October 2, 2013. *Id.*, bate stamp 113. At that juncture, the Claimant had continued being treated at Concentra and was also under the restriction of no use of his right arm.

8. The doctor at Concentra, Scott K. Richardson, M.D., eventually placed the Claimant at MMI on January 28, 2014. *Id.*, bate stamp 32.

Overcoming the Division Independent Medical Examination (DIME) of Richard L. Stieg, M.D.

9. The Claimant underwent a DIME with Dr. Stieg on July 29, 2014. DIME Dr. Stieg was of the opinion that the Claimant was not at MMI and that further medical treatment was required, specifically cervical surgery, which should take place prior to shoulder surgery, as a prerequisite to shoulder surgery. In his report, DIME Dr. Stieg stated:

> It is absolutely correct (Dr. Steinmetz) that this gentlemen has had chronic degenerative problems of the cervical and thoracic spine, shoulders, knees, and hands for a very long time. The point to be made here, however, is that he has gone on working his jobs in the food industry for a very long time until the event of 06/09/13 (as I have described) following which he has had significant and new right

> shoulder and arm pain and numbness and weakness and progressive myelopathy. He had been taking Vicodin on and off for years because of his arthritic pain and that has not increased since the injury. The medical records do not indicate progressive myelopathy or problems with pain, numbness, and weakness in the right and upper extremity prior to 06/09/13.

(Claimant's Exhibit 3, bate stamp 16)

10. In rejecting the opinion of Dr. Steinmetz, DIME Dr. Stieg's ultimate opinion on the treatment needed by the Claimant and MMI were as follows:

> [Claimant] has not reached the point of Maximum Medical Improvement. Exploratory surgery, decompression, and fusion of his cervical spine have been recommended as has subsequent right shoulder surgery. But for the incident of 06/09/13 neither procedure would be currently recommended.

Id., BS 17.

11. Orthopedic surgeon Dr. Schwappach, to whom the Claimant had been sent initially by Concentra, subsequently issued a report on September 18, 2014, in which he stated the opinion that the Claimant "has severe right shoulder rotator cuff tear. He also has severe cervical spine pathology which will require treatment prior to the right shoulder." (Claimant's Exhibit 12, bate stamp 98).

12. Based on the opinions of Dr. Schwappach, Dr. Falci, Dr. Hatzidakis and Dr. Steig that the Claimant needs resolution of his cervical problems before right shoulder surgery should occur, the ALJ finds that the cervical surgery is a medical prerequisite to the right shoulder surgery. DIME Dr. Stieg's report is unambiguous that the need for cervical surgery and shoulder surgery are not separable and the ALJ so finds, despite the opinion of Michael Rauzzino, M.D., to the contrary.

Medical Records Review by Michael Rauzzino, M.D. on behalf of the Respondent

13. Following the DIME, the Respondent objected to the opinion of DIME Dr. Stieg and set this matter for hearing to overcome the DIME.

14. At hearing, the Respondent presented the testimony of Dr. Rauzzino, a neurologist, who issued a report but had not clinically evaluated the Claimant. It was

Dr. Rauzzino's opinion that DIME Dr. Stieg was incorrect concerning his causation analysis of the relationship between the Claimant's need for cervical surgery and his injury of June 9, 2013. Dr. Rauzzino also was of the opinion that the Claimant had not reached MMI on his right shoulder but that treatment on that shoulder could take place without necessary cervical intervention. At the same time, Dr. Rauzzino testified that he would generally defer to an orthopedic surgeon on this and he recognized that Dr. Schwappach, as an orthopedic surgeon, could require cervical surgery before addressing the Claimant's shoulder problems.

15. The ALJ finds that DIME Dr. Stieg is convincingly of the opinion, with medical record support, that the Claimant is not at MMI for either his cervical problems, or his right shoulder problems, and that neither problem is separate from the other.

Medical Records Review by Ronald J. Swarsen, M.D. on behalf of the Claimant

16. Dr. Swarsen is of the opinion that DIME Dr. Stieg had performed the DIME in compliance with the requirements of the Division of Workers Compensation, and that the opinion of DIME Dr. Stieg was supported by substantial medical evidence in the medical record.

Average Weekly Wage and Temporary Disability

17. Based upon the Claimant's multiple employments with the Employer herein and Albertson's, the ALJ finds that his AWW is $917.51, which yields a TTD rate of $611.67 per week, or $87.38 per day.

18. Following his injury on June 9, 2013, the Claimant was not permitted to return to work at Albertsons, where his AWW was $484.15 (his temporary wage loss), because of the disability caused by his right shoulder injury. As a consequence, he was temporarily and partially disabled between June 10, 2013 and October 1, 2013, both dates inclusive, a total of 114 days. Aggregate past due TPD benefits for this period of time are $5,256.43.

19. Between October 2, 2013 and November 30, 2013, both dates inclusive, a total of 60 days, the Claimant was unable to work at either his job with the Employer herein or at Albertsons. During this time his AWW was $917.51 for his concurrent employment. His TTD benefit rate is $611.67, or $87.38. Aggregate past due TTD benefits for this period are $5,242.80.

20. Effective December 1, 2013, the Claimant became entitled to Social Security Disability benefits (SSDI) for which the Respondent is entitled to an offset of $236.08 per week, leaving net TTD benefits past due between December 1, 2013

and June 5, 2014,both dates inclusive, a total of 187 days, of $373.59 per week, or $53.37 per day. Aggregate net past due TTD benefits, including the SSDI offset, for this period equal $9,980.19.

21. On June 6, 2014, the Claimant lost health insurance coverage as confirmed by a COBRA letter (*see* Claimant's Exhibit 15, bate stamp 118). This loss resulted in an increased AWW of $220.85 per week, bringing the AWW up to $1,138.36, which yields a TTD benefit rate of $758.90 per week. After the SSDI offset, the net weekly TTD benefit rate equals $522.82 per week, or $74.69 per day. The period from June 6, 2014 through the hearing date, February 24, 2015, both dates inclusive, is 264 days. Aggregate net past due TTD benefits for this period equal $19, 717.78.

22. Grand total aggregate past due temporary disability benefits as of the February 24, 2015 hearing date equal $40, 197.20.

23. The Claimant has not yet been able to return to any work, he has not earned any wages, and he has not reached MMI. Therefore, he continues to be temporarily and totally disabled.

Ultimate Findings

24. The ALJ finds the opinions of Dr. Schwappach, Dr. Falci, Dr. Hatzidakis and Dr. Steig that the Claimant needs resolution of his cervical problems before right shoulder surgery should occur, as a medical prerequisite to the right shoulder surgery, credible and highly persuasive. The ALJ further finds the opinions of Dr. Rauzzino and Dr. Steinmetz unpersuasive, contrary to the weight of the evidence, and lacking in credibility.

25. Between conflicting medical opinions, the ALJ makes a rational choice, consistent with the substantial weight of the evidence, to accept the opinions of DIME Dr. Stieg, Dr. Schwappach, Dr. Falci and Dr. Hatzidakis, and to reject the opinions of Dr. Rauzzino and Dr. Steinmetz.

26. The Respondent has failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Stieg's opinion that the Claimant has not reached MMI is erroneous. Therefore, the Respondent has failed to overcome DIME Dr. Stieg's opinion by clear and convincing evidence.

27. The Claimant's AWW from multiple employments was $917.51 until he lost his health insurance benefits on June 6, 2014 whereupon the COBRA accretion became operative and his AWW increased to $1,138.36.

28. Between June 10, 2013 and October 1, 2013, both dates inclusive, a total of 114 days, the Claimant was temporarily and partially disabled with a temporary wage loss of $484.15 per week, thus, entitling him to TPD benefits of $322.76 per

week, or $46.11 per day. Aggregate past due TPD benefits for this period of time are $5,256.43.

29. Between October 2, 2013 and November 30, 2013, both dates inclusive, a total of 60 days, the Claimant was unable to work at either his job with the Employer herein or at Albertsons. During this time his AWW was $917.51 from his concurrent employments. He has proven entitlement toTTD benefits of $611.67 per week, or $87.38 per day in the aggregate amount of $5,242.80.

30. As found herein above, effective December 1, 2013, the Claimant became entitled to SSDI benefits for which the Respondent is entitled to an offset of $236.08 per week, leaving net TTD benefits of $373.59 per week, or $53.37 per day. As found herein above, aggregate past due net benefits between December 1, 2013 and June 5, 2014, both dates inclusive, a total of 187 days, for this period equal $9,980.19. The respondent sustained its burden by preponderant evidence on this issue.

31. As found herein above, on June 6, 2014, the Claimant lost health insurance coverage resulting in an increased AWW by $220.85 per week, bringing the AWW up to $1,138.36, which yields a TTD benefit rate of $758.90 per week. After the SSDI offset, the net weekly TTD benefit rate equals $522.82 per week, or $74.69 per day. Consequently, for the period from June 6, 2014 through the hearing date, February 24, 2015, both dates inclusive, a total of 264 days, aggregate net past due TTD benefits equal $19, 717.78.

32. Grand total aggregate past due temporary disability benefits as of the February 24, 2015 hearing date equal $40, 197.20.

33. As found herein above, the Claimant continues to be temporarily and totally disabled.

CONCLUSIONS OF LAW

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

Credibility

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

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

Substantial Evidence

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

of the evidence, to accept the opinions of DIME Dr. Stieg, Dr. Schwappach, Dr. Falci and Dr. Hatzidakis, and to reject the opinions of Dr. Rauzzino and Dr. Steinmetz.

Overcoming the DIME of Dr. Stieg

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, The Respondent has failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Stieg's opinion that the Claimant has not reached MMI is erroneous. Therefore, the Respondent has failed to overcome DIME Dr. Stieg's opinion by clear and convincing evidence.

Average Weekly Wage

d. Where an injured worker has arranged **multiple** employments to earn a living, and the injury precludes work altogether, a fair computation of the true AWW encompasses all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW from multiple employments was $917.51 until he lost his health insurance benefits on June 6, 2014.

Temporary Disability Benefits

e. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination from his Albertson's job was because of his work related disability, sustained while he was employed by the Employer herein. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id.*

f. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, between June 10, 2013 and October 1, 2013, both dates inclusive, a total of 114 days, the Claimant was temporarily and partially disabled with a temporary wage loss of $484.15 per week, thus, entitling him to TPD benefits of $322.76 per week, or $46.11 per day. Aggregate past due TPD benefits for this period of time are $5,256.43. Between October 2, 2013 and November 30, 2013, both dates inclusive, a total of 60 days, the Claimant was unable to work at either his job with the Employer herein or at Albertsons. During this time his AWW was $917.51 from his concurrent employments. As found, he is entitled to TTD benefits of $611.67 per week, or $87.38 per day, for this period of time. in the aggregate amount of $5,242.80.

Social Security Disability (SSDI) Offset and Net TTD Benefits

g. Section 8-42-103 (1) (c) (I), C.R.S., provides that an insurance carrier is entitled to an offset against indemnity benefits equal to one-half of the weekly SSDI benefit. In this case, the monthly SSDI award is $2,046, which equates to $472.15 per week, thus, establishing a weekly offset of $236.08 against indemnity benefits. As found, effective December 1, 2013, the Claimant became entitled to SSDI benefits for which the Respondent is entitled to an offset of $236.08 per week, leaving net TTD benefits of $373. 59 per week, or $53.37 per day. As further found , aggregate past due net benefits between December 1, 2013 and June 5, 2014,both dates inclusive, a total of 187 days, for this period equal $9,980.19. The amount of the offset is fixed as of the time of the award, and cost-of-living adjustments (COLAs) do not affect the offset amount. *Engelbrecht v. Hartford Acc. and Indem. Co.,* 680 P.2d 231 (Colo. 1984).

Temporary Disability Benefits With COBRA Accretion

h. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, when the Claimant lost his health insurance

benefits, the COBRA accretion became operative and his AWW increased to $1,138.36. As found, on June 6, 2014, the Claimant lost health insurance coverage resulting in an increased AWW by $220.85 per week, bringing the AWW up to $1,138.36, which yields a TTD benefit rate of $758.90 per week. After the SSDI offset, the net weekly TTD benefit rate equals $522.82 per week, or $74.69 per day. Consequently, for the period from June 6, 2014 through the hearing date, February 24, 2015, both dates inclusive, a total of 264 days, aggregate net (including the SSDI offset) past due TTD benefits equal $19, 717.78.

Grand Total Past Due and Prospective Temporary Disability Benefits

i. As found, grand total aggregate past due temporary disability benefits as of the February 24, 2015 hearing date equal $40, 197.20.

j. As further found, the Claimant continues to be temporarily and totally disabled and entitled to net TTD benefits of $522.82 per week.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits to indemnity and medical benefits prior to MMI having been reached. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v.*

M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven entitlement to the indemnity benefits as herein above specified. Also, as found, the Respondent has sustained its burden with respect to its entitlement to the SSDI offset.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent having failed to overcome the Division Independent Medical Examination of Richard L. Stage, M.D., the Claimant is not at maximum medical improvement, the Claimant is, therefore, not at maximum medical improvement.

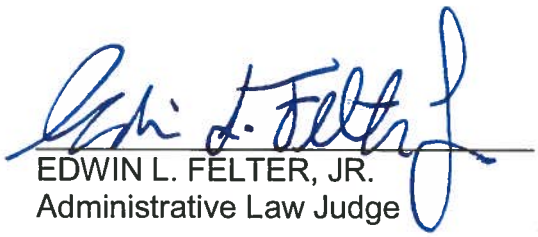
B. The Respondent shall pay the Claimant aggregate grand total past due temporary disability benefits, as specified in detail herein above, of $40, 197.20, which is payable retroactively and forthwith.

C. From February 25, 2015 and continuing until termination is warranted by law, the Respondent shall pay the Claimant net Temporary total disability benefits (including the SSDI offset and the COBRA factor) of $522.82 per week.

D. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

DATED this 5 day of March 2015.



EDWIN L. FELTER, JR.
Administrative Law Judge

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

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered a compensable injury/occupational disease of a C6-C7 disc herniation, arising out of her employment as an account executive, with an onset date in July 2013, a flare up of October 5, 2013 and a reporting date of October 15, 2013. If compensable, additional issues concern medical benefits (authorized, causally related and reasonably necessary) and degree of permanent partial disability (PPD). Temporary Disability was **not** an issue because the Claimant claimed no temporary disability benefits through the date of maximum medical improvement (MMI), April 9, 2014.

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

STIPULATION

The parties stipulated that if the matter is compensable, the Claimant's average weekly wage (AWW) is $894.23.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a forty-six year old female who works as an underwriter. Her date of birth is April 24, 1968. She continues to works full-time for the Employer and has worked at the company for almost five years. Prior to October of 2013, the Employer moved locations from Littleton, Colorado to Greenwood Village, Colorado.

2. The Claimant's job consists of sitting for nearly the entirety of her eight hour shift, minus any breaks and lunch, with a great part of her day spent keyboarding on a computer.

3. After the company moved, her work station configuration changed and it was composed of a different desk and chair. The Claimant noticed at the end of July 2013 that she became very uncomfortable using the new desk. She tried four different desk chairs, but ultimately chose to use her chair from the office prior to the move.

4. Prior to the move, the Claimant did not have pain. The pain started in August of 2013 and severe pain started in October of 2013. The Claimant woke up on October 5, 2013 with a stiff neck and whole right sided arm pain. She worked through the end of the week and then went to Exempla Lutheran Southwest, an urgent care facility, on October 11, 2013. Exempla discharged the Claimant with pain medication and instructions to follow up with her primary care physician if she did not feel better within three to five days. The Claimant went to her primary care physician, Jill Quigley, M.D., on October 14, 2013.

The Injury/Occupational Disease

5. On October 15, 2013, the Claimant informed her work supervisor that she sustained an injury (occupational disease) and was planning on filing a worker's compensation claim. She wanted to discuss the possibility of changing the configuration of her work station. Her supervisor referred the Claimant to Arbor Occupational Medicine, and the Claimant came under the care of John Sanidas, M.D., who became her authorized treating physician (ATP).

6. On October 16, 2013, the Claimant saw Dr. Sanidas for a new patient evaluation. Dr. Sanidas gave the Claimant temporary work restrictions of stretching breaks for five to ten minutes every hour when she is sitting at her desk and working. He also referred her to physical therapy (PT) sessions, and continued her on pain killers [Claimant's Ex. 6]. The ALJ infers and finds that Dr. Sanidas is implicitly of the opinion that the Claimant's right C7 and cervical spine conditions are work-related.

7. On December 4, 2013, during a follow up visit with Dr. Sanidas, Dr. Sanidas requested an MRI (magnetic resonance imaging) of the cervical spine. The MRI showed that the Claimant had a C6 disc protrusion and symptoms of the right C7. Dr. Sanidas referred the Claimant to Barry A. Ogin, M.D., who is a board certified physician in Physical Medicine and Rehabilitation and Pain Medicine [Claimant's Ex. 6].

8. Dr. Ogin's impression of the Claimant was that she suffered a right C6-7 herniation; probable right C7 radiculopathy; parascapular myofascial pain; and possible lower cervical facet involvement. Dr. Ogin set the Claimant up with a C7-T1 intralaminar epidural steroid injection [Claimant's Ex. 6]. Based on the four corners of Dr. Ogin's reports, the ALJ infers and finds that Dr. Ogin is of the opinion that the Claimant's conditions, as he described them above, are work-related.

Respondents' Independent Medical Examiner (IME), F. Mark Paz, M.D.

9. On October 5, 2013, THE Respondents' IME, Dr. Paz, performed an IME to which he testified at the hearing. Dr. Paz concluded, based on the Claimant's medical history and evaluation that it was not medically probable that the cervical degenerative

disc disease and right extremity symptoms were causally related to Claimant's reported work exposure or related injury from October 5, 2013 [Respondents' Ex. J].

10. Dr. Paz's ultimate opinion was that the Claimant's injuries were not work related. He based his opinion on his interpretation of the Claimant's medical history and the possibility of her sleeping incorrectly on a pillow. He further was of the opinion that the desk would not exacerbate the Claimant's condition because there was no literature (of an unknown source) to support this finding (Dr. Paz did not mention any specific pieces of literature).

11. Dr. Paz, however, stated that he did not assess the Claimant's permanent disability. He did not take the steps needed to assess a Table 53 diagnosis because in his opinion there was no Table 53 diagnosis.

12. The ALJ finds that Dr. Paz's opinions, for the most part, were conclusory and without adequate explanation of their foundation other than general references to the "medical records" and the "literature." For this reason, the ALJ finds the opinions of the Claimant's ATP, Dr. Sanidas, and Dr. Ogin, the basis of which are clearly explained, to be more credible and persuasive than Dr. Paz's opinions.

Average Weekly Wage (AWW)

13. Based on the Stipulation herein above, which the ALJ accepts, the ALJ finds that the Claimant's AWW is $894.23, Also, which yields a temporary total disability (TTD) and Whole Person PPD benefit rate of $596.15 per week, for purposes of the Whole Person Formula, contained in§ 8-42-107 (8) (d) and (e), C.R.S.

Permanent Partial Disability (PPD)

14. On April 9, 2014, Dr. Sanidas prepared his discharge summary and impairment rating. The impairment rating was accomplished using the *AMA Guides to the Evaluation of Permanent Impairment*, 3rd Ed., Rev. Dr. Sanidas used Table 53, Under Specific Disorders, to conclude that it was appropriate to use II-C, and combined the values to conclude that the Claimant suffers from 12% impairment of the whole person [Claimant's Ex. 6], attributable to the cervical spine. Implicitly, Dr. Sanidas determined that the Claimant reached maximum medical improvement on April 9, 2014, at which time she was 45-years old. Using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S. (12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76. Consequently, aggregate PPD benefits of $37,199.76, at the rate of $596.15 per week from April 9, 2014 and continuing would be due and payable to the Claimant.

Ultimate Findings

15. As found herein above, the opinions of ATP Dr. Sanidas and Dr. Ogin are more credible and persuasive than the opinions of Respondents' IME, Dr. Paz because they are based on a more thorough familiarity with the Claimant's medical case.

16. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of ATP Dr. Sanidas and Dr. Ogin, and to reject the opinions of IME Dr. Paz.

17. The Claimant has proven, by a preponderance of the evidence that her injury/occupational disease, arose out of the course and scope of her employment for the Employer and the conditions of her employment, as opposed to non-work related factors. Therefore, the Claimant has proven a compensable injury/occupational disease.

18. The Claimant's AWW is $894.23.

19. There is no claim for temporary disability benefits through April 9, 2014.

20. The Claimant reached MMI on April 9, 2014, at which time she was 45-years old.

21. The Claimant has proven, by preponderant evidence that she sustained a compensable injury/occupational disease that resulted in PPD of 12% whole person. Using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S. [12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76]. Aggregate PPD benefits equal $37,199.76, payable at the rate of $596.15 per week from April 9, 2014 and continuing are due and payable to the Claimant.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684

(Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of ATP Dr. Sanidas and Dr. Ogin were more credible and persuasive than the opinions of Respondents' IME, Dr. Paz.

Substantial Evidence

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

medical opinions, the ALJ made a rational choice to accept the opinions of ATP Dr. Sanidas and Dr. Ogin, and to reject the opinions of IME Dr. Paz.

Permanent Partial Disability

c. Section 8-42-107 (8), C.R.S., provides that the rating of the ATP is controlling on the degree of PPD unless it is established by other medical evidence to be improbable, or unless it is overcome by a Division Independent Medical Examination (DIME). In this case, the opinions of Dr. Paz, Respondents' IME, did not detract from Dr. Sanidas' rating. Consequently, Dr. Sanidas" rating, which established the Claimant's PPD at 12% whole person, by preponderant evidence, is the degree of her PPD. Also, there was no DIME challenge to Dr. Sanidas' opinion. As found, using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S.[12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76]. Consequently, aggregate PPD benefits of $37,199.76, at the rate of $596.15 per week from April 9, 2014 and continuing would be due and payable to the Claimant.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's average weekly wage is $894.23, which yields a whole person permanent partial disability benefit rate of $596.15 per week.

B. Temporary disability benefits through the date of maximum medical improvement, April 9, 2014, are hereby denied and dismissed.

C. The Respondents shall pay the Claimant aggregate permanent partial disability benefits, based on 12% whole person permanent partial disability. Using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S.[12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76], aggregate permanent partial disability benefits are $37,199.76, payable at the rate of $596.15 per week from April 9, 2014 and continuing until paid in full.

DATED this 9 day of March 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant to be filed, electronically, giving the Respondents 2 working days within which to file objections. The proposed decision was filed, electronically, on March 24, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable injury to his right knee on July 20, 2014; if so, whether the Claimant is entitled to medical benefits; average weekly wage (AWW); and, temporary total disability (TTD) benefits from January 24, 2015 and continuing.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues. The Respondents raised the issue of 'idiopathic" injury. Once, it is established that the injury occurred within the course and scope of employment, under *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** (Colo. 2014), the burden should shift to the Respondents to prove the "idiopathic injury," or that the injury did not arise out of the conditions of employment. Nonetheless, the ALJ assigns the burden of proof to the Claimant, by preponderant evidence.

FINDINGS OF FACT

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

Compensability

1. On July 20, 2014, the Claimant was working as a warehouse order selector for the Employer when he sustained an injury to his right knee while in the process of stepping down from his pallet jack. According to the Claimant, at the time that the incident occurred he was moving at a rapid pace to meet production goals. The Claimant's head was turned to the right as he was stepping down. He felt a snapping, crackling and popping sound in his right knee as he extended it and his right foot hit the floor.

2. The Claimant immediately fell to the ground with right knee pain and he was unable to continue his shift. His Employer eventually sent the Claimant o the doctors at Concentra, which referred the Claimant for an MRI (magnetic resonance imaging) at Heath Images.

3. The Claimant's injury happened around 11:00 PM. By that time, he had pulled between 8 or 9 other orders weighing approximately 2,500 lbs. each.

4. The Claimant was in a position to suffer his right knee injury due to the nature of the work he was required to perform for the Employer as an order selector. Why his right knee went out when he was in the process of descending his pallet jack may only be explainable by his action of stepping down from his pallet jack, which caused the aggravation and acceleration of his dormant right knee arthritis. Regardless, his injury arose out of and in the scope of employment because there is no persuasive evidence that "it would not have occurred but for the fact that the conditions and obligation placed [the] Claimant in the position where he [or she] was injured. Indeed, there is no persuasive evidence here that the Claimant's right knee injury was unrelated to his employment, such as would be the case should there have been a fainting spell, heart disease, or epilepsy. Rather, it arose while he was engaged in a work related activity of moving to load potatoes onto his pallet jack and stepping down from his pallet jack.

5. The nature of the physical activities the Claimant was required to perform stem from a neutral risk and do not amount to an "idiopathic" or "syncopal" event. The Claimant's injury arose out of employment, *i.e.*, it would not have occurred but for the fact that the work he was performing as part of his contract of hire placed him in a position to be injured.

Medical

6. The records from Concentra, completed by Keith Meier during the Claimant's first visit, state that the Claimant had a work related injury within a greater than 50% medical probability (Respondents' Exhibit E, bates stamp 18).

7. The Claimant's MRI of August 11, 2014, showed a large bucket-handle tear of his medial meniscus, as well as an ACL tear (Claimant's Exhibit 4, bates stamp 49).

8. After the MRI, the Claimant was referred to Mark S. Failinger, M.D., who issued a report on August 28, 2014. He described the Claimant's injury history as follows:

> HISTORY OF PRESENT ILLNESS: The patient comes in for evaluation of his right knee. He is accompanied by his mother. He is 33 years old. He injured his right knee as an order selector when he stepped off a pallet. It torqued the leg. It went off to the side. He did feel somewhat of a pop and pain, and he could not straighten his knee. It was on July 28, 2014. He went home and reported this. It was until

> about a week later that he was referred to Concentra, and he had some therapy twice a week. He could not extend his knee at times. In the morning, he cannot straighten his knee. He has to torque it around. On some days it will freeze itself, it would pop, and then suddenly he has a good motion and he can walk on it. Otherwise, he can walk on it. There is no fever, chills, warmth, or redness. No history of injury prior to this. No previous history of any problems.

(Claimant's Exhibit 5, bates stamp 58)

9. Dr. Failinger eventually recommended surgery. The surgery has not yet been performed (*Id.,* BS 56), although the Claimant expressed a willingness to undergo the recommended surgery.

10. While being treated, the Claimant continued working modified duty until January 23, 2014, when his temporary alternate duty ("TAD") was terminated by the Employer (Claimant's Exhibit 7, bates stamp 67). The Claimant has not worked since that date nor has he earned any wages; also, he continues to suffer right knee limitations impacting his ability to work. No authorized treating physician (ATP) has released the Claimant to return to work without restrictions nor has an ATP declared the Claimant to be at maximum medical improvement (MMI).

Average Weekly Wage (AWW)

11. The Claimant's AWW, including night and Sunday premiums, totals $710.00 per week, which yields a TTD benefit rate of $473.33 per week, or $67.62 per day.

Previous Right Knee History

12. According to the Claimant, while he was playing basketball in high school (approximately 15 years ago) he suffered a right knee injury which required arthroscopic intervention. This consisted of cleaning the meniscal area. According to the Claimant's undisputed testimony, there was no ACL involvement.

13. Following his high school arthroscopy, the Claimant was released without permanent restrictions. He was working full duty without restrictions at the time of the present injury on July 20, 2014. In fact, the Claimant's production rate was 39% higher

than the expected amount and he was functioning without any restrictions throughout his work as an order selector.

14. When the Claimant saw Dr. Failinger, the Claimant denied having undergone a prior surgery. At hearing, he readily and straight-forwardly acknowledged that he had made a mistake in this regard. He did not know the importance of this question and considered it in the context of how well he was functioning as of the date of his injury. The ALJ finds that this omission on his part was not an attempt to deliberately conceal this fact. Moreover, the ALJ finds that it is attributable to inadvertence. This is supported by the fact that the Claimant informed the supervisor to whom he reported the injury that he had a prior right knee arthroscopic procedure.

Respondents' Independent Medical Examiner (IME), Timothy O"Brien, M.D.

15. The Respondents presented expert testimony from Dr. O'Brien, an orthopedist. Dr. O'Brien agreed that the surgery recommended by Dr. Failinger was reasonably necessary, but he was of the opinion that it was not causally related to the present injury. The ALJ finds that Dr. O'Brien speculated that the Claimant would have needed surgery at some undetermined time in the future even if he not had the present injury. In Dr. O'Brien's view, the event of July 20, 2014merely accelerated the need for surgery. Indeed, the ALJ finds that Dr. O'Brien's opinion in this regard supports the "acceleration' prong of the "aggravates and accelerates" test for a compensable aggravation of a pre-existing condition, which significantly compromises the credibility of Dr. O'Brien's overall causality opinion. Dr. O'Brien explained that "accelerates" factors into his overall opinion of determining that the Claimant's work related incident was **not** work-related. The ALJ infers and finds that Dr. O'Brien's opinion that the incident "only" accelerated the Claimant's pre-existing right knee condition reveals a defective grasp of the law and, therefore, undermines the credibility of Dr. O"Brien's overall opinion. Dr. O'Brien's opinion was based, in part, on the Claimant's pre-existing condition which Dr. O'Brien admitted was asymptomatic and had not required restrictions.

Ultimate Findings

16. The ALJ finds the medical record, the Claimant's lay testimony and the implied opinions of the ATPs and Dr. Failinger more credible and persuasive than the IME opinion of Dr. O'Brien. Further, for the reasons detailed herein above, the ALJ finds Dr. O"Brien's causality opinion lacking in credibility.

17. The ALJ makes a rational choice, between conflicting opinions, to accept the medical record, the Claimant's lay testimony, and the implied opinions of the Claimant's ATPs; and, to reject the IME opinion of Dr. O'Brien.

18. Based on the totality of the evidence, including the testimony of the Claimant, the ALJ rejects the opinion of Dr. O'Brien on causation and finds that the Claimant has proven, by a preponderance of the evidence that the injury of July 20, 2014, aggravated, accelerated and/or made worse any predisposing right knee condition; triggered the need for surgery; and, caused temporary disability from January 24, 2015 and continuing, this, the Claimant has proven a compensable right knee injury which occurred on July 20, 2014.

19. The Claimant has initially proven, by preponderant evidence that his right knee injury of July 20, 2014, occurred during the course and scope of his employment for the Employer, *i.e.,* it occurred during the Claimant's normal working hours, on the Employer's premises, while the Claimant was performing his job duties.

20. Further, once the "course and scope of employment" has been established, the Claimant has proven, by preponderant evidence that his injury "arose out of his employment, *i.e.,* it was causally connected to the performance of his job duties and it was not an "imported condition" such as a propensity to faint or fall.

21. The Claimant has proven, by preponderant evidence that his Employer referred him to Concentra for medical care, which in turn referred the Claimant for an MRI and to Dr. Failinger, and all of this treatment was authorized and within the authorized chain of referrals. Also, all of the medical treatment for the Claimant's right knee injury has been causally related to the compensable injury of July 20, 2014 and reasonably necessary to cure and relieve the effects of that injury.

22. The Claimant's AWW, including night and Sunday premiums, totals $710.00 per week, which yields a TTD benefit rate of $473.33 per week, or $67.62 per day.

23. The Claimant has proven, by a preponderance of the evidence that he has been temporarily and totally disabled since January 24, 2015 and continuing.

CONCLUSIONS OF LAW

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

Credibility

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

the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the medical record, the Claimant's lay testimony, and the implied opinions of the ATPs and Dr. Failinger were more credible and persuasive than the IME opinion of Dr. O'Brien [for consideration of lay testimony as a factor, *see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997)]. As further found, Dr. O'Brien's lack of causality opinion was defective and not credible.

Substantial Evidence

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

Office, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, The ALJ made a rational choice, between conflicting opinions, to accept the medical record, the Claimant's lay testimony, and the implied opinions of the Claimant's ATPs; and, to reject the IME opinion of Dr. O'Brien.

Compensable Aggravation and Acceleration of Pre-Existing Condition

c. "Course and scope of employment" concerns the time, place and circumstances of a claimant's injury. *Wild West Radio, Inc. v. Indus. Claim Appeals Office,* 905 P.2d 6 (Colo. App. 1995). As found, has proven by preponderant evidence that his right knee injury occurred during his normal working hours, on the Employer's premises, while the Claimant was performing his job duties.

d. "Arising out of employment" deals with the causal connection between the employment and the injury. *General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1995). As found, once the "course and scope of employment" has been established, the Claimant has proven, by preponderant evidence that his injury "arose out of his employment," *i.e.,* it was causally connected to the performance of his job duties and it was not an "imported condition" such as a propensity to faint or fall. *Also see City of Brighton v. Rodriguez, supra.*

e. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory, supra. Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). Indeed, if an injury occurs at work, it is effectively presumed that the injury is work-related unless it is shown that it is attributable to non work-related hazards. *City of Brighton v. Rodriguez, supra.* As found, the Claimant established that there is no cause of his injury other than the work

related fall described in his medical histories and in his testimony; and, as found, the incident of July 20, 2014 aggravated and accelerated the Claimant's underlying arthritis to the point that he required significant medical care and he experienced disability from work.

f. The *City of Brighton* Court identified risks causing an injury as falling into various categories, one of which is a neutral risk. In addressing the neutral risks the Court concluded that an injury which is unexplained necessarily constitutes a neutral risk arising out of employment because it "would **not** (emphasis supplied) have occurred but for employment". *Id .i.e.,* the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of the injury. In the present case, the Claimant was performing order selections while his right knee was injured. As noted by the Court in *City of Brighton,* "some form of the "but-for" test appear to be the approach taken by the majority of states that have addressed unexplained falls." *Id.* 16, The Court relied on *Larson*, 7.04 [1] [a] at 7-24 in examining the extent to which courts are willing to accept this general but-for theory and noted that most courts confronted with the unexplained-fall problem have seen fit to award compensation. The Court went on to explain that it was more persuaded by this approach than the other possible alternatives. In so doing, the Court rejected requiring an employee to rule out idiopathic cause for his injury absent a known idiopathic event such as a stroke or seizure. *Id.*

g. As further found, the Claimant was in a position to suffer his right knee injury due to the nature of the work he was required to perform for the Employer as an order selector. Why his right knee went out when he was in the process of descending his pallet jack may only be explained by his act of stepping down from his pallet jack. Regardless, his injury arose out of and in the scope of employment because there is no evidence that "it would not have occurred but for the fact that the conditions and obligation placed [the] Claimant in the position where he [or she] was injured." *Id. Also see City of Brighton v. Karanian,* 32 P.3d 470, 477 (Colo. 2001). As found, there is no persuasive evidence to outweigh the proposition that the Claimant's right knee injury was causally related to his employment, such as would be the case should there have been a fainting spell, heart disease, or epilepsy. Rather, it arose while he was engaged in the work related activity of moving to load potatoes onto his pallet jack. As further found, the nature of the physical activities the Claimant was required to perform stem from a neutral risk and are not "idiopathic." The Claimant's injury arose out of employment, *i.e.,* it would not have occurred but for the fact that the work he was performing as part of his contract of hire placed him in a position to be injured.

Medical Benefits

h. Because this matter is compensable, the Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of his industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An employer's right of first selection of a medical provider

is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer referred the Claimant to Concentra and he came under the care and treatment of medical providers at Concentra. Therefore, Concentra is an authorized medical provider.

i. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997 As found, the referral for an MRI and the referral to Dr. Failinger were within the authorized chain of referrals and, therefore, authorized.

j. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable, aggravating injury of July 20, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for the right knee injury was and is reasonably necessary to cure and relieve the effects of that injury.

Average Weekly Wage (AWW)

k. . An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant lost wages from the Employer equal $710 per week, which establishes the Claimant's AWW.

Temporary Total Disability

l. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103 (1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Indeed, there is no

statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish physical disability. See *Lymburn v. Symbois Logic*, *supra*. Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id.* As found, the Claimant has been temporarily and totally disabled since January 24, 2015 and continuing. Based on the AWW of $710.00, a TTD benefit rate of $473.33 per week, or $67.62 per day results.

m. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is no longer made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has been temporarily and totally disabled since January 24, 2015 and continuing.

Burden of Proof

n. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues, including lack of an "idiopathic" cause of his injury. To be clear, the Respondents had **no** burden to sustain.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all authorized, causally related and reasonably necessary medical benefits related to the Claimant's right knee injury of July 20, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents shall pay the Claimant temporary total disability benefits from January 24, 2015 through March 17, 2015, both dates inclusive, a total of 53 days, at the rate of $473.33 per week, or $67.62 per day, in the aggregate amount of $3,583.86, which is payable retroactively and forthwith.

C. From January 25, 2015 and continuing until cessation of temporary disability benefits is warranted by law, the Respondents shall pay the Claimant $473.33 per week in temporary total disability benefits.

D. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this 30 day of March 2015.

EDWIN L. PELTER, JR.
Administrative Law Judge

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the proposed surgery recommended by Dr. Pevny is reasonable, necessary and related to her admitted February 12, 2013 work injury?

FINDINGS OF FACT

1. Claimant was employed as a certified nursing assistance ("CNA") for employer. Claimant testified that on February 12, 2013 she was walking down the hall when she heard a patient yell for help. Claimant went into the patient's room and noticed the patient by the bed, trying to get into the bed. Claimant testified she put her right knee under the patient's bottom and lifted the patient up and twisted her knee when her foot got caught between a pole and the bed. Claimant testified she felt pain in her knee and her knee began to feel hot.

2. Claimant reported her injury to employer and put ice on her knee and elevated her knee for approximately 30 minutes. Claimant testified her knee did not get better and she returned to employer and filled out the necessary paperwork to make a claim for workers' compensation benefits. Claimant's claim was accepted as compensable.

3. Claimant was initially treated by Dr. Gary Knaus on February 12, 2013. Dr. Gary Knaus noted clamant reported she injured her knee when she was transferring a patient and caught her right foot in between the pole next to the bed and fell backwards with a twisting motion on a fixed foot. Dr. Gary Knaus noted a bit of a click on full extension of the knee. Claimant testified at hearing that Dr. Gary Knaus referred her for physical therapy.

4. Claimant returned to Dr. Gary Knaus on February 19, 2013 and noted that she had been off of work for five days and felt like her knee returned to near normal, but after being on her feet the previous day, she experienced some swelling and discomfort with some clicking. Claimant returned to Dr. Gary Knaus on March 5, 2013 and reported her knee would get a bit sore toward the end of the day, but was not swelling at this point. Dr. Gary Knaus noted that claimant continued to report a bit of a click anteriorly with flexion, but it was something she could live with. Dr. Gary Knaus opined that claimant could have a meniscal tear and that it could become more symptomatic as she goes forward. Dr. Gary Knaus noted, however, that claimant was at maximum

medical improvement ("MMI"), but if her knee worsened, she may need a magnetic resonance image ("MRI") in the future.

5. Claimant subsequently returned to Dr. Chad Knaus on June 25, 2013. Dr. Chad Knaus noted claimant's ongoing complaints and recommended claimant undergo an MRI of her knee. The MRI was performed on June 25, 2013 and demonstrated a partial tear of the distal anterior cruciate ligament, a small contusion of the posterior medial tibial plateau, a probably old tear of the proximal lateral collateral ligament, and mild degeneration of articular cartilage of the medial patellar facet. Claimant was referred to Dr. Adams for a surgical consultation.

6. Dr. Adams evaluated claimant on July 3, 2013. Dr. Adams noted that claimant had undergone an MRI of the knee and continued to complain of popping, clicking and grinding. Dr. Adams diagnosed claimant with chondromalacia versus chondral defects of the patella with effusion and pain and discussed conservative options versus arthroscopic evaluation and treatment. Claimant elected conservative treatment in the form of physical therapy and avoiding squatting.

7. Claimant returned to Dr. Adams on September 30, 2013. Dr. Adams noted she had undergone a course of physical therapy that had helped strengthen the knee, but she still had pain and problems. Dr. Adams diagnosed claimant with chondromalacia patella with some patellofemoral maltracking. Based on claimant having failed conservative management, Dr. Adams recommended a right knee arthroscopy.

8. Dr. Adams performed the surgery on October 17, 2013. Dr. Adams noted in the operative report a preoperative diagnosis of chondromalacia of the patella with maltracking. Dr. Adams performed a right knee arthroscopy, chondroplasty of patella and partial lateral menisectomy, with a resection of a notch mass and synovial biopsy. Dr. Adams did not provide a postoperative diagnosis of patella maltracking. The operative report notes that there was a little bit of mild lateral tracking of the patella, but it was not felt that a lateral release was indicated because the changes were more diffuse about the patella.

9. Claimant was examined by Dr. Chad Knaus on October 22, 2013. Dr. Chad Knaus noted claimant had occasional catching of her knee with full extension, but was otherwise doing great. Dr. Chad Knaus provided claimant with work restrictions allowing for light clerical work.

10. Following the surgery, claimant followed up with Dr. Adams on October 23, 2013. Dr. Adams noted that he had performed a synovial biopsy to determine if claimant had rheumatoid arthritis and the pathologist noted that claimant could have

rheumatoid arthritis or it could be regular degenerative arthritis. Dr. Adams recommended therapy and instructed claimant to follow up in 4 to 5 weeks.

11. Claimant was seen again by Dr. Adams on October 29, 2013 after claimant had a big flare up of her knee with swelling. Dr. Adams recommended claimant be set up for an arthritis panel and prescribed Celebrex. Following the arthritis panel, Dr. Adams noted that claimant's rheumatoid factor was negative, but her ANA was positive with a titer of 1:160 and claimant was referred to a rheumatologist.

12. Claimant returned to Dr. Chad Knaus on November 22, 2013 and reported continued issued with her knee cap. Dr. Chad Knaus noted that claimant felt like the tracking of her patella was "off" with occasional popping and crepitus.

13. By December 18, 2013, claimant was continuing to complain of issues with her knee, but Dr. Adams had indicated that her knee looked great with a trace amount of crepitance with range of motion. Dr. Adams noted that claimant could have her workers' comp claim closed and instructed claimant to return on an as needed basis. Dr. Adams released claimant to return to work without restrictions.

14. Claimant returned to Dr. Chad Knaus on December 24, 2013 and reported she was at physical therapy when she had some significant effusion in her right knee after doing some squatting. Dr. Chad Knaus noted claimant had a problem with her patella tracking. Dr. Chad Knaus recommended a follow up MRI and continued claimant on light duty restrictions.

15. Claimant underwent the MRI on December 30, 2013. The MRI showed a small joint effusion and a Baker's cyst, but no meniscal tear, and no high-grade chondral defect.

16. Claimant returned to Dr. Adams on January 7, 2014. Dr. Adams reviewed the MRI scan and noted that the MRI showed evidence of effusion of the knee with a popliteal cyst. Dr. Adams noted he didn't see anything major structurally that would cause the recurrent effusions.

17. Claimant was subsequently referred to Dr. Pevny by Dr. Chad Knaus for a second opinion. Dr. Pevny evaluated claimant on January 21, 2014. Dr. Pevny examined claimant's knee and noted the mild diffusion. Dr. Pevny opined that claimant's pain was from her patellofemoral and noted that claimant had some maltracking and chondral issues at the time of her surgery. Dr. Pevny recommended injections for claimant's knee.

18. Claimant returned to Dr. Pevny on March 4, 2014. Dr. Pevny noted that claimant was complaining of pain over the anterior portion of her knee as well as just

lateral to her patella. Dr. Pevny recommended visco supplementation injections. The first injection took place on March 25, 2014 and her second injection took place on April 1, 2014 with her third injection on April 8, 2014. Claimant did not improve significantly with the injections and Dr. Pevny recommended surgery when claimant returned on May 13, 2014. The surgery was scheduled for May 22, 2014.

19. Claimant returned to Dr. Pevny for the preoperative evaluation on May 16, 2014. Dr. Pevny noted claimant had an arthroscopic chondroplasty of patella, partial lateral meniscectomy and resection with small mass from the notch in October 2013. Dr. Pevny noted that postoperatively, claimant had a recurrent effusion and the repeat MRI did not show any significant structure abnormality. Dr. Pevny noted that his plan was to undergo a right knee diagnostic scope and chondroplasty of the patella with possible medial meniscectomy and lateral release.

20. Respondents obtained a records review independent medical examination ("IME") with Dr. Ciccone on May 20, 2014. Dr. Ciccone noted claimant's history of treatment for her right knee condition and opined that the proposed second knee arthroscopy should be denied as claimant had undergone appropriate treatment for the knee injury by Dr. Adams and had suffered no further work related injury to her knee as evidenced by the second MRI that was read as negative for meniscus or cartilage injury. Dr. Ciccone opined that claimant's persistent patellofemoral pain was not related to her work injury and opined that claimant's maltracking was secondary to her elevated Q angle, what was anatomic and unrelated to any industrial knee injury.

21. The surgery was denied by respondents and therefore was cancelled.

22. Dr. Pevny issued a report dated July 3, 2014 noting that because of claimant's persistent pain and swelling with activity, Dr. Pevny felt a diagnostic scope and checking of the patella tracking with a possible lateral release, chondroplasty would be an appropriate procedure.

23. Dr. Ciccone issued a supplemental report dated July 18, 2014 after reviewing Dr. Pevny's July 3, 2014 report. Dr. Ciccone opined that claimant's further pain and symptoms following her initial surgery were related to mechanical malalignment and possible early degenerative changes within the knee and were not work related.

24. Dr. Pevny issued a report dated January 21, 2015 after reviewing Dr. Ciccone's reports and noted that he had since been able to review claimant's medical records involving an injury to her left knee dating back to 1998. Dr. Pevny opined in this report, after reviewing additional reports that claimant's current pain in her right knee was related to the patellofemoral joint. Dr. Pevny noted that even thought he believed claimant would require surgery after not responding to non-operative treatment, it was

very difficult for him to confirm that this was a work related injury. Dr. Pevny ultimately opined that he concurred with Dr. Ciccone that claimant's current symptoms were not work related.

25. Dr. Ciccone testified by deposition in this case. Dr. Ciccone's testimony was consistent with his medical reports. Dr. Ciccone noted that claimant's symptoms developed after her work related injury, but noted that claimant's underlying condition was degenerative in nature and not related to the work injury.

26. Dr. Chad Knaus testified liver at hearing. Dr. Chad Knaus testified it was his opinion that claimant's ongoing knee complaints were related to her work injury. Dr. Chad Knaus testified that he saw no evidence of claimant complaining of problems with her right knee prior to her work injury and noted that claimant had consistent complaints of pain in her right knee following the work injury.

27. Claimant testified at hearing that her problems with her right knee developed following her work injury. Claimant testified she did not have issues with her right knee prior to her work injury. Claimant testified she noticed that tracking issues when she got out of bed following her surgery with Dr. Adams. Claimant denied having any problems with tracking prior to her surgery.

28. As claimant noted at hearing, there is a strong temporal relationship between the onset of her symptoms and her work injury and subsequent surgery (although Dr. Adams first noted that patellofemoral tracking problems on September 30, 2013). However, the "what came before must have caused what came after" theory of proof has a name: post hoc fallacy or post hoc ergo propter hoc (after this, therefore because of it). This error of reasoning, sometimes referred to as false cause or coincidental correlation is widely discredited because it wrongly assumes that a temporal relation transfers into a causal relation.

29. In this case, the surgeon recommending the operative procedure has indicated that he cannot state that claimant's condition is related to her work injury. Therefore, the ALJ concludes that claimant has failed to establish that it is more likely true than not that the proposed surgery to her knee is related to her admitted work injury. The ALJ relies on the opinions expressed by Dr. Ciccone and Dr. Pevny in coming to this conclusion.

30. Because claimant has failed to establish the proposed surgery is related to her work injury, her claim for medical benefits is denied.

CONCLUSIONS OF LAW

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

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

3. 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 surgical procedure proposed by Dr. Pevny is related to her work injury. As found, the ALJ relies on the opinions expressed by Dr. Pevny and Dr. Ciccone in coming to this conclusion.

ORDER

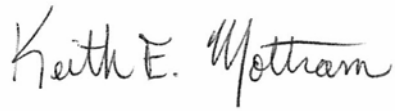
It is therefore ordered that:

1. Claimant's claim for benefits in the form of authorization for the surgery proposed by Dr. Pevny is denied.

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

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

DATED: March 4, 2015



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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Corenman is reasonable and necessary to cure and relieve the claimant from the effects of his admitted Janaury 13, 2014 industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his low back on January 13, 2014 while in the course and scope of his employment with employer. Claimant testified he was injured when he was lifting a 200 pound lid because it was blocking the way of a fork lift. Claimant testified he felt sharp pain in his back after pulling on the lid to move it.

2. Claimant reported the injury to Mr. Riggins with his employer on the day of the injury. Claimant went home that evening and took over the counter medications. Claimant returned to work the next day and sat at his desk. Claimant testified that by approximately 11:00 a.m., he noticed his left leg was going numb and requested to go to a physician. Claimant was referred to Colorado Mountain Medical on January 14, 2014 and was seen by Ms. Nykreim, a physician's assistant. Claimant provided a consistent accident history of injuring his back while lifting a heavy object at work. Claimant was referred for physical therapy.

3. Claimant returned to Colorado Mountain Medical on January 17, 2014 and was evaluated by Dr. Dent. Dr. Dent recommended continuing physical therapy.

4. Claimant subsequently underwent a magnetic resonance image ("MRI") scan of the lumbar spine on January 28, 2014. The MRI revealed diffuse lumbar degenerative disc disease with a small diffuse superimposed caudal disc extrusion at the L5-S1 level. The MRI further showed diffuse neural foraminal stenosis which was moderate to severe bilaterally at L5-S1 with contact of bilateral exiting L5 nerve roots.

5. Claimant returned to Dr. Dent on January 30, 2014. Dr. Dent reviewed the MRI and noted that the degenerative changes shown on the MRI were not directly related to the recent injury at work. Dr. Dent also opined, however, that the disc extrusion noted on the scan was likely to be an acute finding. Dr. Dent referred claimant to Dr. Raub for consideration of lumbar corticosteroid injections.

6. Dr. Raub recommended physical therapy and performed L5-S1 transforaminal injections on March 14, 2014 and May 12, 2014.

7. Dr. Raub referred claimant to Dr. Treihaft on April 17, 2014 for neurological consultation. Dr. Treihaft noted claimant had developed numbness and tingling in both legs on March 6, 2014, which was new. Dr. Treihaft diagnosed claimant with lumbar spondylosis at the L4-5 and L5-S1 level with bilateral foraminal narrowing and possible L5 nerve root impingement. Dr. Treihaft recommended awaiting claimant's spine surgery consultation with Dr. Corenman.

8. Dr. Corenman had previously treated claimant for problems with his cervical spine that resulted in a cervical fusion surgery. Claimant was under the care of Dr. Corenman for his cervical spine at the time of his January 13, 2014 lumbar spine injury.

9. Dr. Corenman initially evaluated claimant for his lumbar spine injury on May 22, 2014. Dr. Corenman noted that claimant reported his low back complaints were 60% of his symptoms while the numbness and paresthesias represented 40% of his symptoms. Dr. Corenman performed a physical evaluation and offered claimant further treatment in the form of a lumbar fusion surgery. Dr. Corenman noted that with 40% of his symptoms being related to the numbness and paresthesias in his legs, this did not follow the typical symptomotolgy for foraminal stenosis and opined that his symptoms may not necessarily resolve with surgery. Nonetheless, Dr. Corenman indicated that claimant had a 70-80% chance of a reduction of symptoms from the surgery.

10. Dr. Corenman subsequently also recommended claimant undergo a rhizotomy at the L4-5 and L5-S1 level.

11. While the surgery recommendation was pending, Dr. Corenman performed a surgery on claimant's cervical spine involving removal of the plate at the C5-C7 level and revision of the C6-C7 fusion in July 2014.

12. Respondents arranged for claimant to undergo an independent medical examination ("IME") with Dr. Fall on August 13, 2014. Dr. Fall reviewed claimant's medical records, obtained a history and performed a physical examination in connection with her IME. Dr. Fall noted that Dr. Corenman had documented that claimant had a history of an unhealthy relationship with alcohol. Dr. Fall diagnosed claimant with lumbar degenerative disc disease and facet arthropathy without objective findings of acute radiculopathy. Dr. Fall opined that claimant's low back and left leg paresthesias was related to his work injury, but noted that the proposed fusion and L4-5 and L5-S1 rhizotomy were not reasonable or necessary medical treatment related to claimant's January 13, 2014 work injury.

13. Dr. Fall testified by deposition in this matter consistent with her report. Dr. Fall testified that claimant's mechanism of injury did not support a finding that the facet joints were injured during the work incident because the injury did not involve hyperextension of the low back. Dr. Fall opined that the L4-5 and L5-S1 rhizotomies were not reasonable and necessary medical treatment related to the January 13, 2014

injury. Dr. Fall opined that the lumbar fusion at L5-S1 could increase claimant's symptomotology and may not address claimant's lower extremity symptoms. Dr. Fall opined that claimant had unreasonable expectations regarding the prospects of surgery and recommended against the proposed surgical procedure.

14. Claimant testified at hearing that he wishes to proceed with the surgical recommendations expressed by Dr. Corenman. Claimant noted that Dr. Corenman had indicated to him that the surgery may or may not relieve his symptoms.

15. The ALJ credits the testimony of claimant at hearing and the medical records from Dr. Corenman, Dr. Dent and Dr. Raub and finds that claimant has demonstrated that it is more probable than not that the proposed medical treatment recommended by Dr. Corenman is reasonable and necessary and related to claimant's January 13, 2014 work injury.

16. The ALJ notes that claimant's low back condition was asymptomatic prior to the January 13, 2014 work injury and finds that the lifting of the 200 pound lid aggravated or accelerated claimant's pre-existing condition resulting in the need for medical treatment. The ALJ further finds that claimant has demonstrated that it is more likely than not that the proposed medical treatment, including the facet rhizotomies and lumbar fusion are reasonable and necessary medical treatment related to the January 13, 2014 work injury.

17. Based on the testimony of claimant at hearing, and the medical reports and records from Dr. Corenman, Dr. Dent and Dr. Raub, the ALJ determines that claimant has proven that it is more likely true than not that the treatment recommended by Dr. Corenman, including the rhizotomies and surgery, represent reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury.

18. The ALJ notes that Dr. Corenman may not ultimately decide to perform both the rhizotomies and the surgery. It is the ALJ's reading of the records that Dr. Corenman's initial recommendation was for claimant to undergo surgery, and the rhizotomies were recommended as an alternative treatment after the surgery was denied by respondents. Noentheless, insofar as Dr. Corenman is recommending additional medical treatment including either rhizotomies, surgery or both, Claimant has established that it is more likely true than not the such treatment is reasonable, necessary and related to his work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S,

2008. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

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

5. As found, the medical treatment in this case recommended by Dr. Corenman was the result of a compensable accident that aggravated, accelerated or combined with a pre-existing disease or infirmity to produce the need for treatment. As found, the proposed surgery and rhizotomies are reasonably necessary to cure and relieve claimant from the effects of the work injury.

ORDER

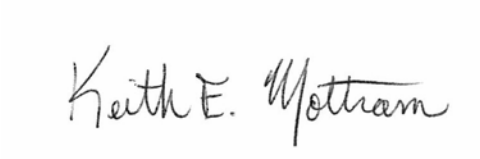
It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment recommended by Dr. Corenman, including the proposed lumbar surgery and rhizotomies 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: March 23, 2015



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

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ISSUES

I. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment?

II. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability (TTD) benefits?

III. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of medical benefits for her treatment with Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, Penrose-St. Francis emergency room and Southwest Diagnostic Centers?

FINDINGS OF FACT

Based on the evidence presented and the parties' post-hearing pleadings, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as a cashier for approximately six (6) months prior to the date of injury. Although she was originally hired part time, Claimant's hours increased to the point that she was working full time on the date of injury.

2. Claimant testified that customers would normally approach her checkout counter from the left side where she would scan items being purchased. She would have to twist to her right to access the cash register and complete transactions. On average, Claimant would check out approximately 200 people per shift. She would perform the aforementioned twisting motion for every transaction, whether it was cash or a credit transaction.

3. While checking out a customer on June 21, 2014, Claimant scanned a customer's merchandise, turned to the right, and felt an immediate stabbing pain in her lower back. She explained that it felt like she had been "cut in half" by a sharp burning pain similar to if someone stabbed her in the low back. Claimant immediately felt numbness going down the outside of her left thigh. This numbness has persisted through the present time.

4. At the time the incident occurred, Claimant testified it felt like her back

"went out" and that she blurted out "Oh My God" when the injury occurred. Tiffany Salazar, a co-employee of Home Depot, was working as a cashier at the register next to Claimant when this occurred. She heard Claimant's outburst and asked her what was wrong and if she was okay. When Claimant told her that she didn't think she was okay, Ms. Salazar called the head cashier, Amber, to report what had happened. Amber brought Claimant a chair to sit on and requested that she finish her shift because they were shorthanded that day. Claimant was able to complete her shift.

5. No written report was filed by Employer or Claimant on the date of injury. Claimant identified Claimant's Exhibit No. 2 as the statement she wrote on 6/23/14 outlining the circumstances surrounding the injury. She completed this statement at the request of Employer. Claimant was injured on a Saturday and the next two days were her regular days off. She did not contact her employer again until 6/24/14, when she was scheduled to work, because she thought her condition might improve during the time she was off. On 6/24/14, Claimant called her employer and spoke with her assistant manager, Eric, who told her to come into the store to get a list of treating providers. She did so on 6/24/14 and chose Penrose Hospital. Claimant did not seek treatment until 6/27/14 when she was seen in the emergency room. Claimant testified that she was unable to get to the doctor on 6/2514 and 6/26/14 because her car had broken down and she had no transportation. During that time frame, she stayed at home and either iced or placed heat on her lower back to try to control the pain.

6. Dr. Langstaff, the emergency room physician from Penrose-St. Francis noted in her 6/27/14 report that Claimant "accidentally twisted into an awkward position while working as a cashier at Home Depot." Physical examination from the ER visit revealed moderate paraspinal tenderness in both the lumbar and thoracic spine. Dr. Langstaff suspected that Claimant had sustained a myofascial strain of her lumbar spine and provided a diagnosis of "acute back pain." Claimant testified that the emergency room physician took her off work for three days. Claimant notified her supervisor, Connie, of her emergency room visit and was directed by Connie to get in touch with the Human Resources Department. Claimant did so and was referred to Concentra where she began treatment with Dr. Randall Jones on 6/27/14.

7. Dr. Jones examined Claimant and referred her to physical therapy (PT) three times a week for a period of two weeks. On 6/27/14, Dr. Jones imposed physical restrictions of no lifting more than 10 pounds, no pushing or pulling more than 20 pounds, no squatting, no climbing of ladders or stairs or climbing of any kind. Dr. Jones noted in his initial assessment that Claimant was standing behind a cash register and twisted to the right to put money in the register and felt left lower lumbar pain. The Physician's Report of Worker's Compensation Injury authored by Dr. Jones on 6/27/14 notes the objective findings he observed to be consistent with the history and the work related mechanism of injury.

7. Claimant provided Dr. Jones' restrictions to her employer at which time she was informed that her restrictions could not be accommodated. Claimant has not worked for Employer or any other job since 6/21/14.

8. Based upon the evidence presented, the ALJ finds that the Claimant is disabled within the meaning of the workers' compensation statutes and entitled to temporary total disability (TTD) benefits commencing 6/21/04.

9. Dr. Jones saw Claimant again on July 12, 2014. During this visit he noted those objective clinical findings he observed were consistent with the history and/or work related mechanism of injury. He continued Claimant's physical restrictions and added that she be provided a chair with a back adjustable to the proper height to complete her cashiering duties.

10. Claimant began physical therapy on July 16, 2014 at Concentra with Katherine Nikolaus, P.T. Ms. Nikolaus noted mild increased muscle tone in both the right and left paraspinal muscles. She also noted severe tenderness of the paraspinal muscles on the left and moderate tenderness on the right. Her record also reflects that the Claimant was unable to lie on her back. On July 17, 2014, Ms. Nickolaus noted that the Claimant should also be sitting 75% of the time while cashiering. The July 18, 2014 physical therapy notes indicate that Claimant reported increased low back pain, up to 9 out of 10. The July 25, 2014 therapy note indicates that the Claimant reported worsening symptoms and was progressing slower than expected.

11. On August 4, 2014, Dr. Randall Jones saw Claimant and noted that if Claimant did not show significant improvement by the next visit, she would need to be referred for an x-ray, an MRI and to Dr. Zimmerman and Dr. Polvi for chiropractic treatment and acupuncture. He continued her physical restrictions. On August 7, 2014, Dr. Jones discontinued physical therapy and referred Claimant to Dr. Jeffrey Jenks, Absolute Health Center and Southwest Diagnostics for an MRI.

12. Claimant underwent an MRI on August 21, 2014 which revealed a broad-based right foraminal bulge and facet arthrosis at L4-5 and mild right foraminal stenosis. It also revealed a broad based foraminal bulge and left paramedian protrusion at L5-S1 with mild canal and foraminal stenosis.

13. Claimant also saw Dr. Jeffrey Jenks on August 21, 2014. Dr. Jenks recommended a left sacroiliac joint injection.

14. The ALJ finds the treatment rendered by Dr. Jones and his referrals in this case reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury.

15. At the time Claimant was hired at Home Depot, she informed Employer

that she had restrictions with respect to her knees due to a preexisting degenerative knee condition. She also reported pre-existing multiple sclerosis. Claimant's physical restrictions due to these conditions required use of a chair with a back so that she could sit when needed while performing her cashier duties. At the time Claimant was injured, she was standing and only had a stationary stool (without a back) to sit on. The stool's seat did not rotate. The Claimant testified that she had previously spoken to an assistant manager, Andy, in the Spring of 2014 regarding her need for a chair with a back on it. She understood the chair to be on back order. She testified she also talked to Andy about the status of the chair in June of 2014 but still had not received it at the time of her industrial injury.

16. Although Claimant had been seen at Memorial Hospital in the emergency room on April 13, 2014 for burning pain in her shin after receiving a steroid injection to her knee, she had no preexisting lumbar spine conditions nor had she received treatment for her lumbar spine in the year prior to this claim. Claimant explained that the pain she experienced in her shin was not the same kind of pain and numbness that she currently has going down the outside of her left thigh since her June 21, 2014 injury.

17. Claimant was also treated in the emergency room of Penrose St. Francis on April 3, 2014 and April 5, 2014 for knee pain. Moreover, she sought treatment through the emergency room of Memorial Hospital on January 25, 2014 for tooth pain. Claimant explained that even though the emergency room report from this visit noted back and neck pain as well as chronic pain, she had no prior back and neck pain and had not been treated for those conditions prior to her June 21, 2014 industrial injury.

18. Claimant was diagnosed with relapsing and remitting multiple sclerosis (MS) in 2004 after experiencing persistent severe headaches. She did not have any symptoms in her lower back or down her legs associated with her MS. She had a relapse of her MS in 2012 when she lost sight in one of her eyes which eventually returned.

19. Claimant receives social security disability benefits and veteran's administration benefits for her preexisting bilateral knee and ankle issues as well as her multiple sclerosis. At the time of her June 21, 2014 injury, Claimant was taking Oxycodone and Fentanyl for her knee and ankle conditions/pain. She continues to take those pain medications since the injury in this case. She has been given no additional pain medications by Dr. Jones or Dr. Jenks. She also testified that none of her prior medical providers had ever diagnosed her with fibromyalgia.

20. Dr. Allison Fall testified on behalf of the Respondents. Dr. Fall is a Level II accredited physiatrist in the State of Colorado. Dr. Fall opined that Claimant could not have injured her lower back by the mechanism of injury she described. Dr. Fall testified that it would not matter how far or how many times an individual

twisted her in a day–twisting at the waist, according to Dr. Fall would never cause lower back problems since the human body was "meant" to twist at the waist. Absent any additional weight or bending while twisting, an individual could not injure her low back from merely twisting per Dr. Fall. Dr. Fall opined that there was no correlation between Claimant's symptoms and the findings on the MRI scan of 8/20/14. She also testified that she did not find any objective findings on examination of Claimant to substantiate Claimant's pain complaints, although she did admit that Claimant could have had muscle spasms which she would not have been able to see or feel at the time she examined Claimant due to her obesity.

21. Dr. Fall testified that it is possible that asymptomatic degenerative conditions can become symptomatic in the face of a traumatic event. She also conceded that bulging disks can be sources of pain in the lower back and that individuals with foraminal stenosis can develop pain in their lower back. She admittedly did not review any, nor is she aware of any, records prior to 6/27/14 documenting treatment of Claimant's low back. Dr. Fall also admitted that she was not aware of any other records, prior to 6/27/14, where the Claimant was complaining of radiating leg pain or numbness with the exception of the emergency room report of Penrose Hospital from 4/3/14 involving pain down the shin after Claimant received a steroid injection to the knee.

22. Dr. Fall further opined that Claimant had preexisting chronic pain associated with fibromyalgia which was probably the source of her ongoing myofascial back pain. However, on cross-examination, Dr. Fall admitted that the basis for this opinion was information that she gleaned from two previous emergency room records which mentioned fibromyalgia in the past medical history section. One of those records was from February 26. 2013 and one was from March 3, 2014. Dr. Fall admitted that she had no idea where the diagnosis of fibromyalgia had originated, nor did she know what doctor or specialist, if any, made the original diagnosis. Additionally, she was not aware of what symptoms (how many tender points and where they were located), if any, the Claimant presented with which resulted in the diagnosis of fibromyalgia. Based upon the totality of the evidence presented, the ALJ is not convinced that Claimant was formally diagnosed with fibromyalgia. Consequently, the ALJ finds Dr. Falls' testimony regarding fibromyalgia, as the likely cause of Claimant's low back pain unconvincing. Dr. Fall also opined that Claimant had some functional overlay in her symptoms due to the Employer failing to accommodate her prior work restrictions due to her knee condition (prior to this industrial injury).

23. Prior to the issuance of the January 15, 2015 full order, Respondents received updated medical records from Dr. Albert Hattem, Claimant's attending medical provider for treatment she received November 20, 2014 and January 13, 2015. The records were received by Respondents on January 14, 2015.

24. Respondents' counsel sought inclusion of the aforementioned medical records as

part of the record by filing a motion to submit additional evidence prior to the issuance of the requested full order. Respondent's motion was filed with the OAC, via electronic transmission (e-mail) on the afternoon of January 14, 2015. The motion was inadvertently rejected by the Court Clerk as exceeding the number of pages, which could be accepted by the OAC via e-mail. Moreover, the undersigned ALJ was out of Office on January 14, 2015 following a medical procedure performed January 13, 2015. Consequently, the ALJ was unaware of Respondent's motion until he returned to the office on January 15, 2015.

25. On January 15, 2015, the undersigned ALJ issued the full order requested by Respondents. The full order was issued at 11:51 AM. At 4:21 PM on January 15, 2015 a copy of Respondents' motion with medical records attached was received by the OAC via facsimile. The original motion was received by the OAC via US mail on January 20, 2015.

26. Dr. Hattem's records were not reviewed and commented upon by the ALJ in his Full Order because he had issued the full order before the facsimile copy of the motion with the attached records was received.

27. At 4:54 PM on January 15, 2015 Claimant faxed her response to Respondents' motion to the OAC. Claimant objects to the admission of Dr. Hattem's records on finality and procedural due process grounds.

28. On January 16, 2015 Respondents' counsel filed a **"PETITION TO REVIEW AND REQUEST FOR TRANSCRIPT."** In the petition, Respondents' counsel asserts that the ALJ "erred as a matter of law when he did not take into consideration the evidence provided in Respondents' Motion to Submit Additional Evidence Prior to the Issuance of the Specific Findings of Fact, Conclusions of Law and Order.

29. The ALJ was out of the office on Friday, January 16, 2015 and did not return to the office until January 20, 2015, following the Martin Luther King Holiday. Upon his return to the office, the undersigned ALJ reviewed Respondents motion, Claimant's response filed thereto and Respondents' Petition to Review and Request for Transcript.

30. The ALJ finds Respondents' motion for inclusion of Dr. Hattem's medical reports from November 20, 2014 and January 13, 2015 to constitute a request to reopen the record for the submission of additional evidence. After careful consideration of the motion, the ALJ finds it meritorious for the following reasons: 1. The ALJ agrees with Respondents that Dr. Hattem's November 20, 2014 and January 13, 2015 reports constitute relevant evidence, which could not have been produced/presented at the November hearing; and, 2. the reports address a material issue in the case, namely the causal relatedness of Claimant's back injury to her work duties. Consequently, the reports have the potential to be "outcome determinative" concerning the issue of compensability.

31. Respondents' motion is **GRANTED**. The medical reports of Dr. Hattem dated November 20, 2014 and January 13, 2015 are considered evidence in the case.

32. Having admitted the aforementioned records into evidence, the ALJ enters the following supplemental factual findings:

    a. Dr. Hattem did not testify at the November 4, 2014 hearing.

    b. On November 20, 2014, Claimant returned to the offices of Concentra and Dr. Albert Hattem for re-evaluation. At the conclusion of this appointment, Dr. Hattem opined that Claimant's low back pain was not work-related. According to Dr. Hattem, Claimant's low back pain began as she was "standing at her cash register." Dr. Hattem continued, noting that "[a]ll she did was twist while holding a 20 dollar bill. Dr. Hattem concluded by indicating that in his opinion "twisting is a ubiquitous activity, not unique to the workplace" and that "a person is expected to twist as a normal activity of daily living." Consequently, Dr. Hattem noted that "[t]here was no injury described at work." Nonetheless, Dr. Hattem indicated that he wanted to review the IME report of Dr. Fall before placing Claimant at MMI. Accordingly, Dr. Hattem set a return appointment for recheck.

    c. Claimant attended a re-evaluation appointment with Dr. Hattem on January 13, 2015. In the report generated following this encounter, Dr. Hattem references that he received the IME report from Dr. Fall and that Dr. Fall also "opined that there was no mechanism of injury to cause any injury to the lumbar spine that would require medical treatment." Thus, Dr. Hattem indicated that Dr. Fall was "in agreement with my conclusion." Dr. Hattem then discharged Claimant from care and instructed her to "follow up with her personal physician for a non-work related chronic pain condition."

33. After careful inspection of the November 20, 2014 and January 13, 2015 records, the ALJ finds Dr. Hattem's statement that a "person is expected to twist as a normal activity of daily living" to be congruous with Dr. Fall's opinion that the human body was meant to twist at the waist no matter how far or how frequently it was done, which was cited by Dr. Fall as the reason Claimant did not injure her low back. The ALJ finds that Dr. Hattem has not expressed any "new" or "different" opinion regarding causality concerning Claimant's back condition than did Dr. Fall. As noted above, the ALJ finds Dr. Fall's opinions unconvincing. Because he did not deviate from Dr. Fall's unpursuasive opinion, the ALJ finds Dr. Hattem's opinion(s) regarding causality equally unconvincing.

34. The Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of the course and scope of her employment with Home Depot.

CONCLUSIONS OF LAW

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

Respondents' Motion for Submission of Post-hearing Evidence

A. The ALJ has discretion whether to permit the admission of post-hearing evidence. *IPMC v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). In deciding whether to receive additional evidence after a party has rested his/her case, the ALJ should consider whether the evidence could have been obtained and presented at the hearing through the exercise of due diligence. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991); Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969). Further, the ALJ should consider whether the evidence involves a material issue and; and whether it has the potential to be outcome determinative. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Potomac Insurance Co. v. Industrial Commission*, 744 P.2d 765 (Colo. App. 1987). The ALJ should consider these factors and balance them against the competing interests, i.e. the expense and inconvenience, of the party opposing receipt of the additional evidence so as to guard against the potential for injustice arising from giving finality to an erroneous result. *IPMC v. Industrial Claim Appeals Office, supra; Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996)(reopening authority is evidence of legislative policy that goal of achieving fair and just result overrides litigants' interests in finality); *Gurule v. Board of Developmentally Disabled*, W.C. No. 3-595-093 (February 9, 1995). As found here, the balance for admission of the additional medical records tips in favor of Respondents as the evidence could not have been previously discovered and presented at hearing through the exercise of due diligence since it arose post-hearing. More importantly, the new evidence addresses the material issue in the case, specifically causation. As such, the ALJ concludes that new evidence is potentially outcome determinative concerning the issue of "compensability." Consequently, Claimant's interest in finality is outweighed by the injustice, which may result from giving final effect to an erroneous result. For these reasons, the ALJ concludes that Respondents' motion is meritorious and is, therefore GRANTED.

Supplemental Order & Other General Legal Principals

B. Section 8-43-301(5) provides that in ruling on a petition to review, the ALJ may issue a supplemental order limited to the "matters raised in the petition to review, and, as to those matters, . . . may amend or alter the original order or set the matter for further hearing." Here the ALJ concludes that a Supplemental Order is necessary to address **RESPONDENTS' MOTION TO SUBMIT ADDITIONAL EVIDENCE PRIOR TO THE ISSUANCE OF THE SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** and the assertion that the ALJ erred as a matter of law when he failed to consider Respondent's request to submit additional as outlined in the January 16, 2015 **PETITION TO REVIEW AND REQUEST FOR TRANSCRIPT**.

C. 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.

D. 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).*

E. 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.

Compensability & Temporary Partial Disability

F. As noted, 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). 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. 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); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the

evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

G. 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). In this case, the evidence demonstrates that Claimant engaged in frequent "twisting" (rotation) of her lumbar spine to complete the duties required of her position as a cashier during her shift. While the ALJ is persuaded that the degenerative findings demonstrated on MRI were not caused by her twisting, the ALJ finds Dr. Fall's testimony–that Claimant could not have injured her low back twisting at the waist because the human body is designed to twist at the waist–unpersuasive. Similarly, the ALJ is not convinced that Claimant did not injure her low back because Dr. Fall was unable to appreciate any objective findings on physical examination which substantiated Claimant's complaints of low back pain or that Claimant's low back pain is chronic and related to preexisting fibromyalgia. The ALJ notes that Dr. Fall's IME was performed on October 8, 2014, in excess of three months after the date of injury. The medical records closer in time to Claimant's date of injury and thereafter during treatment reflect objective findings consistent with lumbar strain and associated left sacroiliac (SI) joint dysfunction. Moreover, Dr. Fall admitted on cross examination that she based her reliance on "fibromyalgia" as a cause of Claimant's low back pain on information gleaned from two ER reports which mention the diagnosis in the past medical history section of the reports. The ALJ credits Claimant's testimony that she has never been diagnosed with "fibromyalgia". Based upon the totality of the evidence presented, the ALJ concludes that, more probably than not, Claimant suffered a myofascial strain of her lumbar spine and left SI joint while having to twist to complete her work duties. Consequently, the ALJ concludes that a logical causal connection exists between the Claimant's complaints and her work-related duties. The claim is compensable.

H. The November 20, 2014 and January 13, 2015 records of Dr. Hattem do not provide a convincing basis to alter the full order issued January 15, 2015. As found, Dr. Hattem did not express any "new" or "different" opinions regarding causality of Claimant's back condition outside of that testified to by Dr. Fall, whose opinions are rejected by the ALJ as unpursuasive. Consequently, the ALJ finds the injury compensable.

Medical Benefits

I. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). As found, the treatment rendered by Dr. Jones and his referrals in this case was reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury. Nonetheless, Respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v.*

Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

J. Authorization refers to a physician's legal status to treat the industrial injury at 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). Once an ATP has been designated, a 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).

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 persuasive record evidence supports that Claimant was given a list of providers from her employer which included Penrose Hospital ER as a choice. After providing the emergency room record to her employer, Claimant was referred to Concentra Medical Centers where she was seen by Dr. Jones who subsequently made referrals to physical therapy, Southwest Diagnostics, Absolute Health Center (Dr. Polvi and Dr. Hill) and Dr. Jeffrey Jenks. Accordingly, the ALJ concludes that Dr. Jones is the designated provider for this claim. Dr. Jones' treatment and the treatment obtained through his referrals, including physical therapy through Concentra, the imaging performed at Southwest Diagnostics, the chiropractic care obtained at Absolute Health Centers and the treatment with Dr. Jenks is authorized.

Disability Benefits

L. Pursuant to §§8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of Temporary Total Disability (TTD) Benefits, if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

M. The term "disability" as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the Claimant's inability to perform his/her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The second element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions which impair a claimant's ability to effectively perform the duties of his regular job. *See Ortiz*

v. Charles J. Murphy & Co., 964 P.2d 595 (Colo. App. 1998). In this case, the persuasive evidence establishes that Dr Jones has continually imposed physical restrictions which have precluded the Claimant from performing the duties of her usual work since July 8, 2014. The evidence also establishes that the Employer chose not to accommodate those restrictions by offering Claimant a modified duty position. Thus, Claimant has been out of work due to her industrial injury and has suffered a wage loss as a direct consequence. Accordingly, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits. *Culver v. Ace Electric, supra; Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office. June 11, 1999). Because Claimant's disability has lasted longer than two weeks from the day she left work as a result of her industrial injury, TTD benefits are recoverable from the day she left work, specifically June 21, 2014. C.R.S. §8-42-103(1)(b). Respondents shall pay TTD in accordance with C.R.S. §8-42-103(1)(b), i.e. beginning June 21, 2014 at a rate of sixty-six and two-thirds percent of her average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week so long as Claimant's disability is total. C.R.S. §8-42-105(1). Such TTD benefits shall continue until the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3) after which Respondents may terminate such TTD payments.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable industrial injury to her low back/lumbar spine on June 21, 2014.

2. Respondents shall pay all reasonable and necessary medical bills associated with Claimant's treatment from Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, Penrose-St. Francis emergency room and Southwest Diagnostic Center related to her June 21, 2014 injury.

3. Respondents shall pay Temporary Total Disability benefits in accordance with C.R.S. §8-42-103 from June 21, 2014 to the present and ongoing until such time as TTD benefits may be terminated pursuant to any one of the events enumerated in C.R.S. §8-42-105(3).

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

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

If you are dissatisfied with the Judge's Supplemental 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. The petition shall be filed within twenty (20) days after the date of the certificate of mailing of the supplemental order. The petition shall be in writing, shall set forth in detail the particular errors and objections relied